



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

THIRD SECTION

CASE OF ZADUMOV v. RUSSIA

(Application no. 2257/12)

JUDGMENT

STRASBOURG

12 December 2017

FINAL

12/03/2018

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

In the case of Zadumov v. Russia,

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

Helena Jäderblom, *President*,

Branko Lubarda,

Luis López Guerra,

Dmitry Dedov,

Pere Pastor Vilanova,

Alena Poláčeková,

Jolien Schukking, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 21 November 2017,

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

PROCEDURE

1. The case originated in an application (no. 2257/12) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Roman Vladimirovich Zadumov (“the applicant”), on 2 December 2011.

2. The applicant was represented by Ms M.A. Virovets, a lawyer practising in Tver. The Russian Government (“the Government”) were represented initially by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged, in particular, that his right to a fair trial under Article 6 § 1 of the Convention had been violated on account of his inability to examine a prosecution witness as guaranteed by Article 6 § 3 (d) of the Convention.

4. On 9 April 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and is detained in Bezhet'sk, Tver Region.

6. According to the indictment, on 15 October 2010 Ms K., who had not been previously known to the applicant, invited him and Mr A. to the apartment of Mr X. In the apartment they found Mr X. lying on the floor in a state of heavy alcoholic intoxication. For reasons which the investigation failed to ascertain, the applicant demanded X.'s passport, but the latter did not react to the demand in any way. Enraged by X.'s inaction, the applicant and Mr A. started violently kicking him in the shoulder, chest, stomach and legs until he stopped breathing. The applicant told Ms K., who witnessed the attack, to "forget everything" and gave her 100 Russian roubles (RUB) (2.5 euros (EUR)).

7. On 18 October 2010 Ms K., aged twenty-four at the time, was voluntarily hospitalised for treatment of alcohol-induced psychosis and seizures after she had an epileptic seizure on the street.

8. On 21 October 2010, while undergoing treatment, Ms K. was taken to an investigator for questioning. Prior to the interview, the investigator had received permission to interview Ms K. from the head doctor of the medical facility and satisfied herself as to the witness's ability to testify, relying on the opinion of the doctor treating her. According to a medical certificate, Ms K. was "conscious, accessible for contact, answer[ed] questions following their direction" and had "no acute psychiatric disorders".

9. According to the interview records, Ms K. alleged that on 11 October 2010 her encounter with Mr X. had resulted in a drinking spree, which had lasted several days until 14 or 15 October 2010, when Mr X. had refused to consume any more alcohol because he could no longer stand up. On the day of the attack, she had witnessed the applicant entering the apartment with Mr A. and immediately starting to violently kick Mr X., who had been lying on the floor. After an unsuccessful search for X.'s passport, they had resumed the attack and had kicked the victim about forty times until he died.

10. On 22 October 2010 the applicant and Mr A. were arrested and detained on suspicion of manslaughter. On the same day Mr A. confessed to manslaughter committed together with the applicant. On 29 October 2010 during questioning, he stated that the applicant's insistence on obtaining X.'s passport had been induced by the desire to coerce the latter to sell his apartment and to share the proceeds.

11. In the course of questioning on 13 and 17 December 2010 the applicant admitted his presence in X.'s apartment during the attack, but denied any involvement in it. In his opinion Mr A. had committed perjury for an unknown reason.

12. The criminal case against the applicant and Mr A. was examined by the Tsentralniy District Court of Tver (*Центральный районный суд г. Твери*) (hereinafter "the District Court").

13. On 17 January 2011 during a pre-trial hearing the District Court granted applications lodged by the applicant's defence lawyer to have the medical records of Ms K. produced in court at trial.

14. On 24 January 2011 the District Court received extracts of Ms K.'s medical history provided by a regional psychiatric hospital. According to the medical records, she suffered from long-term alcohol abuse and had a tendency of having compulsive heavy drinking episodes. In October 2010, during the sixth hospitalisation since 2008, she had been hallucinating, anxious, aggressive, rude and unaware of the current date. When discharged from hospital in November 2010, the symptoms of withdrawal syndrome had receded and there were no signs of acute psychiatric disorders.

15. On 27 January 2011 the District Court received a certificate from a regional psychoneurology clinic. According to the certificate, in 2008 Ms K. had been diagnosed with an organic mental disorder of complex origin (perinatal and alcohol induced), hallucino-paranoid syndrome with mild personality changes, and alcohol-withdrawal symptoms.

16. On 2 and 8 February 2011 the District Court heard several prosecution witnesses, mostly relatives, neighbours and acquaintances of the persons involved. The witnesses either attested to the reputation or character of the victim and the accused, or provided hearsay and circumstantial evidence on the events prior and subsequent to the alleged crime. Ms K. was duly summoned to both hearings, but did not appear and provided no reasons for her absence.

