

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 27 June 2000 No. 11-II

in the case concerning the review of the constitutionality of Section 1, Article 47, and Section 2, Article 51 of the Criminal Procedure Code of the RSFSR in connection with a complaint of V. I. Maslov.

Moscow, 27 June 2000

The Constitutional Court of the Russian Federation composed of Presiding Judge O. I. Tiunov and Judges N. S. Bondar, N. V. Vitruk, G. A. Gadzhiev, A. L. Kononov, T. G. Morshchakova, A. Ya. Sliva, B. S. Ebzeev, and V. G. Yaroslavtsev,

in the attendance of the attorney B. B. Gruzd, representative of V. I. Maslov; Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation V. V. Lazarev; and a representative of the Council of the Federation, attorney A. Yu. Kleimenov, pursuant to Section 4, Article 125 of the Constitution of Russian Federation, Subsection 3, Section 1, Sections 2 and 3 of Article 3, Subsection 3, Section 2 of Article 22, Articles 36, 96, 97 and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of the provisions of Section 1, Article 47, and Section 2, Article 51 of the Criminal Procedure Code of the RSFSR.

The reason for the consideration of the case is a complaint of V. I. Maslov about a violation of his constitutional rights by the mentioned provisions of the Criminal Procedure Code of the RSFSR.

Having heard the report of Judge-Rapporteur A. L. Kononov, statements by the parties’ representatives and interventions by the following representatives invited to participate in the hearing: Judge S. A. Razumov for the Supreme Court of the Russian Federation; A. P. Korotkov for the Office of the Prosecutor General of Russian Federation; and B. Yu. Gavrilov for the Ministry of Internal Affairs of the Russian Federation; and after having examined written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. In his complaint, V. I. Maslov stated that on 2 October 1997, in the course of the investigation in criminal proceedings initiated on the basis of elements of the crime specified in Article 163 of the Criminal Code of the Russian Federation, the investigation authorities of the Central Internal Affairs Department for the city of Saint Petersburg and the Leningrad Region conducted a search in his place of residence. And then they forcibly delivered him to the Regional Organized Crime Department where he was kept for over 16 hours and was subjected to some other investigative actions such as identification, witness interrogation, and confrontation.

In response to V. I. Maslov's request for the assistance of a (defence) counsel, the investigator explained to him that under Section 1, Article 47 of the Criminal Procedure Code of the RSFSR such assistance was only available to the accused person after he was indicted and to the suspect after he was notified of an arrest report or an order to impose a measure of restraint in the form of detention. V. I. Maslov's request was dismissed because he had the status of a witness in criminal proceedings. However, a report of his arrest as a suspect was announced to V. I. Maslov after he had been in fact in detention over a long period of time during which he was subjected to identification, witness interrogation, and confrontation.

Following the indictment of V. I. Maslov, his defence counsel submitted a motion for examination of the records of investigative actions which had involved V. I. Maslov before he was formally declared a suspect. The investigator rejected both the motion and a request to make excerpts from the file provided for examination on the grounds that, in his opinion, under Section 2, Article 51 of the Criminal Procedure Code of the RSFSR, these rights could be exercised by the defence counsel only upon full completion of the preliminary investigation.

V. I. Maslov and his defence counsel repeatedly complained to the court and the prosecutor's office about the investigator's actions, but no violation was found of V. I. Maslov's right to have assistance of a (defence) counsel from the moment of detention. Only in the court of cassation their claims were satisfied to the extent that they concerned the application of Section 2, Article 51 of the Criminal Procedure Code of the RSFSR: it was found to be unlawful to deny the defence counsel access to the official records of investigative actions involving his client and making excerpts from the procedural documents.

V. I. Maslov assumed that his constitutional rights suffered irreparable harm in the criminal proceedings, because they were not effectively exercised at the stage which was crucial to the defence. He requested a constitutional review by the Constitutional Court of the Russian Federation of the provisions of Criminal Procedure Code of the RSFSR which were applied in

his case, alleging that they were inconsistent with Article 45 (2), Article 48 (1–2) and Article 55 (3) of the Constitution of the Russian Federation of the Russian Federation.

