

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 23 March 1999 No. 5-II

in the case concerning the review of the constitutionality of Article 133, Section 1, Article 218, and Article 220 of the Criminal Procedure Code of the RSFSR in connection with complaints of V. K. Borisov, B. A. Kekhman, V. I. Monastyretsky, D. I. Fuflygin, and Monokom LLC.

Moscow, 23 March 1999

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

in the attendance of V. K. Borisov, B. A. Kekhman, V. I. Monastyretsky, D. I. Fuflygin and A. V. Vasilyev as his representative, attorney S. D. Zamoshkin as V. I. Monastyretsky's representative, attorneys B. A. Zolotukhin and A. V. Rakhmilovich as a representative of Monokom LLC, and attorney I. B. Vlasenko as a representative of the Council of the Federation, pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Section 1 Subsection 3 and Sections 2 and 3, Article 3, Articles 36, 74, 96, 97, 99 and 86 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

in an open hearing, examined the constitutionality of the provisions of Article 133, Section 1, Article 218 and Article 220 of the Criminal Procedure Code of the RSFSR.

The reason for consideration of the case is complaints of V. K. Borisov, B. A. Kekhman, V. I. Monastyretsky, D. I. Fuflygin and Monokom LLC about violation of the constitutional right to judicial protection by Articles 133, 218, 219 and 220 of the Criminal Procedure Code of the RSFSR.

Having heard the report of Judge-Rapporteur N. V. Seleznev, statements by the parties and their representatives, statements by the representatives invited to the hearing, including V. V. Doroshkov for the Supreme Court of the Russian Federation, A. A. Belkin for the Office of the Prosecutor General of the Russian Federation, L. N. Bashkatov for the Federal Security Service of the Russian Federation, and Ye. A. Timlev for the Ministry of Internal Affairs of the Russian Federation; 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. The complaints of V. K. Borisov, B. A. Kekhman, V. I. Monastyretsky, D. I. Fuflygin and Monokom LLC lodged with the Constitutional Court of the Russian Federation challenge the constitutionality of Articles 218, 219 and 220 of the Criminal Procedure Code of the RSFSR that regulate the procedure for judicial review of actions and decisions made by an inquiry authority, investigator or a prosecutor.

In courts of general jurisdiction, the above norms served as a basis for denial of consideration of the applicants' complaints for review of decisions and actions (inactions) of investigators and prosecutors within the scope of preliminary investigations in the specific criminal cases. The decisions and actions (inactions) complained of included the decision that instituted criminal proceedings against V. K. Borisov; the inaction of the district prosecutor's office, which resulted in the unreasonable stay of proceedings and prolongation of investigations in criminal prosecution of the destruction of the property (house) belonging to B. A. Kekhman; the decisions of an investigator and a prosecutor to prolong a preliminary investigation in the case of V. I. Monastyretsky; a search in D. I. Fuflygin's apartment and seizure of the valuables, which later went missing; and the attachment order issued by the investigator in respect of the financial assets of Monokom LLC on its settlement account with a commercial bank. The courts dismissed the complaints on the grounds of Articles 218, 219 and 220 of the Criminal Procedure Code of the RSFSR, which stipulates that the resolution of the raised issues falls within the jurisdiction of the respective prosecutors and not the courts of general jurisdiction.

The applicants assert that the said provisions of the criminal procedure legislation are inconsistent with the Constitution of the Russian Federation, its Articles 17 (Section 1), 18, 46 (Sections 1 and 2), 52 and 55. However, in their complaints the applicants do not actually challenge all of the provisions of Articles 218, 219 and 220 of the Criminal Procedure Code of the RSFSR, but only those providing for the review of an inquiry authority's or investigator's actions by a prosecutor (Section 1, Article 218), and the review of the prosecutor's actions or decisions by a superior prosecutor (Article 220). While the applicants do not object to the powers of a prosecutor to conduct review as such, they all claim that the challenged norms within the meaning acquired in law-enforcement practice preclude the possibility for persons having legitimate interests to apply for judicial review of procedural actions of investigative authorities. It is the denial of judicial review of these actions which is the subject matter of all these complaints, and thus, pursuant to Article 48 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Further, the subject matter of consideration by the Constitutional Court of the Russian Federation in the present case is also the procedure to prolong preliminary investigation established by Article 133 of the Criminal Procedure Code of the RSFSR, which is challenged by V. I. Monastyretsky whose complaint against the prolongation of the pretrial investigation in his case was dismissed by a court of general jurisdiction.

