



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KARELIN v. RUSSIA

(Application no. 926/08)

JUDGMENT

STRASBOURG

20 September 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Karelin v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President*,

Helena Jäderblom,

Johannes Silvis,

Dmitry Dedov,

Branko Lubarda,

Alena Poláčková,

Georgios A. Serghides, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 30 August 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 926/08) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Mikhail Yuryevich Karelin (“the applicant”), on 19 November 2007.

2. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. On 2 July 2012 the applicant raised a further complaint concerning new unrelated domestic proceedings in 2012 and the absence of a prosecuting party in these proceedings.

4. On 29 January 2014 the complaint concerning the absence of a prosecuting party in the court proceedings in 2012 was communicated to the Government and the remainder of the application, including the initial complaints raised in November 2007, was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Naberezhnyye Chelny.

6. On 4 March 2012 the applicant was arrested by a police officer, Z., and accused of disorderly behaviour in a public place, an offence under Article 20.1 of the Federal Code of Administrative Offences (“the CAO”),

punishable by a fine or up to fifteen days' detention. It appears that the applicant was then taken to the police station and remained there for some time.

7. In the police station, Z. compiled an administrative offence record, thereby instituting administrative offence proceedings against the applicant. The record read as follows:

“4 March 2012

I have made the following findings under Article 28.3 of the Code of Administrative Offences:

[The applicant] was drunk and used foul language against passers-by, waving his arms in the air; he was trying to start a fight, and did not rectify his behaviour despite remarks from passers-by. Thus, he gravely offended public order and committed an administrative offence under Article 20.1 of the CAO.

The fact of the offence has been confirmed by: witness K.

[The applicant] has been informed of his rights and obligations under Articles 48 and 51 of the Constitution, and Articles 1.5, 24.2 and 25.1 of the CAO: that the person who is being prosecuted for an administrative offence has the right, *inter alia*, to have access to all the material in the file, to testify, to adduce evidence, to lodge interlocutory applications and challenges, and to have legal assistance.

...

Decision: to submit to a court

Signature: deputy chief officer, 5 March 2012”

8. Officer Z. also issued a written report stating that the applicant had used foul language against passers-by.

9. It appears that one of the passers-by, N., accepted a request to make a written statement attesting to the fact that the applicant had been drunk and had used foul language.

10. On 5 March 2012 the police officer submitted the record to his superior, who decided that the case should be transferred to a court for examination.

11. On an unspecified date, the administrative offence file was submitted to a justice of the peace for adjudication. It appears that the file contained the offence record, Z.'s report and N.'s statement. It is unclear whether there was any written statement from K. at that time.

12. On 29 March 2012 the justice of the peace held a hearing. It is unclear whether it was a public one.

13. The applicant made a written statement that he had been apprised of his procedural rights.

14. As can be seen from the judgment in this case (see below), the applicant was accused at the trial of using foul language in the presence of other people, while being drunk, thus breaching public order.

15. The applicant, who is himself a lawyer, did not appoint a legal representative. He pleaded not guilty and made oral submissions on the charge against him.

16. After a request, Officer Z. was present at the hearing and made an oral statement. The court also heard N. and K.. It appears that the justice of the peace asked Z. and N. a couple of questions.

17. By judgment of 29 March 2012 the justice of the peace found the applicant guilty and imposed a fine of 500 Russian roubles (the equivalent of 13 euros at the time) on him. The judgment read as follows:

“The court holds that, while drunk, the defendant used foul language in the presence of other people and thus breached public order ...

The defendant’s guilt is confirmed by Z.’s report and N.’s testimony ... The use of foul language in a public place is unacceptable and discloses a form of disorderly behaviour ... In the court’s view, the use of aberrant language in a public place in the presence of at least one person constitutes an offence under Article 20.1 of the CAO. Moreover, the defendant continued to use foul language during his arrest and while being taken to the police station ...”

18. The applicant appealed to the Naberezhniye Chelny Town Court. He argued, *inter alia*, that although the offence record referred to his using foul language “against passers-by”, the justice of the peace had phrased the charge as using foul language “in the presence of other people”; the judge had not retained the phrase from the offence record, which stated that the applicant “[had not rectified] his behaviour despite remarks from passers-by”.

19. On 16 April 2012 the Town Court held a hearing. It is unclear whether it was a public hearing. The appeal court examined the applicant and upheld the judgment of 29 March 2012. On that date, the appeal decision and the trial judgment became final. The appeal court held as follows:

“The justice of the peace convicted [the applicant] of using foul language in the presence of others, thus breaching public order ...

The appeal court dismisses the argument that the mere use of aberrant language in respect of one person does not disclose an offence. The offence of disorderly conduct is constituted by actions breaching public order and peace. Such actions include using foul language in a public place, insulting people, destruction of or damage to others’ property ... Each of these actions may amount to disorderly behaviour if it breaches public order and discloses a manifest disregard to society ...

