

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment  
of 16 July 2009 No. 14-Π

in the case concerning the review of the constitutionality of Article 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”, Section 1, Article 1, Section 3, Article 8, and Article 297 of the Criminal Procedure Code of the Russian Federation in connection with a complaint of V. V. Milekhin.

Saint Petersburg, 19 July 2009

The Constitutional Court of the Russian Federation composed of Presiding Judge Yu. D. Rudkin and Judges N. S. Bondar, G. A. Gadzhiev, S. D. Knyazev, L. O. Krasavchikova, S. P. Mavrin, O. S. Khokhryakova, V. G. Yaroslavtsev

in the attendance of V. V. Milekhin, who submitted his constitutional complaint to the Constitutional Court of the Russian Federation; 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 of Article 3, Subsection 3, Section 2 of 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 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”, Section 1 of Article 1, Section 3 of Article 8 and Article 297 of the Criminal Procedure Code of the Russian Federation.

The reason for the consideration of the case is a complaint of V. V. Milekhin. 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 Justice-Rapporteur V. G. Yaroslavtsev, statements by the parties, interventions by Judge V. V. Kuznetsov for the Supreme Court of the Russian Federation, D. A. Krasnov for the Council of Judges of the Russian Federation, V. F. Popondopulo for the Supreme Judicial Qualifications Board of the Russian Federation,

T. A. Vasiliyeva for the Prosecutor General of the Russian Federation, the Constitutional Court of the Russian Federation

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

1. Under Article 7<sup>1</sup> of the Law of the Russian Federation No. 3132-I, “On the Status of Judges in the Russian Federation” of 26 June 1992 (added by the Federal Law No. 91-Φ3 of 21 June 1995), a retired judge, subject to his consent, may be commissioned to administration of justice as an acting judge except for the performance of the duties of the Judge of the Constitutional Court, for a period of not more than one year if there is a vacant judicial office, or in the case of substantial temporary increase of amount of work in the court, or in the absence of a judge, or if his powers were suspended (Section 1); the commission of a retired judge to administration of justice as an acting judge is performed by the president of the superior court subject to a positive conclusion of a judicial qualifications board (Section 2).

V. V. Milekhin, who challenges the constitutionality of these provisions, was sentenced to three years of imprisonment and put on probation by the Soviet District Court of Ryazan on 23 July 2003 for intentional injury of medium gravity committed out of malicious motives (Subsection “e”, Section 2, Article 112 of the Criminal Code of the Russian Federation). The judge presiding in the court which considered that criminal case was a retired judge, A. V. Sokolov, who was commissioned to administration of justice as an acting judge.

A. V. Sokolov was appointed to the judicial office in the Soviet District Court of Ryazan for five years by a Decree of the President of the Russian Federation, dated 16 December 1994, No. 2184, “On Appointment of Judges of District (Town) Courts”. Following the expiry of his term of office, A. V. Sokolov applied for the same office for an unlimited term; however, he was not appointed. As a retired judge, A. V. Sokolov was commissioned three times to administration of justice since 2000 for periods of not more than one year (due to substantial increase of amount of work in the court and the presence of a vacant judicial office).

In the applicant’s opinion, Article 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation” allows a retired judge who has not been appointed to office for an unlimited term and is not an honorary judge (i.e. retired judge who served for not less than ten years) to administer justice and thus it does not conform to Section 1, Article 47 of the Constitution of the Russian Federation.

On the same grounds, the applicant challenges the constitutionality of a number of provisions of the Criminal Procedure Code of the Russian Federation together with the provisions of Article 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”. He challenges the following provisions of the Code: Section 1, Article 1,

according to which the procedure for criminal judicial proceedings in the Russian Federation shall be established by the Code based on the Constitution of the Russian Federation; Section 3, Article 8, according to which the accused person may not be deprived of the right to have his case considered by that court and by that judge in whose jurisdiction is the case under the Code; Article 297, according to which the sentence must be lawful, reasonable, and fair; and the sentence is considered lawful, reasonable, and fair if it is imposed in accordance with the requirements of the Code and is based on the proper application of the criminal law.

