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

Communicated on 6 March 2014

FIRST SECTION

Application no. 61834/08
Dmitriy Viktorovich NIKULIN against Russia
and 3 other applications
(see list appended)

STATEMENT OF FACTS

A. The circumstances of the cases

1. The applicants are Russian nationals living in various regions of the Russian Federation. Their names and dates of birth are tabulated below. The facts of the cases, as submitted by the applicants, may be summarised as follows.

2. On various dates between 2008 and 2013 the applicants were criminally prosecuted and convicted for various offences under the Russian legislation in force.

3. The applicants' convictions were based among other evidence on the statements of one or more prosecution witnesses (including victims in certain cases), which were made during pre-trial stages of the proceedings and read out in open court while the witnesses were absent from trials.

4. The national courts allowed the pre-trial statements to be read out and admitted these statements as evidence without examination of the witnesses during trials. In doing so the courts relied on the impossibility of the witnesses' attendance due to their residence in regions distant from the regions where the trials took place.

5. The applicants appealed against the judgments of convictions arguing *inter alia* that their convictions were unfair due to inability to examine prosecution witnesses. However the judgments of conviction were upheld on appeal and became final. The final judgments' particulars, the initials of the witnesses, whose statements were read out, and the reasons for their absence stated by the domestic courts are tabulated below.

B. Relevant domestic law

1. Code of Criminal Procedure

6. The Code of Criminal Procedure of the Russian Federation of 2001 (CCrP), which entered into force on 1 July 2002, provides that a victim or a witness of a crime shall normally be examined in court.

7. Article 240 of the Code provides as follows:

> "1. All the evidence should normally be presented at a court hearing ... The court should hear statements of the defendant, victim, witnesses ... and examine physical evidence ...
>
> 2. The reading of pre-trial depositions is only permitted under Articles 276 and 281 of the Code ..."

8. Pre-trial statements of a victim or a witness, who is absent during the trial, may be read out in the court upon the motion of one of the parties or upon the own motion of the court (Article 281 § 1-2). Article 281 § 2 of the Code provides for the list of grounds for pre-trial statements to be read out. In the relevant part it reads as follows:

> "2. In case of absence at the court hearing of a victim or a witness the court may upon the motion of a party or upon its own motion decide to read out the previously given statements, in case of:
>
> 1) death of a victim or a witness;
>
> 2) grave illness precluding appearance in court;
>
> 3) refusal of a victim or a witness who is a foreign citizen to appear under the summons of the court;
>
> 4) natural disaster or other exceptional circumstances precluding appearance in court."

2. Supreme Court

9. The Plenum of the Supreme Court of the Russian Federation has clarified that under Article 281 § 1 of the CCrP the reading out of the pre-trial statements of absent witnesses is in principle possible with the consent of both prosecution and defence. However, in exceptional cases prescribed by Article 281 § 2, the statements may be read out without the consent of both parties (see Decree of the Plenum of the Supreme Court of the Russian Federation of 5 March 2004 No. 1).

3. Constitutional Court

10. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading out of pre-trial depositions should be considered as an exception to the court's own assessment of evidence and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insists on calling a witness whose testimony may be important to the case, the court should take all available measures to ensure the presence of the witness in court. When that witness is available for questioning, the reading out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, when the witness is not available for questioning, the defence should still be provided with appropriate procedural safeguards such as

challenge to the read-out deposition, a request for challenge by way of examining further evidence, as well as pre-trial face-to-face confrontation between that witness and the defendant when the latter was given an opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

COMPLAINTS

11. The applicants complain under Article 6 § 1 and Article 6 § 3 (d) of the Convention that they did not have a fair trial in criminal proceedings against them, since they were unable to obtain the attendance of the witnesses testifying against them and to examine them in court.

QUESTIONS TO THE PARTIES

1. Did the applicants have a fair hearing in the determination of the criminal charges against them, in accordance with Article 6 § 1 of the Convention? Specifically, were the applicants able to examine the witnesses against them as required by Article 6 § 3 (d) of the Convention?

