CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

**CASE OF METELITSA v. RUSSIA**

*(Application no. 33132/02)*

JUDGMENT

STRASBOURG

22 June 2006

**FINAL**

*23/10/2006*

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

**In the case of Metelitsa v. Russia,**

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

Mr C.L. ROZAKIS, *President,*
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges,*

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 1 June 2006,

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

# PROCEDURE

1. The case originated in an application (no. 33132/02) 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 Yevgeniy Anatolyevich Metelitsa, on 17 August 2002.

2. The applicant was represented before the Court by Ms K. Moskalenko, a lawyer with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that neither he nor his lawyer was apprised of the appeal hearing and given an opportunity to plead his defence before the appeal court.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 28 April 2005 the Court declared the application partly admissible.

6. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1968 and is now serving his sentence in Irkutsk.

8. On 17 September 2001 the applicant was arrested on suspicion of having severely beaten a certain Mr D.

9. On 19 December 2001 the Nazarovo Town Court of the Krasnoyarsk Region found the applicant and his co-defendants guilty of grievous bodily injuries, a criminal offence under Article 111 § 3 (a) of the Russian Criminal Code. The applicant was sentenced to six years' imprisonment in a correctional colony.

10. On 23 December 2001 and 24 January 2002 the applicant submitted his statements of appeal. He contended that his co-accused had slandered him, that the forensic report had not reflected the facts as established by the trial court and that the investigation had not been sufficiently thorough. He asked that the conviction be quashed and his lawyer, Ms Struchenko, be invited to the appeal hearing.

11. On 25 December 2001 Ms Struchenko submitted her statement of appeal. She pointed to discrepancies between the facts established by the trial court and their description in the judgment and sought re-characterisation of the criminal offence and/or reduction of the sentence.

12. On 27 December 2001 the applicant requested the appeal court to examine the case in his absence.

13. According to the applicant, neither he nor his lawyer was notified of the appeal hearing. According to the Government, on 20 February 2002 summonses for the appeal hearing were sent to Ms Struchenko's legal office and to the detention facility where the applicant was held.

14. On 5 March 2002 the Krasnoyarsk Regional Court upheld the conviction in respect of the applicant, reduced the sentences for both of his co-accused and attributed a different legal characterisation to the offence committed by one of them. The applicant and his lawyer were not present at the appeal hearing, whereas his co-accused were both present and represented. According to the Government, the prosecutor was in attendance and made submissions to the appeal court.

15. On 30 October 2003 the applicant received a summons for the hearing before the Krasnoyarsk Regional Court that had taken place on 5 March 2002. The summons was dated 27 February 2002.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

16. Article 336 of the RSFSR Code of Criminal Procedure of 27 October 1960 (the "CCrP", in force at the material time) provided that persons who had submitted their points of appeal were to be apprised of the date and time of the appeal hearing. If a person had been notified, but failed to appear, the appeal court could hold the hearing in that person's absence. Article 338 required that at the beginning of a hearing the presiding judge verify the attendance and the court decide whether to proceed with the hearing.

17. On 16 June 1978 the Plenary Session of the USSR Supreme Court declared that if the requirements of Article 336 of the CCrP had not been respected, the appeal hearing was to be adjourned. The examination of a criminal case in the absence of the accused or his counsel, if they had not been notified of the date and time of the appeal hearing, was considered to be a substantial breach of the law on criminal procedure. On 1 December 1983 the Plenary Session ruled that the appeal court had to verify in each case whether the parties to the proceedings had been notified of the date and time of the appeal hearing, whether their submissions had been sent to the other party and whether the other party had been given an opportunity to comment on them.

