

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 2 February 1996 No. 4-II

i n the case concerning the review of the constitutionality of Subsection 5, Section 2, Article 371, Section 3, Article 374, and Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR in connection with complaints of K. M. Kulnev, V. S. Laluev, Yu. V. Lukashov, and I. P. Serebrennikov.

Moscow, 2 February 1996

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

in the attendance of K. M. Kulnev and Yu. V. Lukashov, who submitted their complaints to the Constitutional Court of the Russian Federation; A. S. Gorelik, PhD in Law, representative of I. P. Serebrennikov, who also submitted his complaint to the Constitutional Court of the Russian Federation,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 2 and 3, Article 3, Subsection 3, Section 2, Article 22, Article 36, Section 1, Article 96, Articles 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 Subsection 5, Section 2, Article 371, Section 3, Article 374 and Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR.

The reason for the consideration of the case is complaints of K. M. Kulnev, V. S. Laluev, Yu. V. Lukashov and I. P. Serebrennikov against violation of their constitutional rights by the provisions of Articles 371, 374 and 384 of the Criminal Procedure Code of the RSFSR, as applied in their cases.

The ground for the consideration of the case is the discovered uncertainty of whether the provision challenged by the applicants is in conformity with the Constitution of the Russian Federation which guarantees the right to judicial protection.

Having heard the report of Judge-Rapporteur T. G. Morshchakova, statements by the parties, statement by V. I. Radchenko, Judge of the Supreme Court of the Russian Federation

invited to participate in the hearing, 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. At different times, K. M. Kulnev, V. S. Laluev, Yu. V. Lukashov and I. P. Serebrennikov were convicted and sentenced to deprivation of liberty. Over a long period of time the applicants have been challenging the lawfulness and reasonableness of their convictions claiming that in examining their criminal cases the courts failed to take into account important, *inter alia* acquitting, circumstances which were significant for rendering a rightful decision, and made mistakes in applying the criminal law. Within the review on cassation and on supervision, including review by the Presidium of the Supreme Court of the Russian Federation, the initial unlawful and unreasonable judicial decisions were substantially altered. However, in the convicted persons' opinion, the judicial mistakes have not been fully rectified. Subsequent complaints lodged with the Supreme Court of the Russian Federation and the Office of the Prosecutor General of the Russian Federation have been dismissed, the reason being that the criminal procedure law in force does not provide for a possibility to review judicial decisions in such cases.

The applicants lodged their complaints with the Constitutional Court of the Russian Federation because they believe that the provisions of Articles 371, 374 and 384 of the Criminal Procedure Code of the RSFSR, on the basis of which the review of the judicial decisions was refused, do not conform to Articles 45, 46 (Section 1) and 50 (Section 3) of the Constitution of the Russian Federation, and restrict their right to judicial protection.

2. The Constitutional Court of the Russian Federation, guided by Article 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", found the complaints of K. M. Kulnev, V. S. Laluev, Y. V. Lukashov and I. P. Serebrennikov admissible since the provisions of the Criminal Procedure Code of the RSFSR the constitutionality of which is challenged by the applicants served as a basis for refusal to review the judgments rendered in their criminal cases, i.e. they were applied and they affect the applicants' constitutional rights. These complaints concern similar legal situations where rectification of judicial mistakes is precluded, *inter alia* the criminal case cannot be re-opened under newly discovered circumstances (Article 384 of the Criminal Procedure Code of the RSFSR) after the possibilities for judicial supervision have been exhausted (Articles 371 and 374 of the Criminal Procedure Code of the RSFSR). The Constitutional Court of the Russian Federation recognized these complaints as concerning essentially the same subject matter and pursuant to Article 48 of the

Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, joined them into single proceedings.

The Constitutional Court of the Russian Federation, not being bound by the grounds and arguments of the complaints, may review the constitutionality only of the norms which have been applied or are to be applied in a specific case. Consequently, the subject matter of the present proceedings shall only include the provisions of Articles 371, 374 and 384 of the Criminal Procedure Code of the RSFSR, which were the basis for the decisions to deny review of the judgments rendered in the criminal cases against the applicants. That is Subsection 5, Section 2, Article 371, and Section 3, Article 374 of the Criminal Procedure Code of the RSFSR, which preclude requesting for review of decisions of the Presidium of the Supreme Court of the Russian Federation and review of these decisions in supervisory proceedings; and Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, which limits the grounds for re-opening criminal cases under newly discovered circumstances. At the same time the Constitutional Court of the Russian Federation, obliged to refrain from establishing and examining the facts if they fall within the jurisdiction of other courts and authorities, does not review the lawfulness and reasonableness of the decisions rendered in the criminal cases against the applicants, but only considers whether the norms of the Criminal Procedure Code of the RSFSR challenged by the applicants conform to the Constitution of the Russian Federation.