17. On 10 February 2011 at the request of the defence the District Court issued a subpoena ordering the bailiffs to ensure Ms K.'s presence at the next hearing.

18. On 17 February 2011 the bailiffs submitted to the trial court a report that the witness could not be found at her place of residence and according to her mother "might be undergoing treatment" in a psychoneurology clinic.

19. On the same day the District Court examined a prosecution witness, Ms D., an investigator during the pre-trial stages of the proceedings. She testified to the circumstances of Ms K.'s interview on 21 October 2010 and her identification of the applicant, as well as to her psychological state and ability to give answers at the time. Ms D. stated that the witness had been "rational", had given coherent testimony, had correctly recounted the events and, according to the doctor treating her at the time, had been capable of answering questions.

20. During the hearing the trial court was notified over the phone that the applicant had been undergoing in-patient treatment for alcohol dependency since 22 January 2011. The prosecutor's request that Ms K.'s pre-trial statements be read out in court was denied and the hearing was adjourned until further information on the witness's health had been received from the doctors.

21. On 18 February 2011 the psychoneurology clinic sent a letter to the District Court confirming the information previously submitted and stating that Ms K. was due to be discharged in early March 2011.

22. On the same day during the hearing, the prosecutor, referring to the above-mentioned letter, repeatedly requested that Ms K.'s pre-trial statements be read out in court on account of her in-patient treatment, the fact that her presence at trial could not be ensured, and because the date of her discharge from the clinic was unclear. The applicant's defence lawyers objected, referring to Article 281 of the Code of Criminal Procedure, which proscribed the reading out of witness statements except in cases of "grave illness". The District Court, without providing further reasons, allowed the reading out of the testimony with reference to Article 281 of the Code.

23. Between 24 February and 6 April 2011 the District Court held at least six further hearings. During those hearings the applicant and his co-accused were examined and essentially confirmed their conflicting pre-trial statements. The District Court also heard two character witnesses called by the defence, who attested to Mr A.'s bad reputation and speculated about his involvement in illegal activities. The trial court also considered the following documentary evidence presented by the prosecution: (a) crime scene inspection records; (b) the confession of Mr A. and verification records; (c) records of identification procedures; and (d) reports of the medical examiner and forensic experts on the victim's injuries and the cause of death.

24. On 8 April 2011 during the closing argument the applicant's defence lawyer, Mr V., argued that the statements of Ms K., which were "the only evidence", could not qualify as eyewitness statements due to her state of mental health. He submitted that in the absence of a forensic psychiatric examination, it was impossible to rely on the testimony of a person suffering from an organic mental disorder and alcohol dependency. Her hospitalisation in a psychiatric facility in a delusional state and her interrogation less than one week after the alleged crime had made any testimony unreliable. He further stated that in any event, the reading out of her testimony had been unlawful under Article 281 of the Code of Criminal Procedure as interpreted by the Supreme Court of the Russian Federation, and in violation of the applicant's right to examine witnesses under Article 6 § 3 (d) of the Convention. Accordingly, her testimony could not be used as evidence in the case against the applicant.

25. On 12 April 2011 the District Court convicted the applicant and Mr A. of manslaughter and sentenced them to ten and eight years' imprisonment respectively in a high-security correctional facility. The District Court, confronted with the conflicting positions of the two co-accused, referred several times to Ms K.'s testimony as a significant, if not decisive, factor. In respect of the reliability of the testimony and its reading out, it stated:

"... The statements of Ms K. made during the pre-trial investigation were read out under Article 281 of the Code of Criminal Procedure ...

The court does not accept Mr Zadumov's argument that [according to the medical records] the mental state of Ms K. casts doubt on her ability to correctly perceive and recount the events and that [her questioning during treatment in a psychoneurology facility] also casts doubt on the veracity and reliability of her testimony ...

The medical records referred to by the defence do not suggest that Ms K. has any psychiatric disorder. [Moreover, the available certificates state that she was accessible for contact, answered questions following their direction and had no acute psychiatric disorders. This fact is further confirmed by the testimony of Ms D., the investigator, given at trial.]

The court also considers that Ms K.'s statements are consistent with the confession of Mr A."

26. The applicant's defence lawyers lodged an appeal, restating among others their arguments concerning the reading out of Ms K.'s pre-trial statements.

27. On 3 June 2011 the Tver Regional Court (*Тверской областной суд*) upheld the judgment on appeal. In respect of Ms K.'s statements the Regional Court stated:

"... The involvement of Mr Zadumov [the applicant] in the committed crime is steadfastly confirmed by the testimony of Ms K.

[The appeal court] like the trial court finds no grounds to doubt the testimony of this witness, because it is coherent, detailed, logical and authentic.

[From] the information provided by Ms K. on the victim's state before and after the infliction of bodily injuries by Mr A. and Mr Zadumov, the sequence of events is consistent with [expert evidence and the testimony of other witnesses and the co-accused].

