

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 20 April 2009 No. 7-II

in the case concerning the review of the constitutionality of the provisions of Subsection 11, Article 38 of the Federal Law “On Military Duty and Military Service”, in connection with a complaint of I. N. Kuashev.

Saint Petersburg, 20 April 2009

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

in the attendance of the attorney A. Kh. Bittirov as I. N. Kuashev’s representative, Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation A. N. Kharitonov, Representative of the Council of the Federation Ye. V. Vinogradova, PhD in Law,

pursuant to Section 4, Article 125 of the Constitution of the 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 Subsection 11, Article 38 of the Federal Law “On Military Duty and Military Service”.

The reason for the consideration of the case is a complaint of I. N. Kuashev. The ground for the consideration of the case is the discovered uncertainty of 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, interventions by T. A. Vasilyeva, representative of the Prosecutor General of the Russian Federation, A. P. Spitsyn, representative of the Investigative Committee under the Prosecutor’s Office of the Russian Federation, V. V. Vinogradov, representative of the Ministry of Defence, 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. Pursuant to Federal Law No. 53-Φ3 of 28 March 1998, “On Military Duty and Military Service”, upon the expiration of the period of conscription military service, a serviceman shall be discharged from military service (Subsection “b”, Section 1, Article 51); the date of the end of military service is the date when servicemen are excluded from the list of personnel of military units (Subsection 1, Section 11, Article 38); a serviceman shall be excluded from the list of personnel of a military unit on the expiration date of the military service period (Subsection 2, Section 11, Article 38), except certain cases, in particular, where the serviceman is under prosecution (Subsection 9, Section 11, Article 38).

On 28 March 2008, a criminal case under Subsections “a” and “c”, Article 163 of the Criminal Code of the Russian Federation (extortion with violence, committed under prior conspiracy by a group of persons) was initiated against I. N. Kuashev, who is the applicant in the present case and whose period of military service expired on 8 June 2008.

After the urgent investigative actions were conducted the case was transmitted for preliminary investigation to the Military Investigative Department of the Investigative Committee under the Prosecutor’s Office of the Russian Federation for the Sochi Garrison.

On 12 May 2008, I. N. Kuashev was interrogated as a suspect within the framework of the proceedings on this criminal case; only on 4 December 2008 he was charged with a crime, and on 8 December 2008 the measure of restraint in the form of supervision by military unit command was imposed on him. However, pursuant to Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, he was on the list of the military unit’s personnel. I. N. Kuashev’s attorney appealed against the actions of the investigative bodies’ officials who repeatedly extended the period of preliminary investigation in the criminal case against I. N. Kuashev. By the judgment of the Sochi Garrison Military Court of 16 December 2008, these actions were recognized unlawful and unreasonable.

The criminal case received by the Military Prosecutor’s Office of the Sochi Garrison on 10 December 2008 was returned for further investigation, elimination of the discovered deficiencies and re-drafting of the bill of indictment. On 18 February 2009, the bill of indictment against I. N. Kuashev was approved by the Military Prosecutor of the Sochi Garrison and the case was transmitted to the Volgograd Garrison Military Court (at the venue of the crime) for examination on its merits.

On 3 February 2009, the measure of restraint which had been previously imposed on the applicant was annulled and the measure of restraint in the form of commitment to appear was chosen. By the military unit commander’s order of 24 February 2009, I. N. Kuashev was excluded from the list of the military unit personnel.

I. N. Kuashev challenges the constitutionality of Subsection 11, Article 38 of the Federal Law “On Military Duty and Military Service”, to the extent that it served as a legal ground for the limitation of his right to be discharged from conscription military service after the expiration of its period. In the applicant’s opinion, the mentioned provisions violate the rights and freedoms guaranteed by Articles 2, 15, 19, 22 and 27 of the Constitution of the Russian Federation as they allow retaining a serviceman in military service after the expiration of its period if a criminal case is initiated against this serviceman and a measure of restraint is not imposed.

Thus, pursuant to Articles 74, 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the subject matter of consideration by the Constitutional Court of the Russian Federation in the present case is the normative provisions of Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, pursuant to which servicemen under prosecution shall not be excluded from the list of personnel of a military unit on the date of expiration of his military service period.

