EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 22134/05
Yuriy Nikolayevich SERDYUK
against Russia

The European Court of Human Rights (Third Section), sitting on 21 November 2017 as a Committee composed of:

Luis López Guerra, *President,*
Dmitry Dedov,
Jolien Schukking, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 May 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Yuriy Nikolayevich Serdyuk, is a Russian national who was born in 1965 and is detained in Novocherkassk.

2. The Russian Government ("the Government") were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

A. Circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Pre-trial investigation

4. On 10 February 2002 the applicant, together with seven other people, was arrested on suspicion of having committed murder, robbery and theft.

5. According to the applicant, after the arrest he was brought to the police station and beaten up by police officers. On the same day he made a confession statement.

6. On 11 February 2002 the applicant was taken to a temporary detention centre.

7. On 18 February 2002 the applicant was taken to a pre-trial detention centre in Rostov-on-Don (SIZO-1).

8. On 7 March 2002 the applicant was apprised of his rights, and a lawyer, D., was appointed to assist him, as confirmed by a representation order issued on the same day. On the same day the applicant was questioned by an investigator, R., in the presence of D. The applicant subsequently complained that D. had been absent from the interview.

9. On 19 March 2002 the applicant refused in writing the services of D. and asked for another lawyer.

10. On the same day another lawyer, G., was appointed to assist the applicant, as confirmed by a representation order issued on the same day. The applicant refused his services on 8 May 2002.

11. On 19 March 2002 the applicant was accused of the murder of M.F. He was again informed of his rights as an accused person, including of his right to a lawyer and his privilege against self-incrimination. He was further questioned three times by an investigator, Kol., in SIZO-1. The three interview records were signed by the lawyer G. The applicant subsequently complained that G. had been absent.

12. The applicant was further assisted by other lawyers: L. (appointed on 26 March 2002), Ket. (appointed on 2 April 2002), Kh. and Th. (appointed on 9 April 2002), and K. (appointed on 6 February 2003). According to the applicant, he met none of them, except K., who assisted him in the first-instance court trial.

13. As from 26 September 2003 the applicant was assisted by a lawyer, A.

2. The applicant's trial

14. The applicant was tried by a jury.

15. On an unspecified date the presiding judge declared the applicant's confession made on 10 February 2002 inadmissible evidence on account of procedural irregularities in its recording by the police officers. The records of the applicant's questioning of 9, 10 and 12 April 2002 were also declared inadmissible as having been given in the absence of a lawyer and not having been confirmed by the applicant at trial.

16. During the trial the applicant's co-accused challenged the records of the applicant's interviews of 19 March 2002 as inadmissible evidence, arguing that no lawyer had been present during those sessions.

17. On 19 February 2003 the applicant asked the presiding judge to request that the administration of SIZO-1 produce a list of lawyers who had visited him in detention. He indicated without giving any specific details that he needed this information because the lawyers had either been absent and their signatures on the interviews records had only appeared afterwards or they had joined the questioning or confrontation in the process or after they had finished.

18. On 19 March 2003 the Rostov Regional Court asked SIZO-1 to provide information on the applicant's visitors during his detention between February and April 2002.

19. On 17 April 2003 the head of SIZO-1 replied to the Rostov Regional Court by letter naming the persons who had visited the applicant in the period between 7 March 2002 and 16 April 2002 and the time of the visits. The letter listed only different investigators.

20. On 17 September 2003 Investigator Kol. was questioned at a hearing held in the absence of the jury. He stated that on 19 March 2002 he had questioned the applicant in the presence of G., his lawyer. In response to a question raised by the presiding judge regarding the reasons why the document issued by the SIZO management did not indicate the lawyers' presence, Kol. reiterated that the lawyer had indeed been present and said that he did not know on the basis of what information the representatives of the remand facility had prepared their document.

21. The applicant's co-accused M. made similar allegations about his questioning by investigators in the absence of a lawyer notwithstanding the fact that the relevant records had been all signed by the different lawyers appointed to assist him. One of M.'s lawyers was questioned during the trial about M.'s allegations that he had been absent during his questioning and denied them.

