



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

FIRST SECTION

CASE OF SAMOKHVALOV v. RUSSIA

(Application no. 3891/03)

JUDGMENT

STRASBOURG

12 February 2009

FINAL

12/05/2009

This judgment may be subject to editorial revision.

In the case of Samokhvalov v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 22 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 3891/03) 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 Aleksandrovich Samokhvalov (“the applicant”), on 16 December 2002.

2. The Russian Government (“the Government”) were represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his right to a fair trial had been violated in that the appeal hearing of his criminal case had been held in his absence.

4. On 15 September 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the use of the joint procedure under Article 29 § 3. The Court examined their objection and dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lives in Kurgan, the Kurgan region. He is currently serving a prison sentence in the Kurgan region.

A. First examination of the case

7. On 15 November 2001 the applicant was arrested on suspicion of murder of a certain S. and was placed in detention.

8. On 5 February 2002 the Kurgan Town Court, Kurgan Region (“the trial court”) held a trial in the applicant’s case. The applicant confessed to the murder in part. He submitted that during a quarrel with S. the latter had threatened him with an axe and he (the applicant) had stabbed him several times with a knife in order to defend himself. The Town Court found the applicant guilty of premeditated murder under Article 105 § 1 of the Criminal Code (see “Relevant domestic law and practice” below, paragraph 22) and sentenced him to eleven years and three months’ imprisonment. On 5 March 2002 the Kurgan Regional Court (“the appeal court”) quashed that judgment and remitted the case for fresh examination to the trial court having found, in particular, that the latter had not established whether the victim had had an axe in his hands during the quarrel. On the same date the Regional Court remanded the applicant in custody. The applicant was neither present nor represented by a lawyer at the appeal hearing.

9. On an unspecified date the applicant was additionally charged with several counts of theft. A certain Sch. was charged with concealment of the murder of S. Criminal proceedings against Sch. were joined to those against the applicant.

B. Second examination of the case

1. Proceedings before the trial court

10. On 22 March 2002 the trial court started the examination of both charges against the applicant and the charges against Sch. At the beginning of the hearing the applicant submitted that he had refused assistance from legal aid counsel and that his refusal was not linked to his financial situation. Lawyer M., who had been provided to the applicant, left the courtroom.

11. The applicant pleaded guilty to theft. As regards the charges of murder, he submitted that he had committed the murder in self-defence because during their quarrel S. had threatened him with an axe. The trial court heard the applicant and his co-accused, the mother of S. and several witnesses including witness K. During the questioning of K. the court rebuked the applicant twice for contempt of court and finally, at the prosecutor’s request, removed the applicant from the hearing for putting pressure on the witnesses. The applicant was absent until the end of the hearing of 22 March 2002. In his absence the trial court continued to hear witness K. and heard witness B. According to the applicant, on 22 March

2002 the trial court also ordered to remove from the hearing everybody except for the victims, their representative, witnesses and his co-accused. The examination of the case continued on 25 March 2002 in the applicant's presence. The trial court heard seven more witnesses and an expert.

12. On 26 March 2002 the trial court found the applicant guilty of theft and premeditated murder and sentenced him to twelve years' imprisonment. Having regard to the statements by the witnesses, it found, in particular, that S. had had no axe in his hands at the moment of his murder, and, therefore, the applicant's version of self-defence had been unfounded. It also held that the applicant's balance of mind had not been disturbed at the moment of the murder. Sch. was found guilty of concealment of murder and was sentenced to one year's imprisonment.

13. The judgment stated that the applicant could lodge an appeal against it within seven days of the date he received its copy. The record of the hearing stated that the time-limits and the procedure for appealing against the judgment had been explained [to the parties].

14. On an unspecified date the applicant lodged his remarks on the record of the hearings of 22 and 25 March 2002 with the trial court. He submitted that the record of the hearing had not mentioned exactly when he had returned to the hearing. He also complained that he had not been given the opportunity to read the record of the questioning of witnesses which had taken place in his absence.

15. On 10 June 2002 the trial court admitted the applicant's remarks to the file. It also found that the applicant had returned to the hearing at 10 a.m. on 25 March 2002, that the testimony given in his absence had been read out to him and that he had been offered the opportunity to question witnesses K. and B., which he had refused. The trial court ordered that the record of the hearings be amended accordingly.

