



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

FIRST SECTION

CASE OF ANDREYEV v. ESTONIA

(Application no. 48132/07)

JUDGMENT

STRASBOURG

22 November 2011

FINAL

22/02/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Andreyev v. Estonia,

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

Nina Vajić, *President*,
Anatoly Kovler,
Khanlar Hajiyeu,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 48132/07) against the Republic of Estonia 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 Sergei Andreyev (“the applicant”), on 30 October 2007.

2. The applicant, who had been granted legal aid, was represented by Mr R. Käbi, a lawyer practising in Tallinn. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had been deprived of his right to appeal to the Supreme Court because of the omissions of the lawyer who had been appointed for him.

4. On 8 March 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The Russian Government, having been informed by the Registrar of their right to intervene (Article 36 § 1 of the Convention), indicated that they did not intend to do so.

6. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the above application was assigned to the newly composed First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1961 and lived in Narva until his arrest. He is currently serving a prison sentence.

A. Criminal proceedings against the applicant

8. The Viru County Court convicted the applicant of repeated rape, between 2001 and 2005, of his minor daughter, and sentenced him to nine years' imprisonment. As summary proceedings had been applied, the sentence was reduced by one third. The operative part of the judgment was delivered at a hearing on 3 November 2006. After the applicant had informed the County Court of his intention to appeal, the court delivered the full text of the judgment, which was served on the applicant on 22 November 2006. The operative provisions of the full text had been amended – in addition to the originally delivered operative part, the expulsion of the applicant after his release from prison was ordered and a ten-year prohibition on entering the country was imposed.

9. The applicant lodged an appeal with the Viru Court of Appeal, requesting his acquittal or the mitigation of the sentence, including the overturning of the expulsion order. He asked that the case be heard in his absence but in the presence of his legal-aid lawyer, B., who had also participated in the first-instance hearing. He requested, *inter alia*, that his former wife, the victim's mother, be re-examined at the appellate court hearing, and asked his lawyer to put certain questions to her.

10. The Court of Appeal scheduled its hearing for 26 February 2007 and informed the parties and the applicant's lawyer, B. As B. already had another court hearing scheduled for that date, he asked the court to reschedule the hearing or appoint another lawyer for the applicant. The Court of Appeal appointed K. as counsel for the applicant. According to the record of the Court of Appeal's hearing, K. challenged the assessment of the evidence and the applicant's conviction by the first-instance court. In the event that the appellate court nevertheless found that the applicant was guilty, K. asked for a more lenient sentence for him. Lastly, he argued that no reasons had been given in the judgment for the applicant's expulsion and that therefore the expulsion was unlawful.

11. By a judgment delivered on 5 March 2007 the Court of Appeal upheld the County Court's judgment. Any intention to appeal to the Supreme Court had to be notified in writing to the Court of Appeal within seven days of the delivery of the judgment. An appeal to the Supreme

Court, drawn up by a lawyer, had to be deposited with the Court of Appeal within thirty days of service of its judgment on the defendant.

12. On 7 March 2007 the applicant refused to accept the Court of Appeal's judgment in Estonian. On 15 March 2007 he received a Russian translation. On the following day he submitted a notice indicating his intention to appeal.

13. On Friday, 13 April 2007 the applicant gave to a prison officer an appeal drawn up by himself addressed to the Supreme Court via the Court of Appeal. It was posted on the following working day, Monday, 16 April 2007.

14. Apparently the applicant had telephoned B. from the prison to ask him to draw up an appeal to the Supreme Court. B. had replied that an appeal to the Supreme Court had to be drawn up by K., the lawyer who had represented the applicant before the Court of Appeal. According to B., he telephoned K. immediately and informed him of the applicant's wish to lodge an appeal with the Supreme Court. According to the applicant, he also telephoned K.

15. According to K., he did not become aware of the applicant's wish to appeal to the Supreme Court until he was telephoned by the office of the Court of Appeal on 17 April 2007. He was informed that the applicant had submitted a notice of intention to appeal and that, accordingly, an actual appeal had to be drawn up by a lawyer. On 23 April 2007 K. lodged the appeal. He argued that the original operative part of the judgment was decisive, and the imposition of the additional sentence was unlawful and had to be quashed. He also asked for a reduction of the length of the prison sentence.

16. On 9 May 2007 the Supreme Court rejected the appeal drawn up by the applicant since such an appeal had to be drawn up by a lawyer. It also rejected the appeal drawn up by K. on the applicant's behalf, noting that the last day for lodging it had been 16 April 2007 and the appeal had arrived at the Court of Appeal too late, on 24 April 2007.

17. On 15 May 2007 K. asked the Supreme Court to restore the time-limit for lodging an appeal. On 23 May 2007 the Supreme Court refused because no acceptable reasons had been put forward.

