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

FIFTH SECTION

CASE OF CHERVONENKO v. RUSSIA

(Application no. 54882/00)

JUDGMENT

STRASBOURG

29 January 2009

FINAL

06/07/2009

This judgment may be subject to editorial revision.

In the case of Chervonenko v. Russia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,
Rait Maruste,
Karel Jungwiert,
Anatoly Kovler,
Renate Jaeger,
Mark Villiger,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 January 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 54882/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Filipp Viktorovich Chervonenko ("the applicant"), on 17 January 2000.

2. The applicant, who had been granted legal aid, was represented by Ms K. Kostromina and Ms K. Moskalenko, lawyers practising in Moscow. 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.

3. The applicant alleged, in particular, that the supervisory review conducted in the present case had violated his rights under Article 6 of the Convention and Article 4 of Protocol No. 7 to the Convention.

4. By a decision of 25 September 2006, the Court declared the application partly admissible.

5. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1958 and lives in Moscow.

7. On 2 June 1996 the applicant had a quarrel with his neighbours and stabbed one of them with a screwdriver causing him fatal injury. On an unspecified date criminal proceedings were instituted against the applicant. He was charged under Article 108 § 2 of the RSFSR Criminal Code (*Уголовный кодекс РСФСР*) with "deliberate infliction of physical injury leading to the victim's death".

8. On 29 September 1997 the Kuntsevskiy District Court of Moscow examined the case at first instance. It requalified the applicant's actions and found him guilty of "murder committed in circumstances where excessive force was used in self-defence" under Article 108 § 1 of the newly enacted Criminal Code of the Russian Federation (*Уголовный кодекс РФ*), which had entered into force on 1 January 1997. The court sentenced the applicant to a prison term of one year and eight months, which was calculated from 15 September 1996, when he was detained pending trial.

9. On 27 November 1997 the Moscow City Court upheld the judgment of 29 September 1997 at final instance.

10. While serving his sentence the applicant attempted to institute supervisory review proceedings against these decisions. His request was rejected by the Vice-President of the Moscow City Court on 2 March 1998.

11. In May 1998 the applicant was released after having served his sentence.

12. On 8 October 1998 the Vice-President of the Supreme Court of Russia lodged an application for supervisory review (*протест в порядке надзора*) of the court decisions of 29 September and 27 November 1997. In the application it was stated that although he had been indicted under Article 108 § 2 of the old Criminal Code, the applicant had been tried and convicted under a different provision, namely, Article 108 § 1 of the new Criminal Code. The new charge, as it was further argued, was more serious than the original charge as it implied, unlike the first one, an intention to cause death. However, Article 254 of the Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*) prevented the trial court from amending charges unless it was to the benefit of the accused.

13. On 22 October 1998 the Presidium of the Moscow City Court granted the application for supervisory review. The Presidium decided to quash the court decisions on the grounds put forward in the application and to remit the case for a new examination at first instance.

14. On 16 July 1999 the Kuntsevskiy District Court found the applicant guilty under Article 108 § 2 of the old Criminal Code of "deliberate infliction of physical injury leading to the victim's death". The court sentenced the applicant to a prison term of six years. In deciding the actual term to be served, the court deducted from this period the prison term of one year and eight months already served by the applicant. On the same day the applicant started serving the remainder of the prison sentence.

15. On 31 August 1999 the Moscow City Court upheld the judgment of 16 July 1999 at final instance.

16. On 28 December 1999 the Vice-President of the Supreme Court of Russia lodged an application for supervisory review of the court decisions of 16 July and 31 August 1999. The application sought to have the case remitted for a new court examination.

17. On 27 January 2000 the Presidium of the Moscow City Court decided to grant the application. The Presidium found that:

> "... the sentence was quashed by the decision of the Presidium of the Moscow City Court of 22 October 1998 ... on the grounds that Article 254 of the Code of Criminal Procedure had been violated as the court qualified [the applicant's] actions under a provision under which he had not been indicted, thus violating [the applicant's] right to defence ...
>
> In accordance with Article 353 of the Code of Criminal Procedure, the imposition of a more severe penalty or application of a more serious criminal law on a new examination of a case at first instance [after it has been remitted by the appellate court] is allowed only if the initial sentence was quashed upon the prosecutor's appeal ... on the grounds of an excessively lenient penalty ...
>
> Therefore, in the new examination of the case the court was not allowed to qualify [the applicant's] actions under a more serious provision and impose a more severe penalty than initially imposed ..."

18. The Presidium decided once again to quash the court decisions and to remit the case for a new examination at first instance. It ordered the applicant to be released.

19. On 30 August 2000 the Kuntsevskiy District Court of Moscow examined the charges against the applicant and found him guilty under Article 111 of the old Criminal Code of "inflicting serious injuries in circumstances where excessive force was used in self-defence". The court sentenced him to ten months' imprisonment. Taking into account the prison terms already served, the court concluded that the punishment had already been executed.