18. On 10 December 1998 the Constitutional Court of the Russian Federation declared Article 335 § 2 of the CCrP incompatible with the Constitution to the extent that it allowed appeal courts to reach a final decision on a convicted person's appeal if the defendant was absent from the hearing and if he (she) had not been provided with an opportunity to study the materials of the hearing and communicate his (her) opinion on the issues raised before the appeal court.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION

19. The applicant complained under Article 6 § 1 and 3 (c) that neither he nor his lawyer was apprised of the appeal hearing. The relevant parts of Article 6 provide 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:

...

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

*1. Arguments by the parties*

20. The Government submitted that the applicant had refused to participate in the appeal hearing and asked that his case be determined in his absence. By contrast, his co-accused Z. had sought leave to appear before the appeal court and the appeal court granted it. A summons for the appeal hearing was sent to the applicant and his lawyer on 20 February 2002. Under the then effective rules of procedure (Article 336 § 3 of the CCrP), if the defendant was duly notified of the hearing and failed to appear, the court could proceed with the examination of the merits in his absence.

21. The Government produced a copy of the summons of 20 February 2002 addressed to, in particular, "[facility no.] IZ-24/3 (for Y. Metelitsa, S. Z[.], Yu. S[.])" and "Achinsk legal services office, for Struchenko N.", and a copy of the "conveyance request" of 21 February 2002 from the deputy president of the Krasnoyarsk Regional Court to the head of investigations ward no. 1 of Krasnoyarsk, relating to the escorting of the applicant's co-accused Z. to the appeal hearing on 5 March 2002.

22. The Government conceded that a prosecutor had been present at the appeal hearing. However, in their opinion, his presence did not affect adversely the applicant's defence rights because the applicant could have raised his arguments in the statement of appeal and because there was no information that the prosecutor sought an amendment of the judgment in respect of the applicant.

23. The applicant submitted that the domestic authorities had violated his right to be informed of the appeal hearing in good time. As he and his lawyer, Ms Struchenko, had lodged separate statements of appeal, by virtue of Article 336 § 1 of the CCrP summonses were to be served on both of them. Paragraph 4 of that Article additionally required the service of summonses in good time. However, this was not done. The applicant contested the evidence produced by the Government arguing that mere copies of the notices allegedly sent to him and his representatives might not be considered as a proof of their notification of the hearing. In the applicant's view, it could only be proved by their signatures acknowledging the receipt of the notices, which the Government had not produced. The applicant's lawyer Ms Struchenko submitted an affidavit that she had never received the summons to which the Government referred and could not attend the appeal hearing. Furthermore, a "receipt", hand-written by the applicant for the head of detention facility no. UK-272/3, indicated that on 30 October 2003 he had received a copy of the appeal judgment of 5 March

2002, a copy of a certain letter of 23 April 2002 and a copy of the summons to the appeal hearing dated 27 February 2002. He also indicated that previously he had already received a copy of the appeal judgment from his mother, in October or November 2002.

24. The applicant argued that the then current rules of criminal procedure did not impose an obligation on the accused or his lawyer to petition the court for leave to appear, such right was vested in them automatically.

25. The applicant further submitted that he had had no knowledge of whether or not the prosecutor had made any observations at the appeal hearing and, in any event, he had had no opportunity to comment on them. The Government's allegation that the prosecutor did not comment on the applicant's sentence had no evidentiary basis because, according to the domestic practice, no record of appeal hearings was kept. Moreover, their submissions were self-contradictory because previously they had referred to the prosecutor's opinion "on the need to amend the judgment". The applicant concluded that there had been a violation of Article 6 §§ 1 and 3 (c) in that he had not been afforded an opportunity to have knowledge of, and to comment on, the observations submitted by the other party at the appeal hearing.

### *2. The Court's assessment*

#### (a) General principles

26. The Court reiterates that it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the first-instance hearing (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, pp. 14-15, §§ 27 and 29).

27. The personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing, even where an appeal court has full jurisdiction to review the case on questions both of fact and law. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appeal court, particularly in the light of the issues to be decided by it and their importance for the appellant (see *Belziuk v. Poland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, § 37).