3. Pursuant to Article 371 of the Criminal Procedure Code of the RSFSR, the supervisory review of a judgment, a decision and a ruling in force shall be exercised only upon a request of a prosecutor, the president of a court and his deputies who are entitled to lodge a request under law in order to rectify the committed judicial mistakes. However, no one from the listed officials, including the highest officials empowered to lodge requests, i.e. the President of the Supreme Court of the Russian Federation or the Prosecutor General of the Russian Federation, is empowered to lodge a request to review the decisions of the Presidium of the Supreme Court of the Russian Federation (Subsection 5, Section 2, Article 37 of the Criminal Procedure Code of the RSFSR).

The law does not provide for a judicial instance which has the power to examine such a request in case of a judicial mistake. Section 3, Article 374 of the Criminal Procedure Code of the RSFSR provides that the Presidium of the Supreme Court of the Russian Federation examines criminal cases upon requests for review of judgments and decisions of the Judicial Section on Criminal Cases of the Supreme Court of the Russian Federation, and decisions of judges of the Supreme Court of the Russian Federation. However, the provision does not vest the Presidium of the Supreme Court of the Russian Federation with the power to review its own decisions in supervisory proceedings.

By virtue of these legal provisions, the decisions of the Presidium of the Supreme Court of the Russian Federation, regardless of their quality, are not subject to judicial review in supervisory proceedings. Requests for supervisory review of decisions of the Presidium of the Supreme Court of the Russian Federation lodged by citizens shall not be examined since they are *a priori* inadmissible. Thereby, the criminal procedure law in force relies on absolute prohibition to discover and rectify any judicial mistake in supervisory review proceedings if a criminal case has been considered by the Presidium of the Supreme Court of the Russian Federation acting as the highest judicial instance.

4. Pursuant to Section 2, Article 74 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation considers not only the literal meaning of the normative act under review, but also the meaning these norms acquire from their place within the hierarchy of legal acts and in law-enforcement practice.

Earlier, pursuant to the legislation of the USSR, the fact that the Prosecutor of the RSFSR, the President of the Supreme Court of the RSFSR and their deputies did not have the right to lodge a request for review of decisions of the Presidium of the Supreme Court of the RSFSR was compensated by vesting such right in the General Prosecutor of the USSR, the President of the Supreme Court of the USSR, and their deputies. They were empowered to appeal against this decision on the basis of its unlawfulness or unreasonableness to the Plenum of the Supreme Court of the USSR, and this is still prescribed by Article 371 of the Criminal Procedure Code of the RSFSR. In this connection, in 1991, the President of the Supreme Court of the RSFSR applied to the President of the Supreme Court of the USSR asking to lodge, with the Supreme Court of the USSR, a request for review of the judgment and the subsequent decisions in the criminal case against one of the applicants in the present proceedings, K. M. Kulnev. The request has not been lodged, since after the operation of the Supreme Court of the USSR was terminated supervisory review of decisions of the Presidium of the Supreme Court of the Russian Federation became impossible.

However, the effectiveness of a legal remedy of citizens’ rights shall be examined taking into account all the remedies available. The provisions of Articles 371 and 374 of the Criminal Procedure Code of the RSFSR challenged by the applicant are an integral part of the institution of reviewing judgments, decisions and rulings in force. This institution, provided for in Part VI of the Criminal Procedure Code of the RSFSR, includes both supervisory review proceedings and re-opening of a criminal case under newly discovered circumstances. The latter, being a particular stage of the criminal proceedings, provides grounds and procedures of rectifying

judicial mistakes which were committed in the course of examination of criminal cases and which were not been and could not be disclosed earlier.