20. No appeal was lodged against the judgment of 30 August 2000, which became final.

II. RELEVANT DOMESTIC LAW

A. Criminal Code

21. The RSFSR Criminal Code of 1960 provided that deliberate infliction of physical injury leading to the victim's death was punishable by five to twelve years' imprisonment. Article 111 provided that infliction of

serious injuries in circumstances where excessive force was used in self-defence was punishable by up to one year's imprisonment.

22. The Criminal Code of the Russian Federation, in force since 1 January 1997, provides that murder committed in circumstances where excessive force was used in self-defence is punishable by up to two years' imprisonment (Article 108 § 1). The Code provides that criminal liability and the applicable penalty are determined by the law in force at the time of commission of the criminal act and that retrospective application of a law or penalty is not permissible unless it is to the advantage of the accused (Articles 8 and 9).

B. Code of Criminal Procedure

23. Article 254 of the 1960 Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*), applicable at the relevant time, provided that a case was examined in court only on the charge put before the court. The charge could be amended by the court provided that this did not worsen the defendant's situation and did not violate his or her right to defence.

24. Section VI, Chapter 30, of the Code regulated the supervisory review procedure which allowed certain officials to challenge a judgment, which had entered into force, and have the case reviewed on points of law and procedure. The supervisory review procedure is to be distinguished from proceedings which review a case because of newly established facts.

25. Pursuant to Section 356 a judgment entered into force and was subject to execution as of the day when the appeal (cassation) instance issued its judgment.

26. Section 371 provided that the power to lodge an application for a supervisory review (an extraordinary appeal) may be exercised by the President and Vice-Presidents of the Supreme Court of Russia, the Prosecutor General and his Deputies, in respect of 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 may solicit the intervention of such officials for a review.

27. Section 373 laid down a limitation period of one year during which an application calling for the supervisory review of a conviction judgment could be brought, if such an application sought a harsher penalty. The same limitation period applied to an application brought against an acquittal. It ran from the day when the conviction or the acquittal entered into force.

28. According to Sections 374, 378 and 380, the application for supervisory review was considered by the presidium of the relevant court which examined the case on the merits, not being bound by the scope and grounds of the application. The presidium could either dismiss the application and thus uphold the earlier judgment, or grant the application. In

the latter case it had to decide whether to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, or for a new court examination at any instance, to uphold a first instance judgment reversed on appeal, or to amend and uphold any of the earlier judgments.

29. Section 382 provided that imposition of a graver punishment or application of a harsher criminal law in the examination of a case at first instance was allowed only if the initial sentence had been quashed upon supervisory review on the grounds seeking imposition of a graver penalty.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

30. The applicant alleged a violation of the guarantees provided for in Article 6 of the Convention and Article 4 of Protocol No. 7 to the Convention which read, in so far as relevant, as follows:

Article 6 of the Convention

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

Article 4 of Protocol No. 7

"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."

A. The parties' submissions

31. The applicant claimed that he had been tried and convicted twice for the same criminal offence because he had had to return to prison after the first set of supervisory-review proceedings amending the charges against him, although he regarded his sentence as having been served in full. He also considered that the manner in which the courts had dealt with his case was contrary to the principle of legal certainty. He alleged that he had

lodged a request for supervisory review because he expected the supervisory instance to establish that the judgment against him had been unlawful and acquit him of all charges. He could not have foreseen that it might entail detrimental consequences for himself, such as aggravation of the charge or extension of the sentence. He considered that the criminal proceedings, taken overall, had been conducted with gross unfairness and numerous procedural irregularities.

32. The Government contested the applicant's allegations. They relied on Article 4 § 2 of Protocol No. 7, which expressly permitted the reopening of a criminal case if there had been a fundamental defect in the previous proceedings that might affect the outcome of the case. They claimed that the supervisory review in the present case fell within the scope of that provision. They pointed out that both sets of supervisory review were called for on the grounds of a fundamental defect in the previous proceedings which were detrimental to the applicant's rights and which could affect the outcome of the case. They further submitted that the resulting judicial decision – the judgment of 30 August 2000 – had remedied the serious defects in both previous sets of proceedings and restored the applicant's fundamental rights. Moreover, it had reduced the applicant's sentence and apparently satisfied the applicant because he had lodged no appeal against it. They stated that any violation that had taken place in the criminal proceedings against him had been remedied by the subsequent quashing of the erroneous judgments.

B. The Court's assessment

33. The Court has previously examined cases raising complaints under the Convention in relation to the quashing of a final judicial decision (see *Nikitin v. Russia*, no. 50178/99, ECHR 2004-VIII; *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006; *Fadin v. Russia*, no. 58079/00, 27 July 2006; and *Radchikov v. Russia*, no. 65582/01, 24 May 2007). It reiterates that the mere possibility of reopening a criminal case is prima facie compatible with the Convention, including the guarantees of Article 6. However, the actual manner in which it is used must not impair the very essence of a fair trial. In other words, the power to reopen criminal proceedings must be exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (see *Nikitin*, cited above, §§ 54-61). In the specific context of supervisory review, the Convention requires that the authorities respect the binding nature of a final judicial decision and allow the resumption of criminal proceedings only if serious legitimate considerations outweigh the principle of legal certainty (see *Bratyakin*, cited above).

