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

FIFTH SECTION

CASE OF SHULEPOV v. RUSSIA

(Application no. 15435/03)

JUDGMENT

STRASBOURG

26 June 2008

FINAL

01/12/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Shulepov v. Russia,

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

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Volodymyr Butkevych,
Anatoly Kovler,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 3 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 15435/03) 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 Arkadiy Anatolievich Shulepov ("the applicant"), on 14 April 2003.

2. The applicant was represented before the Court by Mr A. Manov, a lawyer practising in Moscow. The Russian Government ("the Government") were initially represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mrs V. Milinchuk.

3. On 28 November 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963. He is currently serving a sentence in a correction facility in Nizhniy Tagil, Sverdlovsk Region.

6. On 19 August 1999 the applicant was arrested on suspicion of murder.

7. On 20 August 1999 the local prosecutor remanded him in custody. The duration of the applicant's detention was extended on several occasions; the applicant unsuccessfully challenged those orders.

8. On 30 June 2000 the Sverdlovskiy Regional Court convicted the applicant of aggravated murder and robbery and sentenced him to nineteen years' imprisonment.

9. On 29 March 2001 the Supreme Court of Russia quashed this judgment and remitted the case to the first-instance court for a fresh consideration.

10. On 23 August 2001 the Sverdlovskiy Regional Court remitted the case for an additional investigation to the Prosecutor's Office of the Sverdlovsk Region. The case was then twice more sent to the court and remitted for an additional investigation, being finally referred to the Dzerzhinskiy District Court of Nizhniy Tagil for examination in August 2002.

11. On 27 September 2002 the Dzerzhinskiy District Court, following adversarial proceedings in the course of which several witnesses, including co-defendants, gave evidence and forensic expert reports were examined, convicted the applicant of murder and theft and imposed a sentence of thirteen years' imprisonment for murder and five years' imprisonment for theft, the final sentence being determined by way of partial accumulation as fifteen years' imprisonment. During the proceedings before the first-instance court the applicant was represented by a court-appointed lawyer.

12. On an unspecified date the applicant appealed against the judgment of 27 September 2002.

13. On 20 December 2002 the Sverdlovsk Regional Court upheld the judgment. The applicant appeared before the appeal court via videoconference from the detention facility. He was not represented by a legal-aid lawyer. According to the case file, the prosecutor was present in the courtroom but did not make any submissions. The court put only one question to the applicant during the hearing: it asked whether the applicant wished to amend his appeal.

14. In July 2003 the applicant lodged a request for supervisory review proceedings. On 5 December 2003 the Sverdlovsk Regional Court left this request without consideration, for the applicant's failure to respect procedural formalities stipulated by law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code of the Russian Federation

15. According to Article 69 of the Code, in cases of cumulative crimes, sentences shall be imposed separately for each crime. A final sentence shall be determined by partial or full accumulation of these sentences.

16. Article 105 § 1 of the Code sets out that murder shall be punishable by imprisonment for a term of six to fifteen years. Article 158 § 2 of the Code provides for penalties for theft including, *inter alia*, imprisonment for a term of two to six years.

B. The Code of Criminal Procedure

17. Article 51 of the Code of Criminal Procedure establishes that counsel is appointed by the investigator, prosecutor or the court if, *inter alia*, the accused faces serious charges, carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty. Counsel is appointed by the investigator or court if the accused has not retained a lawyer.

18. Article 373 of the Code provides that an appeal court examines appeals with a view to verifying the lawfulness, validity and fairness of judgments. Under Article 377 §§ 4 and 5 of the Code, an appeal court can directly examine evidence, including additional material submitted by parties.

C. Case-law of the Constitutional Court of the Russian Federation

19. Examining the compatibility of Article 51 of the Code of Criminal Procedure with the Constitution, the Constitutional Court ruled as follows (decision no. 497-O of 18 December 2003):

> "Article 51 § 1 of the Code of Criminal Procedure, which describes the circumstances in which the participation of defence counsel is mandatory, does not contain any indication that its requirements are not applicable in appeal proceedings or that the convict's right to legal assistance in such proceedings may be restricted."

