

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 14 March 2002 No. 6-II

in the case concerning the review of the constitutionality of Articles 90, 96, 122 and 216 of the Criminal Procedure Code of the RSFSR in connection with complaints of S. S. Malenkin, R. N. Martynov, and S. V. Pustovalov.

Moscow, 14 March 2002

The Constitutional Court of the Russian Federation composed of Presiding Judge G. A. Zhilin and Judges M. V. Baglay, Yu. M. Danilov, L. M. Zharkova, V. D. Zorkin, V. O. Luchin, N. V. Seleznev, V. G. Strekozov, O. S. Khokhryakova,

in the attendance of the attorney E. M. Noskova, representative of R. N. Martynov, and the attorney G. S. Kaganer, representative of S. V. Pustovalov; Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation V. V. Lazarev; and representative of the Council of the Federation Yu. A. Sharandin, Chairman of the Committee on Constitutional Legislation;

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, Articles 36, 74, 96, 97, 99 and 86 of the Federal Constitutional Law "On the Constitutional Court of the Russian",

in an open hearing, examined the constitutionality of Articles 90, 96, 122 and 216 of the Criminal Procedure Code of the RSFSR.

The reason for the consideration of the case is complaints of S. S. Malenkin, R. N. Martynov and S. V. Pustovalov about a violation of their constitutional rights by the provisions of the abovementioned articles of the Criminal Procedure Code of the RSFSR, which regulate procedures for detaining persons suspected of having committed a crime and for remanding them in custody as a measure of restraint.

The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by applicants are in conformity with the Constitution of the Russian Federation.

Having heard the report of Judge-Rapporteur N. V. Seleznev, statements by the parties' representatives, and interventions by the following representatives invited to participate in the hearing: Judge A. M. Brizitsky for the Supreme Court of the Russian Federation; A. Ya. Kachanov for the Office of the Prosecutor General of the Russian Federation; N. A. Ivanov for the Ministry of Justice of the Russian Federation; L. N. Bashkatov for the Federal Security Service; and G. G. Nikitin for the Commissioner on Human Rights 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 applicants – S. S. Malenkin, R. N. Martynov and S. V. Pustovalov – have been detained on a number of criminal charges with a prosecutor's authorization.

In their constitutional complaints, R. N. Martynov and S. V. Pustovalov challenge the constitutionality of Article 96 of the Criminal Procedure Code of the RSFSR, which determines that detention shall be used as a measure of restraint in conformity with the requirements of Article 11 of the Criminal Procedure Code of the RSFSR, i.e. it must be ordered by a court or authorized by a prosecutor, and thus defines the respective powers of officers serving in the prosecutor's office. The applicants allege that the provisions of this Article go contrary to Section 2, Article 22 of the Constitution of the Russian Federation, which stipulates that any arrest, detention or remand in custody may be authorized only by a court order and without a court order a person cannot be detained for more than 48 hours. In addition, S. V. Pustovalov requests to recognize, as non-conforming to the Constitution of the Russian Federation, Article 216 of the Criminal Procedure Code of the RSFSR which empowers the prosecutor approving an indictment to subject the accused to detention as a measure of restraint, even after the expiry of the maximal period for remand in custody established by Article 97 of the Criminal Procedure Code of the RSFSR.

In his complaint, S. S. Malenkin alleges a violation of the constitutional right to liberty and security of the person (Article 22 of the Constitution of the Russian Federation) by Article 90 of the Criminal Procedure Code of the RSFSR permitting, in exceptional circumstances, detention of a person suspected of having committed a crime with the prosecutor's authorization for a period of up to ten days before the charges are filed; and by Article 122 of the Criminal Procedure Code of the RSFSR permitting detention of a person suspected of having committed a crime for more than 48 hours without a court order.

Insofar as all the complaints concern essentially the same subject matter, i.e. the provisions of the criminal procedure legislation which permit restriction of liberty and security of

the person without a court order for more than 48 hours at various pretrial stages of criminal proceedings, the Constitutional Court of the Russian Federation is permitted to consider these applications together pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”.

2. The constitutional right to liberty and security of the person (Section 1, Article 22 of the Constitution of the Russian Federation) is recognized as a fundamental, inalienable human right which belongs to everyone from birth (Section 2, Article 17). And the specific criminal procedural guarantees provided by the Constitution of the Russian Federation for judicial protection of this right under Article 18 of the Constitution are directly applicable and therefore determine the meaning, contents and enforcement of the respective provisions of the criminal procedure legislation; they also regulate the adoption, modification and amendment of this legislation by the legislator.