Certain factual contradictions between the information in the administrative offence record, Z.’s report and N.’s testimony (as regards use of foul language on account of low culture rather than in respect of passers-by) were dispelled during the trial following the interview of the witnesses ...”

20. The applicant applied to the Deputy President of the Supreme Court of the Tatarstan Republic for judicial review under Article 30.12 of the

CAO. Having examined the file, by decision of 15 June 2012 the Deputy President upheld the court decisions of 29 March and 16 April 2012.

21. The applicant did not seek further review before the Supreme Court of Russia.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Institution of proceedings and participants under the Federal Code of Administrative Offences (CAO)

22. Article 28.1 of the CAO provides that administrative offence proceedings are initiated by a competent public official such as a police officer or a prosecutor.

23. Chapter 25 of the CAO contains provisions regarding “participants in administrative offence proceedings”, namely the defendant, the victim, their representatives and counsel, witnesses, attesting witnesses, specialists and experts, translators and prosecutors. Article 25.11 empowers a public prosecutor to institute administrative offence proceedings; to take part in the examination of the case, adduce evidence, lodge interlocutory applications and issue reports on matters arising during the examination of the case; and to appeal against the decision taken in the case, irrespective of whether he or she participated in the case.

24. Article 30.1 of the CAO provides that the defendant, the victim, their representatives and counsel have a right to appeal against the decision taken in the administrative offence case. In 2010 the right of appeal was extended to the official who compiled the administrative offence record (and subsequently, more generally, to officials authorised to compile the record).

25. The official who compiled the administrative offence record and the official/non-judicial authority that issued a decision in the case are not considered as “participants” in terms of Chapter 25 of the CAO or “participants who are empowered to carry out a prosecution” (decisions nos. 1311-O and 1312-O of 24 June 2014 by the Constitutional Court). Such officials deal with the collection of evidence (decision no. 2157-O of 25 September 2014 by the Constitutional Court). They cannot lodge interlocutory applications but can be called to a hearing in order “to provide clarifications” (ruling no. 5 of 25 March 2005 by the Plenary Supreme Court of Russia).

B. Examination of the case under the CAO

26. Article 26.2 of the CAO defines “evidence” as any factual data that can be used for establishing the existence or absence of the event giving rise to an administrative offence, the defendant’s guilt and other pertinent

circumstances. Such factual data are established (*устанавливается*) on the basis of the record of an administrative offence, other records prescribed by the CAO, the defendant's statement, an expert report, or statements given by witnesses or victims. The administrative offence record is a procedural document recording factual data, which is relevant to the correct examination of the case (Constitutional Court, decision no. 89-O-O of 27 January 2011).

27. Article 1.5 of the CAO provides for the presumption of innocence. The official or the court dealing with the administrative offence case should establish whether the person concerned is guilty or innocent (ruling no. 5 of 24 March 2005 by the Plenary Supreme Court of Russia).

28. Administrative offence cases should be examined at a public hearing, except in cases relating to State or other protected secrets or where it is necessary to protect the honour or reputation of the people participating in the proceedings (Article 24.3 of the CAO).

29. Article 25.1 § 4 of the CAO provides that anyone charged under the CAO is entitled to study the case-file materials, make representations, adduce evidence, lodge applications and challenges, and to have legal assistance. The Constitutional Court considered that the above guarantees enabled the person concerned to refute, in the course of court proceedings, information contained in the case file, for instance in the offence record (*протокол об административном правонарушении*), thereby exercising his or her right to judicial protection based on the principle of adversarial procedure (decision no. 925-O-O of 17 June 2010).

30. While the administrative offence record must indicate the Article of the CAO corresponding to the charge, the right of final legal classification belongs to a court. If a court considers that the classification given in the administrative offence record was wrong, it may reclassify the relevant actions (or inaction) under another Article of the CAO, concerning the type of offence and provided that the reclassification does not worsen the situation of the defendant (ruling no. 5 of 24 March 2005 by the Plenary Supreme Court of Russia, paragraph 20). If the legal classification of the offence given in the administrative offence record is wrong, a court is empowered to decide the case on the basis of the correct legal classification. In this situation, the factual description of the offence and the adduced evidence should be sufficient for the court to give a different legal classification (ruling no. 10 of 2 June 2004 by the Plenary Supreme Commercial Court of Russia, paragraph 8).

31. The Constitutional Court stated that Articles 118 § 2 and 123 § 3 of the Russian Constitution provided that equality of arms and adversarial procedure should apply in court proceedings, including under the CAO. While the above constitutional guarantees apply in cases examined (directly) by courts, they do not apply in cases examined by non-judicial authorities or officials (decision no. 630-O of 23 April 2013 by the

Constitutional Court). However, the person concerned may seek judicial review of their decisions; such review proceedings should provide for equality of arms and adversarial procedure (*ibid.*).