22. The applicant's co-accused applied to have the presiding judge order SIZO-1 to provide the register of visitors (*журнал регистрации и учета прибытия и убытия лиц для работы в следственные кабинеты СИЗО-1 г. Ростова на Дону*).

23. The presiding judge refused the application lodged by the applicant's co-accused and declared the records of the applicant's questioning on 19 March 2002 admissible. The judge noted that the case file contained an order issued in the name of G. to represent the applicant as his counsel and that the records of the applicant's questioning were signed by both the applicant and by G. The applicant stated at the hearing that he had signed the records in anticipation because he knew that they would in any event be declared inadmissible by the trial court.

24. On 28 April 2004 the Rostov Regional Court, composed of the presiding judge and the jury, found the applicant guilty of murder, illegal possession of weapons, robbery, theft and infliction of grievous bodily harm and sentenced him to seventeen years' imprisonment. The applicant appealed.

25. On 30 March 2005 the Supreme Court of Russia amended the judgment having generally upheld it. The court concluded that the applicant's defence rights had not been violated during the pre-trial investigation or the first-instance proceedings.

3. Developments after communication of the present application to the Government

26. On 6 August 2010 the head of SIZO-1 issued a document indicating that in accordance with the in-service instruction of the Ministry of Justice of 30 July 2001, as well as other regulations in force at the time of the events, no register of visitors was kept.

27. On the same day another representative of the Federal Service for the Execution of Sentences issued another document listing all the individuals who had visited the applicant between February 2002 and April 2005. In addition to the investigators already listed in the document of 17 April 2003, it was indicated that on 2 April 2002 the applicant had been visited by the lawyer Ket. and twice on 9 April 2002 by the lawyer Tch. – on the second occasion this lawyer had been accompanied by Investigator S. The document also indicated that on 10 April 2002 the applicant had been visited not by two but by three different investigators. According to the Government, this document was prepared on the basis of requests to visit the applicant, which were appended to the document.

B. Relevant domestic law

28. On 1 July 2002 the new Code of Criminal Procedure (Law no. 174-FZ of 18 December 2001 – hereinafter "the CCrP") entered into force. Its Article 75 provides that statements by the suspect or accused given in the absence of counsel for the defence in the course of pre-trial proceedings in a criminal case which have not been confirmed in court, should be declared inadmissible evidence.

COMPLAINTS

29. The applicant complained under Article 6 of the Convention that the proceedings against him had been unfair on account of the use of the records of his questioning on 19 March 2002 allegedly made in the absence

of a lawyer. Referring to the same Article, he further complained of a number of irregularities at the time of his arrest and during the subsequent trial, such as lack of notification of charges, unlawful composition of the first-instance court, his repeated removal from the courtroom, and breach of secrecy of the jury deliberations.

30. He also complained, under Articles 3 and 13 of the Convention, of police brutality on 10 February 2002 shortly after his arrest, of the lack of effective remedies, and of the lack of food on the days of the first-instance court hearings.

THE LAW

A. Complaint under Article 6 of the Convention

31. The applicant relied on Article 6 of the Convention, complaining that the presiding judge had declared admissible the records of his questioning of 19 March 2002, which had been carried out in the absence of a lawyer. He alleged that although these records had been signed by G., the latter had not been present in the SIZO on that date, as confirmed by a document issued by the management of that institution.

32. The Government reiterated the reasons referred to by the presiding judge for declaring the records of the applicant's questioning on 19 March 2002 admissible. They indicated in addition that at trial the applicant had not asked for lawyer G. to be questioned about the events of that date. They further explained, with reference to the documents issued by the Federal Service for the Execution Sentences, that the internal regulations in force at the material time had not required the SIZO to keep a register of visitors. Consequently, the lists issued by the SIZO were only based on the requests submitted by different persons who had been in contact in respect of a specific visit; they did not necessarily mention whether this person had been accompanied by someone else.

