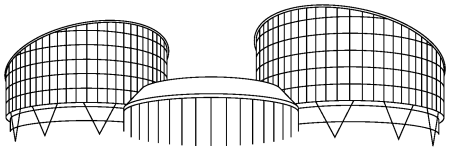

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MIKHAYLOVA v. RUSSIA

(Application no. 46998/08)

JUDGMENT

STRASBOURG

19 November 2015

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 Mikhaylova v. Russia,

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

András Sajó, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 20 October 2015,

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

PROCEDURE

1. The case originated in an application (no. 46998/08) 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, Ms Valentina Nikolayevna Mikhaylova ("the applicant"), on 10 September 2008.

2. The applicant was represented by Mr A. Burkov, a lawyer practising in Yekaterinburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained under Article 6 of the Convention that she could not and did not benefit from free legal assistance in the administrative offence proceedings against her.

4. On 8 October 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Saint Petersburg.

6. On 25 November 2007 the applicant took part in a march.

7. The applicant was then taken to a police station and was accused of disobeying the police order for the march to disband, as it was considered to be a non-authorised public gathering. The applicant was suspected of an

offence under Article 19.3 of the Code of Administrative Offences (CAO), which punishes disobedience of a lawful order by a public official. The police also considered that the applicant had committed an administrative offence under Article 20.2 of the CAO, on account of her participation in a public gathering which had not been subject to prior notification to the authorities, as required by the 2004 Public Gatherings Act.

8. On the same day, the administrative offence record was submitted to a justice of the peace of the 201 district. The applicant was then apprised of her procedural rights under Article 25.1 of the CAO.

9. The applicant lodged a request for adjournment in respect of both cases, since she needed time to retain counsel. The judge granted an adjournment until 28 November 2007.

10. On 27 November 2007 the applicant sought another adjournment, referring to the need for time to study the case material. The judge adjourned the cases until 5 December 2007.

11. On 28 November 2007, referring to the European Court's case-law under Article 6 of the Convention, the applicant sought free legal assistance in these proceedings.

12. On 5 December 2007 the judge adjourned the case again, since the applicant sought to call witnesses.

13. By a procedural order of 19 December 2007, the justice of the peace dismissed the request for free legal assistance as follows:

> "Having examined the administrative offence record and the other documents in the case file, I dismiss the request because the CAO contains no rule concerning provision of legal assistance to the defendant. [The applicant] has been apprised of her rights under Article 25.1 of the CAO and thus must take her own decision whether she wants to retain an advocate, with due regard to her financial situation ..."

14. By a judgment of 19 December 2007 the applicant was found guilty of the administrative offence under Article 19.3 of the CAO and was sentenced to a fine of 500 Russian roubles (RUB)1.

15. On the same date, the same justice of the peace found the applicant guilty of breaching the requirements of the Public Gatherings Act, which is an administrative offence under Article 20.2 of the CAO. The applicant was ordered to pay a fine of RUB 500.

16. The applicant appealed against both judgments and sought free legal assistance for the appeal proceedings.

17. On 19 February 2008 the Dzerzhinksiy District Court of St Petersburg gave her leave to call witnesses but dismissed her request for free legal assistance as follows:

> "[The applicant] has submitted a request for free legal assistance, submitting that she is a pensioner and has insufficient means to retain an advocate; she has no knowledge in the area of jurisprudence.

[1] approximately 14 euros in 2007

> Having examined the request, the court cannot grant it because the CAO contains no rule concerning provision of legal assistance to the defendant. [The applicant] has been apprised of her rights under Article 25.1 of the CAO and thus must take her own decision whether she wants to retain an advocate, with due regard to her financial situation ..."

18. On 11 March 2008 the District Court granted the applicant's request to admit a video recording in evidence. The applicant's renewed application for free legal assistance was again dismissed.

19. On 17 March 2008 the District Court upheld the judgments of the justice of the peace. The appeal court also stated as follows:

> "There has been no violation of [the applicant's] right to legal assistance. She was apprised of her procedural rights ... There is no evidence that the justice of the peace impeded [the applicant's] exercise of her rights."

20. The applicant sought further review of the above court decisions. On 16 and 19 June 2008 the deputy President of the St Petersburg City Court re-examined the case files and upheld the judgments.

21. The applicant sought review before the Supreme Court of Russia. On 31 July and 25 September 2008 the Deputy President of this court dismissed her applications, stating as follows:

> "The applicable legislation contains no rule concerning provision of legal assistance free of charge."

22. Lastly, the applicant lodged a constitutional complaint regarding the non-availability of free legal assistance under the CAO. By decision no. 236-O of 5 February 2015 the Constitutional Court of Russia declared her application inadmissible and made the following findings:

> "The Constitution of the Russian Federation ... provides for a right to legal assistance, in the circumstances prescribed by law, free of charge ...
>
> The federal legislator is empowered to specify the means of access to the right to legal assistance, without impinging upon the essence of this right ...
>
> The Code of Administrative Offences contains provisions allowing the person, who is being prosecuted for an administrative offence, to seek legal assistance ... by way of retaining a defender ... The defendant has a possibility to retain an advocate or another person. Therefore, the possibility to find and retain a defender is wider as compared to the situation of a suspect or accused in criminal proceedings ...
>
> Unlike in criminal cases, the person concerned does not bear any procedural costs ... Therefore, the decision not to prosecute for an administrative offence or a favorable decision following the prosecution for such offence may entail reimbursement of the expenses relating to legal assistance ...
>
> The Constitutional Court previously acknowledged the need for a heightened level of protection of the citizens' rights and freedoms in the areas entailing administrative or another type of public liability ... The relevant legislative regulations should comply with the requirements of fairness, proportionality and legal certainty ... At the same time, the constitutional requirements of fairness and proportionality entail some differentiation of liability on account of the seriousness of the facts, the extent and type of damage caused, the extent of the person's guilt and other relevant factors ...

Classification of offences as administrative or criminal entails corresponding statutory sentences and a set of corresponding procedural rules ... Unlike criminal cases, which include, as a rule, pre-trial proceedings, the cases under the CAO are focused on and processed by way of the non-judicial procedure. It has a more simplified and expedited nature, thus normally not requiring an investigation. Therefore, these proceedings are fit for the person to defend himself and are less financially burdensome as regards recourse to assistance from an advocate or another person ...

Therefore, the federal legislator should not be deprived of the choice in favour of a differentiated approach when putting in place specific modalities concerning legal assistance, with due regard to the type of offences, the severity of penalties, procedural specificities of the procedures and other legitimate criteria ...

In view of the above, as well as the case-law of the European Court of Human Rights, the State's positive obligation to ensure provision of legal assistance, with recourse to public funding, primarily concerns the need to protect vulnerable groups ... and has a special significance in the criminal procedure, in particular on account of the importance of the consequences that may result during or after this procedure ...

