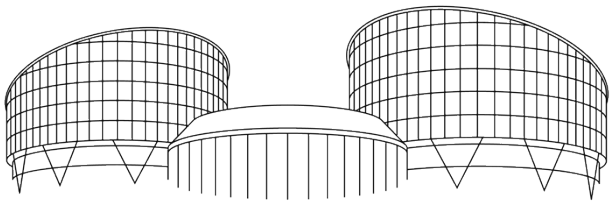

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 44253/08
Oleg Olegovich TETERIN
against Russia
lodged on 7 August 2008

STATEMENT OF FACTS

The applicant, Mr Oleg Olegovich Teterin, is a Russian national who was born in 1975 and lives in Moscow. He is represented before the Court by Ms E. Davidyan, a lawyer practising in Moscow.

A. The circumstances of the case

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

1. Background information

From 12 September 2005 to 12 October 2006 the applicant worked for CJSC GDM Group *(ЗАО "ГДМ Групп")*. He was responsible for implementation of the project on development of the mobile marketing idea which consisted in full screen mobile advertising with each incoming call, SMS and MMS (trademarked Gigafone). The applicant signed a non-disclosure agreement.

On 21 September 2006 he filed a patent application and granted a patent for the invention, - "a method of distributing advertising information images".

On 12 October 2006 the applicant resigned.

On 16 October 2006 the applicant founded LLC Superfone *(ООО "Суперфон")*, which became GDM Group's rival company in the sphere of mobile advertising.

2. Criminal proceedings against the applicant

(a) Institution of criminal proceedings and launching of the applicant's search

On 27 March 2007 GDM Group informed the Economic Crimes Bureau of the Moscow Chief Department of the Interior *(УБЭП ГУВД г. Москвы)* about the alleged violation by Superfone of its "exclusive licence" obtained from American Global Direct Management Corp. for using the method invention in the sphere of advertising via mobile network operators.

On 4 May 2007 criminal proceedings were instituted under Article 147 § 1 of the Criminal Code (violation of inventor's rights and patent rights).

On 20 September 2007 the applicant was questioned as a suspect. He was ordered not to leave his place of residence.

Between 4 May and 20 September 2007 the applicant undertook several trips abroad. According to the certificate issued by the Federal Security Service of 21 January 2008 the applicant crossed the State border at "Sheremetyevo-2" airport on 8 May 2007 departing to Stockholm (Sweden), on 10 May 2007 arriving from Antalya (Turkey), on 19 June 2007 departing to New York (USA) and on 25 June 2007 arriving from New York.

On 24 September 2007 the applicant's name was put in the chargesheet as an accused.

On the same day the applicant was admitted to the hospital for in-patient treatment (exacerbation of symptoms caused by brain cysts), of which the applicant informed the Prosecutor's Office.

On 28 September 2007 the applicant was discharged from hospital.

On 10 October 2007 he was admitted to another hospital for in-patient treatment.

On 19 October 2007 the investigator informed the applicant that on 22 October 2007 at 8 p.m. he would be questioned in the hospital.

On 22 October 2007, however, the applicant was discharged from hospital.

On 23 October 2007 the Prosecutor's Office launched the applicant's search.

On 28 November 2007 the place where the applicant had his permanent residence was searched.

On 24 December 2007 the investigator received a letter from the applicant dated 5 December 2007 in which the latter expressed his disagreement with the charges and his belief that his appearance for questioning would only be a formal pretext for the investigator to terminate the investigation and submit the case file to the court.

On 29 December 2007 the applicant's name was put on an international wanted list: he was nowhere to be found and was holding an international passport; the previously seized servers of Superfone resumed its functioning from the territory of the United States of America.

