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

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Opposition activist's conviction of embezzlement: result of arbitrary application of the law

In today's **Chamber** judgment[1] in the case of Navalnyy and Ofitserov v. Russia (application nos. 46632/13 and 28671/14) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the complaint by an opposition activist and a businessman that the criminal proceedings leading to their conviction for embezzlement had been arbitrary and unfair, and based on an unforeseeable application of criminal law.

The Court found that the conviction of the applicants' co-accused in separate accelerated proceedings had deprived the applicants of basic guarantees of a fair trial. In particular, the trial court convicting the co-accused had worded its judgment in a manner that could only be considered prejudicial as regards the applicants' alleged involvement in the crime. Moreover, the Russian courts had found the applicants guilty of acts indistinguishable from regular commercial activities. In other words, the criminal law had been arbitrarily construed to the applicants' detriment. Finally, the Russian courts had failed to address Mr Navalnyy's arguable allegation that the reasons for his prosecution were his political activities.

Principal facts

The applicants, Aleksey Navalnyy and Petr Ofitserov, are Russian nationals who were born in 1976 and 1975 respectively and live in Moscow. Mr Navalnyy is an opposition leader, anti-corruption campaigner and blogger. He is a lawyer and was, before his criminal conviction, a member of the Moscow bar association. Mr Ofitserov is a businessman.

In January 2009 the Governor of the Kirov region invited Mr Navalnyy to be a volunteer consultant on enhancing the transparency of the region's property management. One of his projects was to help steer the region's loss-making timber industry out of crisis. He discussed the financial and logistical problems of the State enterprise Kirovles, whose commercial activities consisted, in particular, of timber processing, with its director, X. On Mr Navalnyy's suggestion, X agreed that the company join forces with a timber trading company to bring in customers and curtail the Kirovles timber mills' practice of direct sales for cash bypassing Kirovles' accounts. Contacted by Mr Navalnyy, Mr Ofitserov set up a timber trading company, VLK. In April 2009 Kirovles, represented by X, concluded a framework contract with VLK, represented by Mr Ofitserov. In particular, the contract provided for non-exclusive sales by Kirovles to VLK, which would then sell goods on to customers at 7% commission.

In August 2009 the Kirov region's property management department suspended X as Kirovles' director, and in October 2009 he was dismissed for mismanagement. In September 2009 Kirovles terminated the contract with VLK.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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In the course of 2010 Mr Navalnyy pursued an anti-corruption campaign and published a number of articles and documents exposing high ranking officials' involvement in large-scale fraud. In particular, in one article published in November 2010 he claimed that at least four billion US dollars of State funds had been misappropriated during the construction of the East Siberia-Pacific Ocean oil pipeline and suggested that the President of the Russian Federation, Vladimir Putin, had been personally implicated.

In December 2010 the Kirov Regional department of the Investigative Committee of the Prosecutor's Office (later replaced by the Investigative Committee of the Russian Federation – "the Investigative Committee") opened an inquiry on suspicion that the applicants had defrauded Kirovles by inducing its director to enter into a loss-making transaction. Initially the Investigative Committee decided in three consecutive decisions not to open a criminal investigation against them for lack of *corpus delicti* – that is, for lack of a criminal act to be investigated – but in May 2011 a criminal investigation was opened in their respect on suspicion of deception and abuse of trust of the Kirovles director. After a number of witnesses had been questioned – including X and several former employees of Kirovles – and Kirovles' and VLK's accounts had been examined, the investigators found that there was no case against the applicants. In April 2012 the Investigative Committee closed the criminal investigation. However, the Committee subsequently reversed its decision. On 5 July 2012, the Chief of the Investigative Committee, Mr Bastrykin, in a speech at its general meeting, condemned the decision to close the criminal investigation in respect of Mr Navalnyy, warning his subordinates not to let such things happen again. On 26 July 2012 Mr Navalnyy published an article accusing Mr Bastrykin of breaking laws imposing restrictions on high-ranking public servants.

On 30 July 2012 the Investigative Committee opened a criminal investigation against X – on suspicion that he had conspired with unknown individuals to dissipate Kirovles' assets through VLK – which was joined with the criminal case against the applicants. Subsequently the three men were charged with conspiring to dissipate Kirovles' assets.

