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Contact: Zoe Bryanston-Cross
Tel: 03.90.21.59.62

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Meeting: 1377th meeting (June 2020) (DH)

Item reference: Action Report (20/04/2020)

Communication from the Russian Federation concerning the cases PICHUGIN v. Russian Federation (Application No. 38623/03) and PICHUGIN v. Russian Federation (Application No. 38958/07) - (Klyakhin group of cases v. Russian Federation - Application No. 46082/99)

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Réunion : 1377^e réunion (juin 2020) (DH)

Référence du point : Bilan d'action (20/04/2020)

Communication de la Fédération de Russie concernant les affaires PICHUGIN c. Fédération de Russie (requête n° 38623/03) et PICHUGIN c. Fédération de Russie (requête n° 38958/07) - (groupe d'affaires Klyakhin c. Fédération de Russie - requête n° 46082/99) (**anglais uniquement**)



**МИНИСТЕРСТВО ЮСТИЦИИ
РОССИЙСКОЙ ФЕДЕРАЦИИ
(МИНЮСТ РОССИИ)**

Житная ул., д. 14, Москва, 119991
тел. (495) 955-59-99, факс (495) 955-57-79
E-mail: info@minjust.ru

20/04/2020 № 10-46204/20

На № _____ от _____

Dear Madam,

Please find enclosed the Action report of the Russian authorities with regard to execution of the judgments of the European Court of Human Rights in *Pichugin* cases.

Yours faithfully,

Head of the Office of Representative
of the Russian Federation at
the European Court of Human Rights

Andrey Fedorov



DEPARTMENT FOR THE
EXECUTION OF JUDGMENTS
OF THE EUROPEAN COURT
OF HUMAN RIGHTS

Ms Clare Ovey

Enc: on 6 pages.

DGI

20 AVR. 2020

SERVICE DE L'EXECUTION
DES ARRÊTS DE LA CEDH

Prepared for the 1377th CMCE meeting
(2-4 June 2020)

ACTION REPORT

on the execution of the judgments of the European Court of Human Rights in applications nos. 38623/03 and 38958/07 *Pichugin v. Russia*

In its judgment in application no. 38623/03 *Pichugin v. Russia* the European Court of Human Rights found a violation by the Russian authorities of Article 5 §§ 3 and 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (on account of unreasonably long detention of the applicant and improper consideration of appeals against the relevant orders), Article 6 §§ 1 and 3(d) of the Convention (on account of non-compliance with the principles of publicity and fairness of the trial during examination of the applicant's criminal case).

In its judgment in application no. 38958/07 *Pichugin v. Russia* the Court found a violation of Article 6 §§ 1, 2 and 3(d) of the Convention on account of a violation of the principles of fairness of the trial during examination of the applicant's criminal case.

In connection with the said judgments of the European Court, the Russian Government have taken a number of measures and submitted to the Committee of Ministers of the Council of Europe detailed information in this respect (documents DH-DD(2014)1252, DH-DD(2014)1173, DH-DD(2016)871, DH-DD(2017)134, DH-DD(2018)474).

Hereby the Russian Government provide an additional report on individual measures taken in order to execute the said judgments taking into account the issues specified in the CMCE decision of 5 December 2019.

Individual measures

1. Compensation awarded to A.V. Pichugin by the Court in connection with the violations has been paid in full.

2. Other necessary individual measures have been taken.

The Court's judgment in application no. 38623/03 *Pichugin v. Russia*

The Court found the following violations in the course of the criminal proceedings against the applicant:

- excessive length of the applicant's detention in the absence of sufficient grounds and termination of the proceedings on the corresponding cassation appeal against the decision about his continued detention;
 - inadequate reasoning in the decision to hold a hearing *in camera*;
 - the court allowed witness K., whose testimony had been of considerable importance for the criminal case, not to answer the questions of the defence about the circumstances of the crime in the absence of any reason for such decision;
 - witness K. was not warned about criminal liability for refusing to testify.

In this connection:

2.1. The Chairman of the Supreme Court of the Russian Federation filed a submission with the Presidium of that court on reopening of the criminal proceedings against the applicant in view of new circumstances. That submission was satisfied and the proceedings were resumed.

2.2. According to the results of the reopened proceedings, by its judgment of 23 October 2013, the Presidium of the Supreme Court:

- declared all judicial decisions about extension of A.V. Pichugin's detention unlawful and quashed them;
- in view of the ECtHR's findings that the domestic court held a closed judicial session without appropriate substantiation of the decision to do so, the Supreme Court assessed the relevant circumstances of the case in the course of the resumed proceedings in the applicant's case.

It was found that the nature, contents and volume of the data constituting a state secret, which are contained in the criminal case-file, allow concluding that in case of partial (and not full) closing of the judicial proceedings the possibility of disclosure of the data that constituted state secrets could not be fully excluded.

As noted by the Supreme Court, this conclusion acquired special importance in the light of the Russian legislative provisions according to which the order of examination of evidence shall be determined by the party which presents the relevant evidence to the court. Restriction of the trial participant's right to examine any evidence which the party decided to submit to court, at the time and in the scope as believed necessary by the participant to the proceedings filing the relevant motion, would be, as stated by the Supreme Court, a significant violation of the adversarial principle.