(b) Applicant's initial detention on remand

On 4 January 2008 the Savelovskiy District Court of Moscow, in the applicant's absence, decided to remand the applicant in custody. The decision read as follows:

> "... On 20 September 2007 an undertaking not to leave the place of residence was chosen in respect of [the applicant].
>
> On 24 September 2007 [the applicant] stepped in the proceedings as an accused. [He] did not appear at the carrying out of investigative actions on 24 September 2007, having submitted a [medical certificate]. After his discharge from hospital on 28 September 2007 [the applicant] did not inform [the investigator] of his whereabouts. After the applicant had been found in another hospital, on 19 October 2007 [he] was informed that on 22 October 2007 he would participate in investigative actions [in the hospital], however, on 22 October 2007 [the applicant] was discharged from hospital, [he] could not be found on the territory of the hospital at the moment of the carrying out of the investigative action, and he did not inform of his subsequent whereabouts.
>
> On 23 October 2007, in view of the breach of the preventive measure, the applicant's name was put on a wanted list.
>
> On 28 November 2007 ... a search was conducted at the apartment where [the applicant] had his registered place of residence, where he could not be found.
>
> On 24 December 2007 the investigation received a letter from [the applicant] dated 5 December 2007 [to the effect] that [the applicant] did not agree with the charges against him and was indisposed to appear before the investigator. Besides, an information was received to the effect that Superfone resumed its activity from the territory of the USA.
>
> On 29 December 2007 [the applicant] was put on an international wanted list.
>
> ...
>
> It follows from the studied material that [the applicant] on two occasions was informed about the time and the place of the investigative actions to be conducted with his participation; however, having not appeared, [he] had not informed about his whereabouts. [The applicant] does not live at the place where he has his registered residence, he could not be found at his apartment during the search. Knowing of the fact that his name had been put on a wanted list, that a search had been conducted at his flat, [the applicant] failed to appear before the investigator, in his letter [he] informed about his unwillingness to appear on the requests of the investigator.
>
> The foregoing testifies that the accused breached the previously imposed preventive measure ..., escaped from the investigation, and there are sufficient grounds to believe that being at large he will continue to obstruct the investigation and may resume criminal activity. ..."

On 30 January 2008 the Moscow City Court quashed the above decision on appeal, having noted that the District Court had not verified whether in fact the international search had been launched in respect of the applicant. The matter was remitted the District Court for a fresh consideration.

On 13 February 2008 the Savelovskiy District Court again ordered that the applicant be remanded in custody. The District Court held that the case-file material contained the investigator's decision on the launching of the applicant's international search, and that the decision in question had been

lawful and justified. The applicant's two lawyers were present at the hearing.

On 3 March 2008 the Moscow City Court upheld the above decision on appeal.

On 15 March 2008 the applicant was arrested.

On 17 March 2008 the charges under Article 147 § 1 of the Criminal Code were brought against the applicant.

On 24 March 2008 the applicant participated in a confrontation with the victim's representative.

(c) Application for release on bail

On 24 March 2008 the applicant asked the investigator to release him on bail. The applicant argued that he had no criminal record, that he was charged with a crime of minor gravity and that there were no particular circumstances warranting his detention on remand. The applicant further argued that he suffered from chronic brain disease and needed close medical supervision and intake of medicines and that he was the only breadwinner in the family.

On the same day the investigator refused the applicant's request.

On 31 March 2008 the applicant challenged the above refusal in court.

On 7 April 2008 the Savelovskiy District Court of Moscow dismissed the applicant's complaint. The court noted, *inter alia*, that having his lawyers present at the hearing of 13 February 2008, the applicant knew of the decision imposing a custodial measure, but failed to appear before the court until his arrest on 15 March 2008.

On 30 April 2008 the applicant appealed against the judgment of 7 April 2008. He noted, in particular, that the District Court had not given consideration to his personal situation, that it failed to indicate the reasons for its decision to refuse the alteration of the custodial measure to a personal surety, and that it failed to indicate any particular circumstances which warranted maintaining the custodial measure.

On 5 May 2008 the Moscow City Court upheld the judgment of 7 April 2008 on appeal. The court noted, *inter alia,* that the applicant challenged, in substance, the choice of the preventive measure, which should be examined in another judicial procedure.

(d) Application for release on personal surety

On 7 April 2008 the applicant asked the investigator to alter the custodial measure with a personal surety by the Deputy President of the State Duma's Committee for information policy, information technology and communications Mr S. Gavrilov and by the Counsellor for the Security Council's Department of International Security Mr S. Ivanov. The applicant's request was dismissed on the same day.

The applicant challenged the investigator's decision before the court.

On 28 April 2008 the Savelovskiy District Court held that the investigator's decision had been lawful and justified.