2. Proceedings before the appeal court

16. The applicant, but not Sch., appealed against the judgment of 26 March 2002. He argued in the first place that the trial court's conclusion that S. had no axe in his hands had been inconsistent with the facts of the case and the evidence submitted in the trial. His actions should have been re-characterised as a murder committed as a result of exceeding the limits of necessary defence under Article 108 of the Criminal Code (see "Relevant domestic law and practice" below, paragraph 23), because S. had threatened him with an axe. He further submitted that the trial court had wrongly applied to him a rule on repetition of crimes, which had resulted in a heavier sentence. Finally, he complained that two women had been removed from the hearing of 22 March 2002. In his additional grounds of appeal the applicant submitted that the trial court had removed from the hearing people who had come to support him and left only the relatives and friends of the victims. He requested the appeal court to quash his conviction of

premeditated murder and adopt a new judgment. When lodging his appeal the applicant did not expressly state that he wished to take part in the appeal hearing.

17. On 27 June 2002 the applicant received a notification that the appeal hearing would be held on 1 July 2002. The notification stated that personal appearance at that hearing was not obligatory.

18. On 1 July 2002 the appeal court held a hearing in the applicant's absence. The applicant was not represented at that hearing. The appeal court heard the mother of S. and her representative, who considered that the applicant should be convicted of murder, committed with particular cruelty, and a more severe penalty should be imposed. They asked for the judgment to be quashed and the case remitted for fresh consideration to the trial court. The appeal court also heard the prosecutor.

19. Having studied the materials of the case, the appeal court found, in particular, that the trial court had rightly concluded on the basis of evidence and witnesses' testimony that S. had no axe and had not represented a serious danger to the applicant. It further confirmed the trial court's conclusion that the applicant's balance of mind had not been disturbed when he had committed the murder. The appeal court concluded that the trial court had correctly characterised the applicant's actions as premeditated murder and had imposed an appropriate sentence. On the same date it upheld the judgment of 26 March 2002 in its totality.

20. It does not appear from the decision of 1 July 2002 that the appeal court verified whether the applicant had been duly informed of the hearing and of the procedure to follow to take part in it, and whether he had expressed a wish to take part in it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code of the Russian Federation of 13 June 1996, in force since 1 January 1997

21. Article 37, as worded at the material time, provided that it had not to be deemed a crime when harm was inflicted in the state of necessary defence against an attacking person provided that the limits of necessary defence had not been exceeded. Premeditated actions which clearly did not match the character and danger of the attack had to be deemed exceeding the limits of necessary defence.

22. Article 105 § 1 defines murder as the intentional causing of death to another person which shall be punishable with deprivation of liberty for a term of six to fifteen years.

23. Article 108 provides that murder committed in excess of the limits of necessary defence shall be punishable by deprivation of liberty for a term of up to two years or by restraint of liberty for the same term.

B. Code of Criminal Procedure of RSFSR of 1960, in force until 1 July 2002 (“old CCrP”)

24. Article 335 § 1 provided that during the examination of the case on appeal the public prosecutor would give his opinion as to whether a judgment delivered by the trial court was lawful and well-founded. Defence counsel could also take part in the appeal hearing. Article 335 § 2 stated that a decision regarding the defendant’s participation at the hearing was taken by the appeal court and that a defendant who appeared before the court was always entitled to give evidence.

25. In Ruling of 10 December 1998, the Constitutional Court of the Russian Federation declared Article 335 § 2 of the CCrP incompatible with the Constitution in so far as this provision enabled appeal courts to take a final decision in the case where it had rejected a defendant’s request to attend an appeal hearing without giving him or her the opportunity to study the materials of the hearing and state his or her opinion on the issues examined by the court.

26. Article 336 provided that persons who had lodged appeals were to be apprised of the date of the appeal hearing if it was to be held before courts lower than the Supreme Court of Russia. If an appeal was to be examined by the Supreme Court, an appellant had to be apprised of the appeal hearing if he or she had requested the court to do so in their appeal or observations on the appeal. Failure to appear by persons who had been duly notified of the hearing did not preclude examination of the case.