Accordingly there are no reasons to consider that the witness could not correctly perceive or recount the events.

Moreover [her] mental state received consideration during the hearing. [According to the investigator's statements she was rational, gave coherent testimony, correctly recounted the events, and according to her doctor was capable of answering questions.] ... [Therefore] the trial court reached a correct conclusion that this evidence was admissible.

[The appeal court] cannot consider justified the arguments of the defence that criminal procedure legislation had been breached by the reading out of Ms K.'s pre-trial statements, [since her presence at hearings was impossible as she was undergoing treatment in a clinic]."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure

(a) Provisions related to the use of absent witnesses' testimony as in force since 2003

28. The Code of Criminal Procedure of the Russian Federation ("the CCrP" or "the Code") provides that a victim of or a witness to a crime must normally be examined in court. Article 240 of the Code provides:

Article 240. Direct and open [examination of evidence]

"1. All the evidence should normally be presented at a court hearing ... The court should hear statements by the defendant, victim, witnesses ... and examine physical evidence ...

2. The reading of pre-trial statements is only permitted under [Article 281 of the Code] ..."

29. Article 281 of the Code regulates the procedure for the reading out of pre-trial statements of victims and witnesses who are absent from the trial. The relevant part as in force since 2003 read as follows:

Article 281. Reading out of testimony of a victim and a witness

"1. Reading out of statements of a victim and a witness previously given during pre-trial investigation or trial... is permitted only with the consent of the parties in case of a victim's or a witness' failure to appear [in court], except under circumstances prescribed by paragraph 2 of this Article.

2. In case of absence at the court hearing of a victim or a witness the court may upon the motion of a party or upon its own motion decide to read out the previously given statements, in case of:

- 1) death of a victim or a witness;
- 2) grave illness precluding appearance in court;
- 3) refusal of a victim or a witness who is a foreign citizen to appear under the summons of the court;
- 4) natural disaster or other exceptional circumstances precluding appearance in court."

30. Various provisions of the Code provide principles and procedural safeguards for the examination and assessment of evidence. Article 17 provides that no evidence has pre-determined value and that courts assess it relying on their internal conviction based on the all available evidence and being guided by law and conscience. Verification of evidence is performed by referencing it with other evidence, determining its origins and obtaining new corroborating or refuting evidence (Article 87). Paragraph 1 of Article 88 stipulates that each piece of evidence should be assessed in terms of relevance, admissibility and validity, and the totality of the evidence

should be assessed in terms of its sufficiency for a decision in a criminal case.

31. Chapter 39 of the Code prescribes rules for adoption of a judgment. Articles 299 and 305 impose on a court a duty to provide reasons for accepting or rejecting certain evidence.

32. Articles 111 to 113 and 188 of the Code set out the legal regime for summoning witnesses for examination, allowing the courts to compel them to appear, relying on the bailiffs service where appropriate.

(b) 2016 amendments to the CCrP

33. In 2016 significant amendments were made to Article 281 of the Code, notably an additional ground for the reading out of the pre-trial statements was added to paragraph 2 and a new paragraph 2.1 providing additional procedural safeguards was introduced. The relevant parts read as follows:

“2. In case of absence at the court hearing of a victim or a witness the court may upon the motion of a party or upon its own motion decide to read out the previously given statements, in case of...

5) establishing a victim’s or a witness’s whereabouts in order to issue a summons appears impossible despite measures taken.

2.1. In cases prescribed by subparagraphs 2 to 5 of paragraph 2 of this Article a decision to read out the statements of a victim or a witness ... may be taken on condition that the accused has had an opportunity to challenge this evidence by lawful means during the previous stages of the proceedings.”

(c) Other relevant provisions

34. The CCrP provides for a possibility to reopen proceedings in a criminal case when a violation of a Convention right has been found by this Court. The relevant provisions read as follows:

Article 413. Grounds for reopening of proceedings in a criminal case due to new or newly discovered circumstances

“1. Final judgments ... may be annulled and the proceedings in a criminal case reopened due to new or newly discovered circumstances ...

...

4. New circumstances are ...

...

2) A finding by the European Court of Human Rights of a violation of [Convention provisions] during consideration of a criminal case by a Russian court ...”

Article 415. Initiation of [revision] proceedings

“5. The Presidium of the Supreme Court of the Russian Federation revises ... [judgments] under circumstances listed in subparagraphs 1 and 2 of Article 413 of the Code upon application by the President of the Supreme Court of the Russian Federation within one month. Having considered the [above] application, the Presidium ... annuls or alters the judicial decisions in a criminal case in line with ... the judgment of the European Court of Human Rights ...”

Article 419. Proceedings in a criminal case after annulment of judicial decisions

“Judicial proceedings in a criminal case after annulment of judicial decisions due to new or newly discovered circumstances and the lodging of appeals against new judicial decisions follow the general rules [established by the Code].”