2. Pursuant to the Constitution of the Russian Federation, protection of the fatherland is the duty and obligation of citizens of the Russian Federation; citizens of the Russian Federation shall perform military service as prescribed by federal law (Sections 1 and 2, Article 59). Implementing this constitutional requirement in legal regulation, the federal legislator provides for proper performance by a citizen of obligations predetermined by military service, and at the same time the federal legislator provides for lawful nature of activity of the respective authorities and officials.

Within the meaning of Article 59 of the Constitution of the Russian Federation in conjunction with its Articles 17 (Section 3), 19 (Sections 1 and 2), 55 (Sections 2 and 3), 60 and 71 (Subsections “c” and “l”), the specificity of the serviceman’s legal status presumes certain restrictions of the constitutional rights and freedoms of persons who perform military service. Imposing these restrictions the federal legislator shall rely on aims and constitutional purpose of military service as such, and shall ensure proportionality between the imposed restrictions and these aims giving due regard to the character and objective conditions of performing military service.

3. The prohibition to exclude a serviceman from the list of the military unit’s personnel on the date of expiration of the conscription military service period if this serviceman is under prosecution provided in Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, is in itself a restriction of the serviceman’s right to be discharged from military service after expiration of its period. This prohibition has general character, i.e. presumes obligatory retention of a serviceman on the list of military unit personnel regardless of the commanders’ discretion or the serviceman’s will.

At the same time, such restrictive measure is not predetermined by the essence and character of military service and is not aimed at ensuring performance of military service. Considering the literal meaning of the mentioned provision, its place in the system of legal norms determining the status of servicemen, norms establishing the procedure and conditions of criminal prosecution, including application of measures of procedural compulsion under Chapters 13 and 14 of the Criminal Procedure Code of the Russian Federation, this restrictive measure is aimed at ensuring conditions for criminal prosecution.

Retaining a serviceman on the list of the personnel of a military unit under Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, is thus an interim measure. The necessity of this measure is predetermined by the preliminary investigation against this serviceman and it may be applied only if there are respective criminal law relations present. These relations appear and develop under the criminal procedure legislation. The same understanding follows from Article 1 of the Criminal Procedure Code of the Russian Federation, which directly provides that the procedure for criminal proceedings is established by the Code relying on the Constitution of the Russian Federation and shall be binding upon courts, prosecution authorities, preliminary investigation and inquiry authorities, and other participants in criminal proceedings (Sections 1 and 2).

Consequently, the provision of Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, may not in itself be considered as an appropriate and separate ground for restricting the serviceman’s right to timely discharge from the military service and shall not be applied out of the context of criminal procedural norms. Any other approach would be a deviation from the requirement of equality in criminal prosecution against citizens. who perform military service (Sections 1 and 2, Article 19 and Article 59 of the Constitution of the Russian Federation), especially if one gives due regard to the fact that such restrictions do not follow from the law determining military service obligations and from the standpoint of its aims may not be recognized as either reasonable or proportionate.

4. With regard to the criminal procedure legislation, the term “under prosecution” which is used in the Federal Law “On Military Duty and Military Service” may only mean that a serviceman is criminally prosecuted in a criminal case. Meanwhile, in itself this legal fact, serving as a basis for the creation and development of criminal procedure relations, is not considered in the criminal procedure as a sufficient ground for further restrictions on the legal status of the prosecuted person since these restrictions are possible only under special acts of the criminal prosecution authorities. Consequently, the application of Subsection 9, Section 11, Article 38 of the mentioned Federal Law, equally may not take place without adopting a special procedural decision by the preliminary investigation authorities or by a court.

Pursuant to Articles 97 and 98 of the Criminal Procedure Code of the Russian Federation, an inquiry officer, investigator, prosecutor, or court acting within the scope of powers vested in them, may impose one of the measures of restraint prescribed by the Code, namely, a recognizance not to leave the territory, a personal surety, supervision by a military unit command, bail, house arrest, detention, and only if there are grounds which are provided by the criminal procedure law itself. In order to secure the procedure for criminal proceedings as set by the Code and due enforcement of judgments, an inquiry officer, investigator, prosecutor, or a court may apply other measures of procedural compulsion to a suspect or an accused, in particular, commitment to appear (Subsection 1, Section 1, Article 111, Article 112 of the Criminal Procedure Code of the Russian Federation).

