CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

AS TO THE ADMISSIBILITY OF

Application no. 77989/01
by Nikolay Stepanovich and Ivan Stepanovich GONCHAROVY
against Russia

The European Court of Human Rights (First Section), sitting on 27 November 2008 as a Chamber composed of

Christos Rozakis, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar*,

Having regard to the above application lodged on 28 November 2000,

Having regard to the Court's decision to examine jointly the admissibility and merits of the case (Article 29 § 3 of the Convention),

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

The applicants, Mr Nikolay Stepanovich Goncharov and Mr Ivan Stepanovich Goncharov are Russian nationals who were born in 1947 and 1955 respectively and live in the Smolensk Region. The Russian Government ("the Government") were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

1. Applicants' conviction

On 19 February 1981 the applicants were arrested on suspicion of having committed several crimes. They were detained pending investigation.

On 26 May 1982 the Kaluga Regional Court convicted the first applicant of unlawful carriage of firearms, forgery, death threats and misappropriation (Articles 218, 196, 175, 96 and 207 of the Russian Soviet Federative Socialist Republic ("RSFSR") Criminal Code, hereinafter the "Criminal Code") and the second applicant of forgery and misappropriation (Articles 196 and 96 of the Criminal Code). The Regional Court further acquitted the applicants of several other crimes. The applicants were sentenced to one year and three months' imprisonment and one year's imprisonment respectively. The applicants were released in the courtroom.

On 28 July 1982 the Supreme Court of the RSFSR upheld the above judgment on appeal.

2. Supervisory-review proceedings

On 1 April 1991 the first applicant applied to the Supreme Court of the RSFSR requesting the court to initiate a supervisory review of his criminal case, to quash the judgment of 26 May 1982, as upheld on 28 July 1982, and to terminate the criminal proceedings against him owing to the absence of *corpus delicti* in his actions.

On an unspecified date the President of the Supreme Court of the RSFSR lodged an application for supervisory review of the judgment of 26 May 1982, as upheld on 28 July 1982.

On 25 September 1991 the Presidium of the Supreme Court of the RSFSR quashed the judgment of 26 May 1982, as upheld on 28 July 1982, by way of supervisory review. The Supreme Court found that the above judgment could not be considered lawful and well-founded. In particular, the factual circumstances of the case were not sufficiently investigated and the charges against the applicants were not supported by evidence. The Supreme Court ordered that "all measures provided for by law be undertaken for comprehensive, complete and objective investigation into all the circumstances of the case". At the same time, the Presidium left the remainder of the judgment, that is the acquittal part, in force.

3. Subsequent developments

On 25 November 1991 the Prosecutor of the Smolensk Region discontinued the criminal proceedings in respect of the first applicant partly

for want of proof of a crime and partly on the ground that further prosecution was time-barred. The criminal proceedings against the second applicant were discontinued partly because of the lack of *corpus delicti* in his actions and partly because further prosecution was time-barred.

The applicants appealed against the above decision. In their appeal they expressed discontent with the grounds given for termination of the criminal proceedings against them and insisted on the remittal of their case to the court for its examination on the merits. As a result, on 10 January 1992 the Prosecutor of the Smolensk Region quashed the decision of 25 November 1991. The preliminary investigation into the case was assigned to the Bryansk Transport Prosecutor's Office.

On 25 August 1992 and 15 May 1993 the Bryansk Transport Prosecutor's Office again terminated the criminal proceedings against the applicants on the same grounds as previously. However, on 4 September 1992 and 23 October 1998 respectively the Moscow Transport Prosecutor's Office quashed the above decisions on appeal and resumed the preliminary investigation. The Moscow Transport Prosecutor's Office noted on both occasions that a criminal case could be terminated on non-exonerative grounds, such as a time-bar on further prosecution, only with the consent of the prosecuted person. As the applicants had never agreed to the termination of the case on this ground the investigation would have to be continued.

On 18 February 1999 the investigator made the applicants sign a written undertaking not to leave the town.

After the completion of the preliminary investigation, on 30 August 1999 the case was remitted to the Monastyrshinskiy District Court of the Smolensk Region for examination on the merits.

Since the applicants refused to attend the preparatory hearing, the Monastyrshinskiy District Court decided on 15 November 1999 to change the above preventive measure to detention on remand.

The second applicant was remanded in custody on 17 November 1999; however, on the same day the District Court ordered his release subject to an undertaking not to leave the town.

