CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54632/00
by Stanislav Yevgenyevich ZHUKOV
against Russia

The European Court of Human Rights (First Section), sitting on 31 March 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged with the European Court of Human Rights on 5 January 2000,

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

The applicant, Mr Stanislav Yevgenyevich Zhukov, is a Russian national, who was born in 1959 and lives in Moscow. He is represented before the Court by Mr A.G. Knyazev, a lawyer practising in Moscow. The respondent Government are represented by Mr Pavel Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

On 31 October 1995 the applicant was arrested on suspicion of having committed an offence. It appears that on the date of his arrest the applicant was in a hospital receiving treatment for fractures and concussion following a recent car accident. On the same date, the applicant appealed to the prosecutor's office to be released on account of the state of his health. It appears that his appeal was rejected and he was kept in police custody for the following 30 days.

On 29 November 1995 the applicant was charged with kidnapping. On the same date, he was detained on remand on the basis of a prosecutor's order. It appears that the applicant did not appeal against this order.

In April 1996 the investigation was completed.

On 9 December 1996 the Preobrazhenskiy District Court of Moscow (*Преображенский межмуниципальный районный суд города Москвы*) remitted the case to the prosecutor's office for additional investigation. The court also extended the applicant's detention on remand. The applicant did not appeal against this decision.

In January 1997 new charges were brought against the applicant, which included kidnapping and violent extortion. The bill of indictment referred to the relevant provisions of the new Criminal Code (*Уголовный кодекс РФ*), which entered into force on 1 January 1997.

On 15 December 1997 the Ostankinskiy District Court of Moscow (*Останкинский межмуниципальный районный суд города Москвы*) found the applicant guilty of being an accomplice in kidnapping committed by a group with the use of violence, referring to Article 126 of the new Criminal Code. As to the charge of extortion, the District Court re-qualified the applicant's actions and found him guilty of forcible assertion of his private right. He was sentenced to a total of five years in prison.

On an unspecified date, the applicant filed an appeal against this sentence with the Moscow City Court (*Московский городской суд*). In the course of the appeal proceedings, the applicant dispensed with the services of his defence counsel and requested the City Court to allow his presence at its hearing to present his case in person.

On 5 May 1998 the Convention entered into force in respect of Russia.

On 7 May 1998 the Moscow City Court examined the applicant's appeal. The applicant was not present at the hearing, whereas the prosecutor, as required under Article 335 of the Code of Criminal Procedure (CCP) (*Уголовно-процессуальный кодекс РСФСР*), was present and submitted his opinion on the case. The prosecutor contended that the sentence of the trial court should be upheld except for the part concerning the forcible assertion by the applicant of his private right, which should be annulled on

the ground that the limitation period had expired. The City Court upheld the sentence of the trial court, but slightly modified it by accepting the prosecutor's proposal concerning the application of the limitation period. The judgment of the City Court was final and entered into force on the same date.

On 10 December 1998 the Constitutional Court found Article 335 of the CCP unconstitutional (see Relevant domestic law, below).

On 21 April 1999 the Krasnoarmeyskiy Town Court of the Saratov Region (*Красноармейский городской суд Саратовской области*) released the applicant on parole.

On an unspecified date, the applicant lodged a request with the Moscow City Court, seeking to quash his conviction through supervisory review.

By a letter of 26 May 1999 the Moscow City Court rejected the applicant's request for supervisory review.

On 3 June 1999 the applicant lodged a supervisory review request with the Supreme Court of Russia (*Верховный суд РФ*).

By a letter of 7 June 1999 the Vice-Chairman of the Supreme Court of Russia (*Заместитель председателя Верховного Суда РФ*) requested the case file concerning the applicant's case.

On 19 October 1999 the Vice-Chairman of the Supreme Court of Russia brought an application for supervisory review (*протест в порядке надзора*). The application sought to have the earlier judgments modified by re-qualifying the applicant's actions as aiding and abetting kidnapping committed by a group.

By a letter of 27 October 1999 the applicant was informed that an application for supervisory review had been brought. It was further indicated that he would be informed about its outcome.

On 11 November 1999 the Presidium of the Moscow City Court (*Президиум Московского городского суда*) decided to grant the application and to modify the earlier judgments on the grounds presented in it. The Moscow City Prosecutor (*прокурор г. Москвы*) was present at the hearing and submitted his opinion in support of the application, as required under Article 377 of the CCP. The term of imprisonment was not modified and remained the same, i.e. five years. The applicant was not notified of this hearing.

On 14 February 2000 the Constitutional Court found Article 377 of the CCP unconstitutional (see Relevant domestic law, below).

In November 2000 a legal commentary was published in the official Bulletin of the Supreme Court of Russia, which gave details of the applicant's case. The applicant's name was mentioned in full. It appears that he was not asked for his consent to the publication of the commentary. The applicant took no court action in this respect.