Consequently, the subject-matter for consideration by the Constitutional Court of the Russian Federation in the present case is: the provisions of Section 1, Article 47 of the Criminal Procedure Code of the RSFSR, which permit participation of the defence counsel in proceedings after a person suspected of having committed a crime is notified of an arrest report or an order to impose a measure of restraint in the form of detention; and the provisions of Section 2, Article 51 of the Criminal Procedure Code of the RSFSR, which are interpreted by law-enforcement officials as prohibiting the defence counsel from examining, prior to completion of criminal investigation, any official records of investigative actions which involved his client before the latter was officially declared a suspect, and any documents which were presented or should have been presented to the suspect and the accused person and equally precluding the right to make excerpts of necessary data from the file provided to the defence counsel for examination.

2. While guaranteeing state protection of the rights and freedoms of man and citizen (Article 2; Article 45 (1)), the Constitution of the Russian Federation entitles everyone to qualified legal assistance (Article 48 (1)) and states directly that “everyone arrested, detained or accused of a crime shall enjoy the right to have assistance of a (defence) counsel from the moment of arrest, detention or indictment, respectively” (Article 48 (2)).

Under the Constitution of the Russian Federation, the right in question is directly applicable and the assistance of a (defence) counsel does not depend on formal recognition of the person as a suspect or an accused person. Neither does it depend on the moment of adoption of any procedural act by an investigation authority, inquiry authority or a prosecutor’s office; furthermore, the Constitution of the Russian Federation does not empower the federal legislator to impose restrictive condition on the exercise of this right.

Article 48, Section 2 of the Constitution of the Russian Federation clearly specifies the essential characteristics of an individual who actually needs legal assistance because his constitutional rights, primarily the right to liberty and security of the person, are restricted, including in the case of criminal prosecution seeking to establish his guilt. Thus, the constitutional right to have assistance of a (defence) counsel extends to the individual from the moment of actual restriction of his rights.

Within the literal meaning of the provisions enshrined in Articles 2, 45 and 48 of the Constitution of the Russian Federation, the right to qualified legal assistance is guaranteed to any person irrespective of his formal status in the proceedings and whether or not he is officially declared to be detained or under suspicion if duly authorized authorities have subjected the

person to measures that actually restrict his liberty and security of the person, including the freedom of movement. These measures involve keeping a person in custody by officials, forcibly bringing him or delivering to the inquiry or investigation office, holding in confinement without any contacts, and any other actions that significantly restrict the liberty and security of the person.

In contradiction to the requirements of Article 48 of the Constitution of the Russian Federation, the challenged provisions of Section 1, Article 47 of the Criminal Procedure Code of the RSFSR, impede the exercise of the right to assistance of a (defence) counsel by making such assistance available to the suspect not from the moment of his actual detention but only after the investigation or inquiry authorities have announced an arrest report or detention order to the suspect. As a result, the exercise of the right to defence and the right to have assistance of a (defence) counsel depends on the discretion of these authorities.

Such discretion paves a way for an unacceptable arbitrary treatment by authorities of a person whose constitutional rights and freedoms are being restricted, which constitutes not only a violation of the principles of liberty and security of the person (Article 22, Section 1 of the Constitution of the Russian Federation) but also derogation of the human dignity that is the foundation of recognition and respect for individual rights and freedoms (Article 21, Section 1 of the Constitution of the Russian Federation).

3. The right to assistance of a (defence) counsel secured by Article 48, Section 2 of the Constitution of the Russian Federation provides a precise definition of a more general right specified in Section 1 of this Article. It is the right of everyone to qualified legal assistance (Judgment of the Constitutional Court of the Russian Federation of 28 January 1997 in the case concerning the review of constitutionality of Section 4 of Article 47 of the Criminal Procedure Code of the RSFSR). Hence, Article 48, Section 2 of the Constitution of the Russian Federation guaranteeing additional protection against unreasonable restrictions on the right to liberty and security of the person (Article 22 of the Constitution of the Russian Federation) under no circumstance may be interpreted as restricting the right to qualified legal assistance. Such assistance must be provided to everyone, especially within the scope of criminal prosecution regardless of the form it takes. To interpret it otherwise would amount to derogation of the constitutional right of everyone to qualified legal assistance, which under no circumstances can be subject to restrictions and would be inconsistent with Article 55, Section 3 and Article 56, Section 3 of the Constitution of the Russian Federation (Judgment of the Constitutional Court of the Russian Federation of 27 March 1996 in the case concerning the review of constitutionality of Articles 1 and 21 of the Law of the Russian Federation “On State Secrets”).