In September 2012 the Deputy Prosecutor General granted X's request to conclude a plea-bargaining agreement and to have his criminal case examined in accelerated proceedings. As a condition, X undertook to provide the investigation with information about "Mr Ofitserov and Mr Navalnyy's involvement in the misappropriation [of assets]" and "their roles in the commission of the crime". In October 2012 the case against X was disjoined from the applicants' case. A subsequent complaint by Mr Navalnyy, alleging that the plea-bargaining agreement had breached his procedural rights and requesting that X's case be joined with the applicants' case again, was dismissed. In December 2012 X was convicted of dissipating Kirovles' assets and given a four-year suspended sentence with three years' parole. The judgment indicated that X had conspired with two others, "Governor's former volunteer consultant N." and "VLK former director O.", and stated, in particular, that "N." had "developed a criminal plan to misappropriate Kirovles' assets in favour of a newly created entity under his control, to be founded and led by O."

Mr Navalnyy lodged an appeal against the judgment, alleging that it was prejudicial to the outcome of his and Mr Ofitserov's case. He was informed by the trial court that he could not appeal against the judgment in X's case because he had not been party to the proceedings.

The applicants' request to have the judgment in X's case excluded from the evidence in their trial was dismissed by the trial court. During the hearing in their trial, X was examined as a witness, and, against the applicants' objections, before he was cross-examined by the defence, the prosecutor was allowed to read out the statements X had made during the investigation. The court rejected the applicants' requests to have several people called as witnesses, including two public officials of the Kirov region.

On 17 July 2013 Mr Navalnyy was registered as a candidate for the Moscow mayoral elections. On the following day, 18 July 2013, the trial court delivered its judgment in the applicants' case, convicting Mr Navalnyy of organising, and Mr Ofitserov of facilitating, large-scale embezzlement.

They were sentenced to five and four years' imprisonment respectively, to be served in a correctional colony. Among other evidence, the court relied on the testimony of X and his statements made during the investigation. The court dismissed Mr Navalnyy's allegations of political persecution and his objection to admitting X's testimony.

In the Moscow mayoral elections in September 2013 Mr Navalnyy came second, securing approximately 27% of the votes. In October 2013 the judgment against the applicants was upheld in substance but the appeal court amended their sentence and gave them both suspended prison terms on an undertaking not to change their place of residence. In February 2014 Mr Navalnyy was placed under house arrest in the context of another, unrelated, criminal case against him. The court justified this measure by referring to his prior criminal conviction in the Kirovles case.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1, 2 and 3 (d) (right to a fair trial / presumption of innocence / right of a person charged with an offence to examine or have examined witnesses against him), the applicants complained that the criminal proceedings against them had been arbitrary and unfair. Further relying on Article 7 (no punishment without law), they complained that the legal provision on the basis of which they had been convicted had not been applicable to their acts. They claimed that the authorities had extended the interpretation of the offence to such broad and ambiguous terms that it had not satisfied the requirements of foreseeability. Finally, the applicants alleged a violation of Article 18 (limitation on use of restrictions on rights) in conjunction with Articles 6 and 7, maintaining that their prosecution and criminal conviction had been for reasons other than bringing them to justice, and in particular in order to prevent Mr Navalnyy from pursuing his public and political activities.

The case originated in two applications lodged with the European Court of Human Rights on 24 June 2013 and 8 April 2014 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
Helena **Jäderblom** (Sweden),
George **Nicolaou** (Cyprus),
Helen **Keller** (Switzerland),
Johannes **Silvis** (the Netherlands),
Dmitry **Dedov** (Russia),
Branko **Lubarda** (Serbia),

and also Marialena **Tsirli**, *Deputy Section Registrar.*

Decision of the Court

Article 6

Although each of the applicants' complaints under Article 6 would have been capable of raising a separate issue under the Convention, the Court found it appropriate in their case to treat the specific allegations as elements of general fairness under Article 6 § 1. It observed in particular that the complaints were based on the same underlying allegation that X's conviction in separate accelerated proceedings had been instrumental in circumventing important guarantees to which they would have been entitled if all three co-accused had been tried together.

The criminal charges against the applicants had been based on the same facts as those against X. It was therefore undeniable that any facts established and legal findings made in the proceedings

against X had been directly relevant to the applicants' case. In those circumstances it would have been essential for safeguards to be in place to ensure that decisions taken in the proceedings against X would not undermine the fairness of the subsequent proceedings against the applicants.

However, the Court came to the conclusion that the two basic requirements for guaranteeing the fairness of proceedings, when co-accused were being tried in separate sets of proceedings, had not been fulfilled.

