

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment  
of 16 July 2008 No. 9-II

in the case concerning the review of the constitutionality of the provisions of Article 82 of the Criminal Procedure Code of the Russian Federation, in connection with a complaint of V. V. Kostylev.

Saint Petersburg, 16 July 2008

The Constitutional Court of the Russian Federation composed of Presiding Judge Yu. M. Danilov and Judges L. M. Zharkova, G. A. Zhilin, S. M. Kazantsev, M. I. Kleandrov, N. V. Seleznev, V. G. Strekozov,

in the attendance of attorney N. A. Opimakova, as V. V. Kostylev's representative, Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation A. N. Kharitonov, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. V. Krotov,

pursuant to Section 4, Article 125 of the Constitution of Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 86, 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 Article 82 of the Criminal Procedure Code of the Russian Federation.

The reason for the consideration of the case is a complaint of V. V. Kostylev about violation of his constitutional rights by the provisions of Subsection 1 (c), Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation. The ground for the consideration of the case is the discovered uncertainty about whether the provisions challenged by the applicant 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, interventions by the participants invited to the hearing, T. A. Vasilyeva for the Prosecutor General of the Russian Federation, A. V. Timofeyev for the Investigative Committee in the Office of the Prosecutor General of the Russian Federation, L. G. Podgornaya for the Federal Customs Service, having considered written submission and other materials, the Constitutional Court of the Russian Federation

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

1. Subsection 1, Section 2, Article 82 “Storage of material evidence” of the Criminal Procedure Code of the Russian Federation, provides that objects which cannot be kept along with the criminal case file because of their bulkiness or for other reasons, including large consignments of goods that are complicated to store, or when their special storage costs are comparable with their value shall be photographed, videotaped or filmed, sealed (where possible), and kept in a place indicated by the inquirer or investigator. The document specifying the location of such material evidence shall be appended to the criminal case file, also a sample of the material evidence sufficient for comparative examination may be appended (Subsection 1 “a”); or the evidence shall be returned to their lawful owner, if possible without detriment to the proving of guilt (Subsection 1 “b”); or it shall be transferred for sale in accordance with the procedure established by the Government of the Russian Federation. For the time limit prescribed by Section 1 of the said Article the revenue from the sale shall be transferred to the deposit account of the authority that rendered the decision to seize the said material evidence. A sample of the material evidence sufficient for comparative examination may be included in the criminal case file (Subsection 1 “c”). According to Section 4 of the mentioned Article, the transfer of the abovementioned objects for sale shall be based on a decision of an inquirer, an investigator, or a judge.

V. V. Kostylev, the applicant in the present case, alleges that Subsection 1 “c”, Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation, applied in his respect, permits deprivation of the owner of his property which has been recognized as material evidence in the criminal case, without judicial decision, which constitutes violation of the guarantees of the right to property ensured by Article 35 (Section 3) of the Constitution of the Russian Federation.

1.1. On 20 September 2005, the Moscow-Smolensk Transport Prosecutor’s Office of Moscow instituted criminal proceedings based on elements of crime provided by Section 1, Article 188, “Smuggling” of the Criminal Code of the Russian Federation, in connection with the shipment of two helicopters BELL 407 across the customs border of the Russian Federation in 2004. One of the mentioned helicopters was purchased under an agency contract by V. V. Kostylev. The helicopters were recognized as material evidence by the investigator of the Line Department of Internal Affairs at the station of Moscow-Beloruskaya and passed for safekeeping to authorized organizations of the Russian Federal Property Fund. The Tverskoy District Court of Moscow ruled in part in favor of the complaint of V. V. Kostylev against the mentioned decisions. In particular, the court indicated that the transfer of the helicopter BELL 407 (serial number 53605) for safekeeping to the owner shall not cause any damage to the

criminal proceedings, and in its decision of 22 March 2006 it recognized the actions and decisions of the investigator as unreasonable to the extent that they order the transfer of the abovementioned helicopter for safekeeping to the limited liability company RoDan M. The court ordered the investigator to rectify the violations committed.

Meanwhile, on 16 May 2006, the investigator of the Moscow-Smolensk Transport Prosecutor's Office, who decided that the storage of as bulky material evidence as an aircraft is complicated and entails costs comparable with its value. The helicopter, which belonged to V. V. Kostylev, was transferred for sale by the decision of the investigator to the Russian Federal Property Fund and purchased by LLC Master-broker on 9 June 2006. The judge of the Presnensky District Court of Moscow agreed with the conclusion on inexpediency of further storage of the helicopters and, in its decision of 12 December 2006, dismissed the complaint of V. V. Kostylev against the investigator's decision.