B. Relevant domestic law

The Constitution

Article 46 of the Constitution guarantees to everyone the protection of his rights and freedoms in a court of law.

Article 50 of the Constitution guarantees to everyone convicted of a crime the right to have his conviction reviewed by a higher court as provided for by federal law.

Article 123 of the Constitution provides that court proceedings must be conducted in an adversarial manner and be based on the principle of equality of arms.

Criminal legislation

According to Article 125.1 of the former Criminal Code (*Уголовный кодекс РСФСР*), kidnapping committed by a group was punishable with from five to ten years in prison.

According to Article 126 of the new Criminal Code, kidnapping committed by a group is punishable with from six to fifteen years in prison.

Appeal proceedings

Article 335 of the Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*), in force at the material time, provided that at the court hearing in the appeal instance the prosecutor should submit his opinion on the legality of and the reasons for the court's decision. The defence lawyer could take part in the appeal hearing. The question of participation of the convicted person in the appeal hearing was decided by the court itself. In any event, a convicted or acquitted person, if present at the hearing, was always allowed to give explanations. Failure of the above-mentioned persons to appear at the hearing, provided they had been duly notified of the hearing date, was not a ground to adjourn the hearing.

In its Decision No. 27-P of 10 December 1998 (*Постановление Конституционного Суда 27-П по делу о проверке конституционности части второй статьи 335 Уголовно-процессуального кодекса РСФСР в связи с жалобой гражданина М.А. Баронина*) the Constitutional Court declared Article 335 § 2 of the CCP unconstitutional to the extent that it allowed the appeal instance court to decide the appeal without permitting the convicted person to study the materials of the court hearing and to present his position to the court on questions raised during the hearing.

Supervisory review proceedings

Section VI, Chapter 30, of the CCP allowed certain officials to challenge a judgment which had entered into force and have the case reviewed on

points of law and procedure. The supervisory review procedure was to be distinguished from proceedings which review a case because of newly discovered facts.

Pursuant to Article 356 of the CCP, a judgment entered into force and was subject to execution as of the day when the appeal (cassation) instance pronounced its judgment.

Article 371 of the CCP provided that the power to lodge an application for supervisory review could be exercised by the Prosecutor General, the Chairman and the Vice-Chairmen of the Supreme Court of the Russian Federation, in respect of any judgment other than those of the Presidium of the Supreme Court, and by the chairmen of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of such officials for a review.

Article 373 of the CCP laid down a limitation period of one year during which an application for supervisory review of an acquittal judgment could be brought. This period also applied to an application for supervisory review of a conviction, if such application sought a harsher punishment to be imposed. The period ran from the date when the judgment entered into force. In all other cases, there was no time-limit prescribed for lodging such applications.

According to Articles 374, 378 and 380 of the CCP, the application for supervisory review was to be considered by the judicial board of the competent court which examined the case on the merits, not being bound by the scope and grounds of the application. The board could either dismiss the application and thus uphold the earlier judgment, or grant the application. In the latter case it had to decide whether to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, or for a fresh court examination at any instance, to uphold a first instance judgment reversed on appeal, or to modify and uphold any of the earlier judgments.

According to Article 377 of the CCP, the relevant prosecutor was to participate in the supervisory review hearing. If necessary, the convicted person and his counsel could be summoned to the hearing to make submissions. If summoned to the hearing, the convicted person and his counsel were to have a possibility to familiarise themselves with the application for supervisory review. At the hearing, the case was to be presented by a judge rapporteur, following which the convicted person and his counsel, if present, was to be entitled to make oral submissions. Thereupon, the prosecutor was to make submissions in support of the application.

In its Decision No. 2-P of 14 February 2000 (*Постановление Конституционного Суда 2-П по делу о проверке конституционности положений частей третьей, четвертой и пятой статьи 377 Уголовно-процессуального кодекса РСФСР в связи с жалобами гражданина А.Б. Аулова и других*) the Constitutional Court declared

Article 377 of the CCP unconstitutional to the extent that it allowed the supervisory review court to decide an application for supervisory review, which seeks to quash a final court judgment on grounds aimed at worsening the situation of the convicted person, without permitting him and his counsel to familiarise themselves with this application, without notifying them of the date and place of the hearing and without permitting them to present their position concerning the arguments contained in the application.

COMPLAINTS

1. The applicant submits a number of complaints which relate to his arrest on 31 October 1995 and alleged ill-treatment after arrest, his detention on remand and the criminal investigation. He invokes Articles 3, 5 and 8 of the Convention.

2. The applicant complains under Article 6 § 1 of the Convention that he did not receive a fair trial in the proceedings which terminated with the judgment of the Moscow City Court of 7 May 1998. In particular, he submits that he was not allowed to be present at the hearing of the City Court of 7 May 1998, although the prosecutor was. He further submits under Article 6 § 2 that the principle of presumption of innocence was violated as the City Court terminated the proceedings concerning the charge of forcible assertion of his private right on the ground that the limitation period had expired, without having first clarified, as required under the domestic legislation, whether the applicant had any objections. He finally submits that the courts failed to correctly evaluate the facts of the case and interpret the law.

