



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

FIRST SECTION

Application no. 2136/07
Andrey Anatolyevich VASILYEV
against Russia
lodged on 10 November 2006

STATEMENT OF FACTS

The applicant, Mr Andrey Anatolyevich Vasilyev, is a Russian national, who was born in 1972 and lives in Novgorod.

A. The circumstances of the case

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

In 2000 the applicant was convicted of a drug offence and sentenced to eight years' imprisonment. He was released and put on probation in December 2003.

In August 2005 the authorities opened a new criminal investigation relating to drug trafficking. As several police officers stated at the trial (see below), at the time they had in their possession "operational information" that the applicant and Mr Shap. were involved in drug trafficking.

In August 2005 several "test buys" of drugs were effected in respect of a Mr Shap. He was then arrested after having sold drugs to officer San. During an interview, Mr Shap. named the applicant as his drug dealer.

On 7 September 2005 an investigator issued a search order in the following terms:

"On 18 August 2005 Mr San. bought drugs ... Considering that [the applicant] may be involved in procurement of drugs and that drugs, other items relating to the criminal case may be found at his flat, I order a search in [the applicant's flat] ..."

The search was carried out on the same evening. A scoop was seized. No drugs were found in the flat.

Notification was made about the search to the Borovichi Town Court of the Novgorod Region. This notification justified the search without a court order, with reference to the "late evening time and the risk of destruction of important evidence".

On the same evening, the applicant was submitted for a medical examination and was tested positive for drugs. The applicant was locked up in a cell in the temporary detention centre. On 8 September 2005 a court found him guilty of unlawful consumption of drugs (Article 6.9 of the Code of Administrative Offences). The applicant was sentenced to five days of administrative detention. The applicant received the court order on 19 September 2005.

In the meantime, on 9 September 2005 the Town Court heard the investigator and confirmed the lawfulness of the search. For unknown reasons, the applicant was neither present nor represented at this hearing. There is no indication that he made any written submissions before the court. On an unspecified date, the applicant was provided with a copy of the court decision but, for unknown reasons, did not appeal against it. However, he raised arguments relating to the search at his own trial (see below).

The applicant was not released following his five-day administrative arrest. Instead, on 12 September 2005 the investigator compiled a suspect arrest record in respect of the applicant on suspicion of drug trafficking (Article 228.1 of the Criminal Code). While still serving his sentence of administrative detention (see above), an arrest warrant was issued against the applicant on 12 September 2005 in relation to criminal proceedings. Allegedly, the applicant was not timely provided with a copy of the arrest warrant.

A forensic examination disclosed the presence of drugs on the scoop which had been seized during the search on 7 September 2005.

On 14 September 2005 a court held a detention hearing. Having heard the investigator and the applicant, the court confirmed the lawfulness of the arrest and ordered the applicant's continued detention pending investigation. Allegedly, the applicant was not timely provided with a copy of this detention order.

On 20 September 2005 the applicant was given a copy of the document listing charges and outlining the related factual circumstances. This document stated that the applicant had allegedly pre-packed and supplied drugs between 1 and 18 August 2005. The charges were amended in November 2005 and January 2006.

In the meantime, on 8 November 2005 the Town Court extended the applicant's detention on remand. The applicant was provided with a copy of this order on 31 January 2006.

In the meantime, on 15 December 2005 the Town Court issued an extension order.

In December 2005 the applicant studied the case file.

On 12 January 2006 the Novgorod Regional Court upheld the detention order of 15 December 2005.

On 19 January 2006 the Town Court extended the applicant's detention. The court upheld the risks of flight and reoffending, in view of the gravity of the charges and the previous conviction for similar offences; that the imputed offence had been committed during the probation period for the conviction in 2000.

On an unspecified date, the criminal case against the applicant and Mr Shap. was submitted for trial before the Town Court. On 16 February 2006 the court held a preliminary hearing which mostly concerned the

extension of the applicant's detention pending the trial. The court held that the applicant should remain in detention and that the trial should be closed to the public for "ensuring the security of the persons participating in the trial". The detention order was amenable to an appeal. The applicant did not appeal.

Mr Shap. pleaded guilty. The applicant pleaded not guilty, attempting to constitute alibi for the days of the "test buys".

On 7 March 2006 the Town Court convicted Mr Shap. and the applicant of attempted concerted supply of drugs "between 1 and 31 August 2005". The court sentenced the applicant to nine years and seven months of imprisonment. In finding him guilty, the court relied on Mr Shap.'s incriminating statements and the presence of drugs on the scoop seized in the applicant's flat. The trial court also listed some other evidence, including testimonies by the police officers who had been involved in the "test buys" in August 2005.