1.2. Thereby, the subject matter of the present proceedings are interconnected provisions of Subsection 1 "c", Section 2 and Section 4, Article 82 of the Criminal Procedure Code of the Russian Federation, to the extent that they provide for the sale of property seized as material evidence in the form of objects which cannot be kept along with the criminal case file because of their bulkiness or for other reasons, including large consignments of goods that are complicated to store, or when the special storage costs are comparable with their value, on the basis of a decision of an inquirer, an investigator, or a judge.

2. Pursuant to the Constitution of the Russian Federation, recognition, observance and protection of the right to property, belonging to the fundamental rights which are inalienable and belong to everyone from birth, is the duty of the State; at the same time, private, state, municipal and other forms of property enjoy equal recognition and protection in the Russian Federation (Article 2, Article 3, Section 2, Article 17, Section 2).

As one of the fundamentals of the constitutional order, the right to property, as follows from Article 18 of the Constitution of the Russian Federation, along with other rights and freedoms of man and citizen determines the meaning, content and application of laws and the activity of legislative and executive bodies and of local self-government and shall be ensured by administration of justice. On the basis of the above considerations, Article 35 of the Constitution of the Russian Federation, provides that the right to private property shall be protected by law (Section 1); everyone shall be entitled to have property, possess, use and dispose of it both personally and jointly with other people (Section 2); no one may be deprived of property otherwise than by a court decision; property can be taken for state needs only on condition of prior and equal compensation (Section 3).

In the cited provisions of the Constitution of the Russian Federation, one of the fundamental aspects of the supremacy of law is expressed – the principle of inviolability of property, which is universally recognized in civilized states and which is a guarantee of the right to property in all its aspects such as possession, use and disposal of one’s property. The provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms are in line with this idea. According to them, every natural or legal person is entitled to peaceful enjoyment of his possessions; no one shall be deprived of his possessions except in the public interests and subject to conditions provided for by law and by the general principles of international law; the State have the right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest (Article 1 “Protection of property” of Protocol No. 1 to the Convention); in determining his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6 § 1 of the Convention).

Due to such fundamental principles as supremacy of law and equality before the law, state interference in property relations shall not be arbitrary and shall not violate the balance between social interests and necessary conditions for protection of personal fundamental rights. It presumes reasonable proportionality between the means used and the aims pursued in order to ensure a balance of constitutionally protected values and to protect a person against excessive burden.

Accordingly, the Constitution of the Russian Federation, vesting the federal legislator with a certain discretion in regulating the right to property and relations of possession, use and disposal of property interconnected with this right (Article 71, Subsections “c” and “o”), stipulates, in Article 55 (Section 3), that the rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State. It follows from the abovementioned provision in conjunction with Articles 8, 17 (Section 3), 19 (Sections 1 and 2), 34 and 35 of the Constitution of the Russian Federation that the right to property and entrepreneurial and economic activities may be restricted by the federal law only if it is necessary for the protection of other constitutional values, including the rights and lawful interests of other people. Such restrictions shall meet the requirement of justice, reasonableness, proportionality, have a general and abstract character, may not have retroactive effect, and shall not affect the essence of this constitutional right.

The constitutional guarantees of private property protection by law and the possibility of seizing property only on the basis of a court decision reflecting the principle of inviolability of

property, as well as the constitutional guarantees of judicial protection apply both to the sphere of civil law relations and to the relations between the individual and the State in the public law sphere. It means that in case of seizure of property from its owner, regardless of the basis of such seizure (including seizures aiming to safeguard criminal proceedings), since such seizure has a coercive character and implies the presence of a dispute over the right to this property, effective judicial review shall be necessarily conducted.

3. Property as a civilized basis and an expression of human freedom is a necessary condition of freedom of economic (including entrepreneurial) activity, which presumes freedom of contract and equality of subjects of this activity, whose legal status is predetermined by the right to private property and by guarantees of this right and criteria of its possible restrictions, provided by the Constitution of the Russian Federation. Governed by the abovementioned considerations, the Civil Code of the Russian Federation provides for inviolability of property, freedom of contract, equality, autonomy of will and proprietary independence of subjects in civil transactions, free exercise of the civil rights, prohibition of arbitrary interference of anyone in private affairs, guarantee of remedy for the violated rights and their judicial protection as the fundamental principles of civil legislation (Subsection 1, Article 1, Subsection 1, Article 2).