2. Was these witnesses' residence in regions distant from the regions where the trials took place a good reason for their absence (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 120-25, ECHR 2011)?

(a) If yes, did the national authorities make reasonable effort to secure the presence of the witnesses during trials as requested by the applicant?
(b) Were these reasons and efforts duly reviewed by the domestic courts? What proof had been used by the domestic courts in the course of such review?
(c) What were the grounds in the Russian law and practice on which the national courts relied in reading out of the pre-trial statements by the witnesses absent at trials?

3. Were the applicants' convictions based solely or to a decisive degree on the statements of the witnesses absent from trials (see *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001 II, and *Al-Khawaja and Tahery*, cited above, §§ 126-28, ECHR 2011)?

4. Having regard to the reading out of the absent witnesses' pre-trial statements, was the overall fairness of the proceedings ensured by the domestic courts as prescribed by Article 6 § 1 of the Convention (see *Al Khawaja and Tahery*, cited above, §§ 144-47)? In addressing this issue the parties are invited to address each of the following questions:

(a) Did the competent national courts assess the impact of the absence of the witnesses on the overall fairness of the proceedings?
(b) In view of the reasons advanced by the national authorities were reasonable accommodations made by them to ensure the witnesses' presence at trials?
(c) Did the applicants have at their disposal any alternative procedural or technical means to examine during trials the witnesses whose pre-trial statements were read out?
(d) Did the national courts ensure the overall fairness of the proceedings as prescribed by Article 6 § 1 of the Convention by relying in the good reasons for reading out of the witnesses' pre-trial statements and duly reflecting these reasons in the judgments?
(e) Were there strong procedural safeguards put in place by the Russian law, practice, or specific arrangements in the applicants' cases,

which would counterbalance the use of such evidence (see *Al-Khawaja and Tahery*, cited above, § 147)?

(f) Having regard to the right "to examine or have examined witnesses against him" as enshrined in Article 6 § 3 (d), were the applicants able to examine the witnesses absent at trials during the pre-trial proceedings?

(i) Were they able to put questions to these witnesses and to submit their objections?

(ii) Were the applicants assisted by defence lawyers in examining the witnesses against them during the pre-trial proceedings?

(iii) Did the confrontation procedure conducted by the State officials, if any, meet the requirements of independence and impartiality (see *Melnikov v. Russia*, no. 23610/03, § 80, 14 January 2010)?

5. Given the number of similar complaints originating from different Russian regions submitted to the Court over the period of many years and up until now, as well as repeated violations of Article 6 § 3 (d) in connection with Article 6 § 1 found by the Court in certain Russian cases, may it be considered that the present cases reveal an underlying problem that requires adoption of general measures in accordance with Article 46 § 1 of the Convention as interpreted in the light of Article 1 of the Convention?

6. The Government are invited to provide where available:

(a) the copies of reports on pre-trial confrontations of the applicants with the witnesses absent from trials;

(b) the copies of police reports and other relevant documents on the attempts to secure presence of these witnesses during trials.

APPENDIX

No.	Application no.	Lodged on	Applicant name date of birth place of residence	Represented by	Final judgment	Witness(es) absent from trial
1.	61834/08	14/10/2008	**Dmitriy Viktorovich NIKULIN** 06/08/1968	Valeriy Vladimirovich SHUKHARDIN	Moscow City Court, 21 April 2008	prosecution witness Mr T.
2.	50665/12	01/08/2012	**Tatyana Yevgenyevna GORBANEVA** 18/08/1966	Lyubov Germanovna GOLYSHEVA	Tomsk Regional Court, 9 February 2012	prosecution witness Mr B.
3.	65757/12	19/09/2012	**Aleksey Igorevich DUSHKIN** 12/10/1986	Yuriy Vladimirovich SEMENOV	Oryol Regional Court, 20 March 2012	prosecution witness Mr Ok.
4.	65765/13	26/09/2013	**Aleksandr Fedorovich GORBATYUK** 14/02/1978		Primorskiy Regional Court, 27 March 2013	victims Mr D. and Mr S.