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

FIRST SECTION

Application no. 21333/13
Nelli Fedorovna BYKOVTSEVA
against Russia
lodged on 25 February 2013
communicated on 27 November 2013

STATEMENT OF FACTS

The applicant, Ms Nelli Fedorovna Bykovtseva, is a Russian national, who was born in 1938 and lives in Voronezh.

A. The circumstances of the case

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

The applicant is a pensioner. She suffers from a number of serious chronic diseases and has been granted the status of permanent disability of the first degree.

In 2011 her son, V.B., born in 1966, has been sentenced in the final instance to twenty-four years in high security prison for a number of crimes. In particular, he was found guilty of murder (Article 105 of the Criminal Code (CrC)), stealing (Article 158 of the CrC), armed robbery (Article 162 of the CrC), setting up and directing of an armed criminal society (Article 209 part 1 of the CrC) and stealing or extortion of arms and explosives (Article 226 of the CrC).

On 15 June 2011 the chief of the Voronezh department of the penitentiary service of the Ministry of Justice (FSIN) signed expert opinion (*заключение*) about the placement of V.B. for the execution of his prison sentence. The opinion stated that during his stay at the pre-trial detention centre in Voronezh V.B. had behaved appropriately, has not received disciplinary sanctions, remained calm and polite in the contacts with the administration. The note also mentioned that he had shown himself to be a follower of the "*vory*" traditions (informal criminal gang culture). The question of V.B.'s placement should be decided by the FSIN operative department.

On 24 June 2011 the FSIN operative department decided to send V.B. to a high security correctional facility in the Khabarovsk Region.

The applicant contested this decision. She wrote to the head of the FSIN and asked him to transfer her son to serve his sentence closer to Voronezh. The applicant noted the huge distance between Voronezh and Khabarovsk, whereby a train journey took seven days and covered twelve thousand kilometres. The cost of such journey either by plane or by train was incompatible with her monthly pension of 10,000 Russian roubles (RUB). At her age and suffering from a number of serious chronic diseases, she would be unable to visit her son. On 27 April 2012 the head of Department of FSIN responded to the applicant that the transfer of her son to Khabarovsk had been lawful and based on Article 73 § 4 of the Code on the Execution of Sentences (CES).

On 2 July 2012 the applicant appealed to the Sovetskiy District Court of Voronezh against the FSIN decision to send her son to Khabarovsk. She, again, stressed her age, health condition, the distance between the two regions and lack of means for her to carry out such long and expensive journeys. The applicant relied directly on Article 8 of the European Convention as the grounds to invalidate the decision.

On 13 July 2012 the Sovetskiy District Court of Voronezh examined the applicant's complaint. It referred to the provisions of Article 73 § 4 of the CES, which explicitly provided that persons found guilty of setting up and participation in an armed criminal society were exempted from the general principle of territorial allocation of prisoners set up by paragraph 1 of the same Article. The district court referred to the decisions of the Russian Constitutional Court which had found that the said norm of the CES had not raised any issues with regard to the rights protected by the Constitution. The district court was also of the opinion that since Article 8 § 2 of the Convention has expressly provided for limitations of the protected right, the impugned measure was in compliance with the aims and limits as set out in that provision.

The applicant appealed. She stressed that the court decision of 13 July 2012 has failed to balance her right to the protection of family life against the legitimate aims pursued by Article 73 § 4 of the CES. As a result of its application, she was effectively deprived of the possibility to maintain a meaningful contact with her son since she would not be able to travel to Khabarovsk. On 23 October 2012 the Voronezh Regional Court, in appellate proceedings, confirmed the decision of 13 July 2012.

In the meantime, V.B.'s wife Ye.B. lodged a similar complaint to the Kominternovskiy District Court of Voronezh. She, too, complained of the distance and expenses associated with travel between Voronezh and Khabarovsk regions. She stressed that she had two children with V.B., one of them was suffering from an illness. She pointed out the applicant's age and state of health. She asked to court to oblige the FSIN to relocate V.B. to the Voronezh region, or to one of the neighbouring regions. The Kominternovskiy District Court asked the FSIN departments in the Voronezh and neighbouring Belgorod, Volgograd and Lipetsk regions whether prisoners convicted for crimes under Article 209 of the CrC had served sentence in high security prisons in these regions. All four regional departments replied that such persons were serving sentences in their

correctional facilities, some of them provided figures: 24 in the Volgograd region and 13 in the Voronezh region.