B. Supreme Court

35. The Supreme Court of the Russian Federation has issued various interpretative guidelines on the use of absent witnesses’ testimony.

36. In its Ruling No. 1 of 5 March 2004 (with subsequent amendments), the Plenum of the Supreme Court stressed that under Article 281 § 1 of the CCrP the reading out of the pre-trial statements of absent witnesses in principle should be possible only with the consent of both the prosecution and the defence; however, in exceptional cases prescribed by Article 281 § 2, the statements may be read out without the consent of both parties. In cases where the parties have exhausted all means available to them to secure the presence of a witness, a court may assist them by issuing summonses or subpoenas or taking other lawful actions. The Supreme Court stressed that while Article 281 § 2 mentions only certain grounds for reading out previously given statements, other grounds might be sufficient as long as they are comparable in “their nature and significance” (see Ruling No. 1 of the Plenum of the Supreme Court of the Russian Federation of 5 March 2004, with subsequent amendments).

37. In its Ruling No. 55 of 29 November 2016, the Plenum of the Supreme Court instructed the lower courts always to base their judgments on the evidence directly examined during trial. They may refer to witnesses’ statements given before trial only if those statements were read out in accordance with the rules of Article 281 of the Code. Referring to Article 14 of the International Covenant on Civil and Political Rights and Article 6 § 3 (d) of the Convention, the Supreme Court highlighted the significance of the right to examine witnesses and pointed out that under Article 281 § 2.1 of the Code, the reading out of witness’s statements must be secured by affording the accused the opportunity to challenge those statements at previous stages of the proceedings, for example by asking questions and presenting objections during pre-trial confrontations.

C. Constitutional Court

38. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading out of pre-trial depositions should be considered as an exception to the court's own assessment of evidence and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insists on calling a witness whose testimony may be important to the case, the court should take all available measures to ensure the presence of the witness in court. When that witness is available for questioning, the reading out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, when the witness is not available for questioning, the defence should still be provided with appropriate procedural safeguards such as the ability to challenge the read-out deposition, request the examination of further evidence, as well as to consider any pre-trial face-to-face confrontation between that witness and the defendant when the latter was given an opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

39. The applicant complained that his right to a fair trial under Article 6 § 1 of the Convention had been violated on account of his inability to examine a prosecution witness as guaranteed by Article 6 § 3 (d) of the Convention. The relevant Convention provisions read as follows:

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

...

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

...

(d) to examine or have examined witnesses against him ...”

40. The Government contested that argument.

A. Admissibility

41. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

42. The applicant argued that his right to fair trial under Article 6 of the Convention had been violated on account of his inability to examine the prosecution witness, Ms K., and the use of her pre-trial testimony for his conviction. In his opinion, her testimony should not have been read out and used in view of her troubled mental state. The District Court had adjourned the hearings multiple times due to the failure of the witness to appear and had issued a subpoena. However, the authorities had had no valid reasons for reading out her statements, since nothing in her medical records had indicated that she had been unable to attend the hearings or that the trial could not have been postponed until her discharge from the clinic. The applicant also stressed that similar medical treatment had not prevented Ms K. from being questioned by the police during the pre-trial investigation. He further pointed out that his conviction was based exclusively on her statements as the only direct evidence, except for the conflicting statements of the two co-accused.

43. The Government disagreed. They argued that the applicant had had a fair hearing in the determination of the criminal charge against him in accordance with Article 6 § 1 of the Convention. In their opinion, the authorities had taken the necessary steps to ensure that Ms K. appeared and was examined in an adversarial manner; however, her on-going in-patient treatment had prevented her from being present at trial. They suggested that the applicant's conviction had been based on a multiplicity of evidence, which had been sufficient even without the testimony of the absent witness. Lastly, referring to the provisions of the Code of Criminal Procedure, as well as the relevant interpretative guidelines and practice of the Supreme Court and the Constitutional Court, the Government contended that the Russian legal system had afforded the applicant sufficient procedural safeguards aimed at securing his right to examine witnesses testifying against him.

1. General principles

44. At the outset the Court reiterates that the guarantees in paragraph 3 (d) of Article 6 of the Convention are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision (see *Al Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011); it will therefore consider the applicant's complaint under both provisions taken together (see *Windisch v. Austria*, 27 September 1990, § 23, Series A no. 186, and *Lüdi v. Switzerland*, 15 June 1992, § 43, Series A no. 238).

45. The Court's primary concern under Article 6 § 1 of the Convention is to evaluate the overall fairness of the criminal proceedings (see, *inter alia*, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, with further references). In making this assessment the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 163 and 175, ECHR 2010) and, where necessary, to the rights of witnesses (see *Al-Khawaja and Tahery*, cited above, § 118, with further references).

46. The principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him were admitted as evidence have been summarised and refined in the Grand Chamber judgments of 15 December 2011 in *Al-Khawaja and Tahery* (cited above) and of 15 December 2015 in *Schatschaschwili v. Germany* ([GC], no. 9154/10, ECHR 2015).