- In respect of the violation indicated by the European Court in connection with the fact that A.V. Pichugin did not have a proper and effective opportunity to challenge the statements of witness K., the Supreme Court took into account that K. was questioned as a witness and was warned about criminal liability for perjury, but was not warned about the liability for refusal to testify. However, as it was mentioned, that circumstance in itself could not be decisive for assessment of the witness statements in terms of its relevance, admissibility and reliability.

As regards the questions of the defence which witness K. refused to answer, the Supreme Court found that these questions:

- either were irrelevant to the circumstances to be proved in the criminal case,
- or were inadmissible due to specifics of the criminal proceedings in the case examined by the jury,
- or the witness refused to answer the questions in the course of the judicial investigation, the results of which were cancelled due to dissolution of the jury.

- In such circumstances the Supreme Court arrived to the conclusion that violations of Article 6 of the Convention found by the European Court and committed in the course of the criminal proceedings against A.V. Pichugin were not material and had not tainted the legality, substantiation and fairness of the sentence delivered in that case. As it was noted, any other conclusion in that case would mean unjustified derogation from the generally recognized principle of legal certainty implying stability of final judicial decisions and inadmissibility of review of such decisions in the absence of such violations

of the law which had influenced the outcome of the criminal case and the accuracy of its resolution on the merits.

The Court's judgment in application no. 38958/07 *Pichugin v. Russia*

The Court found the following violations in the course of the criminal proceedings against the applicant:

- the Deputy Prosecutor General and the investigator informed the public about the developments in the applicant's case without "...necessary discretion and circumspection...". In the Court's view, these statements made by the officials "... could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to law";
- the court's refusal to admit as evidence the opinion of specialist V., submitted by the defense;
- court's refusal to order an additional forensic handwriting examination and to give the applicant an opportunity to ask the experts questions.

In this connection:

2.3. The Chairman of the Supreme Court of the Russian Federation filed a submission with the Presidium of that court on reopening of the criminal proceedings against the applicant in view of new circumstances. That submission was satisfied and the proceedings were resumed.

2.4. As a result of resumed proceedings, the Presidium of the Supreme Court delivered its judgment of 8 November 2017, in which the Supreme Court, without calling into question the findings of the European Court, examined the A.V. Pichugin's criminal case file in the light of those findings and held as follows.

- as it was noted by the Supreme Court, upon completion of the preliminary investigation, the Deputy Prosecutor General and investigator expressed their opinion in the interview with Russian television channels that the involvement of A.V. Pichugin in commission of the alleged crimes had been established.

However, the Constitution of the Russian Federation establishes a strict distinction between the function of the prosecution and the judicial function of resolving a criminal case. According to Article 8 § 1 of the Code of Criminal Procedure of the Russian Federation, justice in criminal cases in the Russian Federation shall be administered only by the court.

On 21 February 2007, the court of cassation quashed the judgment of the Moscow City Court of 17 August 2006 delivered in respect of A.V. Pichugin after the first trial, and indicated that in the course of a fresh consideration of the criminal case all necessary measures should be taken in order to ensure complete and comprehensive investigation of the circumstances of the case and to prevent violations of the criminal procedure law.

It should be noted that after the judgment had been quashed, fresh consideration of the criminal case against A.V. Pichugin lasted for more than 3 months. During that trial, in accordance with the adversarial principle, the court questioned victims and numerous witnesses, examined the reports on investigative and procedural actions, as well as other evidence in the case.

Moreover, as it was noted by the Supreme Court, the court ensured all necessary conditions for the parties to fulfil their procedural obligations and exercise their rights. A.V. Pichugin had an opportunity to bring his case on the merits, and to submit relevant arguments in support of his position.

In the course of examination of the criminal case-files the court did not reveal indications that the defense was put at a disadvantage or limited in its rights to file objections or motions, to adduce evidence and take part in their examination, to participate in judicial pleadings or to make its statements on certain issues determined in the Code of Criminal Procedure of the Russian Federation.

- As regards the violation found by the ECtHR on account of the refusal to accept the expert opinion as evidence, the Supreme Court noted that in its judgment the European Court emphasized that its task under the Convention was to *ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair*. The assessment of evidence by domestic courts is governed by the domestic law (§ 31 of the judgment).

It should be also noted that according to the criminal procedure law, a specialist's opinion is subject to verification and assessment in accordance with general rules (in terms of his competence, interest in the outcome of the case, justification of the opinions, etc.); the court can accept or reject it, like any other evidence.

In the present case, as it was noted after an additional examination of all the materials, the "Consultative opinion" of specialist V. dated 4 July 2006, prepared by her at the request of lawyer K. regarding the forensic examinations carried out during the preliminary investigation, was assessed at the court hearing and on the basis of its assessment, including in terms of its admissibility, it was rejected; in doing so, the court gave reasoning for its decision.