The issue of free legal assistance in CAO cases may acquire constitutional significance in situations where the degree of actual intrusion into constitutional rights and freedoms, by way of prosecution under the CAO, becomes comparable to measures prescribed by criminal law ...

In substance, the applicant alleges a violation of her constitutional rights on account of the lacunae in Article 25.5 of the CAO that allowed the courts to reject her request to use free of charge the services of the lawyer that would be appointed. At the same time, she referred to a risk of an administrative sentence of fifteen days' detention ...

A theoretical possibility of administrative detention of up to fifteen days was only available as a penalty in respect of one of the two charges against the applicant ... As a matter of fact, with due regard to various circumstances, she was fined only 500 roubles, which was one-fifth the minimum statutory fine under the Criminal Code ...

In view of the above and the other factors (the penalty of administrative detention is only prescribed for some offences, is to be used only in exceptional circumstances; it cannot not be imposed in respect of certain categories of people; the applicant was not subject to any pre-trial detention longer than forty-eight hours), there are no compelling reasons to consider that during the CAO proceedings the applicant was placed in a position which could be compared to that of a defendant in a criminal case and that she ran a risk of being subjected to measures which would be comparable to those under criminal law ...

Therefore, in view of the specific circumstances of the case, the applicant's allegations are abstract ...

Article 25.5 cannot be perceived as violating the applicant's rights in the specific case ... Thus, the complaint should be declared inadmissible ...

However, the foregoing considerations should not prevent the federal legislator from specifying conditions for obtaining legal assistance in CAO cases, including by way of singling out categories of CAO cases and related criteria to determine whether free legal assistance in court proceedings is necessary ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Right to legal assistance

23. Article 48 of the Russian Constitution provides that everyone has a right to receive legal assistance of adequate quality. In situations prescribed by a statute legal assistance should be provided free of charge.

24. The Free Legal Assistance Act (Federal Law no. 324-FZ of 21 November 2011) provides that legal assistance should be provided free of charge in the situations prescribed by the Act and other federal or regional statutes (section 2 of the Act).

B. Administrative offence proceedings

25. Article 1.5 of the Federal Code of Administrative Offences (CAO) provides that the defendant should be presumed innocent until his or her guilt is proven and confirmed by a final judgment or a final decision of a public official.

26. Under the CAO, a penalty is a measure of responsibility for an administrative offence, and is aimed at preventing new offences by the defendant or others (Article 3.1. of the CAO).

27. At the material time, the offence under Article 19.3 § 1 of the CAO (under Chapter 19 concerning offences impinging upon the work of public authorities) concerned resistance to a lawful order by a police officer or impediment to his work. This offence was punishable by a fine of up to RUB 1,000 or by administrative detention of up to fifteen days.

28. At the material time, Article 20.2 § 2 of the CAO (under Chapter 20 concerning offences impinging upon public order and public safety) imposed punishment by a fine of up to RUB 1,000 for violation of "the established procedure" concerning public gatherings, *inter alia*, under the 2004 Public Gatherings Act (see paragraph 36 below). In 2012 Article 20.2 of the CAO was redrafted and amended to make the similar offence punishable by a fine of up to RUB 20,000 or by a new sentence of corrective labour. Higher fines, corrective labour and administrative detention were introduced for other offences under Article 20.2 relating to organisation of and participation in public gatherings which did not comply with the requirements of the Public Gatherings Act.

29. A person's failure to pay a fine within a time-limit entails a monetary penalty or administrative detention of up to fifteen days (Article 20.25 of the CAO). Article 20.25 constituted a separate administrative offence. A case under this provision should be opened and brought before a court without delay (Ruling of the Presidium of the Supreme Court of Russia of 7 March 2007, point 11).

30. Article 3.9 of the Code provided that the penalty of administrative detention could be imposed in exceptional circumstances for listed offences. It could not be imposed in respect of pregnant women, women with children under the age of fourteen, military staff, and some other categories.

31. Article 25.1 of the Code provides that the person, who is being prosecuted for an administrative offence, has a right to study the case file, to adduce evidence and to have legal assistance.

32. Article 25.5 of the CAO provides that a person who is subject to proceedings under the CAO, may receive legal assistance from his or her counsel (an advocate or another person). Once admitted to the case, counsel has a right to study the case file material, to produce evidence, and to lodge petitions and requests.

33. Article 28.1 of the CAO provides that administrative offence proceedings are initiated by a competent public official, who may be among others a police officer or a prosecutor.

34. 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, a court may reclassify the relevant actions (or inaction) under another Article of the CAO, concerning an offence of the appropriate type and provided that this 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).

35. If the administrative offence record contains an incorrect legal classification of the offence, a court is empowered to decide the case on the basis of the correct legal classification. In this situation, a factual description of the offence with adduced evidence should be sufficient to provide a different legal classification (ruling no. 10 of 2 June 2004 by the Plenary Supreme Commercial Court of Russia, paragraph 8).

C. Public Gatherings Act

36. Under sections 5 and 7 of the 2004 Public Gatherings Act in force at the relevant time, the organiser of a public event (except for an event involving one person) was to inform the competent authority of the event at least ten days in advance. The organiser was required to indicate the purpose of the event, its form, the venue and the itinerary, as well as the date, timing and approximate number of participants.

37. The competent authority was to notify the organiser if it had a reasoned proposal for another venue and/or timing for the event. The organiser was required to inform the competent authority whether he or she refused or accepted the suggested new venue and/or timing.

38. The event could not take place if the event organiser and authority had not approved the alternative proposal (section 5 § 5).

39. A public event could be stopped if (i) there was a real threat to life or physical integrity of persons or property; (ii) the event participants had acted unlawfully or if the event organiser had knowingly breached the requirements of the Act as regards the conduct of the event (section 16). In such circumstances the representative of the public authority, who should be present at the event, could order the event organiser to put an end to the event. This representative should also explain the reasons for such order and should provide time for compliance with the above order. If the organiser had not complied, the public official could issue the same order to the participants. If both failed to comply, the police was to take the appropriate measures to stop the event (section 17).