18. In a letter sent to the Supreme Court on 7 June 2007 the applicant insisted that he had done everything he could in the circumstances and asked the Supreme Court to examine his appeal. On 21 June 2007 the Supreme Court replied by a letter reiterating that the appeals drawn up by the applicant himself and K. had been rejected and K.'s request for the restoration of the time-limit dismissed.

B. Subsequent proceedings initiated by the applicant

19. Subsequently, the applicant made several complaints to courts, the Ministry of Justice and the Chancellor of Justice expressing his dissatisfaction with the actions of the courts and the conduct of K. in dealing with his case.

1. The applicant's complaints against the lawyers

20. On 17 September 2007 the applicant made a complaint against K. to the Estonian Bar Association (*Eesti Advokatuur*). He argued that because of K.'s omissions he had been deprived of his right of defence.

21. On 13 November 2007 the Board of the Bar Association (*Advokatuuri juhatus*) found that there were indications that a disciplinary offence (*distsiplinaarsüütegu*) had been committed and proposed that the Court of Honour (*aukohus*) of the Bar Association initiate proceedings in respect of K. Proceedings commenced on 12 December 2007. The Court of Honour gave its decision on 6 March 2008. It considered that K. had had an obligation to take steps to find out whether the applicant wished to appeal against the Court of Appeal's judgment. However, K. had taken no such steps between the delivery of the appellate court's judgment (5 March 2007) and the expiry of the time-limit for lodging an appeal (16 April 2007). The Court of Honour found that K. had breached the requirements of the Code of Conduct (*Eetikakoodeks*) of the Estonian Bar Association and thus committed a disciplinary offence. He was given a reprimand (*noomit*) as a disciplinary penalty.

22. In the meantime, the applicant also made a complaint against B. to the Bar Association. On 13 November 2007 the Board of the Bar Association found that B.'s behaviour showed no elements of a disciplinary offence and would not therefore recommend that the Court of Honour initiate proceedings against him.

2. The applicant's requests for the reopening of the proceedings

23. Subsequently, the applicant applied for legal aid to fund the lodging of a request with the Supreme Court for the criminal proceedings to be reopened (*teistmine*). Such a request had to be drawn up by a lawyer. On 10 March 2008 the Harju County Court granted the applicant legal aid to obtain a lawyer's opinion on the prospects of success of a request to the Supreme Court for the reopening of the proceedings and of an application to the European Court of Human Rights. On 8 May 2008 the lawyer appointed gave her opinion, according to which the request and application in question had no reasonable prospects of success. On the following day an assistant judge at the Harju County Court endorsed the lawyer's opinion and terminated the legal aid granted to the applicant, without extending it to the drawing-up of the request and application referred to above. On

19 September 2008 the Tallinn Court of Appeal dismissed an appeal by the applicant against the County Court's decision to terminate legal aid.

24. Shortly thereafter the applicant applied for legal aid for the second time. On 19 January 2009 the Viru County Court granted his request.

25. On 29 June 2009 L., a lawyer appointed under the legal-aid scheme lodged a request for the reopening of the criminal proceedings (*teistmisavaldus*) with the Supreme Court, together with a request for the restoration of the pertinent time-limit. In the request the severity of the prison sentence and the later amendment of the operative provisions of the convicting judgment were complained about. It was argued that such subsequent amendment of the operative provisions had been unlawful. It was submitted that the applicant wished to use his right to challenge the Court of Appeal's judgment in the procedure for the reopening of the criminal proceedings because he had been unable to exercise his ordinary right to appeal against the said judgment.

26. On 22 July 2009 the Supreme Court declined to accept the request.

C. Revocation of the applicant's residence permit

27. In the meantime, on 24 October 2007 the Citizenship and Migration Board (*Kodakondsus- ja Migratsiooniamet*) revoked the applicant's long-term residence permit in Estonia. The applicant challenged the decision before the Tallinn Administrative Court, which on 11 April 2008 dismissed his complaint. On 30 January 2009 the Tallinn Court of Appeal upheld that judgment. On 2 April 2009 the Supreme Court declined to accept the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

28. Article 45 § 4 of the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*) stipulates that the participation of counsel in court proceedings is mandatory.

29. Pursuant to Article 344 § 3, an appeal in cassation may be filed by an advocate acting as criminal defence counsel.

30. Article 345 § 2 provides that an appeal in cassation must be lodged within thirty days of the date when a party to the proceedings had the opportunity to examine the judgment of the court of appeal. Paragraph 5 provides that, at the request of the appellant, the Supreme Court may restore the time-limit for an appeal in cassation if it was allowed to expire for good reason.