32. The Constitutional Court held, in relation to the Code of Criminal Procedure, that requiring or allowing a court to take over the functions normally attributed to a prosecuting authority contradicted Article 123 of the Constitution and impeded independent and impartial administration of justice (see, among others, ruling no. 16-P of 2 July 2013).

33. Article 29.4 of the CAO provides that when preparing for the examination of a case, the judge has to decide whether to require the presence of people mentioned in Articles 25.1-25.10 (such as witnesses and experts), to order the production of additional documents or to commission an expert report. The judge also has to decide whether to return the case to the authority that initiated the proceedings where the record or other documents were compiled by non-authorized officials, where the record or documents contain mistakes or lack the requisite information, or where such shortcoming cannot be remedied at the trial.

34. Pursuant to Article 30.6 of the CAO, the appeal court ascertains the legality and fairness of the trial decision. For this purpose, it examines the available and additional material, questions the defendant and, if necessary, other people, and examines other evidence and carries out other procedural actions. The appeal court is not limited by the arguments raised in the statement of appeal and carries out a full review of the case.

35. The Constitutional Court stated that in order to comply with the statutory requirement of a “full and objective” examination of the case, a judge has statutory powers to hear participants in the case, to examine evidence, as well as to “carry out other necessary procedural measures aimed at verifying the admissibility and authenticity of evidence, in particular by way of calling *proprio motu* witnesses, including the official who compiled the administrative offence record or another related record”. This is aimed at further examining the available evidence (the record) rather than at collecting new evidence. The above-mentioned power cannot be considered as incompatible with the judicial function and fully complies with the constitutional principle of adversarial procedure under the CAO (decision no. 1086-O of 6 July 2010; decision no. 884-O of 29 May 2012; decision no. 763-O of 23 April 2015).

36. For instance, by decision no. 1817-O of 18 September 2014 the Constitutional Court upheld Article 26.9 of the CAO in so far as it was interpreted as allowing a “public official”, also meaning a trial judge, to ask an “official” (also meaning a judge) in another town to interview the public official who had compiled documents relating to the administrative offence case. The requested judge is not prevented from notifying the defendant, who is not precluded from participating in the interview.

Judge Aranovskiy expressed a separate opinion to the above decision in the following terms. Such a request for an interview amounts to collection of evidence, which should be the function of the parties to the case. An exception is allowed before civil and commercial courts in circumstances where a person or a legal entity challenges a legal act or inaction on the part of a public authority. In such cases a certain encroachment upon the principle of adversarial procedure is acceptable since it is related to the protection of one's rights and freedoms against an action or inaction by a public authority. As a rule, it would be questionable whether a court should be allowed to remedy defects or supplement lacunae in the public authority's effort to prove the defendant's guilt. The court's assistance in adducing proof is only acceptable in a limited number of situations prescribed by law, namely at the request of a party that is deemed to be the weaker one, as in disputes with public authorities. Where evidence is lacking or where it has been obtained in contravention of the applicable rules, the CAO requires the judge to return the case file to the authority or official that initiated the proceedings. "Full and objective examination of the case" does not qualify as a protected constitutional value.

37. A recent assessment of certain problems arising in the CAO proceedings is available in the 2014 report compiled by the Human Rights Ombudsman of the Russian Federation (as quoted in *Mikhaylova v. Russia*, no. 46998/08, § 40, 19 November 2015).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained that the lack of a prosecuting party in the administrative offence case against him had entailed a violation of Article 6 of the Convention, which reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ..."

A. Admissibility

39. First, the Government considered that the applicant had suffered no "significant disadvantage" (see, among others, *Görgün v. Turkey* (dec.), no. 42978/06, 16 September 2014).

40. The applicant argued that despite the low fine imposed on him in the circumstances of his case, the latter raised important issues relating to systemic deficiencies in domestic law, entailing a violation of the

requirement of impartiality and/or the principle of equality of arms and the requirement of adversarial procedure.

41. The Court accepts that the fine imposed on the applicant was small, even by national standards. At the same time, the Court observes that the present case raises an issue under the Code of Administrative Offences concerning the lack of a prosecuting party in the case. The issue arises in a number of similar pending applications before the Court in respect of Russia. Noting the nature of the issue raised in the present case, which also arguably concerns an important matter of principle, the Court does not find it appropriate to dismiss the present application with reference to Article 35 § 3 (b) of the Convention (see *Berladir and Others v. Russia*, no. 34202/06, § 34, 10 July 2012; and *Mikhaylova*, cited above, §§ 40 and 49).