2. Under Article 46 of the Constitution of the Russian Federation, everyone shall be guaranteed the right to judicial protection of his rights and freedoms, and decisions and actions (inactions) of the bodies of state power, local self-government, public associations and officials may be appealed in court. The Constitutional Court of the Russian Federation has repeatedly emphasized in its judgments (namely, the Judgment of 3 May 1995 in the case concerning the review of the constitutionality of Articles 220¹ and 220² of the Criminal Procedure Code of the RSFSR, Judgment of 2 July 1998 in the case concerning the review of the constitutionality of the provisions of Articles 331 and 464 of the Criminal Procedure Code of the RSFSR, etc.) that the right to judicial review also originates from the principle of protection of human dignity, which is proclaimed in Article 21 of the Constitution of the Russian Federation and specifically provides that the State shall ensure every person a possibility to defend his rights by entering in a dispute with any authorities and officials, including those conducting preliminary investigation in criminal cases.

Pursuant to the Criminal Procedure Code of the RSFSR, the institution of criminal proceedings and preliminary investigation are pretrial stages of criminal proceedings which are aimed to create conditions for effective administration of criminal justice. Once a criminal case file with an indictment has been forwarded to the court, it is precisely this body that in the course of consideration of a case will completely and comprehensively examine all the circumstances in a hearing, and review the procedural acts and other materials of the pre-trial investigation. Also the court reviews the investigative authorities' actions and decisions restricting individual rights and freedoms, *inter alia* upon complaints and requests of persons having legitimate interests.

Judicial supervision once the pre-trial investigation is completed may not be regarded as constituting a violation of the right to judicial protection in itself, since Article 46 (Section 2) of the Constitution of the Russian Federation ensures this right without defining any specific procedure for its implementation and thus permits judicial review of complaints against actions and decisions of authorities conducting preliminary investigation after the criminal case has been sent to court for trial.

However, should the respective actions and decisions of investigative authorities not only affect relations arising out of the criminal procedure, but also produce effects going beyond the scope of these relations and significantly restricting the constitutional rights and freedoms of an

individual, a delay of legality and reasonableness review until the trial may cause irreparable harm. In these situations, judicial supervision over the actions and decisions of authorities conducting the pre-trial investigation, if it occurs only during the trial (i.e. the next stage of criminal proceedings), is not an effective remedy to restore the violated rights. Therefore, persons having legitimate interests should be given an opportunity to lodge a complaint with a court, requesting judicial review immediately in the course of the preliminary investigation. An analogous legal opinion (regarding the review of the trial court rulings that precede judgment) was formulated by the Constitutional Court of the Russian Federation in its Judgment of 2 July 1998 in the proceedings on the constitutional review of certain provisions of Articles 331 and 464 of the Criminal Procedure Code of the RSFSR.

At the same time, the court reviewing procedural acts during the period of pre-trial investigations shall not prejudicially decide on issues that could become a matter of judicial proceedings in the criminal case. Otherwise, this would contradict the constitutional principle of judicial independence (Article 120 of the Constitution of the Russian Federation) that guarantees administration of criminal justice in an objective and impartial manner within adversarial proceedings.

