

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment  
of 3 May 1995 No. 4-II

in the case concerning the review of the constitutionality of Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, in connection with a complaint of V. A. Avetyan.

Moscow, 3 May 1995

The Constitutional Court of the Russian Federation composed of Presiding Judge N. V. Vitruk and Judges M. V. Baglay, G. A. Gadzhiev, A. L. Kononov, T. G. Morshchakova, Yu. D. Rudkin, N. V. Seleznev, B. S. Ebzeev and V. G. Yaroslavtsev,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 2 and 3 of Article 3, Subsection 3, Section 2 of Article 22, Articles 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 Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR.

Pursuant to Section 1, Article 36 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the reason for the consideration of the case is a complaint of V. A. Avetyan about violation of his constitutional right to judicial protection by the provisions of the Criminal Procedure Code of the RSFSR as applied in his case.

Pursuant to Section 2, Article 36 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the ground for the consideration of the case is the discovered uncertainty of the constitutionality of the challenged provisions of the Criminal Procedure Code of the RSFSR assigning the right to obtain judicial review of a detention order only to a person in detention, his defence counsel or legal representative at the place of detention.

Having heard the report of Judge-Rapporteur T. G. Morshchakova and interventions by the following representatives invited to participate in the hearing: A. M. Traspov, Deputy of the State Duma, member of the Committee on Legislation, Legal and Judicial Reform; G. P. Ivliev, Deputy of the State Duma, Head of the Judicial Reform Division of the above Committee; L. L. Panteleeva, representative of the Ministry of Justice, Deputy Head of the Judicial Reform

and Crime Prevention Legislation Directorate; and M. D. Smirnov, representative of the Federal Union of Attorneys of the Russian Federation, member of the Moscow Region Chamber of Lawyers; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

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

1. Criminal proceedings were instituted against V. A. Avetyan on charges of the criminal offences specified in Article 122 (fraudulent child support evasion) and in Article 130 (defamation) of the Criminal Code of the RSFSR; and an order was issued to subject him to pretrial restraint measure in the form of detention, which was not put into effect. The order of 16 August 1990 remained unrevoked until the criminal case was dismissed on 16 April 1994. So the decision to detain V. A. Avetyan remained in force for almost four years. He was placed on a list of wanted persons; and this information was published in the local newspaper.

V. A. Avetyan complained to courts of general jurisdiction that the detention order had been issued unlawfully and, accordingly, should be quashed. However, the court dismissed his complaint twice on the grounds that such complaints may be filed only by those who are actually held in custody and must be heard in court at the place of detention as stipulated in Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR.

2. The applicant lodged a complaint with the Constitutional Court of the Russian Federation. He claimed that Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, as applied in his case, restrict his right to liberty and security of person, restrict his right to judicial protection, contradict the constitutional principle of equality of all persons before the law and court and therefore are inconsistent with Articles 19, 22, 45, 46 and 47 of the Constitution of the Russian Federation.

The Constitutional Court of the Russian Federation declared the complaint admissible, because the challenged statutory provisions (of the Criminal Procedure Code of the RSFSR in the present proceedings) were directly applied in the applicant's case and affect his constitutional rights as stipulated in Article 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

When applying Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, courts of general jurisdiction rely upon the literal meaning of these provisions in conformity with the constitutional requirement (Article 120) that judges shall obey only the Constitution of the Russian Federation and the federal law.

At the same time Decree of the Plenum of the Supreme Court of the Russian Federation No. 3, "On the Practice of Judicial Review of Lawfulness and Reasonableness of Arrest or

Prolongation of a Detention”, of 27 April 1993, Decree No. 6, “On the Compliance of the Courts with the Decree of the Plenum of the Supreme Court of the Russian Federation of 27 April 1993”, of 29 September 1994, and summaries of relevant case law emphasize that courts must undertake compliance reviews with respect to all provisions of the Criminal Procedure Code of the RSFSR regulating application of the specified pretrial restraint measure and must rigorously protect the rights of persons applying for judicial review of detention orders. Courts of general jurisdiction recognized the existence of the limitation on the right to judicial review established in the Criminal Procedure Code of the RSFSR; yet, they failed to exercise their power to submit to the Constitutional Court a request for a review of the constitutionality of the articles in question, as provided by Section 4 of Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1 of Article 3 and Articles 101–102 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”. However, a court of general jurisdiction is not empowered to rule on the constitutionality of a statute applicable to a particular case under consideration. This issue is exclusively within the jurisdiction of the Constitutional Court of the Russian Federation which decides only on the points of law and does not consider whether the decisions of courts of general jurisdiction are lawful and well-founded.

3. Within the meaning of Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, it is not pretrial detention itself but the lawfulness and reasonableness of applying this pretrial restraint measure to an accused person or suspect that shall be the subject of a complaint for judicial review.