Notably, contrary to the courts' obligation to refrain from any statements that might have had a prejudicial effect on the pending proceedings, the trial court convicting X had worded its judgment of December 2012 in respect of X in a manner that no doubt could remain as regards the applicants' identities or their involvement in the crime of which X was convicted. It had expressed its findings in terms which could not be defined as anything but prejudicial.

Second, contrary to the courts' obligation not to treat as *res judicata* – that is, a matter already judged – any facts admitted in a case to which the applicants had not been party, the circumstances established in the judgment against X had in effect had the force of *res judicata*. The Russian Government had argued that in the applicants' case the trial court had been obliged to examine all evidence and witnesses and to base its assessment exclusively on the material and testimony presented at the hearing. However, the Court considered that the trial court had had an obvious interest in remaining concordant, because any conflicting findings made in related cases could have undermined the validity of both judgments issued by the same court. The risk of issuing contradictory judgments was a factor that had discouraged the judges from finding out the truth and had diminished their capacity to administer justice.

Similarly, X's conviction with the use of plea-bargaining and accelerated proceedings had compromised his competence as a witness in the applicants' case. His conviction had been based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it had not been required that that account be verified or corroborated by other evidence. Standing later as a witness, X had been compelled to repeat his statements made as an accused during plea-bargaining. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of the events.

As regards the complaint of an allegedly arbitrary application of the law, the Court noted that after the initial charges against the applicants, defined as deception and abuse of trust of X, had been dropped for lack of *corpus delicti*, the prosecution had decided that it had been X who had embezzled the assets by entering into a loss-making transaction, and that the applicants had been his accomplices. The Court further observed that under Russian law, limited liability companies such as VLK were defined as commercial entities whose main purpose was deriving profits. The domestic courts had not established, and it had not even been argued, that VLK, by signing the contract and charging commission, had pursued a goal other than deriving profit from timber resale, for example setting a money laundering, tax evasion or kick-back scheme, or other unlawful or dubious purpose.

The material in the case file showed that the two parties to the contract had pursued commercial goals independently of each other and that those goals had been precisely those that had been stipulated in the contract. The Court therefore observed that the Russian courts had found Mr Ofitserov guilty of acts indistinguishable from regular commercial middleman activities and Mr Navalnyy for fostering them. The Court was thus faced with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants had been convicted. In other words, the criminal law had been arbitrarily construed to the applicants' detriment.

Those findings showed that the Russian courts had failed to ensure a fair hearing in the applicants' case to an extent which might suggest that they did not even care about appearances. It was noteworthy that those courts had dismissed without examination Mr Navalnyy's allegation of political prosecution, which the Court considered at least arguable. It noted in particular that the anti-corruption campaign run by Mr Navalnyy had gained its momentum in the course of 2010; that year it had targeted high-ranking officials, including the President of the Russian Federation. Mr Navalnyy's investigations had attracted the increasing attention of his Internet blog followers, but also a wider audience through other media republishing the blog content. Irrespective of whether the officials concerned had acknowledged the publications, and whether or not they had contested the allegations, they undoubtedly had found them unwelcome. Furthermore, it was impossible to overlook, in particular, that the first Kirovles inquiry had been opened three weeks after the publication of the article about the financial scandal relating to the East Siberia-Pacific Ocean oil pipeline project, suggesting the implication of high-level politicians.

Having omitted to address those arguable allegations of political persecution, the Russian courts had themselves given reason for heightened concern that the real motivation for the applicants' prosecution and conviction was a political one.

The Court concluded that the criminal proceedings against the applicants had been in violation of Article 6 § 1.

Other articles

Having regard to its finding that that the domestic courts had applied the criminal law arbitrarily and had found the applicants guilty of acts indistinguishable from regular commercial activities, the Court considered that it was not necessary to examine whether this also constituted a violation of Article 7.

As regards the complaint under Article 18 in conjunction with Articles 6 and 7, the Court found that it fell outside of the scope of the Convention and declared it inadmissible. It noted that Articles 6 and 7 in so far as relevant to the present case, did not contain any express or implied restrictions that might form the subject of the Court's examination under Article 18.

Just satisfaction (Article 41)

The Court held that Russia was to pay each of the applicants 8,000 euros (EUR) in respect of non-pecuniary damage, and in respect of costs and expenses EUR 48,053 to Mr Navalnyy and EUR 22,893 to Mr Ofitserov.

Separate opinion

Judges Nicolaou, Keller and Dedov expressed a joint partly dissenting opinion.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.