These norms of the Criminal Procedure Code of the Russian Federation specify the corresponding provisions of the Constitution of the Russian Federation. They secure guarantees of implementing of the citizens' constitutional right to judicial protection and as such cannot violate the constitutional rights and freedoms of the applicant. Since there is no uncertainty regarding the conformity of these provisions of the Criminal Procedure Code of the Russian Federation to the Constitution of the Russian Federation, the proceedings in the present case are to be discontinued pursuant to Articles 36 and 68 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" to the extent that they concern the review of the constitutionality of these provisions.

Therefore, the subject matter to be considered by the Constitutional Court of the Russian Federation in the present case is the provisions of Article 7<sup>1</sup> of the Law of the Russian Federation "On the Status of Judges in the Russian Federation" to the extent that they allow a retired judge whose term of office has expired and who has not been appointed to the same office for an unlimited term to be commissioned to administration of justice as an acting federal judge. At the same time, the Constitutional Court of the Russian Federation considers not only the literal meaning of the normative act under review, but also the meaning these norms acquire from their place within the hierarchy of legal acts and in the law-enforcement practice (Articles 74, 96 and 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation").

2. The Constitution of the Russian Federation proclaims that an individual, his rights and freedoms are the supreme value, and the recognition, observance, and protection of the rights and freedoms of man and citizen shall be the duty of the State. The Constitution also guarantees judicial protection of everyone's rights and freedoms (these rights and freedoms being ensured by administration of justice), and establishes that no one may be deprived of the right to have his case considered by that court and by that judge in whose jurisdiction the case is according to law (Articles 2, 18, Section 1, Article 46 and Section 1, Article 47). In the Russian Federation, justice shall be administered only by courts; bodies of judicial power shall be autonomous, judges shall be independent and be bound only by the Constitution of the Russian Federation and federal law,

they shall be irremovable and have immunity (Articles 10, Section 1, Article 118, Section 1, Article 120, Section 1, Article 121 and Section 1, Article 122).

Giving due regard to the cited constitutional provisions, everyone's right to have his case considered by the court and judge in whose jurisdiction the case is according to law is an element of the right to judicial protection and guarantees of unrestrained access to justice. It implies that the appropriate court has to be formed under a procedure prescribed by law and shall consist of judges having appropriate competence and vested with powers according to the requirements prescribed by law. Compliance with all the requirements for candidates to a judicial office, judges, jurors and arbitration court lay judges is the guarantee of a lawful composition of the court.

The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law is also secured by Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and international standards in the area of justice require that the right to be tried by a lawful court corresponds with the duty of the State to take all necessary measures to respect, protect and promote the independence and impartiality of judges and to ensure their efficiency and competence (Section "i", Article 1, Part of the Resolution Res(2002) 12 of the Committee of Ministers of the Council of Europe of 18 September 2002, "Establishing the European Commission for the Efficiency of Justice"). At the same time, the international recommendations in the area of justice, namely impartiality, integrity, compliance with the established standards of competence, conduct and diligence are among the qualities of judges which are vital in order to reinforce public confidence in the judiciary, and fundamental to maintenance of judicial independence (Sections 1.6, 2.2, 3.1 and 6.7 of the Bangalore Principles of Judicial Conduct, adopted by Resolution 2006/23 of the UN Economic and Social Council of 27 July 2006).

Since the constitutional status of judges is predetermined by the performance of the public law function of justice, the federal legislator must introduce special qualifications and other requirements for them, including moral and ethical requirements and, consequently, establish a procedure to form the judiciary which ensures the selection of only candidates who meet the requirements. The respective jurisdiction of the federal legislator stems from Article 119 of the Constitution of the Russian Federation, which provides for a possibility to establish additional requirements for judges in the Russian Federation besides the general provisions on the minimal age, education, experience in legal profession necessary for the judicial office, and provisions of Section 2, Article 121 of the Constitution of the Russian Federation which establishes that the judge's powers shall be terminated or suspended only on the grounds and according to the procedure prescribed by federal law.

The federal legislator enjoys a sufficiently wide discretion in determining the procedure for vesting judges with powers and terminating their powers, but in any event it must ensure observation of constitutional guarantees of lawful, fair, impartial, and competent court, *inter alia* administration of justice by those who meet the requirements established by the Constitution of the Russian Federation and the federal legislation.

