



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

FIRST SECTION

DECISION

Applications nos. 60367/08 and 961/11
Aslan KHAMTOKHU and Artyom AKSENCHIK
against Russia

The European Court of Human Rights (First Section), sitting on 13 May 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,

Khanlar Hajiyeu,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse,

Ksenija Turković,

Dmitry Dedov, *judges*,

and Søren Nielsen, *Section Registrar*,

Having regard to the above applications lodged on 22 October 2008 and 11 February 2011 respectively,

Having regard to the partial decision on admissibility of 27 September 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Alsan Bachmizovich Khamtokhu and Mr Artyom Aleksandrovich Aksenchik, are Russian nationals, born in 1970 and 1985 respectively. They are currently serving life sentences in the Yamalo-Nenetskiy Region. The second applicant is represented before the Court by Mr T. Mikasyan, a lawyer with the International Protection Centre in Moscow.

2. The Russian Government are represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the individual applications

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

1. The first applicant Mr Khamtokhu (application no. 60367/08)

4. On 14 December 2000 the Supreme Court of the Adygeya Republic found the first applicant guilty of multiple offences, including escape from prison, aggravated assault on police officers and illegal possession of firearms, and sentenced him to life imprisonment.

5. On 19 October 2001 the Supreme Court of the Russian Federation upheld the first applicant's conviction on appeal.

6. On 26 March 2008 the Presidium of the Supreme Court of the Russian Federation quashed the appeal judgment of 19 October 2001 by way of supervisory review and remitted the matter for a fresh consideration.

7. On 30 June 2008 the Supreme Court of the Russian Federation upheld the first applicant's conviction on appeal. The court reclassified some of the charges against him but the life sentence remained unchanged.

2. The second applicant Mr Aksenchik (application no. 961/11)

8. On 28 April 2010 the Tomsk Regional Court found the second applicant guilty of three counts of murder and sentenced him to life imprisonment.

9. On 12 August 2010 the Supreme Court of the Russian Federation upheld the conviction on appeal.

B. Relevant domestic law and practice

1. Criminal Code

10. Article 4 establishes that "criminal offenders shall be equal before the law and liable to criminal responsibility irrespective of sex ... and other circumstances".

11. Article 43 establishes that criminal punishment pursues the objectives of restoring social justice, rehabilitating the convict and deterring new offences.

12. Article 56, paragraph 2, sets out that a sentence of imprisonment may have a duration of between two months and twenty years. Paragraph 4 specifies that the aggregate duration of imprisonment may not exceed

twenty-five years in the case of concurrent sentences for multiple offences or thirty years in the case of consecutive sentences.

13. Article 57 provides as follows:

“1. Life imprisonment may be imposed for particularly serious offences against life and ... public safety.

2. Life imprisonment may not be imposed on women, persons who were under eighteen years of age at the time they committed an offence and men who were at least sixty-five years old at the time the verdict in the case was pronounced.”

14. Article 58 provides that both men and women can be sentenced to serve their term of imprisonment in penal settlements and standard-security correctional colonies, while only men can be sentenced to serve their term of imprisonment in high- and special-security correctional colonies and prisons.

15. Article 79, paragraph 5, allows the court to grant early release to an offender who has served at least twenty-five years of a life sentence.

2. Case-law of the Constitutional Court

16. The Constitutional Court has repeatedly declared inadmissible complaints about the alleged incompatibility of Article 57 § 2 of the Criminal Code with the constitutional protection against discrimination. In particular, in decision no. 466-O of 21 December 2004, it held as follows:

“The provisions of Article 57 ... of the Russian Criminal Code preventing a sentence of life imprisonment from being imposed on the listed categories of persons are based on the principles of justice and humanitarian considerations and allow [the sentencing court] to take into account the age and social and physiological characteristics of various categories of persons in order to achieve the objectives of criminal punishment in a democratic and law-abiding society in a comprehensive and effective manner.

...

Laws imposing [criminal] liability and punishment regardless of the character of a guilty person, and other circumstances which are objectively and reasonably justified and ensure an adequate legal assessment of the danger of the offence and of the offender ... would be contrary to the constitutional prohibition of discrimination and the principles of justice and humanism set forth in the Constitution.