On 14 May 2008 the Moscow City Court upheld the judgment of 28 April 2008 on appeal.

(e) Extension of the applicant's detention until 17 June 2008

On 12 May 2008 the Savelovskiy District Court extended the applicant's detention until 17 June 2008, having endorsed its previous reasoning and having indicated that there had been no grounds for lifting or altering the custodial measure. During the hearing an ambulance was twice called for the applicant.

On 4 June 2008 the Moscow City Court upheld the extension order of 12 May 2008 on appeal.

(f) Refusal of investigator's request for further extension of the applicant's detention and applicant's release from custody

On 9 June 2008 the Savelovskiy District Court refused the investigator's request for further extension of the custodial measure. The court held as follows:

> "... The court considers that the investigator's request should be dismissed, because [the applicant] is charged with a crime ... of little gravity. As established by the case-file material [the applicant] was not hiding from the investigating bodies, but was undergoing in-patient treatment until 22 October 2007; after the institution of the criminal proceedings he had on three occasions travelled abroad without breaching the undertaking not to leave [his] place of residence which he had not signed until 20 September 2007. After his discharge from hospital from 23 October 2007 when the federal search had been launched in respect of him, [the applicant] was undergoing medical treatment and living in Moscow; ... he had a five-months' old baby; ... the investigating bodies were not carrying out [the applicant's] search; ... the case-file material does not contain any summonses, telegrams, reports or records of telephone conversations [to the effect] that [the applicant] had been informed of the investigative actions in that period. In his request [for extension of the applicant's detention] the investigator submits that it is necessary to bring finalized charges against [the applicant] ... following which to send the case to the prosecutor and the court ... not later than 14 days prior to the expiry of the time-limit for detention. However, the [previous request for extension] indicated the same reasons. Having studied the case-file material the court established that no investigative actions are being carried out with [the applicant] ..., and the court is persuaded that the investigating bodies ... are deliberately delaying the investigative actions without any due reasons. ..."

On 11 June 2008 additional charges under Article 201 of the Criminal Code (abuse of office) were brought against the applicant, and he was released on an undertaking not to leave his place of residence.

On 9 July the case was sent to the Savelovskiy District Court for trial.

(g) Applicant's trial and conviction

On 3 April 2009 the Savelovskiy District Court convicted the applicant of breaching patent rights and abuse of office under Articles 147 § 1 and 201 § 1 of the Russian Criminal Code and sentenced him to a fine of 150,000 Russian roubles (RUB) to be paid to the State. The court further partially granted the victim's civil claim and obliged the applicant to pay RUB 6,144,966.70. The court based its finding of guilt on the fact that the service provided by the applicant's company was identical to the one provided by GDM Group – display of advertising images on subscribers' mobile phones with each incoming call, SMS or MMS. In reaching this conclusion the court relied on victim's and witnesses' statements and two forensic expert reports (initial and additional) performed by forensic expert A.

Witnesses N. (patent attorney), G. (specialist), Yer. (patent attorney), P. (the inventor of the method used by GDM Group) submitted that in order to prove the fact that the applicant was actually using the method of which GDM Group had exclusive rights it was necessary to examine what technique was employed by the applicant and whether it was distinguishable from the one used by GDM Group. In order to do so it was necessary to provide the expert with computer programs, hard discs, protocols of data communication and mobile phones programs, which were not studied by forensic expert A.

In view of the above statements, in the course of the trial the applicant asked the court to appoint an additional expert examination by independent experts specializing in computer equipment and telecommunications. However, on 19 March 2009 the court dismissed the above request, having found that the differences between the conclusions of the expert and the statements of the above witnesses had been the matter of assessment of evidence.

In finding the applicant guilty of abuse of office the court relied on a copy of a non-disclosure agreement signed by the applicant. The applicant, however, challenged the validity of the above copy. He asked the court to obtain the original of the agreement that he had signed with his former employer, to no avail.

On 20 May 2009 the Moscow City Court upheld the applicant's conviction on appeal.

3. GDM Group v. Superfone commercial dispute

Meanwhile, on an unspecified date GDM Group brought proceedings against Superfone seeking to obtain acknowledgment of the fact that the latter had breached its exclusive ownership rights on the invention, to oblige the defendant to stop the violation and forbid it from using the invention in the future.