In its essence and purpose, re-opening of criminal cases, i.e. new examination, is a mechanism which supplements all ordinary means of ensuring fair judgments. This kind of judicial proceedings, having a reserve status, shall be resorted to when all other legal procedural remedies are inapplicable or have been exhausted. That is why certain procedural conditions inherent in ordinary criminal proceedings are not applicable to the mentioned institution: there is no judicial instance whose decisions are considered final and should not be subject to review; there is neither a prohibition for a judicial instance to review its own decisions nor a prohibition for judges to participate in reconsideration of the case.

Thereby, the determination, in the criminal procedure law, of a final judicial supervisory review instance whose decisions shall not be reviewed in supervisory proceedings, does not in itself lead to denial of the right to judicial protection for citizens whose rights have been violated as a result of a judicial mistake, since along with ordinary remedies there are additional remedies of these rights in the procedure of re-opening of criminal cases in the order established by Articles 384–390 of the Criminal Procedure Code of the RSFSR.

5. Pursuant to Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, review of a judgment, a decision or a ruling in force by re-opening a criminal case under newly discovered circumstances shall be instituted if the fact of the criminal offence committed by the participants in the criminal proceedings which led to adopting an unfair judgment is established by a judgment in force (Subsections 1–3); or on the basis of other circumstances unknown to the court at the time when the case was examined, which alone or combined with other circumstances established earlier prove the innocence of the convicted person or the commission of a more grave or less grave offence than the one of which he was convicted, or the guilt of a person who has been acquitted or whose prosecution was discontinued (Subsection 4).

It follows from the content of Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, and primarily from its Subsection 4, that the unfairness of decisions rendered in the criminal case, which stemmed from ignoring the evidence obtained and reflected in the case file or erroneous assessment of the evidence, or improper application of law is not a ground for re-opening a criminal case under a procedure provided for by Articles 384–390 of the Criminal Procedure Code of the RSFSR.

Such limitation of the grounds for re-opening a criminal case in order to review an unlawful or unreasonable judicial decision which may not be remedied in any other way, including supervisory review proceedings, renders it impossible to rectify many judicial mistakes and to remedy the violated rights and freedoms of the citizens.

6. The Constitution of the Russian Federation (Article 2), relying on the principles of a rule of law state, declares man, his rights and freedoms to be the supreme value. Being natural and inalienable, the human rights determine the meaning, contents and enforcement of laws (Article 18 of the Constitution of the Russian Federation).

According to Articles 2 and 45 (Section 1) of the Constitution of the Russian Federation, the State is obliged to recognize, observe and protect rights and freedoms providing for effective legal mechanisms to remedy any violations, including those committed by state authorities and officials in criminal proceedings. Such obligation is vested, first of all, in the legislator who determines the procedures by which unfair decisions shall be reviewed for purposes of effective remedy of the rights of the participants in the criminal proceedings. These procedures shall guarantee priority of the rights and freedoms of man and citizen and prevent from giving preference even to the most important public, departmental, or private interests.

The introduction of a rigidly limited concept of newly discovered circumstances which shall serve as a ground for re-opening a criminal case, *per se* exempts the State from the obligation to ensure priority protection of rights and freedoms in case of judicial mistakes which have not been discovered in ordinary supervisory review proceedings. Such limitation also restricts everyone's right to protect his interests in these situations by all means not prohibited by law (Article 45, Section 2 of the Constitution of the Russian Federation).

Pursuant to Article 55 (Section 3) of the Constitution of the Russian Federation, the rights and freedoms of man and citizen may be restricted by the federal law only and, consequently, only pursuant to law. In the presence of judicial mistakes, which caused unlawful and unreasonable conviction, contrary to the stated above, the citizens' rights are restricted by a judgment which is not based on law and contradicts the requirements of law. In any event, this shall be considered as violation of the abovementioned provisions of the Constitution of the Russian Federation and, pursuant to its Article 18, shall be remedied through administration of justice. The legislator is not empowered to restrict these constitutional prerogatives of administration of justice.

The courts providing for state protection of rights and freedoms, ensure the right of everyone convicted to obtain review of the judgment in the order prescribed by federal law (Article 50, Section 3 of the Constitution of the Russian Federation). However, the federal law which prescribes a procedure of reviewing judgments may not deny or derogate the rights and freedoms of man and citizen, infringe upon their essential content (Article 55, Section 2 of the Constitution of the Russian Federation) as well as it shall not impose any restrictions on the constitutional rights, which are not necessitated by the protection of social values listed in

Article 55 (Section 3) of the Constitution of the Russian Federation, since it leads to derogation of the rights and freedoms of man and citizen.