Insofar as the constitutional right to have assistance of a (defence) counsel may not be restricted by federal law, terms like ‘detained’, ‘accused’ and ‘indictment’ shall be construed within their constitutional meaning rather than within the more narrow meaning ascribed to them in the Criminal Procedure Code of the RSFSR. Ensuring the exercise of this constitutional right necessitates consideration of both the status in proceedings and the actual situation of the person facing public criminal prosecution. Moreover, the very fact of criminal prosecution and, accordingly, accusatory activity undertaken against a particular person may be proven by a decision to institute criminal proceedings against the person, investigative actions in his regard (search, identification, interrogation, etc.), and other measures aiming at his exposure or indicating the existence of suspicions against him (inter alia by informing him, under Section 1, Article 51 of the Constitution of the Russian Federation, of the right not to testify against himself). Insofar as these actions are intended to establish facts and circumstances proving the guilt of the prosecuted person, he should be given an immediate opportunity to seek assistance of a (defence) counsel. Hereby such conditions are created that enable him to properly understand his rights and responsibilities, charges brought against him, and, consequently, to defend himself effectively. Also these conditions ensure that the evidence obtained during investigation will not be later found inadmissible (Article 50, Section 2 of the Constitution of the Russian Federation).

The above understanding of constitutional norms on the right of a prosecuted person to have assistance of counsel for his defence is coherent with the norms of international law according to which the rights and freedoms of man and citizen are recognized and guaranteed in the Russian Federation (Article 15, Section 4 and Article 17, Section 1 of the Constitution of the Russian Federation).

Pursuant to Article 14 of the International Covenant on Civil and Political Rights and Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, access to legal assistance is seen as an indispensable guarantee of the right to defence in case of criminal prosecution. These international instruments establish that everyone who is arrested or detained shall be informed promptly of the reasons for his arrest and any charge against him, shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court, and shall be entitled to a fair and public hearing and to defending himself in person or through legal assistance of his own choosing.

In extending the right of an accused person to legal assistance to pre-trial proceedings (Judgment of 24 May 1991 in *Quaranta v. Switzerland*, Series A, no. 205, § 27; and Judgment of 24 November 1993 in *Imbrioscia v. Switzerland*, Series A, no. 275, § 36), the European Court of Human Rights has formulated a number of opinions whereby denying the detained person access to defence counsel in the first hours of police questioning, in a situation where the rights of the

defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment of 8 February 1996 in *Murray v. the United Kingdom*, 1996-I, § 66). Furthermore, within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights concluded that the charge is not only the official notification given to an individual but also other measures related to the suspect's criminal offence which have significant implications or affect the situation of the suspect (Judgment of 27 February 1980 in *Deweert v. Belgium*, Series A, no. 35, § 44, 46; Judgment of 15 July 1982 in *Eckle v. Germany*, Series A, no. 51, § 73; Judgment of 10 December 1982 in *Foti v. Italy*, Series A, no. 56, § 52), i.e. the Court finds it necessary to rely on a substantive rather than formal conception of the charge.

Thus, within their literal meaning, the challenged provisions of Section 1 of Article 47 of the Criminal Procedure Code of the RSFSR, which do not permit a person suspected of committing a crime to have assistance of a defence counsel until the announcement of an arrest report or an order to impose a measure of restraint in the form of detention prior to formal indictment do restrict the right of everyone to have assistance of a (defence) counsel at the pre-trial stage of criminal proceedings when his rights and freedoms may be considerably affected by actions and measures undertaken for the purposes of criminal prosecution and therefore do not conform to Articles 17, Section 1, 21, Section 1, 22, Section 1, 48 and 55, Section 3 of the Constitution of the Russian Federation.