III. OTHER RELEVANT MATERIAL

40. The 2014 Report compiled by the Human Rights Ombudsman of the Russian Federation contains the following section concerning proceedings under the CAO:

> "Legislative guarantees relating to adversarial proceedings in CAO cases have until now been lacking.
>
> The Russian Constitution safeguards the principle of equality of arms and the principle of adversarial procedure as the basis of adjudication, without any exception. This means it is absolutely necessary to provide for adversarial proceedings, including in CAO cases. Adversarial proceedings require that the institution of prosecution, the drafting of accusations and their presentation before a court should be carried out by the authorities or officials, as specified in the statute. However, the CAO indicates that a court hearing may be held without any public official who would be empowered in some way to present the administrative offence charge and to prove it. A prosecutor's participation in the case is not mandatory.
>
> As a rule, the participants in the proceedings are the judge, the defendant and his counsel. As a matter of fact, the defence is not opposed to a prosecuting party but to the court itself. This does not exclude the presence of some *de facto* functions of prosecution with the judge.
>
> The overwhelming majority of CAO cases include examination, as evidence, of public officials' reports, while these officials act, *de facto*, as initiators of the proceedings and as accusers. Their written explanations and their oral testimonies in court are also treated as evidence. Thus, the "bulk of evidence" consists of copying all the information which was provided by the person who initiated the proceedings.
>
> Established judicial practice indicates that accusatory testimonies by public officials are treated as more trustworthy than exculpatory evidence which is submitted by the defence ...
>
> An administrative offence record has the same status as a bill of indictment and thus represents the opinion of one of the parties. The merits of this opinion should be established at a court hearing. It is against the right to a fair hearing (on the basis of equality of arms and adversarial procedure) to use in evidence documents which contain accusations and opinion on evidence. In such a situation, the opinion of one party is treated as evidence in the case.

Opinion on the defence's testimonies is not treated as proper evidence. If the defendant is not in a position to adduce objective evidence proving his innocence, his explanations or testimonies by witnesses on his behalf are declared, as a rule, to be untruthful.

The above lacunae in the legislation render examinations of CAO cases partial ...

The contents of the complaints lodged with the Ombudsman confirm the existence of a systemic problem, which calls for additional legislative response. In our view, the burden of proving the offence cannot be on the official who compiled the administrative offence record. But it should be on the public official who has powers to put forward the accusation.

The judge should determine the scope of issues to be proven, provide assistance in collecting evidence, and assess the evidence adduced by the parties. Observance of the above conditions can secure an impartial examination of this type of case ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

41. The applicant complained under Article 6 of the Convention that she could not and did not benefit from free legal assistance in the administrative offence proceedings against her.

42. Article 6 of the Convention reads as follows in the relevant parts:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...

3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

A. The parties' submissions

1. The Government

43. The Government argued that the applicant had not sustained any significant disadvantage on account of the derisory fines imposed on her, while there was no evidence that such an amount adversely affected her situation. No issue regarding respect for human rights arose in the present application, the issue of Article 6 applicability in administrative offences cases being settled in the Court's case-law. Lastly, the matter of legal assistance had been duly considered by the domestic courts.

44. The Government also submitted that the civil aspect of Article 6 of the Convention was inapplicable in respect of the relevant domestic

proceedings under the CAO. The criminal limb of Article 6 was also inapplicable, since Russian law made no provision for free legal assistance in CAO proceedings. However, the applicant could retain counsel for such proceedings, which were in any event quite simple. The applicant had been made aware of her procedural rights and had made use of them during the proceedings, in particular by way of lodging submissions. Provision of free legal assistance was not made necessary by the circumstances of the case, in view of the amount of the fine imposed on the applicant, and the simplicity of the procedure, which could be fully understood by a lay person. In fact, the contents of the applicant's submission to the domestic courts disclosed that she was well versed in domestic law.

2. The applicant

45. As to the matter of significant disadvantage, the applicant argued that the fines in two cases accounted for 25% of her monthly pension at the time, which was a large enough proportion to have a significant impact on her. These fines also had a chilling effect *vis-à-vis* her exercise of the freedoms of expression and assembly in the context of an opposition rally. In any event, the present application raises new and important issues concerning interpretation and application of Article 6 of the Convention in applications concerning Russia, in particular where the defendant did not face a custodial sentence. The legislative exclusion of free legal assistance from CAO cases disclosed a structural deficiency in the domestic legal order, which was and is likely to affect other individuals in the same position as the applicant and, *a fortiori*, following the twenty-fold increase in the level of statutory fines for the relevant offence in 2012 (see paragraph 28 above). Thus, the present case concerns clarification of the extent of Russia's obligations under Article 6 of the Convention.

46. The applicant contended that the criminal limb of Article 6 was applicable to both domestic cases, on account of the generally binding nature of the relevant provisions of the CAO, which were not designed to apply only to a specific group of people. The proceedings had been instituted by a public authority. Following conviction of the applicant for administrative offences the court ordered mandatory penalties, which had a punitive and deterrent character. The procedural guarantees, such as the presumption of innocence, are indicative of the "criminal" nature of the procedure. In any event, the fine imposed on the applicant, which could also entail imprisonment in case of non-payment, was sufficiently severe to make the sanction criminal in nature.

47. The applicant also argued that under the Court's case-law the interests of justice necessitated that an accused in a criminal case who wants legal representation must have access to it; an individual cannot be considered to have had an adequate opportunity to defend herself because she was present and permitted to speak at a hearing. Although the applicant

had made written and oral submissions before the courts and had cross-examined witnesses, her age and lack of legal training pleaded in favour of legal assistance to ensure adequate defence, focusing on making legally important points such as violation of her freedoms of expression and assembly.

B. The Court's assessment

1. Preliminary observations

48. It remains unclear whether the proceedings under the two charges (Articles 19.3 and 20.2 of the CAO) were the same or whether they were separate sets of proceedings which however took place on the same date and before the same court. It remains that separate judgments were delivered on two charges, which, while arising from a set of facts concerning the same event had different pertinent legal elements. The Court will proceed on the assumption that they were separate proceedings. Thus, the Court will have to determine the issue of free legal assistance in respect of each set of the proceedings.

2. Admissibility

(a) Article 35 § 3 (b) of the Convention

49. The Government considered that the applicant had suffered no "significant disadvantage" (see, among others, *Giuran v. Romania*, no. 24360/04, §§ 21-23, ECHR 2011 (extracts), and *Van Velden v. the Netherlands*, no. 30666/08, §§ 37-39, 19 July 2011). The Court accepts that the fines imposed on the applicant were small. The Court observes that the present case raises issues concerning applicability of Article 6 of the Convention in relation to the procedure prescribed by the Russian Code of Administrative Offences and the absence of any provision for a right to free legal assistance under the CAO. Both issues arise in a number of similar pending applications before the Court in respect of Russia. Noting the nature of the issues raised in the present case, which also arguably concerns an important matter of principle, as well as the scope of the limitations, 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 also paragraph 40 above).

(b) Applicability *ratione materiae* under Article 6 of the Convention

50. First, it has not been argued, and the Court does not find it necessary to decide, in view of the conclusions below, whether Article 6 of the Convention was applicable under its civil limb to the domestic proceedings under review.