31. Article 347 sets forth the requirements for an appeal in cassation. These requirements include formal ones, such as the personal details of the appellant and details of the judgment appealed against, as well as substantial ones, such as an indication of the appellant's request and reasoning setting out why he or she considers that the substantive law was incorrectly applied or the criminal procedural law was violated. Pursuant to Article 350, if an appeal in cassation does not meet the requirements set out in Article 347, the Supreme Court gives the appellant a time-limit for amending the appeal; in case of a failure to amend the appeal, or if the appeal has been submitted too late, the Supreme Court rejects the appeal.

32. Article 346 provides that the incorrect application of substantive law and the material violation of criminal procedural law are grounds for appeal in cassation. The latter ground is defined in Article 339 of the Code, which at the material time read as follows:

Article 339 – Material violation of criminal procedural law

“(1) A violation of criminal procedural law is material if:

- 1) a decision is made in a criminal matter by an unlawful court panel;
- 2) a criminal matter is heard in the absence of the accused, except in the cases provided for in Articles 267 § 1 and 334 § 1 of this Code;
- 3) court proceedings are conducted without the participation of counsel;
- 4) court proceedings are conducted without the participation of the prosecutor;
- 5) the confidentiality of deliberations is breached in the making of a judgment;
- 6) a judgment is not signed by all members of the court panel;
- 7) a judgment does not contain reasons;
- 8) the conclusions presented in the conclusion of a judgment do not correspond to the facts established with regard to the subject of proof;
- 9) a criminal matter is heard in a language in which the accused is not proficient without the participation of a translator or interpreter;
- 10) a record is not made of a court session, with the exception of matters heard by way of summary proceedings.

(2) A court may declare any other violation of criminal procedural law to be material if such violation results or may result in an unlawful or unfounded judgment.”

33. Article 349 of the Code of Criminal Procedure provides as follows:

Article 349 – Decision on acceptance of an appeal in cassation

“(1) A panel of three justices of the Supreme Court shall decide on the acceptance of an appeal in cassation on the basis of the material in the criminal file

...

(4) An appeal in cassation shall be accepted if at least one justice of the Supreme Court finds that:

1) the allegations made in the appeal in cassation give reason to believe that the appeal court has applied substantive law incorrectly or has materially violated criminal procedural law;

2) the appeal in cassation contests the correctness of the application of substantive law or requests the annulment of the judgment of an appeal court on account of a material violation of criminal procedural law, and a judgment of the Supreme Court is essential for the uniform application of the law.

...

(5) Acceptance of an appeal in cassation or refusal to accept an appeal in cassation shall be in the form of a decision of the Supreme Court without any reasons being given.”

34. Chapter 13 of the Code of Criminal Procedure sets out the rules concerning a request for the reopening of criminal proceedings. The relevant parts read as follows:

Article 366 – Grounds for the reopening of proceedings (*teistmine*)

“(1) The grounds for the reopening of proceedings (*teistmine*) are:

1) the unlawfulness or unfoundedness of a judgment or decision arising from the false testimony of a witness, knowingly wrong opinion of an expert, knowingly false interpretation or translation, or falsification of documents, or fabrication of evidence, which is established by another judgment which has taken effect;

2) a criminal offence committed by a judge in the hearing of the criminal matter under review and which is established by a judgment;

3) a criminal offence committed by an official of the body that conducted the pre-trial proceedings, or a prosecutor in the pre-trial proceedings of a criminal matter, and which is established by a judgment, if the criminal offence could have had an effect on the judgment made in the criminal matter under review;

4) the annulment of a judgment or decision which was one of the bases for the judgment or decision in the criminal matter under review, if this may result in the making of a judgment of acquittal in the criminal matter under review, or in the mitigation of the situation of the convicted offender;

5) any other facts which are relevant to the just adjudication of the criminal matter but which the court was not aware of when making the judgment or a decision in the criminal matter under review and which independently or together with the facts previously established may result in a judgment of acquittal or in mitigation of the situation of the convicted offender or in mitigation of the situation of a third party whose property has been confiscated on the basis of a judgment or decision;

6) the Supreme Court declares, by way of constitutional review proceedings, that the legislation of general application or provision thereof on which the judgment or decision in the criminal matter under review was based is in conflict with the Constitution;

7) the satisfaction of an individual application filed with the European Court of Human Rights against a judgment or decision in the criminal matter under review on account of a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol thereto, if the violation may have affected the resolution of the matter and it cannot be eliminated or damage caused thereby cannot be compensated for in a manner other than by review.”

Article 370 – Decision on the acceptance of a request for the reopening of proceedings

“...

(2) A request for the reopening of proceedings shall be accepted if at least one justice of the Supreme Court finds that the allegations made in the petition give reason to presume the existence of grounds for review. ...”