42. Secondly, the Government argued in substance that the criminal limb of Article 6 of the Convention was inapplicable to the applicant's case. He merely faced a fine of up to 1,000 Russian roubles or fifteen days' detention. The gravity of such sanctions was not comparable to that of criminal-law punishments. Having regard to its earlier case-law concerning administrative offences punishable by detention (see, among others, *Malofeyeva v. Russia*, no. 36673/04, §§ 99-100, 30 May 2013 and the Court's judgment in the *Mikhaylova* case (cited above)), the Court holds that the criminal limb of Article 6 of the Convention is applicable.

43. The respondent Government have not suggested, and thus the Court has no reason to consider, that the applicant did not exhaust domestic remedies in respect of the present complaint.

44. Lastly, the Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

45. The Government argued that a prosecutor did have the power to institute administrative offence proceedings, to take part in the proceedings and to appeal against decisions. They conceded that the CAO did not provide for mandatory participation of a public prosecutor in each case concerning an administrative offence. However, the present case was distinguishable from the situation examined by the Court in *Ozerov v. Russia* (no. 64962/01, §§ 47-58, judgment of 18 May 2010), which concerned the absence of a public prosecutor from a specific court hearing in the criminal case, where the applicant faced a charge which could have resulted in a long prison term. Unlike a criminal sentence, the applicant in

the instant case merely faced a fine of up to RUB 1,000 or fifteen days' detention.

46. The public official or authority who had initiated the proceedings by way of compiling an administrative offence record was in charge of "identifying and itemising" the evidence against the defendant. Although such a public official was not a party to the proceedings, a court could call him or her for questioning. The defendant had an opportunity to refute the information contained in the offence record and other documents, which sufficed to comply with the principle of adversarial procedure.

47. As to the requirement of impartiality in the context of absence of a prosecuting authority in a court hearing, the Government submitted that when delivering his judgment, the trial judge had narrowed down the factual circumstances held against the applicant, in so far as they had been proved on the basis of the available evidence.

48. Referring to Article 29.4 of the CAO, the Government argued that a court was empowered to decide, *inter alia*, in reply to a defendant's request, whether to require the presence of a prosecutor, witnesses or other people; and whether it was necessary to require the production of certain documents or to commission an expert report (see paragraph 33 above).

(b) The applicant

49. The applicant argued that in the absence of any prosecuting authority or official, the burden of proving the accusation lay exclusively on the judge, who had had no choice but to seek, *proprio motu*, arguments for refuting the applicant's submissions. This could not but upset the balance in assessing the evidence. Officer Z.'s role at the trial was not that of an official empowered to prove the applicant's guilt for the administrative offence. The same had obtained on appeal, when even officer Z. was absent. Moreover, the judge's impartiality had been undermined by the fact that he had modified the charges against the applicant as compared to those in the offence record. During the hearing the applicant had not been informed of the possibility that the judge would ultimately reformulate the charge, namely by imputing factually different actions to him. Had the applicant known that that would happen, he would have taken a different line of defence.

50. As to equality of arms and adversarial procedure, the applicant submitted that it was an essential feature of adversarial procedure that there should be a prosecuting party (a public authority and, possibly, victims of the offence). Having initiated the prosecution, the prosecuting party formulates accusations and proves them before a court. Thus, it was unacceptable to invest a judge with the functions of a prosecuting authority. The procedural role of the official who had compiled the administrative record could not be assimilated to the role of a prosecuting authority.

2. *The Court's assessment*

(a) **General principles concerning impartiality**

(i) *General considerations*

51. The Court reiterates that impartiality normally denotes the absence of prejudice or bias, and that its existence or otherwise can be tested in various ways. The existence of (im)partiality for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. [73797/01](#), § 118, ECHR 2005-XIII; *Micallef v. Malta* [GC], no. [17056/06](#), § 93, ECHR 2009, and *Morice v. France* [GC], no. 29369/10, §§ 73-78, ECHR 2015). As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

52. The Court has previously considered that appearances may be of importance in court proceedings, for instance for assessing compliance with the requirement of objective impartiality, or for the sake of preserving the confidence which the courts in a democratic society must inspire in the public (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 77, ECHR 2007-IV; *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 42, ECHR 2007-VIII; and *Korolev v. Russia* (no. 2), no. 5447/03, § 32, 1 April 2010). In making such an assessment, the focus should be on the legitimacy of the reason to fear that a particular judge lacks impartiality and on whether this fear could be held to be objectively justified (*ibid.*). In the context of the principle of equality of arms, in the case of *Stoimenov v. the former Yugoslav Republic of Macedonia* (no. 17995/02, §§ 40-42, 5 April 2007) the Court also referred to “appearances” when concluding that an opinion submitted by the Forensic Science Bureau, a State agency, was akin to incriminating evidence used by the prosecution and that the refusal of an alternative expert examination and the applicant's inability to challenge the Bureau's report in the circumstances of that case had resulted in a violation of the equality of

arms (see also *Shulepova v. Russia*, no. 34449/03, §§ 65-67, 11 December 2008).

