THIRD SECTION

CASE OF PROSKURNIKOV v. RUSSIA

(Application no. 48364/11)

JUDGMENT

STRASBOURG

1 September 2020

*This judgment is final but it may be subject to editorial revision.*

In the case of Proskurnikov v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

 Georgios A. Serghides, *President,* Erik Wennerström, Lorraine Schembri Orland, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no.48364/11) 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 Gennadiy Nikolayevich Proskurnikov (“the applicant”), on 14 July 2011;

the decision to give notice to the Russian Government (“the Government”) of the complaint under Article 6 concerning the appointment of a police officer as a forensic expert and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 30 June 2020,

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

INTRODUCTION

1.  The case concerns the alleged unfairness of the criminal proceedings against the applicant and, in particular, the appointment as an independent expert of a police officer whose audit report had led to the applicant’s indictment, as well as the domestic judicial authorities’ reliance on that police officer’s findings.

1. THE FACTS

2.  The applicant was born in 1958 and lives in Pirogovskiy, Moscow Region. The applicant was represented by Mr G. Zhuravlev, a lawyer practising in Moscow.

3.  The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

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

5.  On 6 May 2008 the acting head of Investigative Division No. 2 of the Department in Charge of Tax Crimes of the State Department of the Interior of the Moscow Region Colonel Sh. ordered an audit in respect of the municipal hospital where the applicant held the post of chief physician. He assigned the case to Lieutenant Colonel K., Lieutenant Colonel Kuz. and Major R. The audit detected a number of irregularities and the applicant was charged with two counts of abuse of power and two counts of use of State budgetary funds exceeding 7,500,000 Russian roubles for unauthorised purposes.

6.  On 17 March 2009 the investigator with the Investigative Division of the Department of the Interior of the Moscow Region in charge of the applicant’s case appointed Lieutenant Colonel K. to conduct a forensic economic examination to determine, *inter alia*, the damage resulting from the applicant’s unauthorised use of State budgetary funds.

7.  On 18 June 2009 Lieutenant Colonel K. finalised her forensic report. On 10 July 2009 the investigator sent the findings to the applicant.

8.  On an unspecified date the Mytishchi Town Court of the Moscow Region (hereinafter “the Town Court”) opened the trial in the applicant’s case.

9.  On 7 October 2010 the applicant asked the Town Court to exclude K.’s forensic report as evidence, claiming that K., as an officer with Department in Charge of Tax Crimes of the Department of the Interior of the Moscow Region, was not qualified to conduct a forensic examination in his case. The applicant also asked for an independent forensic expert to be appointed. The court dismissed the applicant’s request for lack of feasibility.

10.  On 26 October 2010 the Town Court found the applicant guilty as charged and sentenced him to a conditional sentence of two and a half years’ imprisonment with a two-year probation period during which he was banned from holding public office. As well as putting questions to K., the court questioned medical practitioners who had worked at the hospital, the hospital’s contractors, and patients who had paid to receive medical care there. It also studied contracts and financial documents in the hospital’s possession. It based its findings on the witnesses’ statements and financial evidence, including the report prepared by Colonel K. The applicant maintained his innocence. He challenged the forensic expert’s findings, arguing that Colonel K. could not have been impartial given that she had taken part in the original audit leading to his indictment.

11.  On 3 February 2011 the Moscow Regional Court upheld the applicant’s conviction, in substance, on appeal but overturned the ban on his holding public office. The court ruled that the trial court had established the applicant’s guilt correctly and referred to the evidence admitted and examined by the trial court, including the report prepared by Colonel K.

1. THE LAW
	1. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

12.  The applicant complained that, in contravention of the requirement of a fair trial set out in Article 6 of the Convention, the trial court had refused to appoint an independent forensic expert and had relied on the findings of a police officer who had earlier taken part in the audit leading to the applicant’s indictment. Article 6 of the Convention, in so far as relevant, reads as follows:

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

* + 1. Admissibility

13.  The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

* + 1. Merits
			1. Submissions by the parties

14.  The applicant maintained his complaint. He contended that Lieutenant Colonel K. could not have been an impartial or independent forensic expert; she had been a police officer whose initial findings had prompted a criminal investigation in his case. Moreover, she could not have contradicted her own initial findings once she had taken up her functions as the appointed forensic expert. He further submitted that the investigator had failed to provide him with an opportunity to put questions to the appointed expert prior to the latter’s drafting the report. The applicant further argued that K.’s findings had been decisive for his conviction. The trial court’s refusal to commission a forensic report by an independent expert for lack of feasibility had been prejudicial to the observance of equality of arms. As a result, the criminal proceedings in his case had not been adversarial.

15.  The Government submitted that the criminal proceedings in the applicant’s case had been fair and that the equality-of-arms principle had been observed. In their opinion, the forensic expert’s findings had not been decisive for the national courts, which had also taken into consideration a large number of witness statements and other documents. The applicant and his lawyer had had access to the forensic report in question. It had been open to them to submit an alternative expert report or to ask the courts to secure the attendance of expert witnesses on the applicant’s behalf. In any event, the applicant had had ample opportunity to challenge the appointed forensic expert’s findings.