The mentioned fundamental legal principles of property and freedom of economic activity, as determined in the Constitution of the Russian Federation and the Civil Code of the Russian Federation, underlie any legislative regulation in the sphere of property relations, including the determination of the basis and order for the rights to possess, use and dispose of property to be created, altered, and terminated, as well as an appropriate scope of their protection and lawful restrictions.

According to Article 235 of the Civil Code of the Russian Federation, the right to property is terminated by alienation of property by its owner in favour of other persons, renunciation by the owner of his right to property, loss or destruction of the property, and with the loss of the right to property in other circumstances prescribed by law (Subsection 1); involuntary taking of property from the owner may not be permitted except where, on grounds prescribed by law, the recovery is effected against property on the basis of civil obligation taking of the property, which pursuant to the law may not be owned by this person, taking of immovable property due to the taking of a land plot, redemption of mismanaged cultural values or domestic animals, requisition, forfeiture, the taking of property in other cases prescribed by the Code (Subsection 2).

Therefore, termination of the right to property is possible only under the will of the owner or under circumstances which cannot be considered as actions of a third party directed

specifically at terminating the right to property, or as a result of involuntary taking of property from the owner on legal grounds.

3.1. According to the Criminal Procedure Code of the Russian Federation, objects (including criminally acquired property or objects that may serve as a basis for determining facts of a criminal case), recognized as material evidence, shall be included in the criminal case file (Section 2, Article 81); material evidence must be kept along with the criminal case file until the judgment becomes final or until the time limit of filing complaints against the order or decision to discontinue the criminal proceedings expires, and shall be transferred along with the criminal case file except for cases prescribed by law. When a dispute over the right to property which is material evidence is to be resolved in civil proceedings, such material evidence shall be stored until the court decision becomes final (Section 1, Article 82).

Pursuant to Section 3, Article 81 of the Criminal Procedure Code of the Russian Federation, when a judgment is adopted or when the criminal proceedings are discontinued by an order or decision, the issue of disposal of material evidence shall be resolved. Instruments of crime shall be confiscated or transferred to appropriate institutions or destroyed (Subsection 1); prohibited objects shall be transferred to appropriate institutions or destroyed (Subsection 2); objects of no value and not claimed by a party shall be destroyed, but they may be transferred to the interested persons or institutions upon their request (Subsection 3), criminally acquired money, valuables and other criminally acquired property and any income acquired from this property shall be returned to the lawful owner (Subsection 4). Money, valuables and other property listed in Subsections “a”–“c”, Section 1, Articles 104<sup>1</sup> of the Criminal Code of the Russian Federation, shall be confiscated following the order established by the Government of the Russian Federation, except for circumstances prescribed by Subsection 4 of this Section (Subsection 4<sup>1</sup>). Documents which are material evidence shall remain in the case file for the whole period of its storage or shall be transferred to the interested persons upon their request (Subsection 5). Other objects shall be transferred to their lawful owners or, if they are not identified, to the property of the State. Any disputes over the ownership of material evidence shall be resolved in civil proceedings (Subsection 6). Section 4 of the same Article provides that objects seized in the course of the pre-trial proceedings which have not been recognized as material evidence shall be returned to the persons they were seized from.

Accordingly, the Criminal Procedure Code of the Russian Federation determines the investigator’s power to decide on the material evidence while rendering a decision to discontinue the criminal proceedings and criminal prosecution (Subsection 9, Section 1, Article 213) and the court’s power, in rendering a judgment, to decide whether to rule in favour of a civil lawsuit, in whose favour, in what amount, and how to dispose of the material evidence and property

distrained for the purpose of securing the civil lawsuit or potential forfeiture (Subsections 10, 11, 12, Section 1, Article 299).

As follows from the cited provisions establishing a common order of deciding on material evidence, the taking of property which is recognized as material evidence from its owner shall be conducted as a result of adopting a judicial decision on the merits of a criminal case, which meets the requirement of Article 35 (Section 3) of the Constitution of the Russian Federation, pursuant to which no one may be deprived of property otherwise than by a court decision, and pursuant to the norm of Article 255 of the Civil Code of the Russian Federation, which establishes grounds for terminating the right to property.