(ii) *Examples*

53. The Court has examined several cases in which the fear of partiality arose on account of the public prosecutor's absence from the court hearings.

54. In the case of *Thorgeir Thorgeirson v. Iceland* (judgment of 25 June 1992, §§ 46-54, Series A no. 239) the Court found no violation of Article 6 § 1, having established that the applicant's fears of a lack of impartiality were not objectively justified. Although the prosecutor had been absent from some of the hearings of the first-instance court, the court had not been called upon to conduct any investigation into the merits of the criminal case and had not assumed any functions which might have been fulfilled by the prosecution had it been present. The judge's actions had included asking questions relating to the substance of the charge against the applicant (§ 16 of the judgment).

55. In *Ozerov* (cited above, § 52) the prosecutor was absent from the entire trial. The judge's impugned actions included reading out an indictment submitted by the prosecutor's office; and calling and questioning, of his own motion, a witness who gave evidence incriminating the applicant, on which the District Court then relied in its judgment. The Court noted that the body of evidence on which the District Court had based the applicant's conviction had changed when new incriminating evidence had been taken by the judge of his own motion, and when certain evidence submitted by the prosecutor's office had been removed in support of the charges in the indictment. Moreover, all of that had been done without the prosecutor being present to make a statement on those changes (§ 53 of the judgment). The Court held as follows:

“54. The prosecutor, had he been present at the trial, would, in particular, have taken part in the examination of the evidence and would have given submissions. His exclusive role would have been either to sustain the charges levelled against the applicant before the trial or to drop them had he become convinced that the materials of the judicial investigation no longer supported them ... The preparatory work he had done for the trial in a form of the indictment was undoubtedly important. But it was at the oral hearing of the case before the District Court that he had either to sustain or to abandon the charges against the applicant in view of the judicial investigation as it unfolded, which, in fact, brought about the changes as to the body of evidence. It would be a speculation to suggest what course of actions the prosecutor would have chosen and how it would have affected the course and the outcome of the trial for the applicant. Moreover, this is of no importance for the present case. What is important is that by examining the case on the merits and convicting the applicant without the prosecutor the District Court confused the roles of prosecutor and judge and, thus, gave the grounds for legitimate doubts as to its impartiality. The presence of the victims at the hearing had no impact on the situation, as this was a case of public and not private prosecution.”

56. Similarly, in *Krivoshapkin v. Russia* (no. 42224/02, §§ 44-45, 27 January 2011), in the absence of a prosecutor during the criminal trial, the trial judge, *inter alia*, questioned the defendants and witnesses who attended the hearing. Although the applicant pleaded not guilty, the trial court found his guilt established on the basis of the evidence examined in that manner. In those circumstances, the Court considered that the trial court had not preserved the guarantees of the adversary nature of the criminal proceedings and had confused the functions of prosecutor and judge: it had taken up the prosecution's case, examined the issues, determined the applicant's guilt and imposed a sanction.

57. In *Weh and Weh v. Austria* ((dec.), no. 38544/97, 4 July 2002) the Court dealt with a situation in which a district authority – an administrative non-judicial authority – had itself issued the impugned decision (the “penal order”) and had then assumed, as a party to the judicial proceedings, the function of prosecuting authority before the Independent Administrative Panel. In this context, the Court made the following findings:

“The Court further reiterates that conferring the prosecution and punishment of minor offences on administrative authorities, which do not themselves satisfy the requirements of Article 6 § 1 of the Convention - as in this case the District Authority - is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 ...

The applicant has not alleged, and there is no indication in the present case, that any procedural rights are conferred on the prosecution which would put it in a position more favourable than the accused's.

However, the applicants' complaint that the Independent Administrative Panel conducted the hearing in absence of the prosecuting side may raise an issue as to the Panel's impartiality. In this connection the Court recalls that it had to examine a comparable complaint in the *Thorgeir Thorgeirson v. Iceland* case, relating to criminal proceedings for defamation in which some sittings of the trial court had been conducted in absence of the public prosecutor. It found no violation of Article 6 on the ground that at the sittings held in the public prosecutor's absence the court was not called upon to investigate the merits of the case, let alone to assume any function which might have been fulfilled by the prosecutor had he been present (judgment of 25 June 1992, Series A no. 239, p. 24, § 53).

As opposed to the *Thorgeir Thorgeirson case*, which concerned criminal proceedings, classified as such under domestic law, before a first instance court, the present case concerns proceedings which are classified as administrative under domestic law and are dealt with by the administrative authorities at first instance. Thus, the Independent Administrative Panel, though being the first tribunal dealing with the case, occupies the place of an appellate court in the domestic system. In this context the Court recalls that the manner of application of Article 6 to proceedings before appellate courts depends on the special features of the proceedings involved: account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein ... The Court notes in particular, that the appeal proceedings before the Independent Administrative Panel follow proceedings of a quasi-judicial nature at the lower instance ... In these proceedings the administrative authority must conduct a formal inquiry under the terms specified in

the Law on Administrative Offences; it must inform the accused of all the evidence gathered and, before issuing a penal order, must give the accused the opportunity to submit his defence.