On 7 November 2012 the Kominternovskiy District Court of Voronezh rejected Ye.B.'s complaint against the FSIN decision to send V.B. to the Khabarovsk Region. It relied, essentially, on the same grounds as the Sovetskiy District Court in its decision of 13 July 2012. It is unclear if Ye.B. appealed against this decision.

On 10 December 2012 the head of a department of the FSIN informed the applicant's representative that there were no specially designated correctional facilities for the persons convicted of crimes under Article 209 of the CrC. Their placement to a correctional facility was determined by the FSIN, on the basis of Article 73 § 4 of the CES.

B. Relevant domestic law and practice

1. Legislation on the execution of sentences

The Russian Code on the Execution of Sentences (CES) provides in Article 73 § 1 that persons sentenced to deprivation of liberty must serve their sentences in the federal entity (region) where they had their residence and where they were convicted. Derogations from this rule are possible only on medical grounds or in order to secure the safety of a detainee, or at his or her own request. Article 73 § 2 provides, however, that should there be no appropriate institution within the given region or if it proves impossible to place the convicted person in the existing penal institutions the convicted person is to be sent to the nearest penal institutions located on the territory of the said region, or, exceptionally, they may be sent to penal institutions located on the territory of the next closest region. Article 73 § 4 stipulates, inter alia, that persons who are sentenced to prison sentences for certain crimes, including Article 209 of the CrC (setting up or participation in an armed criminal society) are sent to serve their sentences in the order provided for by the federal penitentiary body.

The Ministry of Justice by its Order No. 235 of 1 December 2005 adopted the "Instruction on the order of transportation of persons convicted to deprivation of liberty, their transfer from one correctional facility to another, and sending them for medical treatment and diagnostics to health institutions and medical correctional facilities" ("the Instruction"). Paragraph 8 of the Instruction stated that persons convicted of crimes provided for by certain articles of the CrC (including Article 209), are, by general rule, sent to serve their sentence within the region where they had been convicted. If their placement to a correctional facility at the place of their conviction is impossible, they are sent to another region by a decision of the FSIN, prepared by its operative department on the basis of reasoned expert opinion (*заключение*) by the relevant regional department.

2. Practice of the Constitutional Court

The Russian Constitutional Court examined the question of constitutionality of the provisions of Article 73 § 4 of the CES. On 23 September 2010 it issued decision No. 1218-O-O upon complaint by A.G., by which it refused to consider on the merits the question of

compatibility of Article 73 § 4 of the CES with several articles of the Constitution. The Constitutional Court stated:

> "The provisions of Article 73 part 4 of the CES, as well as a number of other articles of the same Code, are aimed at achieving an individual punishment and differentiating the conditions of its serving, taking into account the nature of the crime committed, its danger to the values protected by the Constitution and the criminal legislation, intensity, reasons and other circumstances of the crime, personal data about the person who has committed it, and thus create preconditions for achieving the aims of punishment, which, in line with Article 43 part 2 of the CES, are restoring social injustice, correction of the criminal and prevention of new crimes. ..."

The Constitutional Court also noted that the complaint has been brought by the convict's mother, while CES applied to the prisoners themselves. It accordingly refused to consider the merits of the complaint.

On 16 December 2010 the Constitutional Court issued decision No. 1716-O-O upon complaint by Ye.K., who had been convicted for crimes under Article 209 of the CrC. Ye.K. was of the opinion that Article 73 § 4 of the CES allowed the FSIN to change arbitrarily his place of detention and, thus, the court which was to review his application for release on parole. The Constitutional Court relied virtually on the same arguments as cited above and refused to consider the complaint on its merits.

COMPLAINT

The applicant complains under Article 8 of the Convention that sending her son to serve his sentence to the Khabarovsk Region has constituted an impermissible interference with her right to respect for family life.

QUESTIONS TO THE PARTIES

Has there been an interference with the applicant's right to respect for her private and family life, within the meaning of Article 8 § 1 of the Convention?

If so, was that interference in accordance with the law and necessary in a democratic society, in terms of Article 8 § 2?