3.2. Within the meaning of Article 35 in conjunction with Article 55 (Section 3) of the Constitution of the Russian Federation, possible restrictions of the right to property in order to protect the public interests may be conditioned, in particular, by the necessity to safeguard the criminal proceedings. For this purposes persons conducting the inquiry and preliminary investigation are vested with the powers to apply respective interim measures concerning the taking of the property.

Addressing the issue of permissibility of the taking of property from its owner or lawful possessor on the basis of a decision of a state authority or official preventing, suppressing or detecting an offence, the Constitutional Court of the Russian Federation has expressed a legal opinion pursuant to which temporary alienation of property, which serves as a procedural interim measure and does not entail transfer of the right to property, shall not be considered violation of the constitutional rights and freedoms, including the right to property. And the persons to whom these measures restricting their rights of possession, use and disposal are applied are provided with the right to appeal against respective decisions and actions to a court under Article 46 (Section 2) of the Constitution of the Russian Federation.

The cited legal opinion, expressed by the Constitutional Court of the Russian Federation in Judgments No. 8-II of 20 May 1997 and No. 8-II of 11 March 1998 does not preclude the imposition by the legislator of additional guarantees for the protection of the right to property, *inter alia* in the form of preliminary judicial review of the lawfulness and reasonableness of the temporary alienation of the property, as stipulated, for example, by Subsection 9, Section 2, Article 29 and Section 1, Article 115 of the Criminal Procedure Code of the Russian Federation regarding distraining of property to secure enforcement of a judgment inasmuch as it pertains to a civil lawsuit, other pecuniary penalties, or potential forfeiture of property, stipulated by Section 1, Articles 104<sup>1</sup> of the Criminal Code of the Russian Federation.

At the same time, the court's assessment of the lawfulness and reasonableness of property alienation from its owner to include it in the criminal case file as material evidence, within the

meaning of Articles 81 and 82 of the Criminal Procedure Code of the Russian Federation, shall not be limited to formal determination of conformity with the law of the powers of the investigative authorities' officials who applied the above measure. The court must come to the conclusion that other measures may not guarantee implementation of the tasks of the criminal proceedings. In such cases, the court shall take into consideration both the gravity of the crime, in connection with the investigation of which the issue of alienation of the property is examined, and the characteristics of the property, including its value, significance for the owner or other lawful possessor and society, as well as the possible negative results of alienation. Depending on the mentioned circumstances, the inquirer, investigator and then the court deciding on the recognition of the property as material evidence should determine whether this property is subject to seizure or, as provided by Subsection 1 "a" and "b", Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation, it shall be photographed, videotaped or filmed and returned to the legal owner until the decision in the criminal proceedings is adopted.

3.3. Along with the provisions which establish the order and conditions of temporary (only for the period of the preliminary investigation or the trial) storage of material evidence included in the criminal case file, Article 82 of the Criminal Procedure Code of the Russian Federation contains provisions which allow to finally determine the fate of material evidence before the criminal proceedings are finished.

Thus, in compliance with Subsection 3, Section 2 of the present Article, material evidence in the form of ethyl alcohol, alcoholic and alcohol-containing products excluded from illegal circulation, and objects that, if stored for a long time, may be dangerous to the life and health of people or to the environment, after being tested as required shall be transferred for technological reprocessing or shall be destroyed, with an official record to be drawn up under Article 166 of the Criminal Procedure Code of the Russian Federation.

Elaborating on the legal opinion which was expressed earlier, in its Decision No. 97-O of 10 March 2005 the Constitutional Court of the Russian Federation came to conclusion that such measure (unlike the storage of material evidence) is aimed at providing protection of health, rights and lawful interests of citizens rather than creating conditions for adopting reasonable decisions on the merits of the criminal case. As a result of applying this measure, taking, deprivation of the owner of his property takes place, not temporary alienation of the property. That is why in such cases *ex post* judicial review cannot be recognized as an effective guarantee of the right to property. This right may be recognized as guaranteed only provided that the court adopts a respective decision taking into account the constitutionally significant aims and the circumstances of a specific criminal case. Subsection 3, Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation and other provisions of that Article do not mention

that such decisions shall be rendered by an inquirer or an investigator and, thereby, imply that they shall be rendered only by court.

Thereby, as follows from the legal opinions expressed by the Constitutional Court of the Russian Federation, property seizure from its owner or lawful possessor is permissible only in cases when such seizure, as a procedural interim measure, is temporary, does not lead to deprivation of the right to property and implies *ex post* judicial review. The taking of property, which was seized as material evidence in the criminal case, is impossible without a judicial decision.