47. The Court reiterated in those judgments that Article 6 § 3 (d) of the Convention enshrined the principle that, before an accused could be convicted, all evidence against him normally had to be produced in his presence at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of a police inquiry and judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected (see *Al-Khawaja and Tahery*, cited above, § 118, and *Schatschaschwili*, cited above, §§ 103-05).

48. According to the principles developed in the *Al-Khawaja and Tahery* judgment (cited above, § 152), it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence. The Court must examine whether:

(i) there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence (*ibid.*, §§ 119-25);

(ii) the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (*ibid.*, §§ 119 and 126-47); and

(iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147).

49. In the *Schatschaschwili* judgment, the Grand Chamber clarified that all three steps of the test were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair (cited above, § 118). At the same time, it noted in respect of the first

step that while the absence of good reason for the non-attendance of the witness cannot of itself be conclusive of the unfairness of the applicant's trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (§ 113). Expounding on the interplay of the second and third steps the Grand Chamber highlighted the importance of sufficient counterbalancing factors not only in cases in which the absent witness' testimony was the sole or the decisive basis for the conviction, but also in those cases where in the domestic courts' assessment that evidence, without clearly reaching the threshold of 'sole or decisive', carried significant weight and its admission may have handicapped the defence (§ 116). Lastly, it should be underlined that while as a rule, it is pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment, it may be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings (cited above, § 118).

2. Application of the above principles to the present case

50. Having regard to the circumstances of the present case and the legal issues requiring its consideration, the Court will examine all three steps of the above test.

(a) Whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence

51. The Court will examine, first, whether there was a good reason for the non-attendance of prosecution witness Ms K. at the trial, from the trial court's perspective and, as a result, a good reason or justification for that court to admit her pre-trial statements as evidence.

52. The Court notes that Article 281 § 2 of the CCrP provides Russian courts with a list of grounds permitting the reading out of absent witnesses' statements. Although the provisions of the Code mention only certain grounds, the Supreme Court has interpreted the relevant rules as affording the courts a possibility of admitting such statements as evidence in other circumstances if those circumstances were comparable in "their nature and significance" to the ones listed in the Code (see paragraph 36 above).

53. In the present case, the District Court had at its disposal verified information that in February 2011, at the time the evidence was presented and examined during trial, Ms K. was undergoing in-patient treatment for alcohol dependency in a psychoneurology clinic (see paragraph 20 above). The information obtained by the trial court from various medical facilities also demonstrated that she had been suffering from a perinatal and alcohol-induced organic mental disorder, had been having episodes of

psychosis and seizures, and had been hospitalised at least six times during the previous three years (see paragraphs 14-15 above). It appears from the material in the Court's possession that having regard to that information and acting under Article 281 of the Code, the trial court decided on 18 February 2011 to read out the witness's pre-trial statements and admit them as evidence.

54. The Court has previously accepted on several occasions that a witness's state of health or the fact that he or she had been undergoing in-patient treatment might be a valid reason for his or her absence from the trial and for the reading of pre-trial statements as evidence (see, for example, *Bobes v. Romania*, no. 29752/05, § 39, 9 July 2013, and *Lawless v. the United Kingdom* (dec.), no. 44324/11, 16 October 2012). However, in the Court's opinion, the acceptance of such a reason by the domestic courts should depend not on an individual's medical history, but on the individual's condition at the time the trial is held.

55. In this regard, the Court notes that on 18 February 2011 the District Court received a letter from a psychoneurology clinic stating that Ms K. was due to be discharged in early March 2011 and, despite the objections by the defence, allowed her pre-trial statements to be read out. In addition, over the following month and ten days, at least six more hearings were held at which the domestic court examined witnesses and considered documentary evidence. There is nothing in the case file indicating why the District Court considered it impossible or impractical to examine Ms K. during one of those hearings after she had been discharged from the clinic in March 2011.

56. Accordingly, whilst the Court is prepared to accept that Ms K.'s medical condition could have been a sufficient justification for reading out her pre-trial testimony at the end of February 2011, that justification lost its validity after her release in early March 2011. Therefore, the Court concludes that there were no good reasons for the witness's absence from the trial hearings and the reading out of her pre-trial statements as evidence.

(b) Whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction

57. The Court now turns to examine the weight and significance the domestic courts attached to Ms K.'s statements in the body of evidence used for the applicant's conviction.

58. At the outset the Court notes that the domestic courts did not formally consider the witness's statements as the sole (that is to say, only) evidence against the applicant; nor did they clearly classify her testimony as "decisive" evidence, within the meaning defined by the Court in its judgment in *Al-Khawaja and Tahery* (cited above), that is, as being of such significance as to be likely to be determinative of the outcome of the case. It further notes that the applicant's conviction was based on a variety of direct and circumstantial evidence, including other witnesses' testimony, crime-

scene inspection records, the confession of Mr A. and verification records; records of identification procedures; and the reports of the medical examiner and forensic experts on the victim's injuries and the cause of death (see paragraph 16 and 23 above).