34. The Court further notes that the complaints in the present case are different from those examined in the above-cited cases in that they do not concern the acts of quashing – which the applicant had each time solicited himself – but the manner in which the decisions to reopen the case, particularly the first one, were transposed in the ensuing judicial proceedings.

35. The Court is prepared to accept that granting supervisory review was justified both times by what appears to have constituted a "fundamental defect in the previous proceedings" and was brought in the applicant's own interest. The first round of the retrial was intended to amend the charges so as to prevent the applicant from being convicted of a more serious offence than the one he had been indicted for. The supervisory review was thus granted on the assumption that the defect of the previous proceedings would be rectified for the applicant's advantage only. The grounds for the second reopening were also valid and reasonable, namely, to rectify a violation of the applicant's procedural rights in the second set of proceedings. However, the Court considers that the system of reopening of criminal case by means of extraordinary remedy should not function on the assumption that the procedure remains open-ended with a "final judgment" always amenable to modifications and reversals, a situation which would run counter to the very principles of *res judicata* and legal certainty

36. The Court notes that the judgment of 16 July 1999, as well as the appeal decision of 31 August 1999 ran contrary to the principle of legal certainty which is inherent in Article 6 § 1 of the Convention and which, in the circumstances of the present case, required the subordinate court to respect the purpose of the quashing of a final and binding judgment and the scope of the new examination defined by the superior court. By not pursuing the superior court's instructions these judicial instances also encroached on the domestic statutory protection against *reformatio in peius* to which the applicant was entitled since the review was called for on the grounds of his interests. Moreover, the failure to do so necessitated the second set of supervisory review which involved yet another quashing of a final judicial decision.

37. The Court observes that the Government accepted that the first supervisory review, although initiated for the applicant's benefit, resulted in what they called "a gravely unfair decision violating his rights and unlawfully extending his sentence". However, the Government claimed that the second round of supervisory proceedings put matters right ensuring that the applicant was brought to justice without being deprived of the procedural guarantees prescribed by law. They contended that the second quashing effectively resolved the flagrant mistakes committed during the first round of retrial. However, in so far as they may be understood as claiming the loss of the victim status by the applicant after the second quashing, the Court reiterates that "a decision or measure favourable to the

applicant is not in principle sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention" (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). While the authorities in the present case indeed acknowledged a violation of the applicant's rights in the first set of re-trial, the Court considers that the second set of re-trial was insufficient by itself to eliminate the adverse effects of the quashed decisions, but that the notion of "redress" required some form of tangible compensation. It notes that the applicant served six months in excess of his original prison sentence. In the absence of any submissions by the parties concerning the possible avenues provided for in the domestic law for claiming compensation in respect of these periods, the Court cannot but observe that, as matters stand, no compensation has been paid to the applicant for the violation of the applicant's right in the first trial. In such circumstances it concludes that the criminal proceedings against the applicant, taken as a whole, did not satisfy the requirements of a "fair hearing" guaranteed by Article 6 of the Convention.

38. As regards the applicability of Article 4 of Protocol No. 7 to supervisory-review proceedings, 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."

39. The Court observes that the judgment of 29 September 1997 of the Kuntsevskiy District Court of Moscow, which became final after the applicant's appeal was rejected by the Moscow City Court on 27 November 1997, had been quashed on the grounds of serious procedural defects and that the case was reconsidered by two judicial instances, which delivered the final judgment. The latter judgment was subsequently quashed, also on the grounds of a serious procedural violation. As in the *Nikitin* case and other cases cited above, the subject matter of the new sets of 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 separate from that under Article 6 of the Convention (see *Bratyakin*, cited above, and *Savinskiy v. Ukraine* (dec.), no. 6965/02, 31 May 2005).

40. Therefore, the Court finds a violation of Article 6 § 1 of the Convention and finds that the applicant's complaints raise no separate issue under Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The applicant claimed 100,000 United States dollars in respect of non-pecuniary damage.

43. The Government contested the claim as excessive and considered that any finding by the Court of a violation would constitute sufficient just satisfaction in the present case.

44. The Court considers that the applicant must have suffered distress and frustration as a result of the harsher penalty imposed in the criminal proceedings following the supervisory review. Making its assessment on an equitable basis, it awards the applicant 2,000 euros for non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

45. The applicant did not submit any claims for costs and expenses. Accordingly the Court is not required to make any award under this head.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 of the Convention;

2. *Holds* that no separate issue arises under Article 4 of Protocol No. 7 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President