35. Article 369 of the Code of Criminal Procedure sets forth the requirements for a request for the reopening of proceedings. This provision is in substance similar to Article 347, which concerns appeal proceedings. Article 371 provides that Article 350 also applies to requests for the reopening of proceedings (see paragraph 31 above).

36. Article 431 of the Code of Criminal Procedure provides for issues arising in the implementation of judgments for which there is no specific regulation in the preceding provisions of the Code, and other doubts and ambiguities, to be settled by a decision of the court which gave the judgment or the judge in charge of execution of judgments at the county court responsible for enforcing the judgment.

37. Section 19 § 1 of the State Legal Aid Act (*Riigi õigusabi seadus*), as in force at the material time, provided that an advocate was not allowed to refuse to provide State legal aid to a person or terminate the provision of legal services to a person before the final adjudication of the matter.

B. Case-law of the Supreme Court

38. In a judgment of 17 March 2003 (case no. 3-1-3-10-02) the Supreme Court, sitting in plenary session, dealt with an application from a person convicted under the Criminal Code (*Kriminaalkoodeks*) who sought to be

released from serving his remaining sentence after a new Penal Code (*Karistusseadustik*) had entered into force because the new Penal Code provided for a shorter maximum prison term for a similar offence. The Supreme Court considered that the applicant's petition could not be considered a request for the reopening of the criminal proceedings (*teistmine*) or a petition for the correction of court errors (*kohtuvigade parandamine*). The Supreme Court held:

"17. ... [T]he fact that Article 15 of the Constitution recognises everyone's right of recourse to the courts, if his or her rights and freedoms are violated, must not be ignored. [The applicant's] petition concerns the rights referred to in the Constitution Proceeding from Article 15 of the Constitution, the Supreme Court may refuse to hear [the applicant's] petition only if [the applicant] has other effective ways to obtain judicial protection of the right of recourse to the courts established in the [above] provision of the Constitution."

The Supreme Court proceeded to analyse whether other possible procedures were available to the applicant and concluded:

"18. ... [The Supreme Court] is of the opinion that there is no effective remedy for [the applicant] for the protection of his fundamental right. Taking into account this fact, the fundamental rights at stake, and the duration of the sentence served, the [Supreme Court] can find no justification for refusing to hear [the applicant's] petition on the merits. [The Supreme Court] also bears in mind the need to give the courts clear guidelines on how to resolve similar cases."

39. Subsequently, dealing with requests lodged in accordance with the procedure for the reopening of criminal proceedings (*teistmine*), the Supreme Court has in several cases referred to the judgment referred to in the previous paragraph, for example, in the judgments of its Criminal Chamber of 19 October 2009 (case no. 3-1-2-4-09) and 7 April 2010 (case no. 3-1-2-1-10). In the former case, the Supreme Court noted that the grounds invoked by the prosecutor were not included in the exhaustive list given in Article 366 of the Code of Criminal Procedure. Nevertheless, the Supreme Court found that in that case there was no other effective procedure for verifying whether the applicant's right to liberty had been infringed; it heard the case and ordered the applicant's immediate release.

40. In the latter case, the Supreme Court, having also established that there were no grounds for reopening the criminal proceedings, nevertheless analysed whether the applicant's rights had been violated. Finding that this was not the case, it refused to reopen the proceedings.

41. In a judgment of 2 October 2009 (case no. 3-1-2-3-09) the Criminal Chamber of the Supreme Court dealt with a request for the reopening of proceedings (*teistmine*), filed on 25 May 2009, in a case where two different versions of the operative provisions of a judgment of a first-instance court existed. According to the operative part of the judgment originally delivered by the first-instance court, seven months of the ten-month prison sentence imposed on the defendant were to be suspended. However, according to the

operative provisions of the full text of the judgment, delivered at a later date, the defendant had to serve two months' imprisonment immediately and the remaining eight months were suspended.

42. The Supreme Court declined to reopen the proceedings, finding that there were no grounds for that under Article 366 of the Code of Criminal Procedure. Nevertheless, in order to secure the uniform application of the law and consistency in the case-law, the Supreme Court made it clear that the original operative part of the judgment was to be considered decisive and reiterated that pursuant to Article 431 of the Code doubts and ambiguities arising in the execution of a judgment were to be settled by a decision (*määrus*) made by the judge in charge of the execution of judgments (*täitmiskohtunik*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicant complained that he had been deprived of his right to appeal to the Supreme Court because of the omissions of the lawyer who had been appointed for him. He relied on Article 2 § 1 of Protocol No. 7 to the Convention and Articles 6 § 3 (c), 12, 13 and 17 of the Convention. The Court deems it appropriate to examine the complaint under Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

44. The Government contested that argument.

A. Admissibility

1. The parties' submissions

(a) The Government

45. The Government submitted that the application should be deemed to have been lodged more than six months after the Supreme Court's decision of 23 May 2007. They argued that in the applicant's first letter, which had arrived at the Court on 6 November 2007, he had neither complained about the Supreme Court's decisions of 9 May and 23 May 2007 (see paragraphs 16 and 17 above) nor provided a copy of them. The application

form in which the decision of 23 May 2007 was mentioned had only been received by the Court on 21 May 2008.