On 11 February 2008 the Commercial Court of Moscow dismissed the claim. The court arrived to the conclusion that, regard being had to contradictory evidence, the use by Superfone of the invention in question had not been proven. The court held, in particular, that the expert reports prepared within the criminal investigation by expert A. were based on case-file material (advertising material, description of the service provided by Superfone), not the direct study of the method used by defendant in its activities (including the study of technical documentation).

On 26 March 2008 the Appeals Division of the Commercial Court of Moscow upheld the above judgment on appeal.

On 18 June 2008 the Federal Commercial Court of the Moscow Circuit upheld both judgments in cassation.

4. Extrajudicial proceedings

Superfone applied to the Joint Commission for Corporate Ethics with the Russian Union of Industrialists and Entrepreneurs *(Объединенная комиссия по корпоративной этике при Российском союзе промышленников и предпринимателей)* seeking to obtain

acknowledgement of the fact that in pursuing criminal proceedings against it the GDM Group breached corporate ethics.

On 25 September 2008 the panel of arbiters noted large capacities of the Russian mobile advertising market and disapproved the prospect of its monopolization by either party of the dispute. It held that GDM Group breached the corporate ethics by instituting criminal proceedings against the applicant without prior resort to commercial and other civil-law remedies.

B. Relevant domestic law

1. *Criminal liability for violation of patent rights and abuse of authority*

The Criminal Code of the Russian Federation provides as follows:

Article 147. Violation of Inventor's Rights and Patent Rights

"1. Illegal use of an invention, useful model, or industrial design, disclosure of the essence of an invention, useful model, or industrial design, without the consent of its author or applicant and before the official publication of information about them, the illegal acquisition of authorship, or the compelling of co-authorship, if these acts have inflicted damage to a person,

shall be punishable by a fine in the amount up to 200 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for a period up to 18 months, or by compulsory works for a term of 180 to 240 hours, or by deprivation of liberty for a term of up to two years. [...]"

Article 201. Abuse of Authority

"1. The use of authority by a person discharging managerial functions in a profit-making or any other organization in defiance of the lawful interests of this organization and for the purpose of deriving benefits and advantages for himself or for other persons or for the purpose of inflicting harm on other persons, if this deed has involved the infliction of substantial damage on the rights and lawful interests of individuals or organizations or on the legally-protected interests of the society or the State,

shall be punishable by a fine in the amount up to 200 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for a period up to 18 months, or by compulsory works for a term of 180 to 240 hours, or by corrective labour for a term of one to two years, or by arrest for a term of three to six months, or by deprivation of liberty for a term of up to three years. [...]"

2. *Detention pending trial*

(a) The Code of Criminal Procedure of the Russian Federation

"Preventive measures" *(меры пресечения)* include an undertaking not to leave a town or region, personal surety, bail, house arrest and detention on remand (Article 98).

Placement in custody may be ordered by a court if the charge carries a sentence of over two years' imprisonment, provided that a less restrictive preventive measure cannot be applied. In exceptional circumstances

placement in custody may be ordered when the charge carries a sentence of less than two years' imprisonment if the suspect (defendant) does not have a permanent residence on the territory of the Russian Federation, (or) if his/her identity is not established, (or) if he/ she breached the previously applied preventive measure (or) escaped from the investigation or from the court (Article 108). A court may order detention on remand if there are sufficient reasons to believe that the suspect might abscond, re-offend or threaten a witness, destroy evidence or otherwise obstruct the preliminary investigation or trial of the criminal case (Article 97). The circumstances to be taken into account when imposing a preventive measure include, apart from those specified in Article 97, the seriousness of the charges and the suspect's personality, age, health, family status, occupation and other circumstances (Article 98).

After arrest, the suspect is placed in custody "pending investigation". The maximum permitted period of detention "pending investigation" is two months but it can be extended for up to eighteen months in "exceptional circumstances" (Article 109 §§ 1-3).

On 29 October 2009 the Plenary Supreme Court of the Russian Federation adopted Ruling no. 22 governing the application of preventive measures, including placement in custody, bail and house arrest. It provided, in particular, that detention on remand may be ordered only if it is impossible to impose a more lenient preventive measure (clause 2). When examining an application for a detention order, the courts were required to assess the existence of a reasonable suspicion that the person concerned had been involved in the commission of the offence (clause 19). When issuing further extension orders, courts were to specify concrete facts justifying the continued detention and the supporting evidence (clause 21). In addition, the courts had to explain why it was not possible to apply a more lenient preventive measure (clause 26).