Any of the mentioned measures of procedural compulsion may be imposed on servicemen who are suspects or accused if there are appropriate grounds. As a special measure of restraint, which is imposed only on military servicemen, the Criminal Procedure Code of the Russian Federation provides for supervision by the military unit command. This measure of restraint consists in applying measures provided by the regulations of Armed Forces of the Russian Federation with the aim to ensure the respective person's performance of his obligations indicated in Subsection 2 and 3, Article 102 of the Code (to appear when summoned by the inquiry officer, investigator, prosecutor, or court at the designated time and not to obstruct in any other way proceedings in the criminal case). Supervision by the military unit's command is permissible only with the consent of the suspect or the accused, and the decision to impose this measure of restraint forwarded to the command of the military unit shall clarify the nature of the suspicion or charge against this person and his obligations under this measure of restraint (Article 104).

Besides, pursuant to Federal Law No. 103-Φ3, "On Detention of Suspects and Accused of Commission of Crimes", military servicemen who are suspects or accused are detained in detention quarters in cases and in order provided by the Criminal Procedure Code of the Russian Federation, the mentioned Federal Law, and other normative acts which regulate the organization and order of performing garrison and guard service in the Armed Forces of the Russian Federation. Under the mentioned provisions, commanders of military units (ships) who oversee detention quarters and heads of garrison detention quarters are considered to be heads of places of detention (Section 3, Article 12).

It is the command of a military unit that is provided with the right not to exclude a serviceman from the list of the personnel of the military unit on the date of expiration of his military service period if the respective measures of restraint are imposed on this serviceman. The reason for that is that the mentioned authorities and officials ensure the order of performing

military service if the measure of restraint in the form of supervision by the command of a military unit or remand to custody with detention in the detention quarter is imposed on a serviceman who is suspected or accused of committing a crime.

Thus, when a measure of restraint on a military serviceman is imposed under criminal procedure legislation, it is related to retaining the status of the serviceman and is enforced by the command of the military unit (supervision by the military unit's command or remand to custody with detention in detention quarters), the discretionary power of military units' command not to exclude the serviceman from the list of the military unit personnel after the expiration of the military service period may not be considered within the system of legal regulation in force as a disproportionate restriction of servicemen's rights, including the rights provided in Article 59 of the Constitution of the Russian Federation. The mentioned discretion may not be considered as disproportionate despite the fact that the period of military service prescribed by law is extended.

Retaining a serviceman on the list of the personnel of the military unit after the expiration of the period of military service conscription, which is performed under Subsection 9, Section 11, Article 38 of the Federal Law "On Military Duty and Military Service", in conjunction with the provisions of the Criminal Procedure Code of the Russian Federation which determine a procedure of imposing and enforcing measures of restraint, may be recognized as lawful, *inter alia*, in the context of requirements of Articles 1 (Section 1), 18, 19 (Section 1), 22 (Section 1), 55 (Section 3) and 59 of the Constitution of the Russian Federation. The requirements of the mentioned Articles are satisfied provided that a measure of restraint imposed on the serviceman is enforced under the regulation in force with the involvement of the command of the military unit and if the appropriate procedural guarantees provided for prosecuted persons (suspects, accused) by criminal procedure law are observed.

5. The principle of legal equality stemming from Articles 1 (Section 1), 6 (Section 2), 17 (Section 3) and 19 of the Constitution of the Russian Federation predetermines the necessity of formal certainty, precision, clarity, lucidity of legal norms and their coordination within the system of legal regulation in force, because legal equality can be ensured only under uniform understanding and interpretation of a legal norm. Legal provisions which do not meet the mentioned criteria create contradictory law-enforcement practice, a possibility of their ambiguous interpretation and arbitrary application. Thus such provisions violate the constitutional rights to state protection, including judicial protection, of the rights and lawful interests of citizens, *inter alia* the rights exercised within criminal prosecution procedures (Articles 45, 46 and 49 (Section 1) of the Constitution of the Russian Federation).