In the present case relating to minor traffic offences, the applicants had spelt out their position in the objection against the provisional penal order, had been given an opportunity to present their defence before the issuing of the penal order and had once again forwarded the arguments for their defence in their appeal against the latter. On the other hand the penal order, which represents the charge in the proceedings before the Independent Administrative Panel set out the facts the District Authority considered relevant as well as its legal assessment thereof. Thus, the Independent Administrative Panel had both parties' positions before it. Moreover, the Court notes that the procedure before the Panel does not provide for an oral presentation of the charges by the prosecution. Further, as the Government pointed out, the Independent Administrative Panel is obliged to establish exonerating circumstances as well as incriminating circumstances of its own motion. This obligation exists irrespective of whether or not the administrative authority which issued the penal order is present at the hearing. Finally, there are no particular circumstances in the present case, which would indicate that the Independent Administrative Panel exercised any functions which might have been fulfilled by the prosecution, had it been present.

In conclusion the Court finds that the absence of a representative of the District Authority, i.e. the prosecuting side, at the hearing before the Independent Administrative Panel does not give rise to objectively justified fears as regards this body's impartiality."

(b) Application of the general principles in the present case

(i) Scope of the case

58. The applicant argued that the lack of a prosecuting authority in the administrative offence proceedings and the more specific issue of its representative's absence from the court hearings were capable of raising two intertwined but distinct legal issues relating to (i) the adverse effect on the impartiality of the trial and appeal courts; and (ii) the practical implementation of the principle of equality of arms and adversarial procedure.

59. As the Court has already mentioned, there is a close affinity between various safeguards and procedural modalities under Article 6 of the Convention and the manner in which they are combined to complement each other in the context of a given case to ensure fairness, which is the overarching principle. Therefore, it is conceivable that the lack of a prosecuting authority and, by implication, its absence from a trial or an appeal hearing, may have implications for the manner in which the accusation and evidence are presented and defended, and vice versa.

(ii) Specificities of the domestic procedure

60. Before embarking on an assessment of the specific complaints raised by the applicant, the Court finds it opportune first to highlight a number of

specificities arising in administrative offence cases examined by courts of general jurisdiction in Russia.

61. The Court notes that under the CAO proceedings are set in motion by a non-judicial authority (normally and as in the present case, the police). The Court also notes that the CAO gives public prosecutors wide discretionary powers to initiate administrative offence proceedings, and, where initiated, to take part in them. In other words, the CAO does not require a prosecutor to attend a court hearing and attaches no particular consequences to his or her absence from such a hearing. The Court rejects the Government's argument that Article 29.4 of the CAO provides a trial court with the possibility of requiring the presence of a prosecutor. That provision contains an exhaustive list of people whose presence could be required (see paragraph 33 above), and a prosecutor was not among them at the relevant time. Since a public prosecutor was not in any way involved in the present case, the Court finds it unnecessary to make any further findings relating to the role of a public prosecutor.

62. Secondly, it is noted that the role of the police consisted in compiling an "administrative offence record" and transmitting it to a court. It cannot be said that at that stage of the proceedings, the police acted as a "tribunal" proceeding to the "determination of a criminal charge".

63. It has not been submitted, and the Court does not find, that the procedure resulting in the compiling of an administrative offence record contained an adversarial element, which would allow the defence's objections or position to be taken into consideration.

64. Furthermore, it cannot be said that the officer in charge of compiling the administrative offence record or related record (for instance, the arrest record) was treated as a party to the proceedings. It is noted that the officer in question could not lodge interlocutory applications before the trial court, which is an essential feature of a fair trial; nor could the officer appeal against the judgment issued by the court. However, he or she could be called to provide clarifications.

65. Thus, the Court considers that the officer in question was not a "prosecuting authority" or a "prosecuting party" in the sense of a public official designated to oppose the defendant in the CAO case and to present and defend the accusation on behalf of the State before a judge. Consequently, the Court concludes that there was indeed no prosecuting party in the case brought under the CAO.

66. The Court observes that the administrative offence record served as the basis for the judge's examination of the case when the determination of the "charge" was first carried out. For the Court, it is of central importance whether the offence record was or was not assimilated to a bill of indictment, in substance, articulating the essential elements of the "charge" and the "nature and cause of the accusation" within the meaning of Article 6 §§ 1 and 3(a) of the Convention, and substantiating them with reference to

the available evidence. The Court has taken note of the Russian Ombudsman's view (see paragraph 37 above) that an offence record could be or has been used as a piece of evidence. However, in the present case the text of the trial judgment does not disclose that the offence record, *per se*, was treated as a piece of evidence deemed to prove the defendant's guilt. The Court concedes that the information it contained could be treated as evidence relating to establishing factual elements. The appeal court referred to the offence record as establishing "the fact that an offence had taken place" (see paragraph 19 above). The offence record was accompanied by supporting evidence (see paragraph 11 above). It was open to the defendant to contest the information in the offence record, essentially from a formal or procedural point of view, during the examination of the case by the judge.