4. The challenged provisions of Section 2, Article 51 of the Criminal Procedure Code of the RSFSR, within their literal meaning, provide neither for the right of defence counsel to gain access, before completion of the investigation, to the records of investigative actions involving his client before the latter was formally declared a suspect and to the documents presented or to be presented to the suspect and accused person, nor for the right to copy out any information to any extent from the files provided to the defence counsel for examination. This is precisely the way these provisions were interpreted by the investigation, prosecution authorities and by the courts in their initial decisions in the applicant's case.

However, the interpretation made by the authorities enforcing and applying legislation does not stem from the abovementioned provisions of the Criminal Procedure Code of the RSFSR if considered in conjunction with the provisions that establish the right and duty of criminal defence counsel to make use of any legal ways and means of defence (Section 1, Article 51 of the Criminal Procedure Code of the RSFSR, and Article 16 of the Chamber of Lawyers Regulations of the RSFSR).

The challenged provisions of Section 2, Article 51 of the Criminal Procedure Code of the RSFSR, require that the investigation authorities provide the suspect's defence counsel with the records of investigative actions involving the suspect along with the documents that were presented or should be presented to the suspect and the documents proving that the suspect was subjected to a lawful and reasonable measure of restraint. Denying the defence counsel access to the investigation files obtained in the process of involving the suspect or of which he otherwise became aware before being officially recognized as a suspect, and restricting the defence counsel's right to copy out any information to any extent from the files provided to him for examination before the completion of the investigation, has no reasonable grounds and cannot be justified by the interests of the investigation or constitutionally important purposes permitting proportionate restrictions on rights and freedoms (Article 55, Section 3 of the Constitution of the Russian Federation).

Any other interpretation of the challenged provisions of Section 2, Article 51 of the Criminal Procedure Code of the RSFSR, would be contradictory to the meaning of Article 45, Section 1 of the Constitution of the Russian Federation guaranteeing state protection of rights and freedoms in the Russian Federation and to the meaning of Article 48 of the Constitution of the Russian Federation securing the right of everyone to qualified legal assistance, including the assistance of (defence) counsel in criminal cases.

Concluding from the above and by virtue of Sections 1 and 2, Article 71, Articles 72, 74, 75, 79 and 100 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize as non-conforming to the Constitution of the Russian Federation and its Articles 17, Section 1, 21, Section 1, 22, Section 1, 48 and 55, Section 3 the provisions of Section 1 of Article 47 of the Criminal Procedure Code of the RSFSR, which within their literal meaning do not entitle a person suspected of having committed a crime to have assistance of defence counsel until he is notified of an arrest report or an order to impose a measure of restraint in the form of detention, and, therefore, restrict the right of everyone to have assistance of a (defence) counsel at the pre-trial stage of criminal proceedings where his rights and freedoms may be considerably affected by actions and measures undertaken for the purposes of criminal prosecution.

Until the federal legislator enacts new regulation of the matter, the provision of Article 48, Section 2 of the Constitution of the Russian Federation as interpreted by the present Judgment shall be directly applicable.

2. To recognize the provisions of Article 51 of the Criminal Procedure Code of the RSFSR as conforming to the Constitution of the Russian Federation as, within their constitutional interpretation, these provisions place no restrictions on the defence counsel's right to examine, before completion of the preliminary investigation in a criminal case, any official records of investigative actions involving his client before the latter was officially recognized as a suspect, and any documents which were presented or should be presented to the suspect and the accused person, and on the right to copy out any information to any extent from the files provided to the defence counsel for examination.

3. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon its pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

4. Given the conclusions in this Judgment, V.I. Maslov shall be provided with an opportunity to seek remedy for his rights and legitimate interests that might have been infringed as a result of applying the provision of Section 1, Article 47 of the Criminal Procedure Code of the RSFSR, which has been recognized as non-conforming to the Constitution of the Russian Federation.

5. Pursuant to Article 78 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation

No. 11-II