51. As to whether the applicant was charged with a "criminal offence" in these proceedings, the Court reiterates that this is an autonomous concept and must be interpreted according to the three criteria set out in its case-law, namely the classification of the proceedings in domestic law, their essential nature, and the nature and severity of the potential penalty (see, as a recent authority, *Allen v. the United Kingdom* [GC], no. 25424/09, § 95, ECHR 2013; *Escoubet v. Belgium* [GC], no. 26780/95, § 32, ECHR 1999-VII; and *Engel and Others v. the Netherlands*, 8 June 1976, §§ 82 and 83, Series A no. 22).

52. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but the legal characterisation of the procedure as non-criminal under national law cannot be the sole criterion of relevance for establishing the existence of a "criminal charge" for the purpose of Article 6 of the Convention (see *Öztürk v. Germany*, 21 February 1984, § 49, Series A no. 73, and, more recently, *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 83, ECHR 2003-X).

53. By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions, which are numerous but of minor importance, for instance as regards road traffic rules (see *Öztürk*, cited above, § 49). The Convention is not opposed to the moves towards "decriminalization" which are taking place - in extremely varied forms - in the member States of the Council of Europe (*ibid*.). Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 of the Convention, this might lead to results incompatible with the object and purpose of the Convention (*ibid*. and *Ezeh and Connors* [GC], cited above, § 83).

54. In addition, even though the Court's established jurisprudence regards the second and third criteria (the essential nature of the proceedings and the nature and severity of the potential penalty) as alternative and not necessarily cumulative, this does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Ezeh and Connors* [GC], cited above, § 86).

55. Lastly, the Court reiterates that the notion of a "criminal charge" in the text of Article 6 of the Convention must be interpreted in the light of the general principles concerning the corresponding words "criminal offence" and "penalty" in Article 7 of the Convention, and "criminal proceedings"

and "penal procedure" in Article 4 of Protocol No. 7 (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 52, ECHR 2009).

56. In particular, as regards a "penalty" within the meaning of Article 7 of the Convention, the relevant factors may include the nature, purpose and severity of the measure in question, its characterisation under national law, and the procedures involved in the making and implementation of the measure (see *Welch v. the United Kingdom*, 9 February 1995, §§ 28 and 33, Series A no. 307-A). The aim of prevention is consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment (*ibid*., § 30). The severity of the order is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (*ibid*., § 32).

(i) The charge under Article 20.2 of the CAO

(α) Domestic classification of the proceedings and their nature

57. In Russian law, a breach of the regulations on public assemblies may constitute an "administrative offence" under the CAO. The Court has previously examined the sphere defined in certain legal systems as "administrative", and found that it embraced some offences that are criminal in nature but too trivial to be governed by criminal law and procedure (see *Palaoro v. Austria*, 23 October 1995, §§ 33-35, Series A no. 329-B). Where this is the case, the indication afforded by national law is not decisive for the purpose of Article 6, and the very nature of the offence in question is a factor of greater importance (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 71, Series A no. 80; *Weber v. Switzerland*, 22 May 1990, § 32, Series A no. 177; and *Menesheva v. Russia*, no. 59261/00, §§ 96-98, ECHR 2006-III).

58. In the circumstances, the charge capable of being relevant lay in the administrative offence record compiled by a non-judicial authority and submitted to a court. It was this document that settled what was at stake, while the tribunal called upon to give a ruling only had a limited jurisdiction to reclassify the charge (see paragraphs 34-35 above, and see *Engel and Others*, cited above, § 83). The charges were brought against the applicant under Article 20.2 § 2 of the CAO (see paragraph 28 above).

59. As regards the nature of this offence, Article 20.2 § 2 of the CAO made it a punishable offence to participate in a public gathering which contravened the "established procedure", including the requirement of prior notification of the event to the authorities, as specified, *inter alia*, in the 2004 Public Gatherings Act. Article 20.2 of the CAO concerned offences against public order and public safety, and was designed to punish and deter violations of the regulations concerning public gatherings. The proceedings were initiated by a public authority (see paragraph 33 above). The legal rule applied to the applicant was directed towards the whole population rather

than towards a group possessing special status (see, by contrast, *Müller-Hartburg v. Austria*, no. 47195/06, §§ 44-45, 19 February 2013). Indeed, the Court has previously concluded that the offence in question was of a general character (see *Kasparov and Others v. Russia*, no. 21613/07, § 42, 3 October 2013).

60. Lastly, the Court notes that certain procedural guarantees, such as the presumption of innocence contained in the CAO (see paragraph 25 above), are indicative of the "criminal" nature of the procedure.

(β) Assessment of the penalty

61. The Court would specify that the relevant penalty here would be the one that was "risked" or "liable to be imposed" (see *Ezeh and Connors* [GC], cited above, § 120). It is determined by reference to the maximum potential penalty for which the applicable law provides in respect of the offence. The actual penalty imposed is relevant to the determination, but it cannot diminish the importance of what was initially at stake (*ibid*.; see for comparison the ruling of 5 February 2015 by the Russian Constitutional Court mentioned in paragraph 22 above).

62. Turning to the nature and severity of the penalty, the Court observes that, unlike the offence under Article 19.3 of the CAO, following conviction under Article 20.2 of the CAO the applicant only risked a fine. Its maximum statutory amount was RUB 1,000 (or EUR 28 at the relevant time), whereas the applicant was fined RUB 500 (that is the equivalent of EUR 14). Also, it has not been submitted, and the Court does not find, that this penalty also entailed other deprivations, restrictions or further financial or other related disadvantages (see for comparison *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, §§ 97-98, 4 March 2014).

63. The applicant argued however that under the CAO the defendant's failure to pay a fine within a time-limit could entail administrative detention for up to fifteen days. However, it is noted that Article 20.25 constituted a separate administrative offence (see paragraph 29 above). The case under this provision was to be opened separately and brought before a court for determination. Thus, as far as the reference to a possible sentence is concerned, it cannot be said that the administrative fine in question could be converted into a custodial sentence in the event of non-payment (see, by way of comparison, *Escoubet* [GC], cited above, § 38; *Alenka Pečnik v. Slovenia*, no. 44901/05, §§ 32-34, 27 September 2012; *Ravnsborg v. Sweden*, 23 March 1994, § 35, Series A no. 283-B; *Garyfallou AEBE v. Greece*, 24 September 1997, § 34, *Reports of Judgments and Decisions* 1997-V; *Weber*, cited above, §§ 22 and 34, and *Inocencio v. Portugal* (dec.), no. 43862/98, 11 January 2001).

64. However, in the Court's view, what matters is that the fine was not intended as pecuniary compensation for damage but was punitive and

deterrent in nature, which is also a characteristic of criminal penalties (see *Kasparov and Others*, cited above, § 43; *Nemtsov v. Russia*, no. 1774/11, § 83, 31 July 2014; *Jussila v. Finland* [GC], no. 73053/01, § 38, ECHR 2006-XIV; and, by contrast, *Escoubet* [GC], § 37, and *Müller-Hartburg*, §§ 47-48, both cited above). Indeed, it is stated in the CAO that a penalty is a measure of responsibility for an administrative offence, and is aimed at preventing new offences by the defendant or others (see paragraph 26 above).

