



## Conviction of Aleksey Navalnyy for commercial fraud was based on unforeseeable application of criminal law

In today's Chamber judgment<sup>1</sup> in the case of [Navalnyye v. Russia](#) (application no. 101/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 7 (no punishment without law) of the European Convention on Human Rights and**

**a violation of Article 6 § 1 (right to a fair trial).**

The case concerned the complaint by Aleksey Navalnyy, an opposition leader, and his brother Oleg Navalnyy, an entrepreneur, that their criminal conviction for fraud and money laundering was based on an unforeseeable application of criminal law and that the proceedings were arbitrary and unfair.

The Court found in particular that the Russian courts, in determining the criminal charges against the applicants, had extensively and unforeseeably construed to their detriment the offence of commercial fraud under the Russian Criminal Code. It had therefore not been foreseeable that the applicants' commercial conduct would constitute fraud or commercial fraud. Consequently, it had been equally unforeseeable that the profits derived from their commercial activities would constitute the proceeds of crime whose use could amount to money laundering.

The Court considered that the domestic courts' decisions had been arbitrary and manifestly unreasonable. That had undermined the fairness of the criminal proceedings in such a fundamental way that it had rendered other criminal procedure guarantees irrelevant.

### Principal facts

The applicants, Aleksey Navalnyy and Oleg Navalnyy, are Russian nationals who were born in 1976 and 1983 respectively. Aleksey Navalnyy is an opposition leader and popular blogger. His brother Oleg Navalnyy, who is an entrepreneur, is currently serving a sentence in a correctional colony in the Oryol Region.

In 2008, two companies, the Russian subsidiary of the French company Yves Rocher (a limited liability company, Yves Rocher Vostok) and the limited liability company Multidisciplinary Processing ("MPK"), which had both been clients of the State enterprise Russian Post, entered into agreements with the company Chief Subscription Agency ("GPA"). GPA had been set up as a Russian limited liability company by another company, incorporated in Cyprus, which the applicants and their parents had acquired in 2007. Oleg Navalnyy, who was also working as a manager for Russian Post, played an active role in the functioning of GPA. Under the agreements, GPA undertook to provide freight forwarding services to Yves Rocher Vostok and logistical services, such as printing and distribution of telephone bills, to MPK. Subsequently GPA subcontracted the services to a number of other companies. GPA and its contractors provided these services to Yves Rocher Vostok until the end of 2012 and to MPK until March 2013.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

During the same period, Aleksey Navalnyy ran an increasingly public anti-corruption campaign targeting high-ranking public officials, and he organised a number of political rallies, including one at Bolotnaya Square in Moscow in May 2012. The aim of that rally was to protest against “abuses and falsifications” in the presidential elections held earlier in 2012. He also investigated the off-duty activities of the chief of the Investigative Committee of the Russian Federation. In April 2012 the Investigative Committee opened criminal proceedings against Aleksey Navalnyy in another embezzlement case (the “Kirovles case” which was subject of the case *Navalnyy and Ofitserov v. Russia* (46632/13 and 28671/14) before the European Court of Human Rights).

In December 2012 the Investigative Committee opened a criminal file on the basis of material severed from the Kirovles case, on the suspicion that Aleksey and Oleg Navalnyy had committed fraud against Yves Rocher Vostok and had laundered the proceeds of illegal transactions. They were subsequently charged with fraud and money laundering. The investigator rejected a request by Oleg Navalnyy, in February 2013, that five employees of Yves Rocher Vostok be questioned as witnesses in a face-to-face confrontation. During the proceedings, the financial director of Yves Rocher Vostok submitted an internal audit report to the investigator stating that the company had not sustained any damage or loss of profits due to its agreement with GPA. Following the applicants’ request, in December 2014, the court issued a warrant for the general director of Yves Rocher Vostok to appear as a witness, but the warrant was not executed. Instead, statements which he and a manager of the company – whose appearance as a witness the applicants had also requested – had made during the investigation were read out.

In February 2014 the trial court ordered that Aleksey Navalnyy be placed under house arrest as a preventive measure, which was maintained until 5 January 2015. On 30 December 2014 the applicants were convicted of money laundering and defrauding MPK and Yves Rocher Vostok. Aleksey Navalnyy was given a suspended sentence of three and a half years and Oleg Navalnyy a prison sentence of three and a half years, to be served in a correctional colony.

The trial court found in particular that the applicants had set up a “fake company”, GPA, with the intention to use it as an intermediary to offer services to two clients of Russian Post, MPK and Yves Rocher Vostok. It held that Oleg Navalnyy had taken advantage of insider information that Russian Post had ceased to provide the companies with certain services and had convinced those clients to use GPA as a substitute; that he had misled the clients about GPA’s pricing policy and its relationship with Russian Post, thus depriving them of the freedom of choice of service providers; that he had promoted his company’s services while knowing that it would have to subcontract the work to other companies; and that GPA had retained the difference in price between what MPK and Yves Rocher Vostok paid for its services and what GPA paid to its subcontractors.

