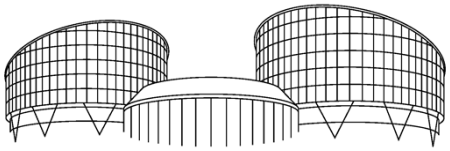

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PAKSHAYEV v. RUSSIA

(Application no. 1377/04)

JUDGMENT

STRASBOURG

13 March 2014

FINAL

07/07/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pakshayev v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 18 February 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1377/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Andrey Fedorovich Pakshayev ("the applicant"), on 9 December 2003.

2. The applicant was represented by Mr V. Postnikov, a lawyer practising in Tyumen. The Russian Government ("the Government") were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been denied legal assistance at the initial stage of the criminal proceedings against him.

4. On 22 October 2007 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in the Tyumen region.

6. On 2 May 1997 the applicant was arrested on suspicion of murder. He was given a written note explaining that he could not be obliged to give evidence against himself, his spouse or close relative and that he was entitled to legal assistance from the moment that the arrest record or the

detention order was read out to him. He signed the explanatory note and asked for legal assistance.

7. At 6.30 p.m. on the same day the applicant was questioned. He was not assisted by a lawyer. According to the applicant, he was threatened that if he did not confess the investigator would order his cellmates to rape him. The applicant confessed to the murder.

8. At 8.20 p.m. on the same day the arrest record was read out to him.

9. On 3 May 1997 the applicant was brought to the scene of the crime where he repeated his confession and gave details of the murder. He was not assisted by a lawyer.

10. On 8 May 1997 the applicant was provided with a lawyer.

11. At the trial the applicant retracted his confession. He admitted that he had been at the victim's house on the evening of the murder. However, he denied killing her.

12. On 15 January 2001 the Kondinskiy District Court of the Khanty-Mansiyskiy Region convicted the applicant of murder and sentenced him to ten years' imprisonment. It relied on the applicant's confession statement of 2 May 1997, testimony by several police officers that the confession had been made by the applicant without any pressure and statements by witness Kh. that he had seen the applicant in the victim's house several hours before the murder. The court also relied on the autopsy of the victim describing the injuries and establishing the cause of death.

13. On 18 October 2006 the Khanty-Mansiskiy Regional Court upheld the conviction on appeal. It found, in particular, that the District Court's reliance on the applicant's confession statement had been lawful. The applicant had been questioned and had confessed before the arrest record had been read out to him. He had not therefore been entitled to legal assistance during that questioning.

II. RELEVANT DOMESTIC LAW

14. The Russian Constitution provides that an arrested or detained person or a person accused of a criminal offence has a right to legal assistance from the moment of his or her arrest, placement in custody or when charges are brought (Article 48 § 2).

15. The RSFSR Code of Criminal Procedure of 27 October 1960 (in force up to 1 July 2002, hereafter "the old CCrP") provided that a suspect or an accused was entitled to legal assistance from the moment that charges were brought or, if a suspect was arrested or detained before the bringing of charges, from the moment that the arrest record or the detention order was read out to him (Article 47 § 1). The investigator, the prosecutor or the court had to provide the suspect or the accused with legal assistance upon his request (Article 48).

16. In a ruling of 27 June 2000 the Constitutional Court declared Article 47 § 1 of the old CCrP unconstitutional. It found that by providing for the right to legal assistance from the moment that the arrest record or the detention order was read out to the suspect, rather than from the moment of arrest as guaranteed by Article 48 of the Constitution, Article 47 § 1 of the old CCrP made the exercise of the right to legal assistance dependent on the discretion of the prosecuting authorities.

17. Article 413 of the 2001 Code of Criminal Procedure (hereafter "the CCrP") provides that criminal proceedings may be reopened if the European Court of Human Rights has found a violation of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

18. The applicant complained that the criminal proceedings against him had been unfair. In particular, he complained that he had been denied access to legal assistance during the first few days of his police custody and that the confession he had made during that period had been used for his conviction. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

A. Admissibility

19. The Government submitted that the Court did not have jurisdiction *ratione temporis* to examine the complaint about the absence of legal assistance during the first days of the police custody. The applicant's complaint concerned the period from 2 to 8 May 1997, while the Russian Federation ratified the Convention on 5 May 1998.

20. The applicant submitted that both the first-instance and the appeal judgments that determined the merits of his criminal case had been taken after 5 May 1998. Therefore, the Court had competence *ratione temporis* in respect of his legal-assistance complaint.

21. The Court reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party ("the critical date"). While it is true that from the critical date onwards all of the State's acts and omissions must conform to the Convention, the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date. Thus, in order to establish the Court's temporal jurisdiction it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so, the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 128-30, 21 October 2013, with further references).

22. Turning to the facts of the present case, the Court notes that the applicant was denied legal assistance from 2 to 8 May 1997. That period falls outside the Court's temporal competence in respect of Russia. However, the thrust of the applicant's complaint is that the confession statement given during that period was used for his conviction. Both the first-instance judgment of 15 January 2001 and the appeal judgment of 18 October 2006 which determined the merits of the applicant's criminal case were taken after the entry into force of the Convention in respect of Russia on 5 May 1998. Both judgments relied on the applicant's confession statement of 2 May 1997. The Court reiterates in that connection that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of the isolated consideration of one particular aspect or one particular incident (see, among other authorities, *Moiseyev v. Russia*, no. 62936/00, § 201, 9 October 2008). It follows that the Court is competent to check whether the proceedings as a whole complied with the Convention (see, for similar reasoning, *Klimentyev v. Russia* (dec.), no. 46503/99, 21 June 2005).