(γ) Additional considerations

65. While the above considerations relating to the essential nature of the proceedings and the punitive and deterrent nature of the penalty are sufficient for the Court to conclude that the criminal limb of Article 6 was applicable, the Court will add the following to complete the analysis.

66. As a matter of principle, the Court attaches particular importance to any form of deprivation of liberty when it comes to defining what constitutes the "criminal" sphere (see *Ziliberberg v. Moldova*, no. 61821/00, § 34, 1 February 2005). When concluding that the criminal limb of Article 6 was applicable, the Court noted in *Kasparov and Others* (cited above), in addition to the above considerations, that the applicants were arrested and taken into police custody for around two hours (§ 44 of the judgment). In that case the Court observed that the applicants were subjected to an administrative arrest under Article 27.3 of the Russian CAO, a measure which has stronger criminal connotations than the escorting of an individual to the police station as provided for by Article 27.2 of the CAO (*ibid*.).

67. Having no copies of the escort or arrest record at its disposal but noting the Government's admission that the applicant was "arrested", the Court will proceed on the assumption that the applicant was subjected to the measure under Article 27.3 of the CAO in relation to both charges against her.

68. Lastly, the Court reiterates that the concept of a "criminal charge" in Article 6 § 1 of the Convention is an autonomous one, which means, *inter alia*, that proceedings concerning certain categories of subject matter may fall outside the scope of this Article (see for comparison domestic decisions regarding "entry, stay and deportation of aliens": *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X, and *Muminov v. Russia*, no. 42502/06, § 126, 11 December 2008, also concerning a case under the Russian CAO). In the present case, however, the Court sees no other reasons to doubt the applicability of Article 6 of the Convention.

69. In view of the foregoing, the Court is satisfied that the proceedings for which the applicant was prosecuted under Article 20.2 of the CAO can be classified as "criminal" within the meaning of Article 6 of the Convention.

(ii) The charge under Article 19.3 of the CAO

70. The Court considers that the majority of the considerations in the preceding paragraphs also apply, *mutatis mutandis*, in relation to the charge under Article 19.3 of the CAO.

71. *A fortiori*, the statutory sentence of administrative detention is a strong indication in favour of classifying the relevant domestic proceedings under the criminal limb of Article 6 of the Convention (see *Menesheva*, cited above, § 97, and *Malofeyeva v. Russia*, no. 36673/04, § 100, 30 May 2013).

72. The Court observes that Article 19.3 of the CAO provided for a fine of RUB 1,000 and/or fifteen days' imprisonment as the maximum penalties. As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves loss of liberty, there is a presumption that the charges against the applicant are "criminal", a presumption which can only exceptionally be rebutted, and only if the deprivation of liberty cannot be considered "appreciably detrimental" given its nature, duration or manner of execution (see *Engel and Others*, § 82, and *Ezeh and Connors* [GC], § 126, both cited above).

73. In the present case the Court does not discern any such exceptional circumstances (see *Sergey Zolotukhin* [GC], cited above, § 56, also concerning the statutory sentence of fifteen days' imprisonment for an administrative offence; see, by contrast, *Engel and Others*, cited above, § 85, where the Court considered that a statutory penalty of two days' detention in the context of military service was of too short a duration to belong to the "criminal" law within the meaning of Article 6 of the Convention).

74. In view of the above considerations, the Court concludes that the criminal limb of Article 6 was applicable to the case under Article 19.3 of the CAO.

(c) Conclusion on admissibility of the case

75. The Court notes that the application 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.

3. Merits

(a) General principles

76. The Court reiterates that the rights set out in Article 6 § 3 (c) of the Convention are elements of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Imbrioscia v. Switzerland*, 24 November 1993, § 37, Series A no. 275).

77. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008).

78. The right to free legal assistance under Article 6 § 3 (c) of the Convention is subject to two conditions. Firstly, the applicant must lack sufficient means to pay for legal assistance. Secondly, the "interests of justice" must require that legal aid be granted.

79. The Court takes into consideration several factors to determine whether the interests of justice required that legal aid be granted in the domestic proceedings. This is to be judged by reference to the facts of the case as a whole, having regard, *inter alia*, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the applicant (see *Quaranta v. Switzerland*, 24 May 1991, §§ 32-36, Series A no. 205; *Zdravko Stanev v. Bulgaria*, no. 32238/04, § 38, 6 November 2012); and *Guney v. Sweden* (dec.), no. 40768/06, 17 June 2008).

80. For instance, as regards legal assistance in appeal proceedings in criminal cases, the Court took into account three factors: (a) the wide powers of the appellate courts; (b) the seriousness of the charges against the applicants; and (c) the severity of the sentence they faced – the Court considered that the interests of justice demanded that, in order to receive a fair hearing, the applicants should have had legal assistance/representation in the appeal proceedings (see *Krylov v. Russia*, no. 36697/03, § 45, 14 March 2013, with further references).

81. While the requirements of a fair hearing are strictest concerning the hard core of criminal law, the guarantees of the limb of Article 6 applying to criminal law do not necessarily apply with their full stringency to other categories of cases falling under that head and which do not carry any significant degree of stigma. The Court therefore accepted that an oral hearing may not be required in all cases in the criminal sphere (see *Jussila* [GC], cited above, § 43).

82. The Court has held that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation, and if the defendant cannot pay for it himself public funds must be made available (see *Benham v. the United Kingdom*, 10 June 1996, § 61, Reports of Judgments and Decisions 1996-III, where the applicant faced a three-month prison sentence). However, the Convention does not set any particular threshold in terms of the length of such deprivation of liberty. Moreover, the above is not to say that public funds do not have to be available where deprivation of liberty is not at stake (see, for example, *Barsom and Varli v. Sweden* (dec.), nos. 40766/06 and 40831/06, 4 January 2008).

83. Article 6 § 3 (c) does not specify the manner in which this right is to be exercised. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 95, 2 November 2010).

84. Lastly, the Court finds it pertinent to note by way of comparison that even outside the criminal law sphere Article 6 § 1 may compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 61, ECHR 2005-II).

(b) Application of the principles in the present case

85. The Court observes at the outset that the applicant's grievance relates to the absence of free legal assistance at the trial and appeal stages of the proceedings. Thus, the present case does not concern the question of legal assistance after arrest (see *A.V. v. Ukraine*, no. 65032/09, § 59, 29 January 2015), or for the purposes of supervisory review.