That position was subsequently confirmed and developed in seven decisions delivered by the Constitutional Court on 8 February 2007. It found that free legal assistance for the purpose of appellate proceedings should be provided on the same conditions as during the earlier stages in the proceedings and is mandatory in situations listed in Article 51. It further underlined the obligation of courts to secure participation of defence counsel in appeal proceedings.

D. Case-law of the Supreme Court

20. In a number of cases (decisions of 13 October 2004 and 26 January, 6 April, 15 June and 21 December 2005) the Presidium of the Supreme Court of the Russian Federation quashed judgments of appeal courts and remitted the cases for fresh considerations on the ground that the courts had failed to secure the presence of defence counsel in the appeal proceedings, although it was obligatory for the accused to be legally represented.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

21. The applicant complained that he had not been provided with a legal-aid lawyer during the appeal hearing of 20 December 2002. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal....
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... (c) to defend himself in person or through legal assistance of his own choosing..."

A. Admissibility

22. The Government contended that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They submitted that he had not lodged an application for supervisory review of his conviction after the relevant changes in domestic practice (see paragraphs 19-20 above). They maintained that the Constitutional Court's interpretation of the relevant law had adjusted to prevent similar breaches in future and influenced the subsequent practice of the domestic courts.

23. The Court reiterates that an application for supervisory review is not a remedy to be exhausted under Article 35 § 1 of the Convention (see *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004). Therefore, the Government's objection as to the non-exhaustion of domestic remedies must be dismissed.

24. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Parties' submissions

(a) The Government

25. The Government submitted that the applicant had not informed the court that he wished to be represented by court-appointed counsel at the appeal hearing. No request had been made either in his appeal or separately in writing.

26. They further underlined that the applicant had been represented by court-appointed counsel in the first-instance court, and thus the criminal proceedings against him had been in conformity with the requirements of Article 6 § 3 (c) of the Convention. It was for the applicant to secure his own rights to defence: moreover, having previously been charged with a number of criminal offences, the applicant could be expected to know all the features of the court proceedings.

27. Finally the Government stated that the court had a duty to provide an accused with counsel if he or she faced charges carrying a term of imprisonment exceeding fifteen years, whereas the charges against the applicant, taken separately, did not presuppose such a punishment.

(b) The applicant

28. The applicant argued that while he did not remember if he had made a relevant request for participation of a court-appointed lawyer in appeal proceedings, he had never waived his right to have such a lawyer, whose participation in the applicant's case was obligatory according to Article 51 of the Code of Criminal Procedure (see paragraph 17 above).

29. The applicant thus protested against the Government's finding that the charges against him had not required obligatory legal representation. He pointed out that the most severe sentence for murder was fifteen years' imprisonment and for theft was six years' imprisonment, whereas Article 69 of the Criminal Code provided for cumulative sentencing by way of partial or full accumulation of penalties (see paragraphs 15 -16 above).

30. Furthermore, the appeal proceedings had been conducted by videoconference, which, in the applicant's point of view, limited his capacity to state his case without the assistance of a lawyer who could be present in the courtroom. In sum, the applicant considered that the interests of justice in his case had required the appeal court not to remain passive and to enable him to be represented by counsel.

2. The Court's assessment

(a) General principles

31. The Court notes at the outset that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under Article 6 §§ 1 and 3 should be examined together (see *Vacher v. France*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2147, § 22).

32. The Court reiterates that the manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 is to be applied in relation to appellate or cassation courts depends upon the particular features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and the role of the appellate or cassation court therein (see *Twalib v. Greece*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 46, and *Granger v. the United Kingdom*, judgment of 28 March 1990, Series A no. 174, p. 17, § 44). The Court has already held that the situation in a case involving a heavy penalty where an appellant was left to present his own defence unassisted before the highest instance of appeal was not in conformity with the requirements of Article 6 (see *Maxwell v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-C, § 40).