C. Code of Criminal Procedure of the Russian Federation of 18 December 2001, in force since 1 July 2002 (“new CCrP”)

27. Article 360 establishes the scope of the examination of the case by an appeal court. It provides that the appeal court shall verify the legality, validity and fairness of the judgment of the trial court only to the extent to which it has been complained against and only in respect of those convicted who are concerned by the appeal. The appeal court is empowered to reduce the sentence imposed on the convicted person or apply the law of a lesser offence, but shall have no power to impose a more severe penalty or apply a law of a more serious offence.

28. Article 375 § 2 provides that if a convicted person wishes to take part in the appeal hearing, he shall indicate that in his statement of appeal.

29. Under Article 376 § 2 parties shall be notified of the date, time and place of an appeal hearing no later than fourteen days in advance. Whether a

convicted person held in custody shall be summoned shall be decided by the court. Article 376 § 3 provides that a convicted person held in custody who expressed a wish to be present at the examination of appeal shall be entitled to participate either directly in the court session or to state his case by video link. The court shall take a decision with respect to the form of participation of the convicted person in the court session. A defendant who has appeared before the court shall be always entitled to take part in the hearing. Article 376 § 4 states that if persons who have been given timely notice of the venue and time of the appeal hearing fail to appear, this shall not preclude examination of the case.

30. Article 377 describes the procedure for examining cases by the appeal court. It provides, among other things, that at the hearing the court shall hear the statement of the party who had lodged the appeal and the objections of the opposing party. The appeal court shall be empowered, at the party's request, to directly examine evidence and additional materials provided by the parties to support or disprove the arguments cited in the statement of appeal or in the statements of the opposing party.

31. Article 378 establishes which decisions may be taken by the appeal court. It provides that the appeal court may decide to dismiss the appeal and uphold the judgment, to quash the judgment and terminate the criminal proceedings, to quash the judgment and remit the case for a fresh trial, or to amend the judgment.

32. Article 379 sets out the grounds for quashing or setting aside judgments by way of appeal. In particular, a judgment shall be quashed or amended on appeal if there is an inconsistency between the conclusions reached by the trial court in the judgment and the facts established by that court. Violation of procedural law and wrongful application of criminal law, as well as unfairness of the judgment, shall also constitute grounds for reversing or changing the judgment.

33. Article 383 provides that the judgment shall be deemed unfair if the sentence imposed is inconsistent with the seriousness of the offence, the personality of the convicted person, or if that sentence, although within the limits of the relevant Article of the Criminal Code, is unfair in its chosen type or extent, being either disproportionately lenient or disproportionately severe. A judgment may be reversed in connection with the necessity to impose a more severe penalty due to the fact that the penalty imposed by the trial court is deemed unfair as being disproportionately lenient, but only in instances when there is either a prosecution request or an application as a private prosecution, the victim or his representative to that effect.

34. Article 387 provides that where there has been a violation of the provisions of the Criminal Code, the appeal court may apply a law of a less serious offence and reduce the sentence, in accordance with legal reclassification of the acts committed. In doing so, the appeal court may not apply a law of a more serious offence or aggravate a sentence imposed. In

cases where the trial court imposed a sentence more severe than that set forth by the relevant Article of the Criminal Code, the appeal court may reduce the sentence without changing the legal classification of the offence.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

35. The applicant made several complaints under Article 6 §§ 1 and 3 (c) of the Convention. In particular, he complained that (1) the record of the hearing of 5 February 2002 had been falsified, (2) he could not question witnesses K. and B. because he had been removed from the court room on 22 March 2002, (3) the trial court had removed the public from a part of the hearing of 22 March 2002, (4) the appeal hearing of his criminal case had been held in his absence on 1 July 2002 and he could not plead his defence and confront the prosecutor. The relevant parts of Article 6 of the Convention provide:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial 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 ...;”

A. Admissibility

36. As regards the applicant’s complaint about the alleged falsification of the minutes of the hearing of 5 February 2002, the Court observes that the judgment of 5 February 2002 was quashed on appeal and the case was examined anew. Therefore, the alleged falsification of the record of the minutes did not influence the overall fairness of the proceedings. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