86. The Court also notes that the applicant's complaint before the Court arises from the allegedly unsatisfactory state of domestic law. In this connection, the Court reiterates that in cases arising from individual petitions its task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it. Here, therefore, the Court's task is not to review, *in abstracto*, the compatibility with the Convention of the above procedure, but to determine, *in concreto*, the effect of the interference on the Convention right in the circumstances of the case (see, as a recent authority, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 68-70, 20 October 2011).

87. It is noted that Article 25.5 of the CAO provided at the material time that a person who was subject to proceedings under the CAO could receive legal assistance from his or her counsel (an advocate or another person). The Government conceded that neither the Code itself nor the judicial practice at the time interpreted this provision as securing an enforceable right to obtain legal assistance free of charge, if appropriate, under conditions. This Court will examine this case with the benefit of the detailed findings made recently by the Russian Constitutional Court in reply to the applicant's complaint.

88. As regards the question of sufficient means to pay for legal assistance (see paragraph 78 above), since the applicant's grievance arises from the state of domestic law rather than its application to the particular situation, it is clear that a "means test" was not and could not be applied at

the domestic level. For its part, having regard to the available information, the Court is ready to assume that the applicant would satisfy such a test.

89. Thus, it remains for the Court to determine whether "the interests of justice" required that legal assistance be provided to the applicant free of charge for the purpose of the administrative offence proceedings on two charges against her.

(i) The charge under Article 19.3 of the CAO

90. It is noted that the applicant ran a risk of receiving a sentence of up to fifteen days' detention. In this context, the Court is not oblivious to the requirement under Russian law that administrative detention was to be applied only in "exceptional circumstances" (see paragraph 30 above). However, this is a question to be decided by a domestic judge in each given case, and thus cannot, as such, weigh in the analysis of whether legal assistance should have been made available free of charge, to comply with the requirements of Article 6. It does not appear that the applicant fell within the excluded categories of people on whom administrative detention could not be imposed as a possible statutory penalty. Thus, the Court considers that a lot was at stake for the applicant (see, by way of comparison, *Mato Jara v. Spain* (dec.), no. 43550/08, 4 May 2000).

91. As to other factors (such as the seriousness of the offence, the seriousness of the specific charge, and the complexity of the case against the applicant), the Court observes that she faced an accusation for one episode relating to her resistance to an order from the police. Arguably, a proper determination of this charge could require, *inter alia*, that the lawfulness of the officer's order be ascertained (with particular reference to other legislation such as the Public Gatherings Act and the Police Act), or legal conclusions to be drawn on account of the defendant's exercise of her freedom of assembly or freedom of expression (see, by way of comparison, *Nemtsov*, cited above, §§ 76-77 and § 93; *Malofeyeva*, cited above, §§ 117-118; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 73, 4 December 2014; and *Makhmudov v. Russia*, no. 35082/04, § 83, 26 July 2007). Although the Court accepts that the applicant's submissions before the domestic courts were not devoid of substance, this could not have been reliably assumed in advance as far as a question of legal aid was concerned. In any event, any possibility of legal aid being ruled out by law, the question of the applicant's possibly (in)sufficient knowledge of law was not and is not a relevant consideration. In so far as the applicant's personal situation may be relevant, the Court rather notes that the applicant was a pensioner, with no legal or other relevant training.

92. Be that as it may, the gravity of the penalty suffices for the Court to conclude that the applicant should have been given legal assistance free of charge since the "interests of justice" so required.

93. It appears that the Russian Constitutional Court stated, in the same vein, that the federal legislator was empowered to set out means of access to free legal assistance without impinging upon the essence of this right; that this right could acquire "constitutional significance" in a situation where the degree of intrusion into constitutional rights or freedoms, by way of prosecution under the CAO, became comparable to measures prescribed by criminal law (see paragraph 22 above).

94. For its part, the Court reiterates that Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that the right to legal assistance is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Sakhnovskiy* [GC], cited above, § 95). However, the applicant could not benefit from legal assistance during the trial hearing, nor did she obtain another form of assistance, for instance, a legal consultation or assistance/representation before a court hearing or for the purpose of drafting an appeal, or a combination of the above (see for comparison *Benham*, cited above, § 63). Lastly, no question arises as to whether an appeal or further proceedings, given their scope of review and practical arrangements, would have been a remedy for the unavailability of legal assistance (see for comparison *Toeva v. Bulgaria* (dec.), no. 53329/99, 9 September 2004, and *Khrabrova v. Russia*, no. 18498/04, § 52, 2 October 2012). In fact, no free legal assistance was made available in these proceedings either.

95. The foregoing considerations are sufficient for the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

(ii) The charge under Article 20.2 of the CAO

96. As regards the gravity of the statutory penalties, the Court observes that at the material time the only statutory penalty was a fine of up to RUB 1,000 (or EUR 28), which was relatively low, even by national standards.

97. The Court also observes that the case concerned one event, for which the relevant legal elements, including the *corpus delicti*, were relatively straightforward. At the same time, the Court notes that the determination of the charge required that the applicable rules and the acts punishable under Article 20.2 of the CAO be determined and assessed with reference to, and on the basis of, other legislation such as the Public Gatherings Act (see paragraphs 28 and 36 above), and, eventually, with reference to legal considerations on account of the defendant's exercise of her freedom of assembly and/or freedom of expression (see, by way of comparison, *Kasparov and Others*, § 90, and *Berladir and Others*, § 61, both cited above). Arguably, this task was capable of disclosing some degree of complexity where the applicant had no requisite legal training or knowledge.

98. In particular, it was relevant to determine whether the public gathering did or did not comply with the notification requirement under the Public Gathering Act (see paragraph 36 above), and that the defendant took part in this demonstration. It is also observed that the CAO did not require in the circumstances the participation of a public prosecutor, who would present the case against the defendant before a judge (see *Malofeyeva*, cited above, § 116). While the police were in charge of compiling the administrative offence file before transmitting it to a court, it appears that the accusation against the defendant was then both presented and examined by the judge dealing with the case (*ibid*.).

99. In the present case the Court attaches importance to the fact that the proceedings against the applicant directly related to her exercise of the fundamental freedoms protected under Articles 10 and 11 of the Convention. Thus, it cannot be assumed that little was at stake for the applicant.

100. It is also noted that the applicant could not benefit from legal assistance during the trial hearing, nor did she obtain another form of assistance, for instance, a legal consultation or assistance/representation before a court hearing or for the purpose of drafting an appeal, or a combination of the above.

101. Lastly, the Court considers that, for the purpose of complying with Article 6 of the Convention, it should be preferable that the pertinent factual and legal elements (such as the means test and the question of "the interests of justice") be first assessed at the domestic level when the issue of legal aid is decided, especially when, as in the present case, a fundamental right or freedom protected under the Convention is at stake in the domestic proceedings in question. However, in view of the state of the national law, no such assessment was made at the domestic level (see also the Court's findings in paragraph 94 above).