Pursuant to Section 2, “Concluding and Transitional Provisions” (Subsection 6.2), of the Constitution of the Russian Federation, until the criminal procedure legislation is brought into conformity with the provisions of the Constitution the previous rules for arrest, detention and remand in custody of persons suspected of having committed a crime shall be preserved. Thus, the Constitution obliges the legislator to amend the legislation in force during the transitional period of unspecified duration so that the legal framework for the application of restraint measures incorporates the rules requiring a court order for arrest, detention, and remand in custody and establishing the maximum 48-hour period of detention without a court order.

The temporary nature of the procedures for arresting, detaining and keeping in custody persons suspected of having committed crimes, which are set forth in the criminal procedure legislation that existed before the enactment of the Constitution of the Russian Federation, is reaffirmed by the Federal Law “On Ratification of the European Convention on Human Rights and Fundamental Freedoms and Protocols Thereto” of 30 March 1998. In recognizing the right of every arrested or detained person to be brought promptly before a judge and to be tried within a reasonable time (Article 5 § 3–4 of the Convention), the Russian legislator has limited the scope of application of the procedures for arrest, detention, and remand in custody of persons suspected of having committed crimes, as provided by Subsection 6.2 of Section 2, “Concluding and Transitional Provisions”, of the Constitution of the Russian Federation, and by Section 1, Article 11, Section 1, Article 89, Articles 90, 92, 96, 96¹, 96², 97, 101 and 122 of the Criminal Procedure Code of the RSFSR, to a period necessary to amend the legislation of the Russian Federation and bring it in full compliance with the abovementioned provisions of the Convention.

Therefore, both the Constitution of the Russian Federation and the Federal Law “On Ratification of the European Convention on Human Rights and Fundamental Freedoms and Protocols Thereto” provide that the provisions of the criminal procedure legislation regulating the procedures for detention and remand in custody of persons suspected of having committed crimes should be treated as a transitional measure limited by a time period required to introduce appropriate amendments to the national legislation.

3. Where a constitutionally guaranteed right is to be protected through the enactment of a law, such duty must be discharged as quickly as possible. This legal opinion was articulated by the Constitutional Court of the Russian Federation in its Judgment of 2 February 1999 in the proceedings on the constitutional review of provisions of Article 41, Section 3, Article 42 of the Criminal Procedure Code of the RSFSR, and expressed in Sections 1 and 2 of the Decree of the Supreme Court of the Russian Federation of 16 July 1993, “On a Procedure of Entry into Force of the Law of the Russian Federation ‘On Amendments to the Law of RSFSR ‘On the Judicial System of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR, and the Administrative Offences Code of the RSFSR””.

The Constitutional Court of the Russian Federation expressed a legal opinion on the matter and reasserted it in its Judgment of 2 April 2001 concerning the complaint of S. V. Posokhov about a violation of his constitutional rights by Articles 90 and 122 of the Criminal Procedure Code of the RSFSR. As follows from the Court’s legal opinion, a sufficient period of time had elapsed after the adoption of the Constitution of the Russian Federation for the legislator not only to fulfill the requirement set out in Section 2, “Concluding and Transitional Provisions”, (Subsection 6.2) of the Constitution, for bringing the criminal procedure legislation in compliance with it, but also to ensure its implementation. As a result, the transitional provisions contained in the Constitution of the Russian Federation change their constitutional meaning as they actually become permanent rather than temporary rules in violation of not only the right guaranteed by Article 22 of the Constitution, but also of the principle proclaimed in its Article 18 stating that the rights and freedoms of man and citizen are directly applicable.

Consequently, the preservation of the prior procedures for detention and remand in custody already from that moment resulted in denial of the implementation of the judicial protection mechanism provided for the civil rights and freedoms of man and citizen by Article 2 of the Constitution of the Russian Federation, in spite of the constitutional meaning of Subsection 6.2 of “Concluding and Transitional Provisions” of the Constitution of the Russian Federation and the obligations undertaken by the Russian Federation through ratification of the European Convention on Human Rights.

At the same time judicial protection guarantees are of special importance in the context of restrictions imposed on one of the fundamental human rights, namely the right to liberty and security of the person. This is acknowledged by the European Convention on Human Rights and by the International Covenant on Civil and Political Rights. Under these international instruments, which form an integral part of the Russian legal system pursuant to Section 4, Article 15 of the Constitution of the Russian Federation, anyone arrested or detained on criminal charges shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (Article 5 § 3 of the European Convention on Human Rights and Article 9 § 3 of the International Covenant on Civil and Political Rights).