28. It is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first-instance and on appeal (see *Lala v. the Netherlands*, judgment of 22 September 1994, Series A no. 297-A, p. 13, § 33).

29. The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that

criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 27, §§ 66-67).

**(b) Application of the above principles to the instant case**

30. The Court would note at the outset that it does not consider it necessary to decide whether the absence of the applicant and his counsel, taken separately, would render the proceedings before the appeal court unfair. Neither of them was present before the Krasnoyarsk Regional Court, and it is against this background that the Court will determine the complaint in issue (cf. *Vanyan v. Russia*, no. 53203/99, § 63, 15 December 2005).

31. The Court observes that criminal appeals in the Russian legal system deal with both facts and law, that the applicant's and his lawyer's submissions covered both points of facts and points of law, and that their version of events differed in important aspects from that of the applicant's co-accused. The applicant contested his conviction, and sought re-characterisation of the criminal offence and reduction of the sentence. As matters transpired, the appeal court reduced the sentences for both of the applicant's co-accused who were present and represented at the hearing, but not for the applicant himself. Taking into account what was at stake for the applicant, who had been sentenced to six years' imprisonment, the Court does not consider that the Krasnoyarsk Regional Court could properly determine the issues before it without a direct assessment of the evidence given by the applicant either in person or through some form of legal assistance (see, *mutadis mutandis*, *Belziuk,* cited above, § 38).

32. Furthermore, the Court notes that a prosecutor was present at the appeal hearing and made oral submissions to the court. In those circumstances and having regard to the applicant's refusal to participate in the appeal hearing and his request that his lawyer be invited thereto raised in his points of appeal of 24 January 2002, it was incumbent on the domestic authorities to ensure at least the lawyer's presence at the hearing.

33. The Government claimed that summonses had been sent to the applicant and his lawyer two weeks before the hearing and they submitted a copy of those summonses from the case-file. The Court notes that none of the summonses produced by the Government was post-marked and the Government adduced no other evidence that they had actually been sent. There is no indication that the appeal court verified that the summonses had indeed been served on the applicant or his lawyer and, if they had not, adjourned the examination of the appeal, as required by the domestic law (see paragraph 17 above).

34. The applicant maintained that neither addressee ever received the summonses. His statements are corroborated by written affidavits, one of

them was apparently produced at the request of a State official, the head of the detention facility where the applicant was held. It appears from those affidavits that the applicant only received the summons more than a year and a half after the appeal hearing had taken place, and that his lawyer never received it. In these circumstances, the Court is not persuaded by the evidence submitted by the Government in support of their contention that the applicant had been duly summoned to the appeal hearing.

35. It follows that the proceedings before the Krasnoyarsk Regional Court did not comply with the requirement of fairness. There has therefore been a breach of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 5,000 euros ("EUR") in respect of non-pecuniary damage.

38. The Government argued that no compensation should be paid to the applicant because his rights under Article 6 had not been violated.

39. The Court considers that the applicant must have suffered frustration and a feeling of injustice as a consequence of the domestic authorities' failure to apprise him and his lawyer of the appeal hearing in good time. The Court finds that the applicant suffered non-pecuniary damage, which would not be adequately compensated by the finding of a violation. Accordingly, making its assessment on an equitable basis, it awards the applicant EUR 1,000, plus any tax that may be chargeable on that amount.

### B. Costs and expenses

40. The applicant claimed EUR 3,000 in respect of his representation by Ms K. Moskalenko in the proceedings before this Court.

41. The Government contested the claim indicating that the applicant did not produce any evidence to substantiate it.

42. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable

as to quantum. The applicant did not submit any documents on the basis of which such amount could be established. Accordingly, the Court does not make any award under this head.

### C. Default interest

43. The Court considers it appropriate that the default interest 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. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
   (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;

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

Done in English, and notified in writing on 22 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Søren NIELSEN<br>Registrar | Christos ROZAKIS<br>President |