37. Regarding the applicant’s complaint about the impossibility of questioning witnesses K. and B. in proceedings before the trial court, the Court notes that the trial court found in its decision of 10 June 2002 that the applicant had returned to the hearing at 10 a.m. on 25 March 2002, that the testimony given in his absence had been read out to him and that he had

been offered the opportunity to question witnesses K. and B., which he had refused. The Court has no reason to doubt the findings of the trial court. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

38. In so far as the applicant complained about the lack of a public hearing on 22 March 2002, the Court observes that in his grounds of appeal against the judgment of 26 March 2002 the applicant submitted that two women had been removed from the hearing of 22 March 2002. In his additional grounds of appeal he submitted that the trial court had removed from the hearing people who came to support him and left only the relatives and friends of the victims. The Court considers that the applicant's submissions are not supported by the materials of the case, as there is no evidence that all the public had been excluded from the hearing. It follows from the case file that the proceedings before the trial court comprised a public hearing during which the applicant and several witnesses were heard in person. Accordingly, the Court considers that the proceedings before the trial court complied with the requirements of Article 6. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

39. As regards the applicant's complaint about his absence from the appeal hearing of 1 July 2002, the Court considers that it raises serious issues of facts and law and requires an examination on the merits. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

40. The Government considered that the applicant's rights guaranteed by Article 6 §§ 1 and 3 (c) had not been violated. They submitted that under Article 335 of the old CCrP and Article 376 of the new CCrP the applicant had been entitled to take part in the appeal hearing (see "Relevant domestic law and practice" above, §§ 24 and 29). According to the tenor of those provisions, the applicant had to inform the court about his wish to participate in the appeal hearing. It followed from the record of the proceedings that after pronouncement of the judgment, the judge explained to the parties, including the applicant, the procedure and the time-limits for lodging an appeal against the conviction. On 27 June 2002 the applicant, in accordance with the old CCrP, had received a notification that the appeal hearing would take place on 1 July 2002. However, he had not expressed the wish to participate in the appeal hearing either in his grounds of appeal or in a separate motion. The Government pointed out that the old CCrP had

not provided for any time-limits for prior notification of the appeal hearing. In accordance with Article 336 of the old CCrP, Ruling of the Constitutional Court of 10 December 1998 and Article 376 of the new CCrP (see “Relevant Domestic law and practice” above, paragraphs 25, 26 and 29), a failure to appear at the hearing by a person who had been duly informed of the hearing did not preclude examination of the criminal case. Therefore, the appeal court had breached neither the domestic law nor the provisions of the Convention.

41. The applicant maintained his complaint. He confirmed that he had received the notification about the appeal hearing on 27 June 2002. However, he had not been informed about his right to take part in the appeal hearing and about the procedure to follow, as he had only been advised of the time-limits for lodging his appeal.

2. *The Court’s assessment*

(a) **General principles**

42. The Court reiterates that the object and purpose of Article 6 taken as a whole implies that a person “charged with a criminal offence” is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to “everyone charged with a criminal offence” the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”, and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89). Based on that interpretation of Article 6 the Court has held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005).

43. The personal attendance of the defendant does not necessarily take on the same crucial significance for an appeal hearing as it does for the trial (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of appeal court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134).

44. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that he had been heard by a first-instance court (see, among other

authorities, *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 58, Series A no. 115, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74, as regards the court of cassation).

45. In appeal proceedings reviewing the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, 29 October 1991, § 33, Series A no. 212-C). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appeal court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see, among many other authorities, *Kremzow v. Austria*, 21 September 1993, § 59, Series A no. 268-B; *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II; and *Hermi v. Italy* [GC], no. 18114/02, § 62, ECHR 2006-...). For instance, where an appeal court has to make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).

46. The Court further reiterates that the principle of equality of arms is another feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations made and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66-67, Series A no. 211).

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

47. The Court reiterates that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. Therefore, it will examine the applicant's complaints under these provisions taken together (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

48. The Court notes at the outset that it has declared inadmissible the applicant's complaints relating to the alleged unfairness of the proceedings before the trial court, having found that they complied with the requirements of Article 6. In particular, the Court found that those proceedings comprised a public hearing during which the applicant and several witnesses were heard in person and the applicant was given the opportunity to question them (see paragraphs 37 and 38 above). Furthermore, it is not disputed that a hearing was also held by the appeal court, which heard the mother of S., her representative and the prosecutor. The main issue to determine is

whether, in the particular circumstances of the case, holding that hearing in the applicant's absence infringed his right to a fair hearing under Article 6 of the Convention.