The legislative provisions challenged by the complainant ensure the differentiation of criminal responsibility and cannot be considered incompatible with the constitutional principles and rules or to infringe on the human rights and freedoms guaranteed by the Constitution.”

COMPLAINTS

17. Referring to Articles 2, 3, 5, 7, 13, 14 and 17 of the Convention, the applicants, who were sentenced to life imprisonment, complain that they

were subjected to discriminatory treatment *vis-à-vis* other categories of convicts which are exempt from life imprisonment as a matter of law. In his submissions of 6 March 2012 the first applicant also complained that he had not been convicted by a tribunal established by law.

THE LAW

A. Joinder of the applications

18. Given that the present applications concern similar facts and raise identical issues under the Convention, the Court decides to join them in accordance with Rule 42 of the Rules of Court.

B. The discrimination complaint

19. The applicants complained that the fact that they had been sentenced to life imprisonment exposed them to discriminatory treatment. The Court considers that this part of the application falls to be examined under Article 14 of the Convention, taken together with Article 5. These provisions, in the relevant part, read as follows:

Article 5

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court ...”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

1. Submissions by the Government

20. The Government submitted at the outset that the Russian Constitutional Court had examined similar complaints on several occasions and found that, inasmuch as Article 57 of the Criminal Code prohibited the sentencing of women, minors and seniors to life imprisonment, it was based on the principles of justice and humanism which required that the sentencing policy take into account the age and “physiological characteristics” of various categories of offenders. The restrictions concerning those categories of offenders did not affect the sentencing of

other offenders, in whose cases the sentences reflected the nature and public dangerousness of the crime, the circumstances in which it had been committed, and the personality of the offender. The restrictions had no impact on the rights of those offenders and did not discriminate against them.

21. In the Government's view, the case-law of the Constitutional Court reflected the requirements of international law concerning a differentiated approach to punishment on account of the offender's sex and age. As regards the restrictions on the trial and punishment of minors, the Government referred to Article 6 § 5 of the International Covenant on Civil and Political Rights, Article 37 (a) of the Convention on the Rights of the Child, and Article 26 of the Rome Statute of the International Criminal Court. The Government further pointed out that international law set forth a more humane approach towards women: Protocol I to the Geneva Conventions declared women to be the object of special respect who must be protected against rape and forced prostitution (Article 76), the ILO Conventions protected women against night work, the UN Convention on the Elimination of All Forms of Discrimination against Women stated that special measures aimed at protecting maternity were not to be considered discriminatory (Article 4 § 2), and the UN Declaration on the Elimination of Violence against Women recognised that women in detention were especially vulnerable to violence. In the Government's view, the international-law instruments articulated a more humane attitude towards women, which did not amount to discrimination on account of sex.

22. The Russian law established as a general rule that a life sentence could be imposed for particularly serious crimes against life and public safety. The prohibition on sentencing women, minors and seniors to life imprisonment was an exception to the rule. This exception did not infringe on the rights of the majority of convicts but rather established a privileged approach to sentencing for specific groups of individuals. It could be described as "positive inequality" designed to make up, by legal means, for the naturally vulnerable position of those social groups. In the Government's submission, the concept of discrimination referred only to unjustified restrictions. In that sense, there was no discrimination in the applicants' case and their grievances were of an abstract nature because their sentences had been determined in accordance with the gravity of the crimes they had committed and did not put them at any disadvantage *vis-à-vis* women, minors or seniors.

23. On the issue of whether a difference in treatment was reasonably proportionate to the legitimate aim pursued, the Government submitted that age-related restrictions were necessary because minors and seniors were vulnerable social groups who had an underdeveloped or weakened capacity to understand the implications of their conduct, to control it and to foresee the consequences of their actions. They were prone to impulsive,

unconsidered behaviour that could result in criminally reprehensible conduct. In addition, life imprisonment of those aged 65 would make them eligible for early release only at the age of 90, which rendered such a possibility illusory, having regard to the natural life expectancy.

24. As to women, the sentencing exception was justified in view of their special role in society which related, above all, to their reproductive function. The Russian Constitutional Court had previously held that a different retirement age for men and women was accounted for not only by physiological differences between the sexes but also by the special role of motherhood in society and did not amount to discrimination but rather served to reinforce effective, rather than formal, equality. Women were also more psychologically vulnerable than men and were affected to a greater extent by the hardships of detention. The Russian legislation provided for more lenient conditions for women held in correctional colonies, while men were detained in harsher prison conditions.

