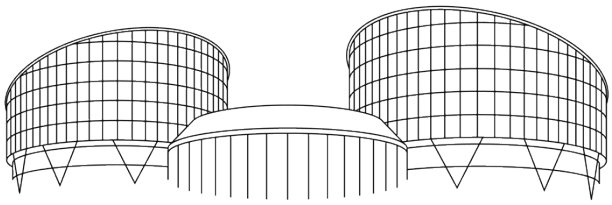

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 12983/06
Stepan Vasilyevich LUPAN
against Russia
lodged on 28 March 2006

STATEMENT OF FACTS

The applicant, Mr Stepan Vasilyevich Lupan, is a Russian national who was born in 1960 and lives in St-Petersburg.

A. The circumstances of the case

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

The applicant, a colonel in the Russian army, was provided with a flat by the State in the town of Severobaykalsk. In 1999 he acquired ownership title to this flat.

In 2003 the applicant applied to the competent authority in order to obtain a so-called "housing subsidy" which entitled a military officer to receive a sum of money from the State to purchase housing (provided the officer, to be retired from the active service, had no other permanent housing).

On 12 June 2003 the Housing Committee for the military personnel (including officer O.) held a hearing, the record of which reads as follows:

> "We note that [the applicant] has a flat in Severobaykalsk ... We unanimously decide that [the applicant's name] should be kept on the list of military personnel requiring housing ... Should he receive such housing, he has undertaken to surrender his title to the flat he has now (a letter of commitment was issued by [the applicant])."

This record was subsequently admitted to the criminal case file against the applicant (see below).

In October 2003 the applicant made a written report expressing his wish to retire on the ground giving entitlement to a housing subsidy, expressed his wish to apply for such subsidy and indicated Moscow as the location where he intended to reside and purchase housing. The report was countersigned by chief officer F.

On 17 November 2003 the Working Committee on housing subsidies for the military personnel (consisting of its President, officer K., and other members including officers S. and O.) examined the applicant's case. The Committee decided as follows:

> "We unanimously decide to include [the applicant] into the list of candidates for obtaining a housing subsidy. He has no permanent housing now."

Having received the subsidy, the applicant purchased a flat in Moscow, resold it soon thereafter and acquired a flat in St Petersburg.

It appears that twice the authorities refused to institute criminal proceedings against the applicant on the fraud charge.

In May 2005 the authorities instituted criminal proceedings accusing the applicant of fraud.

Also in May 2005 the applicant transferred to the military authorities, without any monetary compensation, his title to the first flat.

In July 2005 O. was convicted of offences relating to the unlawful attribution of housing subsidies.

The criminal case against the applicant was submitted for trial before the Military Court of St Petersburg Garrison.

Being called as a witness by the prosecution, officer O. stated that although he had been aware that at the time the applicant owned a flat, this fact had not been determinative since the applicant had signed a "letter of commitment" accepting an obligation to "return" the flat to the State.

At the trial the applicant sought attendance of officers K. and S. to be examined as witnesses on behalf of the defence. Apparently, the defence explained that these witnesses could have provided information about, inter alia, their awareness of the applicant's ownership of a flat when the decision on the subsidy had been taken in November 2003. The trial court dismissed the applicant's request to obtain attendance of officers K. and S. to be examined as witnesses. The court gave any reasons for dismissing this request.

It appears that the prosecution listed chief officer F. as a prosecution witness. However, for unspecified reasons, he was not examined at the trial. Instead, the trial court allowed the reading out of his pre-trial statement to the investigator. In this statement, F. explained that he had indeed issued a decision indicating that the applicant might retire from the active military service. F. also stated that he had not countersigned the applicant's report, from which it followed that he had been aware of the applicant's request to be considered for a housing subsidy.

By a judgment of 1 September 2005, the trial court (composed of a lieutenant colonel of the judiciary) convicted the applicant of fraud by deceit. The court sentenced him to three years' imprisonment and ordered him to repay the sum he had received from the State. The trial court considered that the applicant had knowingly concealed from the authorities that he had had housing and thus was not entitled to apply for a housing subsidy. In addition, he had submitted a fake certificate indicating that he had no housing. For reaching the above conclusions, the court relied on F.'s pre-trial statement and on a statement from officer O., who had participated in the decision authorising delivery of the housing subsidy to the applicant.

On 14 October 2005 the Military Court of the Leningrad Command (composed of three colonels of the judiciary) upheld the trial judgment.

In 2006, having examined the applicant's application for supervisory review, judge So. of the Supreme Court of Russia required the Presidium of the Military Court of the Leningrad Command to re-examine the case by way of supervisory review.

By a ruling of 13 September 2006 the Presidium court re-examined the case and upheld the trial and appeal judgments.