3. Pursuant to the Constitution of the Russian Federation, the competence of the Russian Federation includes establishing a system of federal bodies of judicial power, rules of their organization and activities, a judicial system (Subsections “d”, “n”, Article 71); the powers, the rules of formation and functioning of federal courts shall be prescribed by a federal constitutional law (Section 3, Article 128); judges of federal courts, except for Judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation, shall be appointed by the President of the Russian Federation according to the rules prescribed by federal law (Subsection “f”, Article 83) and Section 2, Article 128).

At the present time, issues of organization and administration of justice, the status of judges, requirements for judges and candidates to judicial office, the procedure of vesting judges with powers, their term of service, and the procedure to terminate their powers are regulated by Federal Constitutional Law No. 1-ФКЗ, “On the Judicial System of the Russian Federation” of 31 December 1996, and the Law of the Russian Federation “On the Status of Judges in the Russian Federation”.

3.1. Under Article 11 of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”, a federal court judge, except for Judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation, shall be appointed to office for the first time for a period of three years (before Federal Law No. 91-ФЗ, of 21 June 1995, entered into force, for five years). After the expiry of this term, he may be re-appointed to the same office for an unlimited term until he reaches the maximum age for service as a judge.

The procedure of vesting judges with powers is established in Article 6 of the said law, which specifies the imperatives of Subsection “f”, Article 83 and Section 2, Article 128 of the Constitution of the Russian Federation, and the grounds for terminating judges’ powers are established in Article 14. At the same time, under Sections 1 and 2 of Article 15, which secure the judge’s right to resignation as a guarantee of his independence, if the judge’s powers are terminated on the grounds of reaching the maximum age for serving as a judge, or expiry of his term of office if it was limited by a certain term (Subsection 4, Section 1, Article 14), the judge is considered to have resigned or being removed. It is considered an honorable resignation or

honorable removal of a judge from office within the meaning of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”. The retired judge retains the title of a judge, personal immunity guarantees, and membership in the judicial community.

According to Article 7<sup>1</sup> of the abovementioned law, a retired judge, subject to his consent, may be commissioned to administer justice as an acting judge by the president of a superior court provided there is a positive conclusion of a judicial qualifications board, for a period of not more than one year. According to the literal meaning of this Article, any judge whose powers have been terminated on the grounds of Subsection 4, Section 1, Article 14, may be commissioned to administer justice as an acting judge.

By establishing this special procedure, which is simplified comparing to the regular appointment to judicial office, the federal legislator sought to provide citizens with unrestrained access to justice within a reasonable time. However, the federal legislator prescribed that a retired judge may be commissioned to administer justice only if there is a vacant judicial office, or in case of substantial temporary increase of amount of work in the court, or in the absence of a judge, or if his powers were suspended. These restrictions are set by the federal legislator assuming that a retired judge does not possess all the status characteristics of an acting judge, and commissioning him to administer justice is only possible under exceptional circumstances when timely judicial protection of citizens’ rights is objectively hindered, and only for a short period of time.

3.2. According to the legal opinions expressed by the Constitutional Court of the Russian Federation in a number of decisions (Judgment No. 6-II of 24 March 2009, Decisions No. 210-O of 1 December 1999, No. 87-O of 19 April 2000, No. 219-O of 5 October 2000, No. 272-O of 21 December 2000, and others), the three-year term of office for judges appointed for the first time (as well as the five-year term of judicial office when A. V. Sokolov was appointed to office) serves, in essence, as an initial probationary period. Such period aims in particular at identifying reasons which may prevent a particular judge from future appointment to office for an unlimited term, and these reasons must be used as grounds for respective authorities’ and officials’ decisions to deny nomination to a judicial office for an unlimited term. However, it is not the expiry of the original term of a particular judicial office itself which is a ground for granting a recommendation for a judicial appointment for an unlimited term or denial of such recommendation, but evaluation of his professional and moral merits. The judicial qualifications board must decide on the appointment of a judge seeking appointment to office after his original three-year term expired, taking into account the necessity to confirm that the candidate meets professional, moral and ethical eligibility requirements which are set for him as a bearer of

judicial power by federal law pursuant to Article 119 of the Constitution of the Russian Federation.

By virtue of the cited legal opinions, such ground for a judge's resignation as expiry of his term of office if it was limited by a certain term appears, in its essence, to be a proof of the fact that certain objective circumstances which prevent a person from future appointment to the judicial office for an unlimited term (against his will) were discovered.