102. Therefore, having examined all relevant elements and despite the low amount of the statutory fine, the Court concludes that in the particular circumstances of the case the "interests of justice" required availability of free legal assistance. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. 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

104. The applicant claimed 28 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

105. The Government contested the claims as unreasonable.

106. The Court does not discern any causal link between the procedural violation found and the pecuniary damage alleged (the amount of the fine); it therefore rejects this claim. On the other hand, having regard to the violation of Article 6 of the Convention in the CAO cases, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

107. The applicant also claimed EUR 128 for the costs and expenses incurred before the Court.

108. The Government contested the claim.

109. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court grants the claim, plus any tax that may be chargeable to the applicant.

C. Default interest

110. 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.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as to the case under Article 19.3 of the Russian Code of Administrative Offences;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as to the case under Article 20.2 of the Russian Code of Administrative Offences;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 128 (one hundred and twenty-eight euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 19 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	András Sajó
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate concurring opinion of Judge Pinto de Albuquerque joined by Judge Dedov is annexed to this judgment.

A.S.
S.N.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE DEDOV

1. I subscribe to the majority's finding of a violation of Article 6 §§ 1 and 3 (c) of the European Convention on Human Rights (the Convention). But the reasoning provided by the majority is not entirely convincing. Worse still, the majority have failed to see the broader picture of the systemic failure of the Russian legal system to deal with the problem raised by the applicant in the present case. This case presented an excellent opportunity for the European Court of Human Rights (the Court) to provide much needed guidance to the Russian authorities on the general measures that should be taken to prevent similar situations, in view of the insufficient efforts made by the Russian Constitutional Court to address that systemic failure. The purpose of my opinion is to help the Russian authorities define and implement a human-rights-compatible solution to this problem – which the majority chose to omit.

2. The applicant was charged with two different offences: the offence of failure to comply with a lawful order given by a public official, as set out in Article 19.3 of the Code of Administrative Offences ("CAO"), and the offence of participation in a public gathering which had not been notified in advance to the authorities, as provided for in Article 20.2 of the CAO. Given that both charges against the applicant arose from the same event, I will proceed to examine whether the interests of justice required that the applicant should have had an opportunity to obtain free legal assistance for this case taken as a whole. A formalistic approach to the facts, separating the two imputed offences, would hinder the adequate consideration of the substance of the case.

Lack of free legal assistance in CAO proceedings

3. The most important criterion to consider in deciding whether free legal assistance should be provided to a defendant in a criminal or administrative offence procedure is the severity of the penalty[1]. The Government referred to the criterion of the penalty as applied *in concreto* ("The amount of the fines imposed on the applicant is insignificant in view of the Court's case-law as well")[2]. This criterion is evidently not relevant to determining whether it is in the interest of justice to afford free legal assistance to the defendant, for the simple reason that when a lawyer is

[1] As the majority rightly pointed out, the punitive character of the administrative offence procedure under the CAO is plain to see, in particular when it refers to the presumption of innocence as an overarching principle of this procedure (Article 1.5 CAO) and to the "punitive measure for committing an administrative offence, established by the State" (Article 3.1 CAO).

[2] Page 11 of the Government's observations.

appointed it is not yet possible to know what the penalty will be *in concreto*. The relevant criterion is obviously the penalty applicable *in abstracto* to the offence. In the case of multiple offences imputed to a defendant, as a result of the same set of facts, the most severe applicable penalty is the one to be considered for the purposes of deciding on the need for free legal assistance.

4. In the present case, the applicant was liable to a sentence of up to fifteen days' detention in respect of the charge under Article 19.3 of the CAO. The legal possibility that imprisonment may be imposed as an alternative to the fine referred to in Article 19.3 of the CAO suffices to trigger the need for legal assistance, if necessary provided free of charge. Moreover, the applicant was also accused of another, less serious, offence. Under Article 20.2 of the CAO at the material time, the only statutory penalty was a fine of up to RUB 1,000 (EUR 28), which represented 25% of the applicant's monthly pension in 2007[3]. Although under Russian law administrative detention was to be applied only in "exceptional circumstances" (see paragraph 30 of the judgment), the applicant did not fall within the excluded categories of people on whom such detention could not be imposed as a statutory penalty. In this context, the decisive factor to be weighed in the analysis of whether legal assistance should have been made available free of charge, in order to comply with the requirements of Article 6 of the Convention, is the fact that failure to pay a fine within a time-limit entails, under Article 20.25 CAO, statutory imprisonment of up to fifteen days. Thus, the fact that Article 20.25 constitutes in itself a separate administrative offence, which gives rise to a separate judicial case, is entirely irrelevant.

5. In the light of Article 6 of the Convention, legal assistance is required as a basic procedural safeguard for defendants when they face charges carrying, directly or indirectly, a prison sentence[4]. For the purposes of securing an adequate defence strategy, it makes no difference to the nature of the safeguard whether the offence is directly or indirectly punishable by imprisonment. Any distinction between prison as an alternative penalty or as a subsidiary penalty would be purely artificial, in terms of the necessary procedural guarantees in a fair criminal trial. Thus, if a prison term of fifteen days is applicable, either as an alternative to a fine (as in the case of

[3] In *Berladir v. Russia* (no. 34202/06, 10 July 2012) the Court had already accepted that a fine of the same amount was not sufficient in itself to render the application inadmissible. Furthermore, the maximum fine applicable to the Article 20.2 CAO offence was increased from RUB 1,000 to RUB 20,000 on 8 June 2012. Thus, individuals who now find themselves in the exact same situation as the applicant face a potentially much greater direct financial disadvantage.

[4] A person charged with a criminal offence punishable by a prison sentence who does not want to defend himself or herself in person must be able to have recourse to legal assistance of his or her own choosing. That was the finding in the ground-breaking case of *Pakelli v. Germany*, no. 8398/78, 25 April 1983.

Article 19.3 of the CAO)[5] or as a subsidiary penalty in the event of failure to pay a fine (as in the case of Article 20.2, in conjunction with Article 20.25)[6], it is evidently necessary to secure to the defendant the basic procedural safeguard of legal assistance. Whenever the defendant does not have the financial means to pay for legal assistance in such cases, it must be publicly funded.