Since the notion "under prosecution" is not explicitly used by the Criminal Procedure Code of the Russian Federation, the provision of Subsection 9, Section 11, Article 38 of the

Federal Law “On Military Duty and Military Service”, which is formulated as a general rule, has an indeterminate meaning from the standpoint of the criminal procedure status of the military serviceman who is held criminally responsible. By retaining a military serviceman in military service after the expiration of the legally prescribed period only on the basis of the fact that a criminal case was initiated against him and in the absence of a proper procedural decision of criminal procedure authorities, this provision allows to apply the mentioned measure of restraint in the absence of grounds provided by the criminal procedure legislation. This possibility exists while this measure is directly aimed at ensuring a possibility of criminal prosecution and it is not predetermined by the aims and tasks of military service stemming from Article 59 and 71 (Subsection “1”) of the Constitution of the Russian Federation.

Such regulation leads to lack of equality between military servicemen and other persons for whom any restrictions imposed due to initiation of a criminal case are considered permissible only under lawful decisions (acts) of the inquirer, investigator or court, which may be appealed against under the Criminal Procedure Code of the Russian Federation. A serviceman who is a suspect or an accused cannot exercise his right to appeal under the provisions of Articles 123–125 of the Criminal Procedure Code of the Russian Federation against the restrictive measure imposed on him because the authorities conducting criminal proceedings are not obliged to issue decisions further restricting the status of a military serviceman. Moreover, a serviceman is further deprived of his right to file a motion requesting annulment of the military command’s decision to retain him on the list of the personnel of the military unit, while the right to file a motion regarding any other procedural decisions concerning the measures of procedural compulsion is recognized.

Consequently, the restrictive measure provided by Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, is predetermined by criminal prosecution of a person and has discriminatory effect for servicemen as participants in criminal proceedings if the period of their military service has expired. The mentioned provision violates the requirement of equality before the law of persons who have an equal procedural status. Such discrimination on the grounds of the type and nature of occupation is impermissible under Article 19 (Sections 1 and 2) of the Constitution of the Russian Federation. The Criminal Procedure Code of the Russian Federation is guided by the same approach since it establishes a uniform order of criminal proceedings for everyone including military servicemen.

The application of Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, without being necessarily applied together with the criminal procedure legislation does not either conform to the requirements of the Constitution of the Russian Federation, which prescribes that citizens performing military service exercise the rights

and freedoms of military servicemen and the right to judicial protection in case of criminal prosecution on the basis of observance of the principles of equality and fairness in providing them with guarantees against all disproportionate restrictions of their private and social life.

6. Thus, the provision of Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, does not conform to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 46 (Section 1), 55 (Section 3) and 59, to the extent that it allows (within the meaning acquired in the law-enforcement practice) retaining a serviceman on the list of the military unit personnel after the expiration of his military service period and extending this period when the measure of restraint, which under the legislation in force is performed by the military unit’s command, is not imposed on him.

This conclusion does not limit the power of the federal legislator to impose restrictions on the legal status of military servicemen due to criminal prosecution against them, if the legislator is being guided by the Constitution of the Russian Federation and the present Judgment. Before the introduction of amendments to the regulation of military servicemen’s legal status by the federal legislator the provision of Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, may be applied only when the measure of restraint imposed on the serviceman is performed under the legislation in force by the military unit’s command (supervision by the military unit’s command, remand to custody in detention quarters).

In respect of military servicemen who were not excluded from the list of the military unit personnel after the expiration of the military service period due to criminal prosecution against them, the criminal prosecution authorities shall, under the present Judgment, examine the possibility of imposing a measure of restraint performed under legislation in force by the military unit’s command. If such measure is not imposed, the command of the military unit shall adopt a decision excluding military serviceman from the list of the military unit personnel.

Concluding from the above and pursuant to Section 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 provision of Subsection 9, Section 11, Article 38 of the Federal Law “On Military Duty and Military Service”, pursuant to which a serviceman shall be excluded from the list of the military unit personnel on the date of expiration of his military service period, except for cases where he is under prosecution, as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 46 (Section 1), 55 (Section 3) and 59. The provision is unconstitutional to the extent that it allows (within the meaning acquired in the

law-enforcement practice) retaining a serviceman on the list of the military unit personnel after the expiration of his military service period and extending this period when the measure of restraint, which under the legislation in force is performed by the military unit's command, is not imposed on him.

2. 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 other authorities and state officials.

3. Pursuant to Article 78 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be published in the Collection of Laws of the Russian Federation 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. 7-II