67. Lastly, the following considerations have some import in the examination of the present case. The Court observes that an oral hearing was required by the CAO (see paragraph 28 above) and one was held before both the trial court and the appellate court in the present case. Given the statutory presumption in favour of a public hearing and the absence of a related complaint, the Court is inclined to hold that there were public hearings at the trial and appeal stages of the proceedings in respect of the applicant. There was no one else to contradict the applicant (for instance, a victim of the alleged offence). It is also noted that the applicant pleaded not guilty.

68. Bearing in mind the specific procedure outlined above and the practical arrangements in the applicant's case, the Court will now examine whether the absence of a prosecuting authority entailed a violation of Article 6 of the Convention in the present case.

(iii) Compliance with the impartiality requirement

69. The Court notes at the outset that there is neither an allegation nor any evidence that the trial judge or appeal court judges in the applicant's case lacked impartiality. Thus, no issue arises in the present case under the subjective test of partiality.

70. The Court is called upon to determine whether the applicant's specific allegations, taken together with the applicable procedure, disclosed legitimate doubts about the impartiality of the trial court.

71. First of all, the Court notes that the question of impartiality has been raised by the applicant in the context of an oral and public hearing held in his case.

72. The Court further notes that the lack of a prosecuting party had an effect on the operation of the presumption of innocence during the trial and, by implication, on the question of the trial court's impartiality and vice versa. The Court reiterates in this connection that Article 6 § 2 of the Convention safeguards the right to be "presumed innocent until proved guilty according to law". The presumption of innocence will be infringed

where, as a matter of fact or on account of the operation of the applicable law (for instance, a legal presumption), the burden of proof is shifted from the prosecution to the defence (see *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001).

73. The available information concerning the content and application of the pertinent provisions of domestic law do not enable the Court to ascertain the manner in which the presumption of innocence and the burden of proof operated in the administrative offence cases examined by the courts of general jurisdiction, including the present case. In such circumstances the Court accepts that the trial court had no alternative but to undertake the task of presenting – and, what is more pertinent, to carry the burden of supporting – the accusation during an oral hearing.

74. Furthermore, the CAO provided that the trial court could decide whether to require oral evidence or the production of documents or to commission a report. The Government submitted that such decisions could be taken “*inter alia*, at the defendant’s request”. By implication, this may also mean that such decisions could be taken by the trial court *proprio motu*. The Court has examined a number of constitutional decisions relating to the matter and does not find their rationale conclusive as regards the question of the search and collection of evidence by a court (see paragraphs 33-36 above).

75. Having examined the available material and the relevant provisions of domestic legislation and case-law, the Court is not convinced that sufficient safeguards were in place to exclude legitimate doubts as to the adverse effect the procedure had on the trial court’s impartiality. While noting that the impartiality issue here relates to the context of a relatively minor offence while arising from the specific procedure itself rather than from any action or inaction in the circumstances of the case, the Court considers that impartiality is not commensurate to the nature and severity of the penalties incurred or to what is at stake for the defendant in the proceedings.

76. The Court considers that where an oral hearing is judged opportune (for instance, because a possible penalty of detention is at stake, as in the present case) for the judicial determination of a “criminal charge” against a defendant and where, having been afforded an adequate opportunity to attend, the defence has not validly waived it, the presence of a prosecuting party is, as a rule, appropriate in order to avert legitimate doubts that may otherwise arise in relation to the impartiality of the court (see, in the same vein, *Ozerov*, cited above, §§ 52-54).

77. Unlike in civil cases where a party can waive an opportunity to be present at an oral hearing, the situation in criminal or assimilated matters may be different, since while the judge is the ultimate guardian of the proceedings, it is normally the task of a public authority in a case of public

prosecution to present and substantiate the criminal charge with a view to adversarial argument with the other party or parties.

78. The remaining question before the Court is whether the issue of impartiality also arose in the appeal proceedings before the District Court and, if not, whether the appeal proceedings remedied the issue that had arisen during the first-instance examination of the case against the applicant.

79. The Court notes that the appeal proceedings in the present case were initiated by the applicant. At the time, the official who had initiated the case was not authorised to appeal against the trial judgment in the administrative offence case, whereas a public prosecutor did have such a right, irrespective of whether he had participated in the trial proceedings (see paragraphs 23-24 above).