On 7 December 1999 the Smolensk Regional Court upheld on appeal the decision of 15 November 1999 in respect of the first applicant.

On 3 March 2000 the first applicant was detained.

On 7 March 2000 the applicants consented to termination of the criminal proceedings against them owing to the expiry of the statutory limitation period for their criminal prosecution.

On the same day the Monastyrshinskiy District Court of the Smolensk Region in compliance with Article 5 § 1 (3) of the Code of Criminal Procedure of the RSFSR discontinued the criminal proceedings against the applicants for being time-barred. The first applicant was released from detention.

On 4 July 2000 the Smolensk Regional Court upheld the above decision on appeal.

The first applicant challenged the lawfulness of the decision of 15 November 1999, as upheld on 7 December 1999, before the Presidium of the Smolensk Regional Court.

On 15 June 2005 the Presidium of the Smolensk Regional Court acknowledged that the decisions in question had been unlawful and accordingly quashed them by way of supervisory review.

B. Relevant domestic law

1. Supervisory review in criminal proceedings

Section VI, Chapter 30, of the 1960 Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*), as in force at the material time, allowed certain officials to challenge a judgment which had become effective and to have the case reviewed on points of law and procedure. The supervisory review procedure (Articles 371-83 of the Code) is distinct from proceedings in which a case is reviewed in the light of newly established facts (Articles 384-90). However, similar rules apply to both procedures (Article 388).

(a) Date on which a judgment becomes effective

Under the terms of Article 356 of the Code of Criminal Procedure, a judgment takes effect and is enforceable from the date on which the appeal court renders its decision or, if no appeal has been lodged, once the time-limit for appeal has expired.

(b) Grounds for supervisory review and reopening of a case

Article 379
Grounds for setting aside judgments which have become effective

"The grounds for quashing or varying a judgment [on supervisory review] are the same as [those for setting aside judgments (which have not taken effect) on appeal] ..."

Article 342
Grounds for quashing or varying judgments [on appeal]

"The grounds for quashing or varying a judgment on appeal are as follows:

(i) prejudicial or incomplete investigation or pre-trial or court examination;

(ii) inconsistency between the facts of the case and the conclusions reached by the court;

(iii) a grave violation of procedural law;

(iv) misapplication of [substantive] law;

(v) discrepancy between the sentence and the seriousness of the offence or the convicted person's personality."

(c) Authorised officials

Article 371 of the Code of Criminal Procedure provided that the power to lodge a request for a supervisory review could be exercised by the Prosecutor-General, the President of the Supreme Court of the Russian Federation or their respective deputies in relation to any judgment other than those of the Presidium of the Supreme Court, and by the presidents of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of those officials for a review.

(d) Limitation period

Article 373 of the Code of Criminal Procedure did not set a limitation period for lodging an application for a supervisory review that might be beneficial to a convicted person.

(e) The effect of a supervisory review

Under Articles 374, 378 and 380 of the Code of Criminal Procedure, a request for supervisory review was to be considered by the judicial board (the Presidium) of the competent court. The court could examine the case on the merits and was not bound by the scope and grounds of the request for supervisory review.

The Presidium could dismiss or grant the request. If it dismissed the request, the earlier judgment remained in force. If it granted the request, the Presidium could decide to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, to order a fresh court examination at any instance, to uphold a first-instance judgment reversed on appeal, or to vary or uphold any of the earlier judgments.

Article 380 §§ 2 and 3 provided that the Presidium could, in the same proceedings, reduce a sentence or amend the legal classification of a conviction or sentence to the defendant's advantage. If it found a sentence or legal classification to be too lenient, it was obliged to remit the case for a new examination.

2. Appeal against detention orders and decisions of a first-instance court

Under Article 331 of the Code of Criminal Procedure an appeal against a decision of a first-instance court (including an order authorising or extending pre-trial detention) lay to a higher court. It had to be lodged within ten days and examined within the same time-limit as an appeal against a judgment on the merits.

3. Compensation for unlawful deprivation of liberty

The State or regional treasury is liable – irrespective of any fault by State officials – for the damage sustained by an individual on account of unlawful criminal prosecution, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence, or an unlawful administrative penalty in the form of detention or community work (Article 1070 § 1 of the Civil Code).