The applicant applied for supervisory review before the Supreme Court. By a ruling of 18 January 2007 the Supreme Court (composed of judge So. and two other judges) upheld the conviction but reduced the prison term to two years. The Supreme Court considered that the authorities' awareness of the letter of commitment was irrelevant for the fraud charge since the applicant, in any event, had had no right to claim a housing subsidy. In any event, this letter had not been examined by the Working Committee in November 2003 since the letter had been kept in O.'s office.

Having made the claim for a subsidy, he had acted in a deceitful way thus committing criminal fraud. Fraud was equally constituted by (i) the applicant's application for a housing subsidy in Moscow (with a higher monetary value) while he actually intended to reside in St Petersburg (with a lower monetary value); (ii) falsification of the documents authorising his retirement on the statutory ground giving entitlement to a housing subsidy; and (iii) deception as to the fact that he had been in need of housing.

The Supreme Court also set aside the civil claims and ordered their examination by a civil court. It appears from the applicant's submissions that the civil claims were subsequently dropped or dismissed.

B. Relevant domestic law and practice

Article 159 of the Criminal Code punishes fraud constituted by actions which were committed with deceit or abuse of trust and which induce the victim to surrender his or her property or title to it to the offender. Deceit, as the means of committing the offence, consists of submission of false information, non-communication of true information or intentional actions aimed at deceiving the property owner or another person. The above information may concern a variety of circumstances, for instance legally significant facts or events, the offender's personality, his or her professional duties or intentions. Fraud is constituted by submission of false information about the circumstances which give statutory or other entitlement to a social allowance, a subsidy or alike (see ruling no. 27 of 27 December 2007 by the Plenary Supreme Court of Russia).

In Russia under certain conditions the military personnel was entitled, at the material time, to a subsidy from the State for purchasing housing. The allocation of such subsidy is governed by the Regulations on housing subsidies adopted by the Federal Government in decree no. 168 of 19 March 2002. The following conditions were to be met by an applicant (paragraphs 5 and 7 of the Regulations):

(i) there should be a decision authorising the applicant's retirement from the military service due to the attainment of the retirement age; due to his medical condition; or due to the restructuring or similar decisions affecting the military staff;

(ii) the applicant should have no housing (suitable) for permanent residence;
(iii) the applicant should have been declared as requiring improvement of his housing conditions (on account of the absence of housing for permanent residence).

COMPLAINTS

The applicant complains under Article 6 of the Convention that he was wrongly convicted and that the trial court made a wrong assessment of evidence. He also alleges that he was deprived of an opportunity to call K. and S. as witnesses whose testimonies could have been in his favour; while the trial court relied on F.'s adverse pre-trial statement, the applicant had not been afforded any opportunity to examine him at the trial or to obtain a forensic examination of F.'s signature on the document signed by him.

The applicant also argues that the trial court was not "independent and impartial" since it was composed of a military officer; the trial court was not "established by law" since it had no jurisdiction to examine a criminal case against a retired military officer.

Lastly, the applicant alleges that the prosecution against him for having sought a housing subsidy in Moscow interfered with his freedom of movement and his freedom to choose his residence.

QUESTIONS TO THE PARTIES

Did the applicant have a fair hearing in the determination of the criminal charges against him? If not, was there a violation of Article 6 §§ 1 and 3 (d) of the Convention in the present case (see by way of comparison *Polyakov v. Russia*, no. 77018/01, §§ 34-37, 29 January 2009, and *Miminoshvili v. Russia*, no. 20197/03, §§ 132-137, 28 June 2011)? In particular, was the principle of equality of arms and the right to the obtain attendance and examination of witnesses violated on account of the courts' refusals to call officers K. and S. as witnesses; lack of an opportunity examine officer F. and to challenge his pre-trial statement; and the refusal of a forensic examination of F.'s signature on a document? In particular:

- Before the national courts did the applicant support his request for calling S. and K. by explaining why it was important for the witnesses concerned to be heard or why a refusal to call these witnesses was prejudicial to the defence rights?
- What reasons were given by the national courts for dismissing this request? For instance, did the national courts consider that these witnesses' testimonies were clearly irrelevant; that they were not

necessary for the establishment of the truth; that they were not capable of providing relevant information relating to the factual or legal issues discussed at the trial, and/or were not capable of strengthening the defence position?

- If no reasons were given by the national courts, did this omission amount to a violation of Article 6 of the Convention (see *Vidal v. Belgium*, 22 April 1992, § 34, Series A no. 235-B; *Pisano v. Italy*, no. 36732/97, § 24, 27 July 2000, and *Ilyadi v. Russia*, no. 6642/05, §§ 45-47, 5 May 2011)?

- Was F. listed by the prosecution to be called as a witness at the trial? Why was he absent from the trial? What were the parties' positions at the trial in relation to the absence of this witness and the reading out of his pre-trial statement? Was the defence afforded an adequate opportunity to effectively challenge F.'s pre-trial testimony?