Meanwhile, Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR strictly provides for the opposite regulation, which *de facto* restricts the citizens' right to judicial protection and serves as a normative ground for denial of justice both within its procedural meaning and substantive content.

This situation does not conform to Article 46 of the Constitution of the Russian Federation, pursuant to which everyone shall be guaranteed judicial protection of his rights and freedoms. At the same time, the right to judicial protection, which is exercised in full through a system of various procedural means, belongs to the list of rights which shall not be restricted (Article 56, Section 3 of the Constitution of the Russian Federation). Along with that, administration of justice in its very essence may be recognized as such only on condition that it conforms to the requirements of fairness and ensures effective remedy of rights (Article 14 of the International Covenant on Civil and Political Rights of 1966; Article 8 of the Universal Declaration of Human Rights of 1948). Fairness as a fundamental idea is also to be found in the introductory provisions of the Constitution of the Russian Federation. An erroneous judicial decision shall not be considered a fair act of administration of justice and shall be rectified.

The International Covenant on Civil and Political Rights relying on the substantive content of administration of justice and the priority of the human rights emphasizes that the purpose of rectifying judicial mistakes serves as a ground for review of the judicial decisions in force, "if any new or newly discovered fact shows conclusively that there has been a miscarriage of justice" (Article 14 § 6). This international legal provision establishes wider possibilities for rectifying judicial mistakes than the Criminal Procedure Code of the RSFSR in force, and, pursuant to Article 15 (Section 4) of the Constitution of the Russian Federation, is an integral part of the legal system of Russia which underlies the national legislation on issues of protection of the rights and freedoms violated as a result of judicial mistakes.

In the absence of other mechanisms, legal regulation *de facto* prohibiting recourse to the judicial authorities in order to obtain protection against erroneous decisions in cases which do not fall under Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, means that an individual is obliged to obey unlawful, unreasonable conviction. Deprivation of the right to appeal against such conviction obviously derogates human dignity. Meanwhile, pursuant to Article 21 of the Constitution of the Russian Federation "nothing may serve as a basis for its derogation".

7. The Constitution of the Russian Federation, guaranteeing the right to judicial protection, does not preclude but, on the contrary, provides for a possibility to rectify a judicial

mistake after a case has been considered by the judicial instance whose decision is final within a specific area of law, meaning that it may not be altered in an ordinary manner.

Such conclusion follows from Article 46 (Section 3) of the Constitution of the Russian Federation, which provides that, pursuant to international treaties of the Russian Federation, everyone in accordance with the international treaties of the Russian Federation shall have the right to address international bodies for protection of human rights and freedoms if all available domestic remedies have been exhausted. The mentioned constitutional provision indicating that the international authorities' decisions may involve review of certain cases resolved by the highest courts of the Russian Federation, consequently, paves the way for the latter's powers to reconsider the case in order to amend the decisions rendered, *inter alia* those rendered by the highest domestic judicial instance. It would be illogical to deny the abovementioned powers in cases where the need to amend judicial decisions may be discovered without the involvement of international authorities. Even more so considering that under its international obligations the Russian Federation pursuant to Article 2 § 2 of the International Covenant on Civil and Political Rights undertakes to adopt "laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

8. The limited scope of grounds prescribed by Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, according to which rectification of judicial mistakes is permitted through re-examination of the case by the same judicial instance, does not fully conform to the present social and legal reality.

The legislation in force and the practice of applying Article 384 of the Criminal Procedure Code of the RSFSR show a tendency towards correcting this norm. Thus, a possibility to re-open a case and review final judicial decisions, in case of need for new legal and factual assessment of the circumstances which have already been affirmed by a judicial decision, directly follows from the Federal Constitutional Law "On the Constitutional Court of the Russian Federation". It provides that any judicial decisions, including final, based on acts which have been recognized as non-conforming to the Constitution of the Russian Federation shall be reviewed (Section 3, Article 79, Section 2, Article 100). *De facto* what is at issue is the development of a new legal situation which has not been provided for in Article 384 of the Criminal Procedure Code of the RSFSR, and which, at the same time, requires examination following a procedure prescribed by the mentioned Article.