* + - 1. The Court’s assessment

16.  The Court reiterates that it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and the defence, which requires a “fair balance” between them: each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent or opponents (see, among many other authorities, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001‑VI). It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his or her report that in fact prompted the bringing of a prosecution (see *Bönisch v. Austria*, 6 May 1985, § 32, Series A no. 92). Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held to be objectively justified (see *Brandstetter v. Austria*, 28 August 1991, § 44, Series A no. 211).

17.  Turning to the circumstances of the present case, the Court notes from the outset that the forensic report prepared by Police Lieutenant Colonel K. directly concerned the *corpus delicti* the applicant was charged with. The expert was to determine the damage resulting from the applicant’s allegedly unauthorised use of State budgetary funds. Her findings were relied upon by the trial court when delivering a guilty verdict in the applicant’s case. The appellate court also referred to them, upholding the applicant’s conviction. The Court accordingly dismisses the Government’s argument that the report was not decisive for the applicant’s conviction and will proceed to examine whether the applicant was placed on a par with the prosecution, in accordance with the principle of equality of arms.

18.  Having examined the materials submitted by the parties, the Court considers that the principle of equality of arms was not complied with in the present case. In its opinion, the doubts which the applicant had as to K.’s impartiality were objectively justified.

19.  In this connection, the Court takes into account that K. was not a court-appointed forensic expert *stricto sensu*. She was a law-enforcement officer who had conducted an audit of the applicant’s professional activities and it was her findings that had prompted the latter’s indictment. At the instigation of the investigator, K. also prepared a forensic report which was used by the prosecuting authorities as evidence against the applicant. The applicant was unable to challenge K.’s appointment by the investigator, to formulate questions to be addressed directly to her or to propose the appointment of another expert. In such circumstances, the Court cannot but conclude that appearances suggest that the report prepared by K. was more akin to evidence against the applicant to be used by the prosecuting authorities rather than a “neutral” or “independent” expert opinion (see, for similar reasoning, *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, §§ 39-40, 5 April 2007).

20.  The Court further notes that the applicant attempted to procure an alternative forensic report in the course of the judicial proceedings, but to no avail. The trial court did no more than dismiss his request, noting that commissioning another forensic report was not feasible. The appellate court did nothing to remedy that omission on the part of the trial court. While reviewing the applicant’s case, it merely reiterated the findings that the applicant’s guilt had been established on the basis of the evidence, including K.’s report. Even though, as argued by the Government, the trial court questioned K. in the presence of the applicant and the latter was able to put questions to her, the Court considers that such a measure did not suffice for it to conclude that the applicant was provided with an opportunity to present his case under conditions that did not place him at a disadvantage *vis-à-vis* the prosecution.

21.  Regard being had to the above, the Court considers that the proceedings brought against the applicant, when considered as a whole, were unfair. The applicant was unable to challenge the forensic report submitted by the prosecution. As a result, he was deprived of the opportunity to put forward arguments in his defence on the same terms as the prosecution. There has therefore been a violation of Article 6 § 1 of the Convention.

* 1. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22.  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.”

* + 1. Damage

23.  The applicant claimed 9,400,281 Russian roubles (RUB) in respect of pecuniary damage (for loss of income) and RUB 2,000,000 in respect of non-pecuniary damage. He argued that, as a result of his conviction, he had lost his job and suffered mental distress and anguish.

24.  The Government submitted that, should the Court decide to award just satisfaction to the applicant, it should do so in compliance with the relevant case-law.

25.  The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards the applicant’s claim for non-pecuniary damage, the Court does not consider it necessary to make an award under this head in the circumstances of this case (compare *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 315, 16 December 2014). It further refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights 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 the reopening of the proceedings, if requested (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005‑IV, and *Popov v.* *Russia*, no. 26853/04, § 263, 13 July 2006). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides the basis for the reopening of the domestic proceedings if the Court finds a violation of the Convention. It therefore considers that its finding of a violation constitutes a sufficient just satisfaction and makes no award under this head.

* + 1. Costs and expenses

26.  The applicant claimed RUB 450,000 in respect of costs and expenses. As regards the domestic proceedings, he submitted copies of the relevant receipts totalling RUB 20,000 in respect of the domestic proceedings and RUB 87,320 in respect of the proceedings before the Court. Lastly, he claimed RUB 2,720 in respect of translation costs.

27.  The Government submitted that, should the Court decide to award just satisfaction to the applicant, it should do so in compliance with the relevant case-law.

28.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in the Court’s possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 under all heads, plus any tax that may be chargeable on the applicant.

1. FOR THESE REASONS, THE COURT, UNANIMOUSLY,
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. *Holds*
	1. that the respondent State is to pay the applicant, within three months, EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;
	2. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 1 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Georgios A. Serghides
 Deputy Registrar President