80. It also appears that the above-mentioned official did not make any written submissions to the appeal court, for instance in reply to the applicant's statement of appeal. In fact, it appears that the official who had initiated the case had no such right. The appeal court did not hear any officials. Having examined the applicant, the appeal court upheld the trial judgment. In the Court's view, the applicant has not raised any meritorious complaints relating to the fairness of the appeal proceedings *per se*.

81. Arguably, the issue arising from the lack of a prosecuting authority might be different on appeal, when an appellate court reviews, at the defendant's request, a judgment that has already been rendered. The Court does not rule out the possibility that once a "charge" has been "determined" in procedure devoid of the defects discussed above and the defendant lodges an appeal on points of law only, the prosecution's role might be perceived as less compelling, also in so far as the notion of impartiality is concerned.

82. The Court observes in this connection that the statutory scope of appeal proceedings under the CAO was such as to afford the appeal court an opportunity to reassess the existing evidence, examine additional evidence and review the case as a whole, whether or not prompted to do so in the statement of appeal (see paragraph 34 above). Therefore, the Court considers that, as a matter of law, an appeal court was empowered to proceed in a manner that might remedy some of the shortcomings adversely affecting the fairness of the trial proceedings (see, by way of comparison, *Dallos v. Hungary*, no. 29082/95, §§ 50-53, ECHR 2001-II, and *Abramyan v. Russia*, no. 10709/02, §§ 37-38, 9 October 2008).

83. At the same time, given the wide statutory scope of review on appeal, the impartiality requirement must also be respected in such appeal proceedings. By implication, the Court concludes that the lack of a prosecuting party in the appeal proceedings was a serious shortcoming too. Thus, the appeal proceedings did not remedy the impartiality matter arising at the trial (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86, and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII).

84. There has therefore been a violation of Article 6 § 1 of the Convention in relation to the impartiality requirement.

85. In view of the above conclusion, the Court finds it unnecessary to examine whether there was also a breach of Article 6 § 1 of the Convention on account of the principle of the equality of arms and the requirement of adversarial procedure.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

87. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

88. The Government contested the claim as excessive.

89. The Court awards the applicant EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Default interest

90. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

91. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

92. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to

supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects.

93. The Court has previously examined applications relating to the administrative offence proceedings under Russian law and found violations of Article 6 of the Convention, in particular on account of the fairness requirement (see *Menesheva v. Russia*, no. 59261/00, §§ 94-100, ECHR 2006-III; *Malofeyeva*, cited above, §§ 97-120; *Kasparov and Others v. Russia*, no. 21613/07, §§ 36-69, 3 October 2013; *Nemtsov v. Russia*, no. 1774/11, §§ 81-94, 31 July 2014; and *Navalnyy and Yashin v. Russia*, no. 76204/11, §§ 76-85, 4 December 2014). The present case has disclosed a violation under Article 6 of the Convention on account of the state of domestic legislation and judicial practice concerning the lack of a prosecuting party in administrative offence cases. It is also noted that there are a number of pending applications before the Court raising similar issues.

94. In principle, it is not for the Court to determine possible appropriate measures of redress for a respondent State to carry out in accordance with its obligations under Article 46 of the Convention. With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 148, ECHR 2009; and *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). The Court's concern is to facilitate the rapid and effective suppression of a malfunction in the national system of human-rights protection. In that connection, the Court considers that general measures at the national level are undoubtedly called for in the execution of the present judgment (see *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-V (extracts)).

A. General measures to prevent similar violations

95. In view of its finding of a violation of Article 6 in the instant case, the Court considers that it is necessary to indicate the general measures required to prevent other similar violations in the future. It has found a violation of Article 6 on account of the lack of a prosecuting party in the administrative offence case examined by the courts of general jurisdiction.

96. Thus, the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism which provides sufficient safeguards for ensuring impartiality of the courts dealing with such cases, by way of introducing a prosecuting authority (a representative of a prosecutor's office or another

public authority) where there is an oral hearing, or by other appropriate means.

B. Remedial measures in respect of the applicant

97. The Court reiterates that when an applicant has been convicted despite an infringement of his rights guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010).

98. The Court notes in this connection that, unlike Article 413 of the Russian Code of Criminal Procedure, the CAO does not explicitly provide for a possibility of reopening the proceedings if the Court finds a violation of the Convention. At the same time, the available information before the Court does not disclose that the applicant made an application for review under Article 30.12 of the CAO before the Supreme Court of Russia. Apparently, this remedy remains available to the applicant and is, *prima facie*, capable of serving the aim of reopening the proceedings.

99. In the Court's view, the question of whether it is appropriate and practicable to reopen the domestic proceedings may be usefully addressed by the respondent State, when choosing, subject to supervision by the Committee of Ministers, the measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the adverse effects of this violation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the impartiality requirement;
3. *Holds* that it is not necessary to examine separately whether there has been a violation of Article 6 § 1 of the Convention on account of the principle of the equality of arms and the requirement of adversarial procedure;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Luis López Guerra
President