In the legislation, the application of a pretrial restraint measure means that an inquiry authority, investigator or a prosecutor issues an order imposing the pretrial restraint measure (Articles 89 and 92 of the Criminal Procedure Code of the RSFSR). Any detention order, even if it has not been enforced, does affect the rights and freedoms of citizens accused or suspected of crimes. Government agencies may restrict their liberty and employ coercive measures when the order is issued. It is from this point in time that an accused person or suspect becomes legally entitled to seek review of the pretrial restraint measure, and he shall be informed of this right when the detention order is announced (Section 1, Article 92 of the Criminal Procedure Code of the RSFSR). According to Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, the procedure of judicial review can be also construed as implementation of the constitutional right to judicial protection specified in Article 46 of the Constitution of the Russian Federation.

This right may not be restricted. Under Article 55 (Section 3) of the Constitution of the Russian Federation, constitutional rights may be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional order, morality, health, rights and legitimate interests of other persons, for ensuring defence of the country and security of the

state. In no manner can the right to judicial protection contradict the stated purposes and, accordingly, it may not be restricted. It is precisely for this reason that the right to judicial protection is listed in Article 56 (Section 3) of the Constitution of the Russian Federation among the rights which cannot be restricted or denied. Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR deviate from the constitutional provision and impose restrictions on the right to judicial review for some categories of accused persons and suspects.

4. The right to judicial protection constitutes a guarantee for all constitutional rights and freedoms. Its legislative interpretation in Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR should guarantee the right to protection of dignity by the state, and the right to liberty and security of person.

The International Covenant on Civil and Political Rights asserts in the preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 21 of the Constitution of the Russian Federation proclaims that the state shall protect the dignity of the person in all spheres of life, which serves to affirm the priority of the person and his rights (Section 2, Article 17 and Article 18 of the Constitution of the Russian Federation). Therefore, the role of the individual vis-à-vis the state is not to be a target of government actions, but an equal player who should be able to defend his rights by any means not prohibited by law (Section 2, Article 45 of the Constitution of the Russian Federation), and enter in disputes with any authority representing the state. No one may be restricted in the ability to defend his dignity and all related rights in court.

5. The constitutional right to liberty and security of person implies that no one may be arbitrarily imprisoned or detained by authorities. Any order imposing a pretrial restraint measure in the form of detention invariably restricts the right to liberty and security of person irrespective of whether or not it has been enforced. Not only actual restrictions but also their potential threat and primarily the risk of losing liberty interfere with the security of person, and influence the person's mental safety, thoughts and actions.

At the same time detention orders, both executed and unexecuted, could be unlawful or unreasonable. Protection against such arbitrary restriction of the liberty and security of person is ensured by the right to seek judicial review of detention grounds. The risk of restricting the liberty and security of person, even if it has a sound legal basis, should be countered by the right to judicial review.

6. Under Articles 220<sup>1</sup> and 220<sup>2</sup> of the RSFSR Code of Criminal Procedure the scope of persons entitled to judicial review is limited to those in detention. This limitation contravenes

Article 19 of the Constitution of the Russian Federation which stipulates that all are equal before the law and the court.

The principle of equality before the law and the court does not eliminate actual differences which should be considered by the legislator. However, such consideration shall not lead to restriction of such rights, which are constitutionally protected from any restrictions. Moreover, the different situations of persons liable to detention or kept in detention may not influence determination of their right to challenge and the court's obligation to review the lawfulness of detention orders. Within the meaning of the Criminal Procedure Code of the RSFSR in force, the purpose of the appeal mechanism for the review of detention decisions is to ascertain whether orders imposing this pretrial restraint measure are lawful and reasonable. Restricting the right to judicial review of the persons liable to detention who have not been actually arrested does not serve the stated purpose. Prohibition on judicial review over unenforced detention orders enables inquiry authorities, investigators and prosecutors to deviate from the statutory requirements regarding grounds for detention as their actions and decisions fall outside of the scope of judicial review.

Consequently, Articles 220<sup>1</sup> and 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR contain provisions restricting certain constitutional rights and freedoms contrary to Article 18 and Article 55 (Section 2) of the Constitution of the Russian Federation stipulating that no laws denying or restricting these rights may be issued in the Russian Federation.

Concluding from the above and pursuant to Section 1 of Article 71, Articles 72, 75 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 the provision of Article 220<sup>1</sup> of the Criminal Procedure Code of the RSFSR, which limits the scope of the right to judicial review of detention orders only to persons held in detention, and the related provision of Article 220<sup>2</sup> of the Criminal Procedure Code of the RSFSR, which permits judicial review of the lawfulness and reasonableness of detention only by the court having jurisdiction over the place of detention, as non-conforming to the Constitution of the Russian Federation, its Article 46 (Sections 1–2), Article 19 (Section 1), Article 21 (Section 1), Article 22 (Section 1) and Article 55 (Section 3).

2. Pursuant to Sections 1–2 of Article 79 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" this Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, and shall be directly applicable.

3. 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, *Rossiyskaya Gazeta* and other official publications of the Russian government. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

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