59. At the same time it must not be overlooked that the applicant and his co-accused maintained their directly contradictory statements regarding their involvement in the crime. While the applicant conceded his presence in X.'s apartment during the attack, he insisted that he was innocent. Mr A., on the other hand, confessed to committing the crime together with the applicant (see paragraph 10 above). It appears that of all the available evidence, it was Ms K.'s eyewitness statements which, given the manner in which the domestic courts construed the case, pointed to the applicant's involvement in inflicting the injuries.

60. The Court, having regard to all the evidence, stresses that Ms K. was the only eyewitness to the offence in question and that her testimony was critical to the domestic courts for resolving the conflict between the testimony of the two co-accused – the applicant, who refuted any involvement in the crime, and Mr A., who confessed to it. Despite the availability to the courts of other diverse evidence, in their opinion none of that evidence attained the significance of the testimony of the absent eyewitness, which was decisive for determining the fundamental elements of the crime.

61. Accordingly, while maintaining its firmly established position that the national courts are in principle better placed to assess the evidence presented to them, the Court considers that in the present case the manner in which the Russian courts construed their judgments made the evidence of the absent witness "decisive", that is, determinative of the applicant's conviction.

(c) Whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence

62. Lastly, the Court will examine whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence. Among many other elements which could be relevant in this context, the following might be mentioned: the trial court's approach to the untested evidence; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, cited above, § 145).

63. Having regard to the legislative framework as in force since 2003 and applicable at the material time, as well as relevant interpretative guidelines provided by the Supreme Court and the Constitutional Court (see

paragraphs 28-32, 36 and 38 above), the Court concludes that in principle the Russian legal system offered robust procedural guarantees securing the right of an accused to examine witnesses testifying against him, ensuring that the reading out of absent witnesses' testimony is possible only as an exception. Most notably, Article 281 of the CCrP listed the accepted compelling reasons for relying on such testimony (subparagraph 2). Articles 299 and 305 of the Code imposed on judges an obligation to provide reasons for accepting or refuting evidence, including the testimony of absent witnesses, while the rules set out in Articles 17, 87 and 88 made individual assessment, verification and cross-referencing compulsory for every piece of evidence. Furthermore, the relevant provisions of Articles 111, 113, and 188 of the Code endowed the courts with significant powers to summon witnesses and compel them to attend where necessary.

64. However, the existing legislative framework and interpretative guidance of the superior courts need to be supplemented by the trial and appeal courts' duty to consider the specific circumstances of a case, which might require them, as guardians of the Convention rights, to take individualised and tailored measures aimed at compensating for the handicap created by a witness's absence from the courtroom. The courts verify whether the chosen solution respects the rights of the accused, allows him to participate effectively in the proceedings and avoids placing him at a substantial disadvantage *vis-à-vis* the prosecution.

65. Turning to the present case, the Court observes that between 17 January and 18 February 2011 the District Court adopted a number of measures aimed at ensuring Ms K.'s presence at trial and obtaining the relevant medical information for the assessment of her testimony (see paragraphs 13, 16-19 above).

66. It transpires from the medical records that despite Ms K.'s voluntarily committal on 18 October 2010 to a specialised facility for the treatment of alcohol-induced psychosis and seizures, she was questioned by an investigator on 21 October 2010. The medical certificate provided during questioning stated that she had been "conscious, accessible for contact, answer[ed] questions following their direction" and had "no acute psychiatric disorders". Her medical records, on the other hand, stated that in October 2011 she was hallucinating, anxious, aggressive, rude and not aware of the current date and that the withdrawal symptoms had receded by November 2011 (see paragraphs 8 and 14 above). Overall, her medical condition was characterised by an organic mental disorder of complex origin, and hallucino-paranoid syndrome with mild personality changes.

67. The District Court possessing that information repeatedly summoned Ms K. to the hearings at the beginning of February and, after her repeated failure to appear, ordered the bailiffs service to compel her to attend. In an apparent attempt to verify the credibility of the witness, the trial court questioned the investigator, Ms D., about Ms K.'s psychological state and

conduct during the police interview on 21 October 2011 and at the identification parade (see paragraph 19 above).

68. Notwithstanding the above-mentioned measures, on 18 February 2011 the District Court decided not to pursue them any further and allowed the absent witness's testimony to be read out without providing any justification required by Article 281 of the Code (see paragraph 22 above). As concluded above, the trial court, presented with an opportunity to summon the witness after her release in March 2011, did not attempt to do so, despite the fact that at least six more hearings were held until 6 April 2011 (see paragraph 23 above).