33. The applicant did not dispute that he had not applied to have lawyer G. questioned at the trial but specified that such a request would have in any event been refused by the presiding judge, who had been biased. He further disagreed with the Government's statement that it was impossible that the details and time of arrival and departure of all persons entering the SIZO would not have been recorded. He did not however refer to any specific text or regulation.

34. The Court reiterates that in order to assess the evidence, it adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many

other authorities, *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 124, 12 May 2017). The Court requires compelling evidence to convince it that an official document is unreliable (see *Galstyan v. Armenia*, no. 26986/03, § 76, 15 November 2007, and *Saranchov v. Ukraine*, no. 2308/06, § 54, 9 June 2016).

35. Turning to the present case, the Court observes that the presence of the applicant's lawyer, G., during the interviews on 19 March 2002 was confirmed by the latter's representation order and signatures on the records of the applicant's questioning drawn up on that date as well as by the testimony of Investigator Kol. The Court does not disregard the fact neither the document issued by the SIZO management in 2003 nor the new one drawn up in 2010 lists G.'s name among the persons who visited the applicant in SIZO-1 on 19 March 2002. It cannot however be said that those documents constitute an extract from an official record kept on a regular basis by the SIZO. Consequently, it remains unclear to what extent the information they contain is reliable and exhaustive, notably in view of a number of inconsistencies they contain (see paragraph 27 above).

36. Furthermore, the Court finds it particularly unfortunate that the applicant did not apply to have the lawyer G. questioned during his trial. It is not convinced by the applicant's explanation that such a request would in any event have been refused by the presiding judge. It first observes that the presiding judge previously granted the defence application to have the SIZO produce the list of visitors (see paragraph 18 above). The same judge also decided to exclude the applicant's confession statement made on 10 February 2002 and the records of the applicant's questioning of 9, 10 and 12 April 2002 (see paragraph 15 above). Lastly, while examining M.'s similar allegations, the lawyer who had assisted him was questioned. This lawyer, when questioned about the circumstances of M.'s questioning, denied the latter's allegations in respect of his absence during that questioning (see paragraph 22 above). There is no indication that the applicant, assisted by a lawyer, sought to complain about this situation and in particular about the lawyer G., who allegedly signed the interview records without actually having been present at the interviews, to any other body capable of establishing what really happened on that day and resolving the contradiction between different documents present in the file (see *Hovanesian v. Bulgaria*, no. 31814/03, § 27, 21 December 2010).

37. In these circumstances, the Court is not ready to accept, regard being had to the Government's explanation (see paragraph 32 above) and in the absence of any meaningful fact-finding carried out at domestic level, that these documents as such are enough to rebut the strong presumption of fact resulting from a series of official documents drawn up on 19 March 2002 and corroborated by the testimony of investigator Kol. given in open court and in adversarial proceedings.

38. The Court further observes that the applicant did not make any specific submission concerning the impact of the alleged restriction of his defence rights on the fairness of the proceedings. He did not allege that his testimony constituted the significant or decisive evidence of his guilt. Since the jury verdict contained no reasons, it is unclear what weight, if any, was given to the records of the applicant's questioning on 19 March 2002. Nor did the applicant complain that his counsel and he himself had not had an opportunity to put forward in open court their version of the events, adduce their evidence and contest the evidence submitted by the prosecution.

39. Hence, having assessed all relevant elements, the Court does not consider that it has been established beyond reasonable doubt that the applicant's right of access to a lawyer was restricted on 19 March 2002 to such an extent so as to irretrievably prejudice the overall fairness of the criminal proceedings against him.

40. Accordingly, it follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

B. The remainder of the applicant's complaints

41. Referring to Articles 3, 6 and 13 of the Convention, the applicant further complained of a number of violations affecting the criminal proceedings in his case.

42. The Court has examined these complaints and considers that, in the light of all the material in its possession and in so far as the matter complained of is within its competence, they either do not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or do not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

43. It follows that this part of the application must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares inadmissible the application.

Done in English and notified in writing on 14 December 2017.

Fatoş Aracı
Deputy Registrar

Luis López Guerra
President