(b) Practice of the Russian Constitutional Court

In its ruling no. 245-O-O of 20 March 2008, the Russian Constitutional Court noted that it had reiterated on several occasions (rulings nos. 14-P, 4-P, 417-O and 330-O of 13 June 1996, 22 March 2005, 4 December 2003 and 12 July 2005 respectively) that a court, when taking a decision under Articles 100, 108, 109 and 255 of the Russian Code of Criminal Procedure on the placement of an individual into detention or on the extension of a period of an individual's detention, was under obligation, *inter alia*, to calculate and specify a time-limit for such detention.

3. State liability for damages

The Civil Code of the Russian Federation provides as follows:

The State or regional treasury is liable – irrespective of any fault by State officials – for the damage sustained by an individual on account of, in particular, unlawful criminal prosecution or unlawful application of a preventive measure in the form of placement in custody (Article 1070 § 1).

A court may hold the tortfeasor liable for non-pecuniary damage incurred by an individual through actions impairing his or her personal non-property rights, such as the right to personal integrity and the right to liberty of movement (Articles 150 and 151). Non-pecuniary damage must be

compensated for irrespective of the tortfeasor's fault in the event of, in particular, unlawful conviction or prosecution or unlawful application of a preventive measure in the form of placement in custody (Article 1100 § 2).

4. Evidence in criminal proceedings

(a) The Code of Criminal Procedure (at the material time)

Article 90. Prejudice

"The circumstances, established by the sentence which has come into legal force, shall be recognized by the court, by the prosecutor, by the investigator and by the inquirer without an additional verification, unless these circumstances raise the court's doubts. [...]"

(b) Practice of the Russian Constitutional Court

In its ruling no. 193-O-P of 15 January 2008, the Constitutional Court held that Article 90 of the Code of Criminal Procedure does not imply that a court examining a criminal case may disregard the circumstances established by the decisions of the commercial courts taken in civil cases, which entered into force and were not quashed, until such circumstances are disproved by the prosecution.

COMPLAINTS

In his initial application form dated 17 March 2009:

1. The applicant complained under Article 5 § 1 (c) of the Convention that his detention on remand had been arbitrary and unlawful. The applicant amplified that he had never been hiding from the investigation, that he actively co-operated by providing information about his activities, about the patent, about peculiarities and differences between his invention and the one used by the victim. The applicant further submitted that he had had a valid United States visa and that between the institution of the criminal proceedings and the decision obliging him to remain at his place of residence he had undertaken several trips abroad, which confirmed that he had had no intention to escape even if he had had such an opportunity. Afterwards the applicant submitted to the investigation the information about his undergoing in-patient treatment; he lived at his father's house with his wife and a newborn baby, he had been to work in Moscow every day, used his car and checked his mailbox. The applicant had never been informed of any investigative actions; he had never received any summonses; his lawyers learned about the course of the investigation mostly from mass media. The applicant averred that there had been no reason for putting him on an international wanted list, that the decision of 4 January 2008 ordering his detention on remand had been taken in the absence of any proof that he had been on a single occasions summonsed by the investigation or that he left abroad.

2. The applicant complained under Article 5 § 3 that his continued detention on remand had not been based on relevant and sufficient reasons,

that the domestic authorities had not given due consideration to his personal situation and the possibility of applying a more lenient preventive measure.

3. The applicant further complained under Article 5 § 4 that he had had no possibility to challenge the lawfulness of his arrest and detention. The applicant referred, in particular, to the fact that the decision on application of the custodial measure had been taken in his absence, that when extending his detention on remand the domestic court relied on reasons set out in the initial decision on application of the custodial measure, and refused to examine the applicant's complaints challenging the investigator's refusals to alter the custodial measure with indication that the issue in question had to be examined in another judicial procedure.

4. The applicant complained under Article 5 § 5 that he had had no possibility to claim damages for his detention since it had not been acknowledged as unlawful by the domestic courts.