On 18 May 2006 the Novgorod Regional Court held a public hearing and upheld the trial judgment. The appeal court considered that the applicants' guilt was proven on account of Shap.'s incriminating statement and testimonies made by several police officers on the existence of "operational information" in respect of both defendants and their testimonies relating to the test buys in respect of Shap. Furthermore, the appeal court noted that the applicant had been previously convicted of a similar offence; had been tested positive for drugs after his arrest; and used a scoop having traces of drugs in his flat. Lastly, the appeal court stated that the trial court had given reasons for closing the trial to the public, which had not affected the fairness of the trial.

B. Relevant domestic law and practice

Article 360 of the Code of Criminal Procedure provided, at the time, that the appeal court was to examine whether the trial judgment was lawful, well-reasoned and fair. The appeal court was to deal with the case "in the part which was subject to appeal". A party to the appeal proceedings was entitled to request the appeal court to examine evidence (Article 377 of the Code).

Article 165 of the Code required that the investigator was to obtain a court order authorising a search in one's home. However, in exceptional circumstances disclosing urgency, a search could be carried out without a court order. In such case, the investigator was required to notify a prosecutor and a judge, within twenty-four hours, about the search. If the judge declared the search unlawful, the related evidence should be considered inadmissible.

On 27 June 2013 the Plenary session of the Supreme Court of Russia adopted a landmark Ruling no. 21 concerning application of the Convention and its Protocols by the courts of general jurisdiction. The Supreme Court stated that the quashing of the court decision, which was at the origin of a violation of the Convention right or freedom, may amount to adequate redress, even without payment of any compensation in respect of non-pecuniary damage. For instance, the wrongful restriction of a right to a

public hearing in a civil or criminal case may be remedied by a public hearing by the appellate court (paragraph 9 of the Ruling).

COMPLAINTS

The applicant complains under Article 8 of the Convention that the search in his flat was unlawful in the absence of a court order and that there were no sufficient grounds for it; that he was not afforded any reasonable opportunity to contest the search and the reasons for dispensing with a prior court order.

The applicant also contends under Article 6 of the Convention that there were no valid reasons for excluding the public from the trial. He also argues that the criminal proceedings against him were unfair. In particular he mentions that he was not timely informed of the factual grounds for prosecution (dates, times and circumstances of various episodes of the drug offence); the modification of the factual and legal basis for the charges during the preliminary investigation; the allegedly imprecise timeframe of the imputed offences; the court's reliance on the evidence collected during the unlawful search. In addition, he alleges that he had no access to the "operational information" referred to by the police officers and thus could not effectively challenge their testimonies which were based on such information.

QUESTIONS TO THE PARTIES

1. Was there a violation of Article 8 of the Convention? In particular, was the search in the applicant's "home" "in accordance with the law", as required under Article 8 § 2 of the Convention? Did the domestic decisions, including the judgments of 9 September 2005, 7 March and 18 May 2006, convincingly establish "exceptional circumstances" required under Article 165 of the Code of Criminal Procedure? Was the interference complained of proportionate to the legitimate aim?

2. Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 8 of the Convention, as required by its Article 13? In particular, was he afforded an adequate opportunity to have knowledge of the information and documents relating to such exceptional circumstances, when he contested the search on judicial review or during his own trial? If not, was there a violation of Article 13 of the Convention?

The respondent Government is invited to submit examples from the domestic judicial practice.

3. (a) Was there a public hearing in the present case, as required by Article 6 § 1 of the Convention? Did the national courts justify that the exclusion of the public was "strictly necessary" for one of the purposes listed there? Did the appeal hearing (which was held in public) provide a "complete rehearing" of the criminal case (see, by way of comparison, *Khrabrova v. Russia*, no. 18498/04, § 52, 2 October 2012; *Shulepov v. Russia*, no. 15435/03, § 34, 26 June 2008; and *Riepan v. Austria*, no. 35115/97, §§ 40-41, ECHR 2000-XII)?

(b) If not, was there a violation of Article 6 § 1 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 of the Convention? In particular:

- Were the principle of equality of arms and the adversarial nature of the proceedings respect as regards non-disclosure of the "operational information" referred to in the testimonies of the police officers? Was such "information" made available to the defence as well as the trial and appeal courts in the applicant's case?

- Was there a violation of Article 6 §§ 3(a)-(c) on account of the modification of the factual and legal basis for the charges during the preliminary investigation; and the allegedly imprecise timeframe of the imputed offences?

- Was there a violation of Article 6 § 1 on account of the use made at the trial of the evidence relating to the allegedly unlawful search in the applicant's flat?