46. Furthermore, the Government contended that the application was manifestly ill-founded since the applicant had been assigned counsel under the State legal-aid scheme and the courts had not needed to be aware of his problems of communication with his counsel. Moreover, the State could not be held directly responsible for the activities of counsel. In any event, the applicant had lost his “victim” status since he was later afforded a new legal-aid lawyer for the filing of his request with the Supreme Court for the reopening of the proceedings (cf. *Fiecek v. Poland* (dec.), no. 27913/95, 23 October 2001).

47. Lastly, the Government argued that the applicant had failed to exhaust domestic remedies, namely to file a claim for damages against the lawyer or his law firm or insurer.

(b) The applicant

48. The applicant reiterated that the breaches of the Convention and events leading to his having no effective access to the Supreme Court had been outlined in his first submission to the Court and thus the six-month rule had been complied with.

49. The applicant emphasised that in the case of *Fiecek*, referred to by the Government, a cassation appeal had been lodged after the appointment of a lawyer and the Supreme Court had heard the appeal but rejected it. Furthermore, cassation proceedings and proceedings concerning a request for the reopening of criminal proceedings were to be distinguished in Estonian law. Therefore, the applicant had maintained his “victim” status.

50. In respect of whether he had to lodge a claim for damages in order to exhaust domestic remedies, the applicant submitted that such a claim could not have changed his criminal punishment, including his expulsion after serving the prison sentence.

2. The Court’s assessment

51. In respect of the question whether the six-month rule (Article 35 § 1) has been complied with, the Court notes that pursuant to Rule 47 § 5 of the Rules of Court, as in force at the material time, the date of introduction of the application was as a general rule to be considered to be the date of the “first communication from the applicant setting out, even summarily, the object of the application”. The Court further notes that in the applicant’s first communication, signed on 30 October 2007 and handed to the prison authorities on the following day, the applicant set out the facts of the case and his complaints in a rather detailed manner, his submissions comprising eleven pages of handwritten text. Although the applicant did not mention in that letter the Supreme Court’s decisions referred to by the Government, he explicitly invoked his right to appeal against the Court of Appeal’s

judgment and in substance complained that in his case his lawyers and a judge of the Court of Appeal had deprived him of that right. In the Court's opinion the applicant's first communication to the Court was sufficient to interrupt the running of the six-month period referred to in Article 35 § 1. It follows that the applicant complied with the six-month rule and that the Government's objection should be rejected.

52. As concerns the question whether the applicant has lost his "victim" status, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III). The Court observes that in the present case the domestic authorities have not made a decision where a breach of the applicant's right to appeal has been acknowledged. It further notes that, unlike the case of *Fiecek*, referred to by the Government, the present case does not concern a reversal by the State authorities of their initial decision to refuse legal aid, but rather whether and to what extent the State was responsible for securing the applicant the right to appeal to the Supreme Court. Therefore, the Court considers that the applicant has not lost his "victim" status.

53. In respect of the Government's argument that the applicant could have claimed damages from the lawyer or his law company or insurer, the Court reiterates that the only remedies which Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999-V).

54. In the Court's opinion the gist of the applicant's complaint was that he was deprived of his right to appeal to the Supreme Court. It considers that a claim for damages, as suggested by the Government, would not have allowed him to have access to the Supreme Court. In these circumstances, the Court considers that the applicant's complaint cannot be rejected for failure to exhaust domestic remedies.

55. In conclusion, the Court considers 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 applicant

56. The applicant argued that he had not had effective access to the Supreme Court. He was of the opinion that the mere appointment of a legal-aid lawyer – who without good reason had failed to lodge an appeal – was insufficient.

57. The applicant pointed out that he had done everything he could reasonably have been expected to do in order to have an appeal lodged: he had telephoned both his lawyers in the case, informed the court about his intention to lodge an appeal, and drafted an appeal of his own. There had been no reason to make any complaints against the lawyer while the time-limit for appeal had not yet expired, whereas afterwards it had been too late.

58. The applicant was of the opinion that the rapid replacement of his original counsel B. by K. by the Court of Appeal had contributed to the result that had followed. He also noted that the officers of the Court of Appeal had deemed it necessary to notify K. of the applicant's intention to appeal to the Supreme Court but they had done so only after the time-limit for appeal had expired.