49. The Government's main argument was that the applicant by his own fault lost the opportunity to be present at the appeal hearing because he had failed to inform the authorities of his wish to take part in the hearing by lodging a special request. In other words, he had waived his right to be present at the hearing. The applicant admitted that he had not applied to participate in the appeal hearing, but argued that he had not been aware of the procedure to follow.

50. The Court will first examine whether the departure from the principle that an accused should be present at the hearing, could, in the circumstances of the case, be justified at the appeal stage by the special features of the domestic proceedings, viewed as a whole. It will next determine whether the applicant had waived his right to be present at that hearing.

51. The Court observes that in the Russian criminal procedure appeal courts have jurisdiction to deal not only with questions of law but also with questions of fact pertaining both to criminal liability and to sentencing, but only to the extent to which they have been complained against and only in respect of those convicted who were concerned by the appeal. They are empowered to examine the evidence and additional materials submitted by the parties directly. As a result of the examination, the appeal courts may dismiss the appeal and uphold the judgment, quash the judgment and terminate the criminal proceedings, quash the judgment and remit the case for a fresh trial, or amend the judgment. They may reduce the sentence but cannot impose a more severe penalty or apply a law of a more serious offence. However, in case of a disproportionately lenient sentence, the appeal courts may reverse the judgment (see "Relevant domestic law and practice" above, paragraphs 27 and 30-34).

52. In his statement of appeal the applicant contested his conviction on factual and legal grounds. He sought a re-characterisation of the criminal offence, from premeditated murder to murder committed as a result of exceeding limits of self-defence. In particular, he considered that the trial court's conclusion that S. had no axe in his hands had been inconsistent with the facts established by the trial court and the evidence submitted in trial. He also considered that the trial court had wrongly applied the law when it had imposed his sentence. The applicant requested the appeal court to quash his conviction and adopt a fresh decision in his case. The mother of S. sought the imposition of a heavier sentence on the applicant by sending the case for a fresh trial. The prosecutor asked for the conviction to be upheld. Consequently, the Court observes that in the instant case the issues to be determined by the appeal court in deciding the applicant's criminal liability were both factual and legal. Despite the fact that the applicant had

confessed to causing the death of the victim, the appeal court was called to make a full assessment of his guilt or innocence regarding the charges of premeditated murder and to verify whether the sentence had been imposed correctly.

53. The Court further observes that the proceedings at issue were of capital importance for the applicant, who had been sentenced to twelve years' imprisonment and had not been represented. It also does not lose sight of the fact that the prosecutor and the mother of S. and her representative were present at the hearing and made submissions.

54. Having regard to the criminal proceedings against the applicant in their entirety and to the above elements, the Court considers that the appeal court could not properly determine the issues before it without a direct assessment of the evidence given by the applicant in person. Neither could it ensure equality of arms between the parties without giving the applicant the opportunity to reply to the observations made by the mother of the victim and by the prosecutor at the hearing. It follows that in the circumstances of the present case, it was essential to the fairness of the proceedings that the applicant be present at the appeal hearing.

55. It remains to be determined whether, as argued by the Government, the applicant lost the opportunity to be present at the appeal hearing by failing to submit a special request, in other words whether he had waived his right to take part in the appeal hearing.

56. In that respect the Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to "defend him in person or through legal assistance..." it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their legal systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirement for a fair trial (see *Quaranta v. Switzerland*, 24 May 1991, § 30, Series A no. 205). The Court considers that the requirement to lodge a prior request for participation in the appeal hearing would not in itself contradict the requirements of Article 6, if the procedure is clearly set out in the domestic law.

57. The Court further reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...), and it must be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A). Furthermore, in view of the prominent place held in a democratic society by the right to a fair trial Article 6 of the Convention imposes on every national court an obligation to check whether

the defendant has had the opportunity to apprise himself of the date of the hearing and the steps to be taken in order to take part where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV, and *Hermi*, cited above, § 76).