3. The existing criminal procedure legislation provides that during the pre-trial stages of criminal proceedings only complaints against refusal to institute criminal proceedings, discontinuance of criminal proceedings and the arrest of an accused person or a suspect may be filed with a court. And under Articles 218 and 220 of the Criminal Procedure Code of the RSFSR, at these stages of proceedings the court has to dismiss applications for review of other actions and decisions from the persons whose constitutional rights are affected by these actions and decisions of investigative authorities, even if the violated rights cannot be later restored during the judicial proceedings. Furthermore, persons who have a legitimate interest in judicial review sometimes are not parties to criminal proceedings and they are not able to defend their interests in court after the investigation is completed and the criminal case file with an indictment has been forwarded to court. In particular, this rendered the right to judicial protection unenforceable for the applicant D. I. Fuflygin, whose home was searched and valuables were seized, and for the applicant Monokom LLC, whose financial assets on the settlement account with a commercial bank were attached in connection with the criminal proceedings. As a result, no judicial protection was actually available for the applicants' constitutional rights, such as the right to have property, possess, use and dispose of it both personally and jointly with other people (Section 2, Article 35) and the right to inviolability of home (Article 25).

Legal regulation, which leads to such consequences, does not correspond to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ratified by the Russian Federation on 30 March 1998). Within the meaning of Article 6 of the Convention everyone has the right to judicial protection, implying that in determination of civil rights and obligations an access to court within a reasonable time shall be guaranteed. This should serve as a guarantee against excessive restrictions on human rights and freedoms incompatible with the constitutional aims, in particular during the pre-trial stages of criminal proceedings.

Therefore, the failure to grant all persons having legitimate interests the right to seek judicial review of investigative authorities' actions and decisions which restrict the inviolability of their home or deprive them of an opportunity to dispose of their property, contradicts Article 46 (Sections 1 and 2) of the Constitution of the Russian Federation and narrows the scope of constitutional guarantees for the rights specified in Articles 25 and 35 (Sections 1 and 2) of the Constitution of the Russian Federation.

At the same time, within the meaning of procedural law in force and the requirement of holding a hearing within a reasonable time and without unjustified delays, immediate judicial protection of persons whose rights and legitimate interests are being violated by the actions and decisions of inquiry and investigative authorities does not imply mandatory termination of the challenged action or a stay in executing the challenged decision pending the court's examination of the respective complaint.

4. The constitutional right to judicial protection was not ensured in the proceedings involving B. A. Kekhman and V. I. Monastyretsky, who applied to the Constitutional Court of the Russian Federation in connection with a refusal of judicial review, under Articles 218 and 220 of the Criminal Procedure Code of the RSFSR, of the investigative authorities' actual inaction which resulted in a stay of proceedings and prolongation of the preliminary investigation.

This kind of procedural actions and decisions delay the prospective of judicial resolution of the case, preserve the uncertainty over the legal status of the participants in the proceedings, and prolong the periods of applying restrictive measures to individuals, including restraint measures and suspension from office, which took place in the case of V. I. Monastyretsky. Unlawful and unreasonable prolongation of the preliminary investigation, let alone a stay of proceedings on the case, may cause loss of evidence in the case and hence make it impossible for the parties to restore their violated rights and legitimate interests, violate the rights of the victims of the crime and abuse of power to access to justice and entitlement to compensation for the damage sustained (Article 52 of the Constitution of the Russian Federation).

5. Article 133 of the Criminal Procedure Code of the RSFSR, which is challenged by V. I. Monastyretsky, regulates prolongation of preliminary investigation. The literal meaning of the challenged Article implies that there should be no arbitrary and unlimited prolongation, because after a period of six months it may be approved only by the Prosecutor General of the Russian Federation or his Deputy and only in exceptional cases. The application of this norm within its constitutional meaning is ensured by Article 15 (Sections 1 and 4) of the Constitution of the Russian Federation that compels courts and authorities conducting preliminary investigation to fulfill such constitutional requirements as providing access to justice and judicial protection to all citizens (Articles 52 and 46), taking into account the international legal instruments establishing everyone's right to a fair and public hearing within a reasonable time and without undue delay (Section 1, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Subsection "c", Section 3, Article 14, International Covenant on Civil and Political Rights).