6. This is not to say that I do not attach importance to the fact, invoked by the majority, that the proceedings against the applicant directly related to her exercise of the fundamental freedoms protected under Articles 10 and 11 of the Convention. As to the Article 19.3 CAO charge, I note that the applicant faced an accusation for one episode relating to her resistance to an order from the police. Arguably, a proper determination of this charge could require, *inter alia*, that the lawfulness of the officer's order be ascertained with particular reference to other legislation such as the Public Gatherings Act and the Police Act, or that legal conclusions be drawn on account of the defendant's exercise of her freedom of assembly or freedom of expression[7]. The same applies to the charge under Article 20.2 of the CAO. Ultimately, both charges related to the defendant's exercise of her freedom of assembly and/or freedom of expression and therefore were capable of involving some degree of complexity[8]. At this juncture, it must also be taken into account that the applicant was a pensioner and had no legal training or knowledge[9]. In sum, the delicate nature of the subject matter of the charges and the relative complexity of the case, in both its facts and legal aspects, are factors of importance in order to determine the need for free legal assistance, but they only enhance and reinforce the conclusion reached on the basis of the assessment of the severity of the imposable penalties.

7. Furthermore, it should not be overlooked that, while the police were in charge of compiling the administrative offence file before transmitting it

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[5] For a case concerning an offence punishable by an alternative penalty of imprisonment that the Court treated under the criminal limb of Article 6, see *Demicoli v. Malta*, no. 13057/87, § 34, 27 August 1991.

[6] For a case concerning an offence punishable by a subsidiary prison term which the Court took under the criminal limb of Article 6, see *Weber v. Switzerland*, no. 11034/84, § 34, 22 May 1990.

[7] See *Navalnyy and Yashin v. Russia*, no. 76204/11, § 73, 4 December 2014; *Nemtsov v. Russia*, no. 1774/11, §§ 76-77 and § 93, 31 July 2014; *Malofeyeva v. Russia*, no. 36673/04, §§ 117-118, 30 May 2013; and *Makhmudov v. Russia*, no. 35082/04, § 83, 26 July 2007.

[8] See *Kasparov and Others v. Russia*, no. 21613/07, § 90, 3 October 2013, and *Berladir and Others*, cited above, § 61.

[9] It goes without saying that the applicant's personal appearance did not compensate for the absence of a lawyer, since she was in no position to plead the case effectively and counter the arguments raised against her (see *Zdravko Stanev v. Bulgaria*, no. 32238/04, 6 November 2012). While the proceedings were not of the highest level of complexity, the relevant issues included, among others, the exercise of constitutional freedoms and the meaning of her intent to disobey.

to a court, the accusation against the defendant was both presented and examined by the judge dealing with the case. In a procedure where the judge also assumes the function of a prosecutor, notifying the charges to the defendant, and there is no one to assist the latter in terms of legal advice, the individual's procedural position is particularly deficient[10]. In other words, where justice is a one-man-show, the risk of a miscarriage is much higher. In such a situation, legal assistance is an imperative of justice. Hence, it should be provided freely if and when the defendant does not have the financial means to afford a lawyer. Again, this is only one additional factor that reinforces the above-mentioned conclusion about the need to provide free legal assistance in the framework of CAO proceedings.

8. Lastly, no question arises as to whether an appeal or further proceedings, given their scope of review and practical arrangements, would have been a remedy for the unavailability of legal assistance[11]. In fact, no free legal assistance was made available in the appeal proceedings either. In reality, both the Justice of the Peace and the District Court failed to give the applicant's Convention arguments any consideration, as the courts ruled that the provision of free legal assistance was simply not prescribed by domestic law. It appears that the Russian Constitutional Court stated that the right to free legal assistance had "constitutional significance" in a situation where the degree of intrusion into constitutional rights or freedoms, by way of prosecution under the CAO, became comparable to measures prescribed by criminal law (see paragraph 22 of the judgment). Unfortunately, the Russian Constitutional Court has not yet drawn all the necessary conclusions from this reasoning in terms of the required protection of defenceless defendants in CAO proceedings who are charged with offences punishable directly or indirectly by imprisonment, of which the present case offers a good example. The foregoing considerations are sufficient to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

General remedies to resolve the systemic failure in CAO proceedings

9. Under 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

[10] See *Malofeyeva*, cited above, § 116.

[11] See, by way of comparison, *Toeva v. Bulgaria* (dec.), no. 53329/99, 9 September 2004, and *Khrabrova v. Russia*, no. 18498/04, § 52, 2 October 2012.

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.

The Court has previously examined applications relating to administrative offence proceedings under Russian law and found violations of Article 6 of the Convention, in particular having regard to the fairness requirement[12]. 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 right to legal assistance in administrative offence cases. It is also noted that there are a number of pending applications before the Court raising similar issues. To put it in Convention terms, the applicant's case evinces a structural deficiency likely to affect other individuals in the same position as her.

10. In this context, the Court should have indicated 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[13]. The Court's concern should have been to facilitate the rapid and effective suppression of a malfunction in the national system of human-rights protection and, for that reason, it should have considered that general measures at the national level are undoubtedly called for in the execution of the present judgment[14].

Thus, the respondent State should, through appropriate and timely measures taken by the legislative and/or judicial powers, secure in its domestic legal order a mechanism which allows individuals to obtain legal assistance in CAO proceedings whenever the person does not have sufficient means to pay for it and the interests of justice so require, and in particular whenever imprisonment is applicable, as either a principal or an alternative or subsidiary penalty.

Individual remedies in respect of the applicant's convictions

11. The Court has repeatedly reiterated 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, where requested[15].

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[12] See *Menesheva v. Russia*, no. 59261/00, §§ 94-100, ECHR 2006-III; and the above-cited cases of *Malofeyeva*, §§ 97-120; *Kasparov and Others*, §§ 36-69; *Nemtsov*, §§ 81-94; and *Navalnyy and Yashin*, §§ 76-85.

[13] 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.

[14] See *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-V.

[15] 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.

12. Unlike Article 413 of the Russian Code of Criminal Procedure, the CAO does not expressly provide for a possibility that the proceedings may be reopened if the Court finds a violation of the Convention. Nevertheless, the question whether it is appropriate and practicable to reopen the domestic proceedings in order to put an end to the violation found by the Court and to redress the adverse effects of this violation does not fall within the discretion of the respondent State. In other words, the respondent State should use all legal avenues available in the domestic legal order to suppress the negative effects of the conviction and sentence which are in breach of the Convention and, if this suppression is not possible within the existing legal framework, it should introduce a legal mechanism to reopen the proceedings for that purpose.

Conclusion

13. The statutory penalty of fifteen days' detention, which was directly applicable to the Article 19.3 CAO charge and indirectly applicable to the Article 20.2 CAO charge, suffices for it to be concluded that the applicant, who was a pensioner with no legal knowledge, should have been given legal assistance free of charge, since the "interests of justice" so required. This conclusion is reinforced by the relative complexity of the subject matter of the case and by the fact that the trial judge also assumed prosecutorial functions. In order to redress the violation of Article 6 §§ 1 and 3 (c) of the Convention and to fully comply with the obligations resulting from Article 46 of the Convention, the respondent State should adopt remedies of both an individual and a general nature, as emphasised above.