3.4. Among the provisions which allow to finally determine what to do with the material evidence before the criminal proceedings are finished are the interconnected provisions of Subsection 1 “c”, Section 2 and Section 4, Article 82 of the Criminal Procedure Code of the Russian Federation. The measure prescribed by the abovementioned provisions (transfer for sale of the respective material evidence under a decision of an inquirer, an investigator or a judge) is not aimed at temporary seizure of property and its storage as material evidence in order for a reasonable and reasoned decision on the merits of the criminal case to be adopted. The task of this measure is to avoid difficulties and significant expenses of providing special conditions for storage of bulky objects, large consignments of goods, etc. As a result, property is taken from the owner, not temporarily seized, i.e. the owner is deprived of his property within the meaning of Article 35 (Section 3) of the Constitution of the Russian Federation. In this situation, *ex post* judicial review of the lawfulness and reasonableness of applying the abovementioned measure cannot not be recognized as an effective guarantee of the right to property.

Involuntary alienation of property, entailing termination of the right to the mentioned property, is in its essence taking of and thereby due to full and effective protection of the right to property and criteria of fair trial may not be effected without preliminary judicial review and adoption of a respective judicial act (Articles 35 and 46 of the Constitution of the Russian Federation, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms). Precisely for this reason the right stipulated by Article 35 (Section 3) of the Constitution of the Russian Federation may be recognized as guaranteed only if the issue of depriving of property recognized as material evidence (Subsection 1 “c”, Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation) may be resolved only upon examination of the criminal case on its merits. Otherwise it would result in violation of constitutional guarantees of the right to property, and would mean that the taking of property recognized as material evidence from the owner or lawful possessor is carried out in the absence of a final judgment, which resolves issues related to this property as material evidence (Article 81 and Subsection 2, Section 1, Article 309 of the Criminal Procedure Code of the Russian Federation),

or before a court decision which resolves the dispute over property recognized as material evidence and falling within the scope of civil proceedings becomes final.

Consequently, the restriction of the right to property stipulated by Subsection 1 “c”, Section 2 in conjunction with Section 4, Article 82 of the Criminal Procedure Code of the Russian Federation shall not be recognized as lawful in the context of the requirements stipulated by Article 8 (Section 2), Article 35 (Sections 1–3), Articles 46 and 55 (Section 3) of the Constitution of the Russian Federation, since, with regard to material evidence stipulated by the mentioned legal provisions, the means chosen by the federal legislator are disproportionate to the aims pursued. This restriction of the right to property is not necessary, as the presumed aims for the achievement of which it is imposed may be achieved by other adequate measures, in particular, those provided by Subsection 1 “a” and “b”, Section 2, Article 82 of the Criminal Procedure Code of the Russian Federation. These latter measures do not entail taking of the property from its owner or lawful possessor before the criminal case is examined on its merits. Along with that, considering the exclusive public responsibility of the State for the organization of the criminal proceedings, the federal legislator, in order to develop the legislation in force, has the right to amend the current legal regulation on storage, stock-taking and transferring of material evidence, giving due regard to the Constitution of the Russian Federation and the present Judgment.

Concluding from the above and pursuant to 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 the interconnected provision of Subsection 1 “c”, Section 2 and 4, Article 82 of the Criminal Procedure Code of the Russian Federation providing that objects which cannot be kept along with the criminal case file because of their bulkiness or for other reasons, including large consignments of goods that are complicated to store or whose special storage costs are comparable with their value shall be transferred for sale on the basis of a decision of an inquirer, an investigator or a judge, as non-conforming to the Constitution of the Russian Federation and its Articles 35 (Sections 1 and 3) and 55 (Section 3), to the extent that these legal provisions allow to deprive an owner or a lawful possessor of his property recognized as material evidence in the absence of a final judgment which resolves issues related to this property as material evidence, or before a court decision which resolves the dispute over property recognized as material evidence and falling within the scope of civil proceedings becomes final.

2. The law-enforcement decisions rendered in respect of V. V. Kostylev on the basis of the provisions of Subsection 1 “c”, Section 2 and Section 4, Article 82 of the Criminal Procedure Code of the Russian Federation, recognized by the present Judgment as non-conforming to the Constitution of the Russian Federation, shall in any case be reviewed by the competent authority.

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

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

No. 9-II