69. The Court considers that the information on the witness's medical history and state of mental health, her frequent admissions to psychoneurology clinics, and the fact that she was questioned by the police about the events only three days after starting her treatment for alcohol-induced psychosis and seizures, created valid concerns about the veracity and reliability of her statements. It must be concluded that her statements, unchallenged during cross-examination in court, were used for the applicant's conviction, while further opportunities for ensuring her presence remained unexplored.

70. The Court observes that the domestic courts relied on some additional incriminating hearsay and circumstantial evidence supporting the witness statements made by Ms K. It further observes that the applicant used his right to give his own version of the events on 15 April 2010 and to cast doubt on the credibility of the absent witness. However, despite Ms K.'s availability for questioning during the pre-trial stage of the proceedings, it is unclear why the applicant was not afforded an opportunity to challenge her testimony during a confrontation.

71. In the Court's opinion these procedural arrangements, which could have been otherwise considered sufficient, were incapable of remedying the difficulties faced by the defence given the unexplained decision of the District Court to forgo measures ensuring Ms K.'s attendance. The simplistic and sketchy dismissals of the relevant arguments of the defence in the first-instance and appeal judgments do not remove the valid concerns about the veracity and reliability of her statements.

72. Accordingly, despite the existence in the Russian legal system of robust procedural guarantees securing the right of an accused to examine witnesses testifying against him, the domestic courts in this case failed to put in place sufficient safeguards capable of compensating for the handicaps caused to the defence.

(d) Was the trial, judged as a whole, fair?

73. In assessing the overall fairness of the trial, the Court will have regard to the reasons for the witness's absence and the counterbalancing

factors, viewed in their entirety in the light of its finding to the effect that the evidence given by Ms K. was “decisive” for the applicant’s conviction.

74. The Court observes that the national courts had before them other additional incriminating evidence regarding the offence of which the applicant was found guilty. However, the reasoning and logic of both the trial and appeal courts’ judgments were construed around the testimony of Ms K. as the crucial piece of evidence capable of resolving the existing contradictions and indicating conclusively the applicant’s guilt. In this regard, the Court notes that after choosing to shape the case along the lines of Ms K.’s statements, the national courts took almost no procedural steps to compensate for the lack of opportunity to directly cross-examine her at the trial. The lack of valid reasons for Ms K.’s absence and the lack of sufficient counterbalancing measures, despite their evident availability, as well as the superficial assessment of the reliability of her testimony, weigh heavily against consideration of the trial as fair judged as a whole, under Article 6 of the Convention.

75. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage.

78. The Government objected to the application of Article 41 of the Convention and considered that no monetary award should be made in the present case, even if the Court found a violation of Article 6 of the Convention. Referring to the text of Article 41, they argued that just satisfaction needed to be awarded only “if the internal law of the High Contracting Party concerned allows only partial reparation to be made”. In their opinion, if a violation was found, the applicant had a possibility for *restitution in integrum* through the reopening of the criminal proceedings, as provided for by Article 413 of the CCrP. In support of their argument they referred to cases where the Court had concluded that under the criminal limb of Article 6 of the Convention, full acquittal, discontinuation of the proceedings, trial *de novo* or reopening of the proceedings had been considered as appropriate redress for a person having victim status under the

Convention (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006; *Olesky v. Poland* (dec.), no. 1379/06, 16 June 2009; and *Carboni v. Italy* (dec.), no 51554/99, 12 February 2004).

79. Implicitly referring to the amount claimed by the applicant, the Government cited a number of Russian cases where a violation of Article 6 of the Convention had been found and the applicants had been awarded between EUR 500 and 2,000.

80. The Court has consistently held that for an individual who has been convicted in proceedings which did not meet the requirements of Article 6 of the Convention, the most appropriate form of redress would, in principle, be a retrial or the reopening of the case, if requested (see, among many other authorities, *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010, and *Şaman v. Turkey*, no. 35292/05, § 44, 5 April 2011). In this connection, the Court is mindful that Articles 413 and 415 of the CCRP provide for the possibility of revision by the Presidium of the Supreme Court of a judgment where it has been determined in a ruling of the Court that there has been a violation of the Convention provisions.

81. The Court notes that it has previously concluded that a finding of a violation of Article 6 of the Convention constitutes sufficient just satisfaction for the purposes of Article 41 of the Convention when similar procedural arrangements were in place under the domestic law (see, among recent authorities, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 315, ECHR 2016; *Hokkeling v. the Netherlands*, no. 30749/12, §§ 67-68, 14 February 2017; *Sitnevskiy and Chaykovskiy v. Ukraine*, nos. 48016/06 and 7817/07, § 142, 10 November 2016; and *A.T. v. Luxembourg*, no. 30460/13, § 97, 9 April 2015). At the same time, it considers that the payment of monetary awards under Article 41 is designed to make reparation only for such consequences of a violation that cannot be remedied otherwise (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 250, ECHR 2000-VIII). The Court concludes that reopening of the proceedings is the most appropriate form of redress for the established violation of the applicant's rights, should he request it, given that it is capable of providing *restitutio in integrum* as required under Article 41 of the Convention. Therefore, the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

82. The applicant did not submit any claim for the costs and expenses incurred before the domestic courts or for those incurred before the Court.