3. The applicant complains under Article 6 §§ 1 and 3 (a), (b) and (c) that he did not receive a fair trial in the determination of the criminal charge on supervisory review. In particular, he complains of the fact that he was not present in court whereas the prosecutor was. He further submits that he was not informed that an application for supervisory review had been brought and that he was not notified of the date and place of the hearing held by the supervisory instance in order to be able to defend his case in person or through a lawyer.

4. The applicant complains that the re-qualification of his actions by the supervisory instance was in violation of Article 7 § 1 of the Convention. In particular, he submits that pursuant to this re-qualification he was convicted under the new Criminal Code, which entered into force on 1 January 1997, for an act committed in October 1995, when the former Criminal Code was applicable. As a result, a heavier penalty was imposed on him, because after having served his sentence he would be rehabilitated one year later than if he had been convicted under the former Criminal Code. He finally

complains that his conviction by the supervisory instance violated his rights guaranteed under Articles 8 and 10 of the Convention.

5. The applicant complains that the publication of a legal commentary in the official Bulletin of the Supreme Court violated his rights guaranteed under Articles 6 § 2, 8 and 10 of the Convention. He submits that appeals against such violations generally have no prospects of succeeding. The applicant invokes Article 13.

THE LAW

1. The applicant complains under Articles 3, 5 and 8 about his alleged ill-treatment and arrest, his detention on remand and the investigation against him.

The Court notes that the events complained of took place before 5 May 1998 which is the date of the Convention's entry into force in respect of Russia. The Court recalls, however, that in accordance with the generally recognised rules of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with regard to that Party. Therefore, the Court is not competent to deal with these complaints.

It follows that this part of the application is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. The applicant complains under Article 6 §§ 1 and 2 about the proceedings which terminated with the judgment of the Moscow City Court of 7 May 1998.

The Government, referring to the case of *Tumilovich v. Russia* (no. 47033/99, Dec. 22.6.99), submit that the final decision in the applicant's case was the judgment of the Moscow City Court of 7 May 1998 and, accordingly, the applicant failed to lodge the application within the six months time-limit prescribed by Article 35 § 1 of the Convention.

The applicant submits that the final decision in his case was the decision of the Presidium of the Moscow City Court of 11 November 1999, which made the final determination on the criminal charge against him. The application was lodged on 5 January 2000, therefore, he did not miss the six months time-limit.

The Court recalls that according to Article 35 § 1 of the Convention it may only deal with a matter where it has been introduced within six months from the date of the final domestic decision. In this context the Court notes that the proceedings, which are at the core of the applicant's complaint, terminated with the final judgment of Moscow City Court of 7 May 1998 (see *Nikitin v. Russia*, no. 50178/99, § 39, 20 July 2004) and there were no effective domestic remedies available to the applicant following that

judgment (see *Tumilovich v. Russia*, no. 47033/99, Dec. 22.6.99). It follows that, having lodged his application with the Court on 2 January 2000, the applicant failed to bring the complaint about his conviction of 7 May 1998 within six months from the date of the final judgment in those proceedings.

It follows that this complaint was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

3. The applicant complains under Article 6 §§ 1 and 3 (a), (b) and (c) that he did not receive a fair trial in the determination of the criminal charge on supervisory review.

The Government accept that the applicant and his counsel were not notified about the Presidium's hearing of 11 November 1999. Referring to Article 377 of the CCP and to the Constitutional Court's Decision No. 2-P, the Government submit that there was no need for the applicant's or his counsel's presence at the Presidium's hearing, as the application for supervisory review had been brought on grounds aimed at improving the applicant's situation by re-qualifying his actions from being an accomplice to aiding and abetting. Furthermore, the arguments raised in the application were fully corroborated by the evidence examined in the judgment of 15 December 1997 and there was no need to submit new information or to clarify the facts.

The Government further submit that the applicant was duly informed, by the letter of 27 October 1999, about the fact that an application for supervisory review had been brought, but he failed to make a request seeking to be summoned to the supervisory hearing.

The applicant submits that the supervisory review proceedings resulted in the determination of a new criminal charge against him. This new charge was never brought against him and he did not have a possibility to defend himself against it. The arguments raised in his supervisory review request of 3 June 1999 differ from those contained in the application for supervisory review lodged by the Vice-Chairman of the Supreme Court of Russia. Since the applicant and his counsel were not acquainted with the content of this application, the applicant was deprived of the possibility to submit his objections as to the qualification of his actions and the sentence sought to be imposed.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. The Court has examined the remainder of the applicant's complaints as submitted by him (complaints Nos. 4 and 5 above). However, having regard to all the material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out

in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint about the alleged unfairness of the supervisory review proceedings;

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President