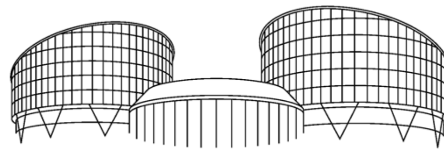

Information Note on the Court's case-law 116

February 2009

Sergey Zolotukhin v. Russia [GC] - 14939/03

Judgment 10.2.2009 [GC]

Article 4 of Protocol No. 7

Right not to be tried or punished twice

Administrative conviction of "minor disorderly acts" and subsequent criminal prosecution for "disorderly acts" concerning the same facts: *violation*

Facts: In January 2002 the applicant was arrested for bringing his girlfriend into a military compound without authorisation and was taken to the district police station. According to the police report, he was drunk, behaved insolently, used obscene language and attempted to escape. On the same day a district court found him guilty of swearing at police employees and breaching public order shortly after his arrival at the police station. It convicted him of "minor disorderly acts" under Article 158 of the Code of Administrative Offences and sentenced him to three days' detention. Subsequently, criminal proceedings were brought against him in relation to the same events. He was charged with "disorderly acts" under Article 213 of the Criminal Code for swearing at police employees and breaching public order in the immediate aftermath of his arrival at the police station. He was also charged with insulting a public official under Article 319 of the Criminal Code for swearing at a major who was drafting the administrative offence report. Lastly, he was charged with threatening violence against a public official under Article 318 of the Criminal Code it being alleged that he had threatened to kill the major en route to the regional police station. In December 2002 the same district court found the applicant guilty of the charges under Articles 318 and 319 of the Criminal Code, but acquitted him of the charges under Article 213, after finding that that his guilt had not been proven to the requisite standard.

Law: In its Chamber judgment of 7 June 2007, the Court had held unanimously that there had been a violation of Article 4 of Protocol No. 7. The case had been referred to the Grand Chamber at the Government's request. As to the existence of a "criminal charge" for the purposes of that Article, the Grand Chamber endorsed the Chamber's finding that although the initial set of proceedings against the applicant were classified as administrative in national law, they were to be equated with criminal proceedings on account, in particular, of the nature of the offence of "minor disorderly acts" and the severity of the penalty. As to whether the offences were the same, the Court had adopted a variety of approaches in the past, placing the emphasis on identity of the facts irrespective of their legal characterisation, on the legal classification as the same set of facts could give rise to different offences, or on the existence of essential elements common to both offences. Taking the view that the existence of these different approaches was a source of legal uncertainty which was incompatible with the fundamental right guaranteed by Article 4 of Protocol No. 7, the Court decided to define in detail what was to be understood by the term "same offence" for the purposes of the Convention. After examining the scope of the right not to be tried and punished twice as set forth in other international instruments, in particular the United Nations Covenant on Civil and Political Rights, the European Union's Charter of Fundamental Rights and the

American Convention on Human Rights, it stated that Article 4 of Protocol No. 7 should be construed as prohibiting the prosecution or trial of an individual for a second offence in so far as it arose from identical facts or facts that were "substantially" the same as those underlying the first offence. This guarantee came into play where a new set of proceedings was instituted after a previous acquittal or conviction had acquired the force of *res judicata*. In the instant case, no issue arose under Article 4 of Protocol No. 7 in respect of the applicant's prosecution under Articles 319 and 318 of the Criminal Code, as the charges relating to his conduct towards the major had been raised for the first and only time in the criminal proceedings. The situation was, however, different with regard to the disorderly conduct in respect of which he had first been convicted in the administrative proceedings under Article 158 of the Code of Administrative Offences and had subsequently been prosecuted under Article 213 of the Criminal Code. The facts underlying the two sets of administrative and criminal proceedings against the applicant differed in only one element, namely the threat to use violence against a police officer, and should therefore be regarded as substantially the same. As to whether there had been a duplication of proceedings, the Court endorsed the Chamber's conclusion that the judgment in the "administrative" proceedings sentencing the applicant to three days' detention had amounted to a final decision. The fact that the applicant had been acquitted in the criminal proceedings had no bearing on his claim that he had been prosecuted twice for the same offence. The Court reiterated that Article 4 of Protocol No. 7 contained three distinct guarantees and provided that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence. Nor had the acquittal deprived the applicant of his victim status, as he had been acquitted solely on the ground of insufficient evidence against him. At no point had the Russian authorities acknowledged a breach of the *non bis in idem* principle. In sum, the proceedings instituted against the applicant under Article 213 of the Criminal Code concerned essentially the same offence as that of which he had already been convicted under Article 158 of the Code of Administrative Offences.

Conclusion: violation (unanimously).

Article 41 – EUR 1,500 in respect of non-pecuniary damage.

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