58. The Court observes that no explicit waiver was made in the present case. The question is whether there was a tacit one. On 27 June 2002 the applicant was informed that the appeal hearing had been set for 1 July 2002. However, the Court has strong doubts as to whether the applicant had been properly informed of the procedure to follow if he wished to take part in the hearing. The Government contended that the trial court had informed the applicant about the procedure after pronouncing the judgment. The applicant argued that he had been informed only of the time-limits for lodging his appeal. It is true that the record of proceedings stated that the procedure for appealing against the judgment and the time-limits had been explained to the parties. However, it is not certain whether it had been explained to the applicant that he had to make a special request if he wished to take part in the appeal hearing. It is also true that the notice informing the applicant of the appeal hearing stated that attendance at the appeal hearing was not obligatory. It may be argued that from that wording the applicant could have understood that he would not be brought to the hearing unless he made a special request. However, the Court cannot base its findings on presumptions as regards the inferences which the applicant might have had after reading the notice. Regard must be had to the provisions of the domestic law to see whether the procedure for taking part in the appeal hearing had been set there in a sufficiently clear manner.

59. The Court notes that the present case resembles to a certain extent the case of *Hermi v. Italy* where the applicant, represented by two counsel, had been informed of the appeal hearing more than two months in advance but did not apply to attend it within the deadline of five days beforehand and where the procedure for applying to the court had been clearly set out in the domestic law. The Court found that the domestic court had been entitled to take the applicant's conduct as a tacit but unequivocal waiver, in particular as there had been no excessive procedural formalities involved in making the requisite application (see *Hermi*, cited above, §§ 89-103).

60. Turning to the present case, the Court observes that the provisions of the old CCrP, in force at the material time, did not expressly state that in order to take part in the hearing a defendant had to submit a special request (see "Relevant domestic law and practice" above, paragraphs 24-26). The Government contended that the tenor of those provisions implied that the applicant had to make a special request if he wished to take part in the appeal hearing. However, it is questionable, whether the applicant, who had not been assisted by legal counsel, could have understood the tenor of those provisions in the way the Government suggested. It is true that Articles 375

and 376 of the new CCrP describe the procedure for applying for participation at the appeal hearing (see “Relevant domestic law and practice” above, paragraphs 28 and 29), however, they had entered into force only on 1 July 2002, the date on which the appeal hearing of the applicant’s case had taken place. Furthermore, it follows from the appeal decision of 1 July 2002 that the appeal court had not verified whether the applicant had been duly informed of the hearing and of the steps to be taken in order to participate in it. Neither did that decision state that the applicant had failed to submit a request for participation in the hearing and had waived his right, and therefore that his failure to appear would not preclude examination of the case. In such circumstances, the Court considers that it cannot be said that in the present case the applicant had waived his right to take part in the hearing in an unequivocal manner.

61. Having regard to its findings in paragraphs 54 and 60 above the Court considers that the proceedings before the Kurgan Regional Court did not comply with the requirements 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

62. 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

63. The applicant claimed 158,600 euros (EUR) in respect of non-pecuniary damage sustained as a result of his unfair conviction and EUR 150,000 for the authorities’ failure to provide him with adequate medical treatment. He considered that he should be compensated for pension which he had not received because he had been convicted, and claimed EUR 7,800 in this respect.

64. The Government contested his claims.

65. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. It further observes that a part of the applicant’s claim for non-pecuniary damage relates to the authorities’ alleged failure to provide him with medical assistance. However, those allegations have not been examined in the present case and the Court therefore rejects the claim in that part. On the other hand, the Court considers that the applicant must have suffered

distress and frustration from violation of his right to a fair hearing. However, the amount claimed appears to be excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 in that respect, plus any tax that may be chargeable on that amount.

B. Costs and expenses

66. The applicant also claimed EUR 50,000 for the costs and expenses which he would have in future in order to rehabilitate himself and to bring proceedings for compensation against the domestic authorities.

67. The Government contested the claim.

68. 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 are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the applicant's claim for prospective costs and expenses.

C. Default interest

69. 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. *Declares* the complaint concerning the applicant's absence from the appeal hearing of 1 July 2002 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention;
3. *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), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (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 12 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President