Accordingly, courts of general jurisdiction shall review the lawfulness and reasonableness of prolongation of investigation following complaints of persons having legitimate interests. They shall do so following the legal opinion of the Constitutional Court of the Russian Federation which requires determination of both the factual and legal basis of procedural acts restricting the rights and freedoms of individuals (as determined in the Judgment of 13 June 1996 regarding the constitutionality of Section 5, Article 97 of the Criminal Procedure Code of the RSFSR and in the Decision of 25 December 1998 regarding the constitutionality of Sections 4, 5 and 6, Article 97 of the Criminal Procedure Code of the RSFSR). Due regard shall be given to the provisions articulated by the Court in paragraphs 3–6 of the reasoning in the present Judgment in order to guarantee judicial protection without undue delays for persons whose rights and legitimate interests are violated by the investigative authorities' actions and decisions, including prolongation of preliminary investigation.

6. In his complaint, V. K. Borisov claims that the provisions of Article 218 of the Criminal Procedure Code of the RSFSR violate his constitutional rights by preventing him from challenging in court the order instituting criminal proceedings against him, which allegedly resulted in violation of his rights to liberty and security of person and inviolability of home by unreasonable detention during preliminary investigation, and searches conducted in his home and at his workplace.

However, neither the complaint nor the case file examined during the hearing in the Constitutional Court of the Russian Federation shows that institution of criminal proceedings as such caused restrictions of the rights stated by the applicant. On the contrary, those restrictions were associated precisely with the subsequent procedural actions, *inter alia* the arrest and the

search, which may be challenged in court in accordance with the existing criminal procedure legislation and the present Judgment.

Relying on these considerations, V. K. Borisov's complaint against violation of his constitutional rights and freedoms by Article 218 of the Criminal Procedure Code of the RSFSR, which allegedly precludes judicial review of the order instituting criminal proceedings against him, is inadmissible under Articles 96 and 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

Concluding from the above and pursuant to Section 1 and 2, Article 71, Articles 72, 74, 75 and 86, Article 68 and Section 1, Subsection 2, Article 43 of the Federal Constitutional Law "On the Constitutional Law of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provisions of Section 1, Article 218 and Article 220 of the Criminal Procedure Code of the RSFSR as non-conforming to the Constitution of the Russian Federation and its Article 46 (Section 1 and 2) and Article 52 insofar as they, within the meaning acquired in law-enforcement practice, preclude the interested persons whose constitutional rights have been violated from obtaining, during the preliminary investigation, judicial review of the actions and decisions made by the inquiry authority, investigator or prosecutor in relation to the search, property attachment, suspension of criminal proceedings or prolongation of preliminary investigations.

2. To recognize Article 133 of the Criminal Procedure Code of the RSFSR as conforming to the Constitution of the Russian Federation, since its provisions as such do not permit arbitrary and unlimited prolongation of preliminary investigation. The appropriate constitutional interpretation of this norm, within the meaning of Articles 46 and 52 of the Constitution of the Russian Federation and according to Paragraph 1 of the holding of this Judgment shall be in any case ensured by the court through review of the lawfulness and reasonableness of decisions to prolong preliminary investigation upon individual complaints.

3. To discontinue the proceedings upon V. K. Borisov's complaint, which is found inadmissible under the requirements of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

4. Pursuant to Section 2, Article 100 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", B. A. Kekman, V. I. Monastyretsky, D. I. Fuflygin and Monokom LLC, shall be guaranteed judicial review of the actions and decisions of the authorities conducting preliminary investigation specified in Paragraph 1 of the

reasoning of this Judgment, and such review shall comply with the rules of the procedural stage corresponding to the current status of the proceedings in their respective case.

5. 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.

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 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. 5-II