83. Accordingly, the Court is not called upon to make any award in this regard.

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

84. The relevant provisions of Article 46 of the Convention read:

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

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

...

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. ...”

85. In reply to the question put by the Court under Articles 46 of the Convention, the Government submitted that violations of Article 6 §§ 1 and 3 (d) of the Convention in Russian cases are “episodic” and that there is nothing to support the conclusion that the problem is either “systemic” or “structural”. They maintained that whereas individual violations found by the Court may be indicative of violations caused by the decisions of certain judges, they did not indicate any defectiveness of the system of guarantees as a whole.

86. The applicant did not provide any comments in this regard.

A. General principles

87. The Court emphasises that by ratifying Article 46 of the Convention, the High 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.

88. At the same time the Court is mindful that its judgments are essentially declaratory in nature and that, broadly speaking, it is primarily for the State in question to choose, under the supervision of the Committee of Ministers, the means to be used in its domestic legal system to give effect to its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment (see, among multiple other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). This discretion as to the manner in which a judgment is executed reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

89. In Resolution Res (2004) 3 on judgments revealing an underlying systemic problem adopted on 12 May 2004 the Committee of Ministers emphasised the interest in helping the States to identify the underlying problems and the necessary execution measures and invited the Court to identify systemic problems and their source “as far as possible”. However,

the identification of a systemic or a structural problem as such does not call for providing precise guidance under Article 46 to a High Contracting Party (see, for example, *Vyerentsov v. Ukraine*, no. 20372/11, §§ 94-95, 11 April 2013, and *Zherebin v. Russia*, no. 51445/09, §§ 74-82, 24 March 2016).

90. The Court is conscious that the scope of the exceptional circumstances requiring consideration of a State's obligations under Article 46 of the Convention is necessarily narrow. It will proceed with due caution in deciding whether the absence of prosecution witnesses at trial could be classified as a structural or systemic problem in Russia and whether the existing legal framework or practice calls for an indication of any specific general measures.

B. On the existence of a structural or systemic problem and the need for general measures

91. The Court has on certain occasions identified existing structural problems in the Russian legal system giving rise to a large number of applications (see, notably, *Burdov v. Russia (no. 2)*, no. 33509/04, §§ 131-41, ECHR 2009; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 184-234, 10 January 2012; and *Zherebin*, cited above, §§ 74-82). At the same time, the number of pending admissible applications raising a similar Convention issue cannot in itself be a decisive factor warranting a conclusion on the existence of a structural or systemic problem.

92. The Court notes that in the recent years over 250 applications lodged against Russia, in which a problem similar to the one in the present case is the primary issue, have been communicated to the Government. The Court observes that while the overall number of pending cases communicated to the Government is quite significant, it must not be overlooked that they have accumulated on the Court's docket over the period of more than ten years. As such the above figures do not indicate the existence in the past or in the present of a systemic or a structural problem.

93. The Court reiterates its conclusion that at the material time the existing legislative framework for the use of absent witnesses' testimony, as well as the interpretative guidelines provided by the Supreme Court, offered robust procedural guarantees securing the right of an accused to examine witnesses testifying against him and ensuring that the reading out of absent witnesses' testimony was possible only as an exception (see paragraph 63 above).

94. Furthermore, without prejudice to any future assessment of the 2016 amendments to the CCrP, which were not applicable at the time the facts in this case occurred, the Court notes that those amendments appear to further strengthen the rights of the defence. In this regard, the Court considers that it would not be appropriate for it to give any indication of possible, general

measures in cases such as the present one, where the facts pre-date the most recent legislative amendments.

95. At the same time the Court has no reason to doubt that the present judgment would benefit from general measures aimed at national authorities' awareness raising and capacity building in the manner already set out in the Recommendations of the Committee of Ministers CM/Rec(2002)13 of 18 December 2002, CM/Rec(2004)4 of 12 May 2004 and CM/Rec(2008)2 of 6 February 2008. The Court maintains this position, taking into account also the fact that those Recommendations reflect the well-established practice of the member States in implementation of the Court's judgments and, therefore, form a core and habitual part of the steps taken within the execution process.

96. In these circumstances, the Court does not find it reasonable or practical to make any pronouncement on the necessity of general measures, in addition to those already undertaken by the Russian authorities, to prevent future similar violations. Any decision on the scope or sufficiency of the general measures must remain the responsibility of the Committee of Ministers, discharging its supervisory functions under Article 46 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the applicant's inability to examine prosecution witnesses testifying against him admissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President