25. Finally, the Government pointed out that the exception concerned in reality a small number of convicted persons. In Russia, as of 1 November 2011, only 1,783 offenders were sentenced to life imprisonment (by way of comparison, in England and Wales in 2009 there were 12,521 lifers). On 1 October 2011 there were 52,626 female convicts serving a custodial sentence, which amounted to 8.17 per cent of the total number of convicts. Among them, only 18 per cent were serving a sentence longer than ten years.

2. Submissions by the applicants

26. The first applicant submitted that a difference in the sentencing policies applicable to men and women did not have a reasonable and objective justification, did not pursue a legitimate aim and amounted to gender prejudice. It was not based on any scientific evidence, statistical data or the legal principles that are generally accepted in the civilised world. It was the product of an outdated and traditionalist view on the social role of women, minors and seniors.

27. The first applicant pointed out that, for the same crime committed under similar circumstances, for instance, aggravated murder, a middle-aged man could be sentenced to life, a woman to eight to twenty years' imprisonment and a minor to up to ten years' imprisonment. However, the crime statistics and judicial information showed a constant increase in the number of women convicted of particularly serious crimes, including terrorist acts. In a recent case, a jury had found a group of teenagers guilty of twenty murders and twelve attempted murders; however, by law they could not be sentenced to more than ten years' imprisonment. Seen in this light, the Government's argument that female and minor criminals should receive "privileged treatment" was unpersuasive.

28. Inasmuch as the Government claimed that prohibiting the sentencing

of women to life was necessary because of their greater vulnerability and reproductive function, the first applicant contended that a more lenient approach to expectant mothers was indeed justified, having regard to the interests of the mother and the child. He referred to Article 64 § 2 of the Criminal Code of Ukraine, which prevented the courts from imposing life sentences on women who were pregnant at the time of the commission of the offence or at the time of passing sentence. In the first applicant's view, the international law instruments cited by the Government were not relevant to the instant case.

29. The first applicant acknowledged that the State had a margin of appreciation in regulating criminal conduct and that a more humane attitude to, and treatment of, women, minors and seniors was an important and necessary objective. Nevertheless, he maintained that the age and sex of criminals should not justify a difference in criminal responsibility but should be factors in determining a sentence in the light of the individual circumstances of each case. Accordingly, he considered that the sex- and age-related provisions should be removed from Article 57 of the Criminal Code and that sex and age be listed instead in Article 61, along with other extenuating circumstances.

30. The second applicant put forward arguments that were substantially similar to those advanced by the first applicant. He emphasised that, while certain physiological features of women – for example, during pregnancy – could reasonably and objectively justify a differential treatment, a blanket distinction between men and women – who were otherwise in an identical situation in terms of their culpability, gravity of the offence and criminal responsibility – with regard to sentencing policies was unjustified, arbitrary and disproportionate. Moreover, because this distinction was incorporated in the law, whereas the courts could be allowed to take account of gender as a pertinent element for exercising their discretion in the determination of individual sentences, the discrimination between men and women did not reflect a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

3. The Court's assessment

31. The Court considers, in the light of the parties' submissions, that the discrimination complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination on the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

C. Other complaints

32. Lastly, in his submissions of 6 March 2012 the first applicant complained that he had not been convicted by a “tribunal established by law” because the Supreme Court of the Adygeya Republic had not been competent to try his case. In this respect, the Court notes that, insofar as the grievances he raised were not substantially the same as the complaints that had already been examined and declared inadmissible by the Court in its partial decision of 27 September 2011, the complaints were made for the first time after the communication of the case, that is, more than six months after the termination of the criminal proceedings. It follows that this part of the application must be rejected in accordance with Article 35 §§ 1, 2 (b) and 4 of the Convention.

For these reasons, the Court

Decides unanimously to join the applications;

Declares, by a majority, admissible, without prejudging the merits of the case, the applicants’ complaint about the allegedly discriminatory sentencing policies;

Declares unanimously the remainder of the case inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President