- As regards the forensic handwriting examination, it is noted that the criminal procedure law does not contain provisions requiring mandatory ordering a forensic examination in the absence of relevant grounds.

An additional study of the criminal case-file in the light of the findings of the European Court showed that the motion of the defense to order an "Interdepartmental comprehensive forensic handwriting analysis", which was dismissed by the court, was considered in the manner prescribed by law. As it follows from the decision, the court did not find any grounds for ordering a new forensic examination in order to resolve the issue that had been examined in the course of forensic handwriting examination, the reports of which (no. 3/432 of 24 December 2003 and no. 1882/06 of 7 October 2004) would be assessed together with other evidence when making the final decision in the case.

As it was noted by the Supreme Court, under Article 283 § 4 of the CCrP, the court shall, at the request of the parties or on its own initiative, order a repeated or an additional forensic expert examination if there are discrepancies between the expert reports, which cannot be eliminated at the trial by questioning of the experts. The grounds for an additional or repeated expert examination by the same or another expert are insufficient clarity or completeness of the expert's opinion or new questions regarding previously investigated circumstances of the criminal case, respectively (Article 207 § 1 of the CCrP) or doubts regarding the validity of the expert's opinion or contradictions in the conclusions

of the expert or experts regarding the same questions (Article 207 § 2 of the CCrP). Accordingly, in the absence of grounds for conducting any of the above expert examinations, the court may dismiss such motion.

The Supreme Court also noted that when A.V. Pichugin and his counsel were studying the forensic examination reports at the stage of pre-trial proceedings, they were notified of the right to request an additional or repeated expert examination (Article 206 § 1 of the CCrP). However, as it follows from the reports on studying the forensic examination reports by the accused and his defense counsel of 4 July 2005, they did not fill such motions. Moreover, they did not request any forensic handwriting examination when studying the criminal case-file in accordance with Article 217 of the CCrP.

Experts K. and P., whose statements were examined at the hearing, confirmed their findings contained in the report of 7 October 2004. Moreover, as it was indicated in the Court's judgment, the experts were questioned at the hearing in the presence of the applicant and his counsel, who had the opportunity to ask experts questions and put their credibility into question (§ 35 of the judgment). In this regard the European Court acknowledged that the defense had the opportunity to challenge the expert opinion of 7 October 2004, which the court referred to in its verdict, and to file a motion for a "new" expert examination.

As for the assessment of the above expert opinion (of 7 October 2004) in the judgments, in the opinion of the Supreme Court, like all other evidence examined at the hearing, it was assessed by the court in accordance with general rules – taking into account the provisions of the criminal procedure law, including the finding that the expert's opinion had no predetermined weight and did not override other evidence.

In view of the above, the Supreme Court held that the violation of the Convention found by the European Court on account of the fact that the expert report of 7 October 2004 was obtained, as stated in the judgment, "... without any participation of the defence" cannot be regarded as making the sentence unjust in this case.

The Supreme Court also held that the factual circumstances of the crimes, the role and extent of A.V. Pichugin's involvement in the crimes, as well as his guilt in their commission, including the attempted murder of R., had been established on the basis of an objective and impartial assessment of the totality of evidence in the criminal case. The sentence has been delivered by the court in accordance with Chapter 39 of the CCrP, and complies with the statutory requirements regarding its content.

2.5. Therefore, in the course of the resumed proceedings the Supreme Court did not put into question the conclusions of the ECtHR about the violations; on the contrary, it examined in detail the materials of the criminal cases in the light of the ECtHR conclusions and the specific violations found by it. As a result, the Supreme Court concluded that the violations identified by the ECtHR did not affect the legality, validity and fairness of the judgments and there were no grounds for their quashing.

The approaches demonstrated by the Supreme Court in these cases are fully consistent with the Russian law, which in this part has never been questioned by the ECtHR. Moreover, they fully correspond to CMCE Recommendation R(2000)2 of 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

It is emphasized that according to the said Recommendation not every violation found by the European Court must entail quashing of previously issued judicial acts. When resolving this issue, national courts take into account the nature of the violations found by the ECtHR and the totality of the materials at their disposal.

These approaches are also consistent with the case-law of the European Court, for example, with the judgment of the Grand Chamber in case no. 19867/12 *Moreira Ferreira v. Portugal (No. 2)* of 11 July 2017.

In that judgment the Court emphasized that according to well-established case-law, the Convention does not guarantee the right to reopening of the proceedings following the Court's judgment about a violation of Article 6 of the Convention. In that case, the Grand Chamber of the European Court, taking into account the principle of subsidiarity, as well as the text of the ECtHR's judgment, considered that the refusal of the Supreme Court of Portugal to reopen the proceedings did not distort the conclusions reached in the first judgment of the ECtHR on the applicant's complaint. The Court also indicated that the grounds on which the Supreme Court of Portugal relied fell within the margin of appreciation of the respondent State.

3. In connection with the recommendations set out in §§ 3-5 of the CMCE decision of 5 December 2019, it is reported that on 10 March 2020 A.V. Pichugin filed a pardon request, which is being under consideration now in accordance with the existing procedures.