A court may hold the tortfeasor liable for non-pecuniary damage incurred by an individual through actions impairing his or her personal non-property rights, such as the right to personal integrity and the right to liberty of movement (Articles 150 and 151). Non-pecuniary damage must be compensated for irrespective of the tortfeasor's fault in the event of unlawful conviction or prosecution, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence, or an unlawful administrative penalty in the form of detention or community service (Article 1100 § 2).

COMPLAINTS

1. The applicants complained under Article 4 of Protocol No. 7 that contrary to the *non bis in idem* principle they had been tried twice for the same offences.

2. The applicants complained under Article 6 of the Convention that, when conducting judicial proceedings in 1999-2000 on the basis of the charges for which they had already been tried and convicted, the domestic court had violated their right to a fair trial.

3. They complained under Article 5 § 1 of the Convention about the alleged unlawfulness of their detention on remand during the second set of criminal proceedings against them in 1999-2000.

4. The applicants complained under Article 3 of the Convention that they had been subjected to degrading treatment while in custody during the second set of criminal proceedings.

5. They complained under Article 7 of the Convention that the acts for which they had been prosecuted the second time did not constitute criminal offences owing to the expiry of the limitation period.

6. The applicants further complained under Article 8 of the Convention about the alleged violation of their right to respect for their private and family life by their continued prosecution in their home town.

7. Finally, the applicants complained that as a result of more than twenty years of criminal prosecution they had been stripped of an effective domestic remedy within the meaning of Article 13 of the Convention. They further relied on Articles 14 and 17 of the Convention.

THE LAW

1. The applicants complained under Article 4 of Protocol No. 7 that contrary to the *non bis in idem* principle they had been tried twice for the same offences. Article 4 of Protocol No. 7 reads, in so far as relevant, as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

The Government submitted, first, that the criminal proceedings against the applicants had been resumed on the initiative of one of the applicants. Secondly, owing to the expiry of the statutory limitation period on further prosecution, the proceedings in the applicant's criminal case had been subsequently discontinued. Thirdly, with reference to the case of *Nikitin v. Russia* (no. 50178/99, ECHR 2004-VIII), the Government argued that the supervisory review in the instant case constituted a reopening of the case owing to a fundamental defect in the previous proceedings within the meaning of Article 4 § 2 of Protocol No. 7. Lastly, the Government contended that Article 4 of Protocol No. 7 was inapplicable to the present case *ratione temporis* since the reopening of the criminal proceedings against the applicants had taken place before the entry into force of Protocol No. 7 in respect of Russia.

The applicants maintained their complaint.

The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see *Franz Fischer v. Austria*, no. 37950/97, § 22, 29 May 2001, and *Gradinger v. Austria*, 23 October 1995, § 53, Series A no. 328-C). That provision does not therefore apply before new proceedings have been opened. In the present case the new proceedings were opened on 25 September 1991 when the Presidium of the Supreme Court of the RSFSR quashed the judgment of 26 May 1982, as upheld on 28 July 1982, by way of supervisory review. Inasmuch as the new proceedings reached their conclusion in a decision later in date than the entry into force of Protocol No. 7 in respect of Russia (1 August 1998), namely the appeal decision of the Smolensk Regional Court of 4 July 2000, the conditions for applicability *ratione temporis* are satisfied (see, for the same reasoning, *Gradinger*, cited above, § 53, and *Korppoo v. Finland* (dec.), no. 19341/92, 17 May 1995).

The Court has previously examined cases raising similar complaints under the Convention in relation to the quashing of a final judicial decision (see *Nikitin*, cited above; *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006; *Fadin v. Russia*, no. 58079/00, 27 July 2006; and, most recently, *Radchikov v. Russia*, no. 65582/01, 24 May 2007).

As regards the applicability of Article 4 of Protocol No. 7 to supervisory review in the *Nikitin* case cited above, the Court found as follows:

> "46. The Court notes that the Russian legislation in force at the material time permitted a criminal case in which a final decision had been given to be reopened on the grounds of new or newly discovered evidence or a fundamental defect (Articles 384-390 of the Code of Criminal Procedure). This procedure obviously falls within the scope of Article 4 § 2 of Protocol No. 7. However, the Court notes that, in addition, a system also existed which allowed the review of a case on the grounds of a judicial error concerning points of law and procedure (supervisory review, Articles 371-383 of the Code of Criminal Procedure). The subject matter of such proceedings remained the same criminal charge and the validity of its previous determination. If the request was granted and the proceedings were resumed for further consideration, the ultimate effect of supervisory review would be to annul all decisions previously taken by courts and to determine the criminal charge in a new decision. To this extent, the effect of supervisory review is the same as reopening, because both constitute a form of continuation of the previous proceedings. The Court therefore concludes that for the purposes of the *ne bis in idem* principle supervisory review may be regarded as a special type of reopening falling within the scope of Article 4 § 2 of Protocol No. 7."