33. Finally, neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007). Such a waiver, however, must be established unequivocally and must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...).

(b) Application of the above principles to the instant case

34. The Court observes that, in Russia, the jurisdiction of appeal courts extends both to legal and factual issues. The Sverdlovsk Regional Court thus had the power to fully review the case and to consider additional arguments which had not been examined in the first-instance proceedings. Given the seriousness of the charges against the applicant and severity of the sentence to which he had been liable, the Court considers that the assistance of a legal-aid lawyer at this stage was essential for the applicant, as the former could effectively draw the appeal court's attention to any substantial argument in the applicant's favour, which might influence the court's decision.

35. Moreover, the applicant appeared before the appeal court by videoconference from the prison facility and the prosecutor appeared in the

courtroom in person, hence the applicant's communication with the court without any representation in the courtroom was at a certain disadvantage (see, *a contrario*, *Marcello Viola v. Italy*, no. 45106/04, § 75, ECHR 2006-... (extracts), and *Golubev v. Russia* (dec.), no. 26260/02, 9 November 2006).

36. Therefore, in the Court's point of view, the interests of justice demanded that, in order to receive a fair hearing, the applicant should have benefited from legal representation at the appeal hearing.

37. The Court further notes that according to the Russian Code of Criminal Proceedings, as interpreted by the Russian Constitutional Court, the onus of appointing a legal aid lawyer rested upon the relevant authority at each stage of the proceedings (see paragraphs 17 and 19 above).

38. Thus it was incumbent on the judicial authorities to appoint a lawyer for the applicant to ensure that the latter received the effective benefit of his rights, notwithstanding the fact that he had failed to request this explicitly. In this respect the Court notes that the applicant never unequivocally waived his defence rights. However, no attempt whatsoever had been made to appoint a lawyer or to adjourn the appeal hearing in order to secure the presence of a lawyer later.

39. In view of the above considerations the Court finds that the proceedings before the Sverdlovsk Regional Court did not comply with the requirements of fairness. There has, therefore, been a breach of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

40. The applicant further relied on Article 5 §§ 1 (c), 3 and 4, Article 6 §§ 1 and 2, Articles 13, 14 and 17 of the Convention and Article 4 of Protocol No. 7, complaining of unlawful pre-trial detention, alleged errors of fact and law committed by the domestic courts, and failure of the authorities to amnesty him.

41. The Court has examined the remainder of the applicant's complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, 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 should be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 1,200,000 Russian roubles (RUB)[1] in respect of pecuniary damage and RUB 2,000,000[2] in respect of non-pecuniary damage.

44. The Government considered the claim completely unsubstantiated and excessive. In the Government's view, the finding of a violation would constitute sufficient just satisfaction in the present case.

45. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it finds that the applicant suffered non-pecuniary damage, which would not be adequately compensated by the finding of a violation alone. However, the amount claimed by the applicant appears to be excessive. Making its assessment on an equitable basis, it awards the applicant EUR 1,000, plus any tax that may be chargeable on that amount.

46. The Court further reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV). The Court notes, in this connection, that Article 413 of the Code of Criminal Procedure of the Russian Federation provides that criminal proceedings may be reopened if the Court finds a violation of the Convention.

B. Costs and expenses

47. The applicant claimed a symbolic sum of 1 RUB[3] for the costs and expenses incurred before the domestic courts.

48. The Government maintained that the applicant had not submitted any documents in support of this claim.

49. The Court notes that the applicant underlined that the sum he claimed under this head was a symbolic one. However, according to the Court's case-law, an applicant is entitled to reimbursement of his costs and

1. Around 33,520 euros
2. Around 55,866 euros
3. Around 0.03 euro

expenses only in so far as it has been shown that these have been actually and necessarily incurred. Therefore, the Court rejects this claim.

C. Default interest

50. 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. *Declares* the complaint concerning lack of legal assistance in the appeal proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of 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 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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 26 June 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President