The applicants’ appeals against the judgment were rejected.

## Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), the applicants complained that they had been convicted of acts that were lawful at the time and that the authorities had extended the interpretation of the criminal law in their case in such broad and ambiguous terms that it did not satisfy the requirements of foreseeability. Relying on Article 6 §§ 1, 2, and 3 (d) (right to a fair trial / presumption of innocence / right to obtain attendance and examination of witnesses), the applicants maintained that the criminal proceedings against them had been arbitrary and unfair. They also relied on Article 18 (limitation on use of restrictions on rights).

The application was lodged with the European Court of Human Rights on 5 January 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Branko Lubarda (Serbia), *President*,  
Luis López Guerra (Spain),  
Helen Keller (Switzerland),  
Dmitry Dedov (Russia),  
Pere Pastor Vilanova (Andorra),  
Alena Poláčková (Slovakia),  
Georgios A. Serghides (Cyprus),

and also Stephen Phillips, *Section Registrar*.

## Decision of the Court

### Article 7

The Court underlined that it was not its task to rule on the applicants' individual criminal responsibility, that being primarily a matter for the domestic courts. Instead, it had to consider whether the acts of which the applicants had been convicted fell within a definition of a criminal offence which was sufficiently accessible and foreseeable.

The Court found that the Russian courts, in determining the criminal charges against the applicants, had extensively and unforeseeably construed to their detriment the offence of commercial fraud set out in Article 159.4 of the Russian Criminal Code, as in force at the time.

Notably, the domestic courts had found Oleg Navalnyy liable for failure to comply with contractual obligations set out in the agreements of the company GPA with MPK and Yves Rocher Vostok without clarifying what conduct had constituted such non-compliance. On the basis of the documents in the case file there were no indications that GPA had failed to comply with its obligations. On the contrary, the services it had rendered corresponded to those set out in the contracts. As for the use of subcontractors, that was a practice open to freight forwarders under the Civil Code. There was no suggestion that the parties had agreed otherwise, and GPA's clients had not objected to third parties providing the services, which appeared to be a common practice in the sector.

According to the domestic courts' interpretation, Oleg Navalnyy had been under an obligation to advise clients of cheaper alternatives to GPA's services and to offer them the same rates as those charged by the subcontractors. However, such an obligation was not based on the terms of the agreements or on the relevant legal provisions.

Moreover, the interpretation of Article 159.4 of the Russian Criminal Code, read in the light of Article 159 ("Fraud"), as adopted by the domestic courts in the applicants' case, required the courts to establish another element of fraud, in particular "motives of personal gain". However, some "motives of personal gain" might be identifiable in every commercial activity. GPA had been set up for profit-making purposes and the applicants had thus pursued the same goal as any other founder of a commercial entity. The domestic courts had not referred to a method for identifying a distinctively criminal "motive of personal gain" in what was otherwise a lawful commercial pursuit.

The Court concluded that it had not been foreseeable that the applicants' conduct, in their dealings with MPK and Yves Rocher Vostok, would constitute fraud or commercial fraud. Consequently, it had been equally unforeseeable that GPA's profits would constitute the proceeds of crime whose use could amount to money laundering.

Accordingly, there had been a violation of Article 7 as regards both applicants.

## Article 6

Having regard to its finding under Article 7, to the effect that the domestic courts had failed to rule on substantive elements of the criminal offence in question, the Court considered that the decisions reached by those courts in the applicants' case had been arbitrary and manifestly unreasonable. That had undermined the fairness of the criminal proceedings in such a fundamental way that it had rendered other criminal procedure guarantees irrelevant.

In view of that conclusion, the Court found a violation of Article 6 § 1 (right to a fair trial) as regards both applicants. It did not consider it necessary to address separately the remainder of the applicants' complaints under Article 6.

## Article 18

The Court rejected as inadmissible the applicants' complaint under Article 18 for being incompatible *ratione materiae* with the provisions of the Convention.

## Just satisfaction (Article 41)

The Court held that Russia was to pay to each applicant 10,000 euros (EUR) in respect of non-pecuniary damage; furthermore, it was to pay, in respect of costs and expenses, EUR 45,000 to Aleksey Navalnyy, and EUR 10,971 and 460,000 Russian roubles to Oleg Navalnyy.

## Separate opinions

Judges Keller and Dedov expressed a joint partly dissenting opinion. Judge Serghides also expressed a partly dissenting opinion. These separate opinions are annexed to the judgment.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.