The Court observes that in the present case a final judicial decision had been quashed on the ground of incomplete investigation and failure to examine all the relevant evidence. It further notes that subsequently the criminal proceedings against the applicants had been discontinued on the ground of expiry of the statutory limitation on further prosecution. As in the *Nikitin* case, cited above, the subject matter of the new proceedings consisted of the same criminal charge and the validity of its previous determination. Having regard to the above findings, the Court concludes that the supervisory review in the instant case constituted a reopening of the case owing to a fundamental defect in the previous proceedings, within the meaning of Article 4 § 2 of Protocol No. 7. Accordingly, the complaint raises no issues under Article 4 § 1 of Protocol No. 7 (see *Fadin*, cited above, § 32; *Bratyakin*, cited above; and *Savinskiy v. Ukraine* (dec.), no. 6965/02, 31 May 2005).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicants complained under Article 6 of the Convention that when conducting judicial proceedings in 1999-2000 on the basis of the charges for which they had already been tried and convicted, the domestic court had violated their right to a fair trial.

Article 6 reads, in so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time ... by [a] ... tribunal ..."

In so far as the applicants may be understood to complain about the reopening of their criminal case, the Court observes that the applicants' complaint relates to events which took place in 1991, prior to the entry into force of the Convention in respect of Russia on 5 May 1998. It reiterates in this connection that the quashing of a final judgment is an instantaneous act, which does not create a continuing situation, even if it entails a re-opening of the proceedings as in the instant case (see *Sardin v. Russia* (dec.), no. 69582/01, 12 February 2004). It follows that this part of the complaint is incompatible *ratione temporis* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 thereof.

To the extent that the applicants complained about the alleged unfairness of the criminal proceedings against them after 5 May 1998, in so far as this complaint concerns the results of the proceedings before the domestic courts, the Court reiterates that it is not its task to review alleged errors of fact and law committed by the domestic judicial authorities and that, as a general rule, it is for the national courts to assess the evidence before them and to apply domestic law. The Court's task is to ascertain whether the proceedings as a whole were fair (see, *inter alia, Bernard v. France,* 23 April 1998, § 37, *Reports of Judgments and Decisions* 1998-II). On the basis of the applicants' submissions and the material held, the Court considers that the case does not disclose any appearance of a violation of Article 6 in connection with the above set of proceedings.

It follows that this part of the applicants' complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicants complained under Article 5 § 1 of the Convention about the alleged unlawfulness of their detention on remand during the second set of criminal proceedings against them in 1999-2000. Article 5 § 1, in so far as relevant, reads as follows:

> "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: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

The Government admitted that the first applicant's detention from 3 March to 7 March 2000 and the second applicant's detention on 17 November 1999 were not in compliance with Article 5 § 1 (c) of the Convention. However, the Government claimed that the applicants had failed to exhaust domestic remedies. In particular, following the domestic court's finding that the first applicant's detention had been unlawful, he

could have filed a civil claim for pecuniary and non-pecuniary damage. As regards the second applicant, he could have lodged an application for supervisory review of the decision authorising his detention on remand.

The applicants maintained their complaint.

The Court observes that on 15 June 2005 the Presidium of the Smolensk Regional Court found that the first applicant's detention from 3 March to 7 March 2000 had been ill-founded and unlawful. The Court further observes that the Russian law of tort explicitly provided for the possibility of filing a claim for pecuniary and non-pecuniary damage in cases of unlawful application of a preventive measure in the form of placement in custody. Therefore, the finding of the Presidium of the Smolensk Regional Court entitled the first applicant to claim damages from the State. By failing to pursue this remedy, the applicant has deprived the State of an opportunity to put matters right internally. It follows that this complaint in respect of the first applicant must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

As to the second applicant, the Court notes that he failed to appeal against the decision of 15 November 1999 authorising his placement in custody. Therefore, his complaint should also be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

4. Having examined the remaining complaints raised by the applicants under Articles 3, 7, 8, 13, 14 and 17 of the Convention and the material in its possession, the Court 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 being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen
Registrar

Christos Rozakis
President