Therefore, commission of a retired judge whose powers have been terminated as a result of expiry of the original term of office and who has not been appointed to the same office for an unlimited term, under the procedure set by Article 7<sup>1</sup> of the Law of the Russian Federation "On the Status of Judges in the Russian Federation", does not conform to the requirement of lawful composition of a court in its constitutional meaning and thus does not ensure guarantees of judicial protection.

The same approach underlies the Federal Constitutional Law "On the Judicial System of the Russian Federation", which establishes that only those retired judges may be commissioned to administer justice whose period of service as a judge exceeds ten years and who are considered honorary judges (Section 2, Article 11). Within the meaning of this Article the ten-year period of service as a necessary element of the honorary judge's legal status does not include periods of other non-judicial professional activities although this is possible, in particular, under the Law of the Russian Federation "On the Status of Judges in the Russian Federation" (Paragraph 2, Section 1, Article 19) and Federal Law No. 6-ΦЗ, "On Additional Guarantees of Social Protection of Judges and Employees of Courts of the Russian Federation" of 10 January 1996 (Article 7) to calculate the period of service granting the right to a monthly lifelong alimony and additional benefits.

This means that the period of judicial service legally recognized for purposes of commissioning a retired judge to administer justice, in contrast to the period of service granting the right to resignation and receiving all payments and benefits, does not include periods of service in courts and judicial authorities holding positions listed by Section 5, Article 4 of the Law of the Russian Federation "On the Status of Judges in the Russian Federation", in particular, the period of service as an attorney or notary. Therefore, a judge whose powers have been terminated upon the expiry of his original term of office may not be considered an honorary judge and, consequently, commissioned to administer justice as an acting judge. Within the current legal regulation, this rule meets to the maximal extent the requirements of a fair trial by a lawfully established, competent and impartial court.

Considering the fact that according to the Constitution of the Russian Federation (Section 3, Article 76 and Section 1, Article 108), federal constitutional laws have supremacy

over federal laws, it is implied that in the legal regulation of commissioning a retired judge to administer justice, a federal law must conform to the requirements prescribed by the Federal Constitutional Law “On the Judicial System of the Russian Federation”.

3.3. Thus, Article 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation”, to the extent that it allows a retired judge whose powers have been terminated upon expiry of the original term of office and who has not been appointed to the same office for an unlimited term, to be commissioned to administer justice as an acting federal judge infringes the constitutionally protected right of everyone to judicial protection of his rights and freedoms and the right to consideration of his case by a lawful court, and thereby contradicts Section 1, Article 46, Section 1, Article 47, Article 119 and Section 1, Article 120 of the Constitution of the Russian Federation.

Moreover, the Constitutional Court of the Russian Federation relying on Subsection 12, Section 1, Article 75 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, considers it necessary to establish a special procedure to enforce its Judgment in part aimed at meeting the requirements of Section 3, Article 79 of the said Law: this Judgment shall not apply to persons who were not parties to the constitutional proceedings in the present case, and it shall not lead to reconsideration of judicial decisions adopted by retired judges commissioned to administer justice, whose powers were terminated upon expiry of the original term of office, and who were not appointed to the same office for an unlimited term.

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 provision of Article 7<sup>1</sup> of the Law of the Russian Federation “On the Status of Judges in the Russian Federation” to the extent that it allows a retired judge whose powers have been terminated upon the expiry of the original term of office and who has not been appointed to the same office for an unlimited term to be commissioned to administer justice as an acting federal judge as non-confirming to the Constitution of the Russian Federation and its Articles 46 (Section 1), 47 (Section 1), 119 and 120 (Section 1).

2. To discontinue proceedings in the present case to the extent concerning review of the constitutionality of Section 1 of Article 1, Section 3 of Article 8, and Article 297 of the Criminal Procedure Code of the Russian Federation.

3. The law-enforcement acts concerning V. V. Milekhin which served as a ground for his complaint to the Constitutional Court of the Russian Federation are to be reconsidered according to the established procedure if there are no other obstacles.

4. 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.

5. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published immediately in *Rossiyskaya Gazeta* and the Collection of Laws of the Russian Federation. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court  
of the Russian Federation

No. 14-II