The abovementioned guarantees of the right to judicial protection must be ensured to the maximal possible extent as an inalienable human right that belongs to everyone from birth. These guarantees cannot be replaced by the entitlement provided by the regulations in force to the accused person or suspect put in detention as a measure of restraint, to file a complaint seeking judicial review of the lawfulness and reasonableness of his arrest or extension of remand in custody (Articles 220¹ and 220² of the Criminal Procedure Code of the RSFSR), since this approach allows restriction of liberty and security of the person without judicial oversight for a considerable period of time (until the complaint is dealt with by the court).

4. The Criminal Procedure Code of the Russian Federation was adopted on 18 December 2001. However, pursuant to the Federal Law “On the Entry into Force of the Criminal Procedure Code of the Russian Federation” of 18 December 2001, it is only on 1 January 2004 that Section 2 of Article 29 will enter into force. This section reserves only for courts the powers to impose such measures of restraint as detention or house arrest and to extend the period of remand in custody in the course of pretrial proceedings. The other related provisions transferring to the court the power to impose detention as a measure of restraint and to extend the period of remand in custody in the course of pretrial criminal proceedings will come into force on the same date. In the meantime, the prosecutor will continue to make decisions on these matters.

Thus, until the mentioned moment the procedure for non-judicial restriction of liberty and security of the person will be still preserved as a part of the Russian legal system, i.e. it will be actually considered by the legislator as compliant with the Constitution of the Russian Federation. Therefore, the legislator employed a purely formalistic approach to fulfilling the requirement set forth in Subsection 6.2 of “Concluding and Transitional Provisions” of the Constitution, and this approach runs counter to the actual meaning of the requirement in question. Moreover, preservation of the former procedure for detaining a person and remanding him in custody as a measure of restraint constitutes not only a deviation from the special

procedural guarantees for the right to liberty and security of the person, which are proclaimed in Section 2, Article 22, and Section 1, Article 46 of the Constitution of the Russian Federation, but also from the principle of direct application of the rights and freedoms of man and citizen, which is enshrined in Articles 17 and 18 of the Constitution, and from the duty of the Russian Federation to recognize and guarantee these rights in accordance with the generally recognized principles and norms of international law. The legislative approach in question is neither consistent with the effective legal opinions expressed on the matter by the Constitutional Court of the Russian Federation, nor compatible with the obligations assumed by Russia upon ratification of the European Convention on Human Rights.

Therefore, as there are no grounds to keep the provisions of Articles 90, 96, 122 and 216 of the Criminal Procedure Code of the RSFSR, which permit detention of a suspect for more than 48 hours and remanding him in custody as a measure of restraint, in effect at the present time, these provisions may not be considered to be in compliance with the Constitution of the Russian Federation.

The Federal Assembly shall accordingly amend the legislation without any delay in order to ensure entry into force of the provisions prescribing a judicial procedure for arrest (detention), remand in custody, and detention of a suspect for more than 48 hours, simultaneously with the entry into force of the Criminal Procedure Code of the Russian Federation as a unified system of norms determining the fundamental principles and procedures of criminal proceedings from 1 July 2002.

Concluding from the above and pursuant to Sections 1 and 2, Article 71, Articles 72, 74, 75, 79, 80, 87 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 provisions of Article 90, 96, 122 and 216 of the Criminal Procedure Code of the RSFSR, which permit detention of a suspect for more than 48 hours and remanding him in custody as a measure of restraint without a court order, as non-conforming to the Constitution of the Russian Federation, its Articles 17 and 22, Section 1, Article 46, and to Subsection 6.2 of its Section 2, “Concluding and Transitional Provisions”.

The abovementioned provisions of the Criminal Procedure Code of the RSFSR along with all other normative legal rules which permit, in the absence of a court order, detention of a person for more than 48 hours as well as arrest (detention) and remand in custody, shall not be applied from 1 July 2002 onwards.

2. The Federal Assembly shall, without any delay, amend the legislation in order to ensure entry into force of the rules prescribing a judicial procedure for arrest (detention), remand in custody, and detention of a suspect for more than 48 hours from 1 July 2002 onwards.

3. Pursuant to Sections 1 and 2, 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.

4. 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

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