The unjustifiably restrictive nature of the examined norm of Article 384 of the Criminal Procedure Code of the RSFSR prevents rectification by re-opening criminal cases of the judicial decisions which are manifestly inadequate to the legal and factual realities reflected, for example, in such acts as the Law of the RSFSR "On Rehabilitation of the Victims of Political

Repression” of 18 October 1991 and the Law of the Russian Federation “On Amendments to the Criminal Code of the RSFSR and the Criminal Procedure Code of the RSFSR” of 1 July 1994. In this connection and especially for the abovementioned cases the legislator had to introduce a procedure by which final decisions could be reviewed. In many respects this procedure is analogous to that of re-opening criminal cases provided by Subsections 1–3, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR. Formally, the necessity to rectify final judicial decisions in supervisory review proceedings was indicated in the abovementioned laws. However, in fact, elements of the named procedure of Article 384 were used on the basis of procedural analogy since only the mentioned Article allowed the highest judicial instance to review its own decisions.

9. The analysis of the legislation in force demonstrates that to counterbalance rigid regulation, which prevents the highest judicial instance from re-examining the case in supervisory review proceedings, a procedure stipulated by Articles 384–390 of the Criminal Procedure Code of the RSFSR could provide the citizens with necessary protection of their rights infringed as a result of a judicial mistake. However, the limitation of the grounds for re-opening cases provided for in Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, which does not conform to the constitutionally declared requirements of state protection of the rights and freedom, prevents ensuring such protection.

Along with that, in the course of further improvement of the legislation and following the requirements mentioned above, the legislator is entitled to choose another system of procedural rules, including one that is unknown to the regulation in force, which would make it possible to achieve the aims of protecting the citizens’ rights against judicial mistakes. It is not excluded that in the course of introduction or development of any procedural institutions which compensate the shortcomings of the provisions of Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR, the perception of the mentioned norm may change in new criminal procedure legislation, even in its present wording. This would not violate the prohibition to overcome the legal effect of a decision of the Constitutional Court of the Russian Federation on unconstitutionality of an act by its re-adoption (Section 2, Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”). This conclusion follows from the fact that the Constitutional Court of the Russian Federation, guided by Section 2, Article 74 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, establishes the constitutional meaning of the challenged provisions giving due regard to their place in the normative system, i.e. following their systemic interpretation, meaning that the constitutional content of the relevant legal institutions may be guaranteed by the aggregate result of the effect of legal norms.

Concluding from the above and pursuant to Articles 72, 74, 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 Subsection 5, Section 2, Article 371, and Section 3, Article 374 of the Criminal Procedure Code of the RSFSR as conforming to the Constitution of the Russian Federation to the extent that the restrictions on reviewing the decisions of the Presidium of the Supreme Court of the Russian Federation in supervisory proceedings do not preclude the use of other procedural means to rectify judicial mistakes.

2. To recognize the provision of Subsection 4, Section 2, Article 384 of the Criminal Procedure Code of the RSFSR as non-conforming to the Constitution of the Russian Federation and its Articles 15 (Section 4), 18, 21 (Section 1), 45, 46, 55 (Sections 2 and 3) to the extent that it limits the grounds for re-opening criminal cases due to circumstances “not known to the court at the time when a judgment or a decision was rendered” and, therefore, if possibilities for judicial supervision have been exhausted, prevents rectifying judicial mistakes which infringe upon the rights and freedoms of man and citizen.

3. According to Section 2, Article 100 of the Federal Constitutional Law of the Russian Federation “On the Constitutional Court of the Russian Federation”, the criminal cases against K. M. Kulnev, V. S. Laluyev, Yu. V. Lukashov, I. P. Serebrennikov shall be reconsidered taking into account Section 2 of the holding of this Judgment, which pursuant to Section 2, Article 79 of the abovementioned Federal Constitutional Law shall be directly applicable and shall not require confirmation by other authorities and state officials.

4. The Federal Assembly of the Russian Federation, adopting new criminal procedure legislation and defining procedural forms and remedies for rectifying judicial mistakes in criminal cases, shall consider it impermissible to reduce the level of guarantees of citizen’s rights and freedoms established by the legislation in force and the present Judgment.

5. Pursuant to Section 1, Article 79 of the Federal Constitutional Law of the Russian Federation “On the Constitutional Court of the Russian Federation”, this Judgment shall be final and shall come into force immediately upon pronouncement.

6. 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*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

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