59. The applicant considered that the procedure for requesting the reopening of criminal proceedings (*teistmine*) was not equivalent to and could not replace the cassation procedure since in the former procedure the Supreme Court's jurisdiction was much more limited than in the latter. Failure by a lawyer to submit an appeal in time did not constitute a ground for reopening criminal proceedings.

60. The applicant noted that only on an extremely limited number of occasions had the Supreme Court examined the matter on the merits and ruled in favour of applicants, who had had no clear-cut formal procedure for enforcing their rights. Had the Supreme Court been willing to find such exceptional circumstances in the present case, it would have had the opportunity to do so on receipt of the applicant's appeal in cassation, his counsel's appeal in cassation and application for the restoration of the time-limit, or the applicant's request for the reopening of the criminal proceedings.

(b) The Government

61. The Government emphasised that the authorities had appointed a legal-aid lawyer for the applicant. Lawyers were independent in their provision of legal services. The State had no right of direct involvement in the lawyers' activities and it could not be held responsible for every shortcoming on the part of a lawyer. As K. had participated as counsel in the

hearing before the Court of Appeal, he had also been obliged to provide legal assistance to the applicant in filing a cassation appeal. The courts dealing with the case had been aware of this and could not have been expected to take any additional steps in this connection. The applicant had also been aware that K. was supposed to file the cassation appeal. The authorities had been unaware of any problems with counsel the applicant might have had at the material time.

62. The Government further submitted that although the State was not responsible for the actions of the lawyer, it had nevertheless remedied the fact that the applicant had had no access to the Supreme Court because of the failure of the advocate to file a cassation appeal within the time-limit by providing new State legal aid to the applicant for filing a request for the reopening of the case after the Bar Association had ascertained the breach of duty by the advocate. The new legal-aid lawyer had filed a request for the reopening of the case with the Supreme Court on the grounds that the former counsel's failure to file a cassation appeal within the time-limit had meant that the applicant had had no access to the Supreme Court. The Supreme Court had examined the request for the reopening of the case and had decided not to accept it for proceedings.

63. The Government acknowledged that in narrow and formal terms it might be said that a refusal by the Supreme Court to accept for proceedings a request for the reopening of a case meant that no grounds for reopening existed. However, according to the Supreme Court's case-law, the Supreme Court did not refuse to review a case on the merits if a person had no other means of protecting his fundamental rights (see paragraphs 38 to 40 above). Thus, it had to be concluded that in essence the refusal to accept the request had also meant that no grounds for cassation existed, that is, that no rules of substantive law had been misapplied or rules of procedure violated.

64. The Government concluded that the applicant had had effective access to the Supreme Court and there had been no violation of Article 6 § 1.

2. The Court's assessment

(a) General principles

65. In respect of the Contracting Parties' liability under the Convention, the Court reiterates that their responsibility is incurred by the actions of their organs. A lawyer, even if officially appointed, cannot be considered to be an organ of the State. Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal-aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention. The competent national authorities are required under Article 6 § 3 (c) to

intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168; *Daud v. Portugal*, 21 April 1998, § 38, *Reports* 1998-II; *Sannino v. Italy*, no. 30961/03, § 49, ECHR 2006-VI; *Siałkowska v. Poland*, no. 8932/05, § 99, 22 March 2007; and *Kulikowski v. Poland*, no. 18353/03, § 56, 19 May 2009). It will depend on the circumstances of the case whether the relevant authorities should take action (see *Daud*, cited above, §§ 40-42) and whether, taking the proceedings as a whole, the legal representation may be regarded as “practical and effective” (see *Kulikowski*, cited above, § 57; *Siałkowska*, cited above, § 100; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI; *Goddi v. Italy*, 9 April 1984, § 27, Series A no. 76; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). Assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see, for example, *Sejdovic v. Italy* [GC], no. 56581/00, § 94, ECHR 2006-II, and *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275).

66. The Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Sabeh El Leil v. France* [GC], no. 34869/05, § 50, 29 June 2011; *Andrejeva v. Latvia* [GC], no. 55707/00, § 98, 18 February 2009; *Kulikowski*, cited above, § 58; *Siałkowska*, cited above, § 101; and *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32).

67. Furthermore, the “right to a court”, of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person’s access in such a way or to such an extent as to impair the very essence of the right. Furthermore, such limitations will only be compatible with Article 6 § 1 if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001-VIII; *RTBF v. Belgium*, no. 50084/06, § 69, 29 March 2011; *Kemp and Others v. Luxembourg*, no. 17140/05, § 47, 24 April 2008; *Běleš and Others v. the Czech Republic*, no. 47273/99, § 61, ECHR 2002-IX; and *Edificaciones March Gallego S.A. v. Spain*, 19 February 1998, § 34, *Reports* 1998-I).

68. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with (see *Delcourt v. Belgium*,

17 January 1970, § 25, Series A no. 11). The manner in which this provision applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them. Given the special nature of the court of cassation's role, which is limited to reviewing whether the law has been correctly applied, the Court is able to accept that the procedure followed in such courts may be more formal (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002-VII; *Khalifaoui v. France*, no. 34791/97, § 37, ECHR 1999-IX; *Kulikowski*, cited above, § 59; and *Siałkowska*, cited above, §§ 103-104). Nevertheless, the Court has in several cases found that a particularly strict construction of procedural rules by the supreme or constitutional courts deprived applicants of their right of access to a court (see, among others, *Běleš and Others*, cited above, § 69; *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 55, ECHR 2002-IX; *Efstathiou and Others v. Greece*, no. 36998/02, § 33, 27 July 2006; *Kemp and Others*, cited above, § 59, 24 April 2008; *Reklos and Davourlis v. Greece*, no. 1234/05, § 28, 15 January 2009; *Dattel v. Luxembourg (no. 2)*, no. 18522/06, § 44, 30 July 2009; and *RTBF*, cited above, § 74).

(b) Application of the principles to the present case

69. Turning to the present case, the Court notes at the outset that the applicant benefited from State legal aid in the proceedings before the first-instance court. He drew up an appeal of his own but did not wish to participate in the appellate court hearing, although he gave certain instructions to his lawyer. When his original legal-aid lawyer could not participate in the hearing, the Court of Appeal replaced him by another lawyer in order to ensure the applicant's representation. The newly appointed lawyer did participate in the hearing before the Court of Appeal.

70. As concerns the applicant's wish to pursue the proceedings before the Supreme Court, the Court notes that he duly notified the appellate court of his intention to appeal. As to the applicant's further steps, the facts are not entirely clear. According to the applicant he telephoned his original lawyer from prison to inform him of his intention to appeal. Having been told that it was for the newly appointed lawyer to provide him with any further assistance, he also telephoned the new lawyer. The supposition that the new lawyer was aware of the applicant's wish to appeal to the Supreme Court is supported by the original lawyer's statements to the Court of Honour of the Bar Association, in which he asserted that having received the telephone call from the applicant he had informed the new lawyer of the applicant's intention to appeal. However, the newly appointed lawyer submitted to the Court of Honour that he had only learned of the need to draft an appeal to the Supreme Court from the Court of Appeal's office after

the expiry of the time-limit. Be that as it may, the Court notes the Court of Honour's finding that it had been the newly appointed lawyer's duty to find out whether the applicant wished to appeal against the Court of Appeal's judgment.

71. This leads the Court to the question of the extent to which the State's responsibility is engaged in such circumstances. Given the independence of the profession, it is impossible for a State to prevent all and any omissions by a lawyer (see the principles established in the Court's case-law, summarised in paragraph 65 above). At the same time, it is for the State to put in place a system capable of ensuring the respect of rights guaranteed under the Convention, including the right to a fair trial (see paragraphs 66 to 68 above).

72. The Court notes in this context that the applicant had no ground to complain about his lawyer before the time-limit allowed for appeal to the Supreme Court had expired; thereafter he wrote a letter to the Supreme Court but received the reply that the appeals had been rejected and the lawyer's request for the restoration of the time-limit dismissed (see paragraph 18 above).

73. As concerns further possibilities to complain about the lawyer's omission, the Court observes that the applicant had the opportunity to use a procedure put in place by the State for that purpose, namely, recourse to the Court of Honour of the Bar Association. While it is true that proceedings in the Court of Honour could not replace an appeal to the Supreme Court, the applicant could, and in fact did, have it established, in those proceedings, that his legal-aid lawyer failed to duly perform his duties.

74. However, the Court observes that the system put in place for dealing with such cases had one important shortcoming: it does not appear that the domestic law provided for any immediate consequences of the establishment of the lawyer's failure to act by the Court of Honour, such as its serving as grounds for the assigning of a new lawyer and the restoration of the time-limit for appeal or the reopening of the criminal proceedings. In the absence of such legislation or court practice, the Court does not consider that the applicant was required to try these remedies before lodging an application with it. Similarly, in the recent case of *Metsaveer v. Estonia*, which concerned civil proceedings, the Court noted that the Government had not referred to any case-law where after proceedings before the Court of Honour of the Bar Association the time-limit for filing an appeal in cassation with the Supreme Court had been restored. In that context, and in the absence of any specific legal provisions which would have secured a person in receipt of legal aid access to the Supreme Court in the case of an omission by the legal-aid lawyer, the Court was not convinced of the effectiveness of the remedies proposed by the Government (see *Metsaveer v. Estonia* (dec.), no. 16343/07, 14 June 2011).