23. In view of the above, the Court rejects the Government's preliminary objection relating to the Court's competence *ratione temporis* to deal with the merits of the applicants' complaint about the absence of legal assistance during the first days of the police custody.

24. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

25. The Government submitted that at the material time the national law had provided for legal assistance from the moment that the arrest record or the detention order was read out to the suspect. Given that the applicant had confessed before his arrest record had been read out to him, he had not been entitled to legal assistance. He had, however, been informed beforehand of his right not to incriminate himself but had not made use of that right. The domestic courts had found that the confession statement had been obtained in accordance with the procedure prescribed by law and that no pressure had been put on the applicant. Moreover, the domestic courts had also relied on witness statements, expert reports and other evidence. The confession statement had not therefore been the sole evidence against the applicant.

26. The applicant submitted that the legal provision guaranteeing legal assistance from the moment the arrest record has been read out had been declared unconstitutional by the Constitutional Court. Despite the fact that the confession statement had been obtained in accordance with an unconstitutional provision, the domestic courts had used it for his conviction. That confession statement obtained without the benefit of legal advice had moreover been the decisive evidence against him as the witnesses and the other pieces of evidence had not implicated him directly. The applicant also alleged that there had been many other procedural defects in the criminal proceedings against him. He submitted, in particular, that the trial judge had been biased, that one of the hearings had been held in his absence and that the evidence had been assessed incorrectly.

27. The Court reiterates that, although not absolute, the right under Article 6 § 3 (c) of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A).

28. As regards legal assistance at the pre-trial stages of the proceedings, the Court has held that the particular vulnerability of the accused at the initial stages of police questioning can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure respect for the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Accordingly, in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first questioning of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right. Even where compelling reasons may exceptionally justify denial of

access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 50-55, ECHR 2008, and *Panovits v. Cyprus*, no. 4268/04, §§ 64-66 and 83, 11 December 2008).

29. In the present case the applicant's right of access to a lawyer was restricted during the first hours of the police custody under Article 47 § 1 of the old CCrP, in force at the material time, which provided that a suspect was entitled to legal assistance from the moment that the arrest record or the detention order was read out to him (see paragraph 15 above). Given that the applicant was questioned before his arrest record was read out to him, his request for legal assistance was denied. As a result, he did not have the benefit of legal advice when he made his confession statement to the police.

30. The Court notes that no compelling reasons to restrict the applicant's right of access to a lawyer were cited by the Government. The restriction was therefore the direct result of the application of Article 47 § 1 of the old CCrP. The Court has previously found that a systematic restriction of the right of access to legal assistance, on the basis of statutory provisions, is sufficient in itself for a violation of Article 6 to be found (see *Dayanan v. Turkey*, no. 7377/03, § 33, 13 October 2009). Moreover, the Court does not lose sight of the fact that that provision was subsequently declared unconstitutional by the Russian Constitutional Court (see paragraph 16 above).

31. The Court further notes that the applicant was undoubtedly affected by the restrictions of his access to a lawyer in that his statement to the police was used for his conviction. Indeed, the confession statement made by the applicant without the benefit of legal advice served as the sole basis for the finding of guilt both in the first-instance and the appeal judgments (see paragraphs 12 and 13 above). The Court therefore finds that, irrespective of whether the applicant had the opportunity to challenge the evidence against him before the courts, the absence of a lawyer while he was in police custody irretrievably affected his defence rights (see *Salduz*, cited above, §§ 58 and 62; *Panovits*, cited above, §§ 75-77 and 84-86; and *Pavlenko v. Russia*, no. 42371/02, § 119, 1 April 2010).

32. The Court concludes from the above findings that the use of his confession statement made without the benefit of legal advice for the applicant's conviction undermined the fairness of the proceedings as a whole.

33. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

34. In view of the above findings, there is no need to examine separately the remaining allegations made by the applicant in relation to the fairness of the trial.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. Lastly, the Court has examined the other complaints submitted by the applicant, and, having regard to all the material in its possession and in so far as they fall within the Court's competence, it finds that they 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 manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

37. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

38. The Government submitted that the applicant had claimed compensation for non-pecuniary damage incurred as a result of his criminal prosecution and conviction. However, they noted that it was not the Court's task to assess the reasonableness of the charges against him and therefore considered that the applicant's claim should be dismissed.

39. The Court reiterates that when an applicant has been convicted despite a potential infringement of his rights guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010). The Court notes, in that connection, that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 17 above).

40. As to the applicant's claims in respect of non-pecuniary damage, the Court considers that the applicant's sufferings and frustration cannot be

compensated for by a mere finding of a violation. Making its assessment on an equitable basis, it awards him EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

41. Relying on receipts and invoices, the applicant also claimed 13,620 Russian roubles (about EUR 373) for legal fees and travel expenses incurred in the domestic proceedings.

42. The Government submitted that the claim was unsubstantiated.

43. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 373 for costs and expenses, plus any tax that may be chargeable to the applicant.

C. Default interest

44. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the alleged unfairness of the criminal proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *Holds* that there is no need to examine the remaining complaints under Article 6 §§ 1 and 3 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 373 (three hundred and seventy-three euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President