5. He complained under Article 6 that the judge who ordered that the applicant be detained on remand and subsequently extended the custodial measure had not been impartial.

In his subsequent application form dated 20 November 2009:

1. The applicant complained under Article 6 § 1 about:

(a) the way the domestic court examined the evidence and reached its conclusions;

(b) the alleged violation of the principle of equality of arms in that the court preferred to rely on expert opinion obtained by the prosecution rather than expert opinions obtained by the defence and in that the court dismissed the applicant's request for appointing an additional expert examination to be carried out with participation of independent experts specialising in computer technology and telecommunications;

(c) the alleged violation of the principle of adversarial nature of the proceedings in that he had been deprived of the opportunity to challenge the conclusions of the forensic expert which could have only been done by way of granting his request for additional expert examination and in that the court had refused to obtain the original of the non-disclosure agreement that the applicant had signed with his former employer, which had been essential for deciding the issue of whether the applicant had breached the commercial secret regime and was liable for abuse of office;

(d) the alleged violation of the principle of motivation of the courts' decisions in that the domestic court had given no due regard to statements of witnesses N., G., Yer. and P., patents issued to the applicant (two Russian patents, two Eurasian patents, two author's certificates of the US Congress Library and a Rospatent certificate) on the basis of which the applicant had been carrying out his activity since October 2006, the judgment of the Commercial Court of Moscow of 11 February 2008, the decision of the Joint Commission for Corporate Ethics with the Russian Union of Industrialists and Entrepreneurs of 25 September 2008, the applicant's allegation to the effect that there had been no commercial secret regime in GDM Group in 2005-2006, the provisions of the Patent Law;

(e) the allegedly manifestly ill-founded, arbitrary and bluntly unfair judgments of the domestic courts in his criminal case;

(f) the alleged partiality of the domestic court in that he had been tried by the same judge who had previously decided on the issue of the applicant's detention.

2. The applicant complained under Article 1 of Protocol No. 1 that the judgment of 3 April 2009 had breached his right to respect for his private property. He amplified that the interference with his possession had been unlawful and contrary to any public interest and that his criminal prosecution had been aimed solely at removing him from the mobile advertising market. With reference to the existence of two final judgments with the same subject-matter yet contradictory conclusions (commercial court judgment and criminal court judgment) and the fact that his patent is still valid, the applicant complained about the violation of the principle of legal certainty.

QUESTIONS TO THE PARTIES

1. Was the applicant deprived of his liberty in breach of Article 5 § 1 of the Convention? In particular, does the absence of any specific time-limit for the applicant's detention on remand in the Savelovskiy District Court's decision of 13 February 2008 amount to a "gross and obvious irregularity" capable of rendering the applicant's detention as from 15 March 2008 pursuant to that order arbitrary and therefore "unlawful" within the meaning of Article 5 § 1 (c) (see *Fedorenko v. Russia*, no. 39602/05, § 50, 20 September 2011)?

2. Was the applicant's detention on remand based on "relevant and sufficient reasons" in compliance with the requirements of Article 5 § 3 of the Convention? Reference is made to the contents of the decision of the Savelovskiy District Court of 9 June 2008 refusing the investigator's request for extension of the custodial measure.

3. Did the applicant have an enforceable right to compensation for his detention, as required by Article 5 § 5 of the Convention?

4. Did the applicant have a fair hearing in the determination of the criminal charges against him, in accordance with Article 6 § 1 of the Convention? In particular:

Did the domestic court examining the applicant's criminal case took into consideration the circumstances previously established by the commercial court to the effect that it had not been proven that the company founded by the applicant had been using the invention to which the exclusive rights belonged to GDM Group?

In the affirmative, were the circumstances established by the commercial courts disproved by the prosecution so as to allow the court examining the criminal case to reach the opposite conclusion?

In the negative, did the existence of the two final domestic court judgments establishing the existence of the same circumstances and

reaching the conflicting conclusions amount to a violation of the principle of legal certainty?

Was the principle of equality of arms and the requirement of adversarial proceedings respected by the domestic court examining the applicant's criminal case? In particular, was the applicant afforded an adequate opportunity to challenge the conclusions of the forensic expert reports? Was he afforded access to the original of the non-disclosure agreement that he signed with GDM Group?