75. Nevertheless, the Court has not overlooked the fact that in the present case the applicant did apply for and was granted legal aid for lodging a request for the reopening of the criminal proceedings and the new legal-aid lawyer did indeed lodge such a request on the applicant's behalf. It further notes that the parties' opinions differ as to the relevance of such a request. According to the applicant, a request for the reopening of proceedings could not replace an appeal in cassation because the legal grounds for reopening a case were much more limited and only on exceptional occasions had the Supreme Court dealt with the merits of such requests. In contrast, the Government referred to the Supreme Court's case-law according to which it did not refuse to review a case on the merits if the person concerned had no other means of protecting his or her fundamental rights.

76. The Court observes that the grounds for cassation and for the reopening of proceedings are indeed different pursuant to the Code of Criminal Procedure (see paragraphs 32 to 34 above). It follows from the text of the law, as well as from the Supreme Court's practice, that a request for the reopening of a case is not meant to be an alternative to cassation proceedings, and the former appears to be limited to rather exceptional circumstances. While it is true that the Supreme Court has stated that it does not decline to accept petitions in circumstances where an applicant has no other effective procedure for the protection of his or her rights (see paragraphs 38 to 40 above), the fact remains that such cases are exceptional and cannot be considered part of the ordinary criminal proceedings. Moreover, the Court reiterates that according to its established case-law Article 6 does not apply to proceedings for the reopening of criminal proceedings (see, for example, *X v. Austria*, no. 7761/77, Commission decision of 8 May 1978, Decisions and Reports 14, p. 173; and, more recently, *Trgo v. Croatia*, no. 35298/04, § 70, 11 June 2009, and *Vojta v. the Czech Republic* (dec.), no. 25126/06, 8 February 2011), nor is it a remedy to be exhausted for the purposes of Article 35 of the Convention. The Court also takes note of the Supreme Court's judgment in case no. 3-1-2-3-09 where it was found that the existence of two divergent sets of operative provisions of a judgment were not grounds for the reopening of the proceedings, the originally delivered operative provisions being decisive (see paragraphs 41 and 42 above). Therefore, the Court cannot accept that filing a request for the reopening of the proceedings meant that the applicant was ensured effective access to the Supreme Court.

77. The Court consequently considers that although the applicant was given State legal aid for filing an appeal with the Supreme Court, and despite the fact that he did everything that could have been expected for his part, the failure of his legal-aid lawyer to duly perform his duties and the lack of any subsequent measures to adequately remedy the situation deprived the applicant of his right of access to the Supreme Court.

78. There has therefore been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

79. The applicant further made a number of complaints under Article 6 §§ 1, 2 and 3 (d) of the Convention. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the provisions invoked. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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.”

81. The Government argued that the applicant had not exhausted domestic remedies in respect of his claim for damages (see paragraph 47 above). Furthermore, the Government questioned the necessity of an award by the Court, arguing that if the Court found a violation of the applicant's rights, he could claim compensation for damage under the domestic law.

82. The Court notes that the argument concerning the non-exhaustion of domestic remedies does not apply in respect of the issue of awarding damages under Article 41 of the Convention.

83. The Court has already held that if a victim, after exhausting the domestic remedies in vain before complaining to the Convention institutions of a violation of his rights, were obliged to do so a second time before being able to obtain just satisfaction from the Court, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of human rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention (see *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III, and *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14).

84. The Court therefore considers that it is required to rule on the applicant's claim for just satisfaction.

A. Damage

85. The applicant argued that as a result of being unlawfully kept in prison, he had been deprived of the opportunity to earn living. He claimed 1,015 kroons (EEK) (64.87 euros (EUR)) for each day spent in prison, starting from 30 December 2005, in respect of pecuniary damage.

86. In respect of non-pecuniary damage, the applicant requested the Court to make an appropriate award.

87. The Government considered that the applicant's claim for pecuniary damage was unsubstantiated and that there was no causal link between the sum claimed and the violation alleged. The Government requested that the applicant's claim for damage be rejected in full. Should the Court nevertheless reject the Government's objections to the award of just satisfaction and find a violation of the Convention, the Government left it to the Court to determine an appropriate sum to be awarded to the applicant for non-pecuniary damage.

88. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

89. The applicant, who had been granted legal aid under the Council of Europe's legal-aid scheme, did not file any further claims for costs and expenses.

90. Therefore, there is no call for the Court to make any award under this head.

C. Default interest

91. 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 complaint concerning right of access to the Supreme Court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (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;

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

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President