



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

FIRST SECTION

CASE OF GRIGORYEVSKIKH v. RUSSIA

(Application no. 22/03)

JUDGMENT

STRASBOURG

9 April 2009

FINAL

09/07/2009

This judgment may be subject to editorial revision.

In the case of Grigoryevskikh 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 19 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 22/03) 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 Aleksandr Sergeyevich Grigoryevskikh (“the applicant”), on 11 November 2002.

2. The applicant was represented by Mr I. Bolshakov, a lawyer practising in St. Petersburg. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been detained in appalling conditions pending trial and that the criminal proceedings against him had been unfair.

4. On 24 October 2007 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and lives in Gribovskiy, in the Voronezh Region.

6. The applicant is suffering from partial deafness (also known as sensor neural hearing loss).

A. Criminal proceedings against the applicant

7. On 17 January 2001 the applicant was arrested on suspicion of several counts of robbery, theft and unlawful possession of arms and taken to a police station for questioning. Following the interrogation, the applicant was remanded in custody pending trial in detention facility IZ-36/2 in Borisoglebsk, Voronezh Region.

8. Upon the applicant's arrest he retained a lawyer, Mr B. In March 2001 the applicant asked for Mr B. to be replaced by Mr S. Later the applicant again asked the court for permission to change his lawyer on two occasions, alleging ineffectiveness. It appears that during the trial hearing he was represented by Ms N.

9. The trial was held on 12 November 2001. The Voronezh Regional Court convicted the applicant, along with nine other co-accused, of theft, aggravated robbery, hijacking, causing deliberate damage to property and possession of firearms, and sentenced him to ten years' imprisonment with forfeiture of estate. The applicant appealed on the point of facts and law, contesting his involvement in several episodes and alleging that the sentence was too severe.

10. According to the applicant, on 26 August 2002 he requested to be present in the courtroom in person for health reasons (partial deafness and weak eyesight) but his request was never examined by the court.

11. According to the Government, the courts did not receive such a request.

12. It appears that the applicant was not informed about the date and time of the appeal hearing in due time but learned about it on the day of the appeal hearing. The authorities submitted a certificate from the IZ-77/3 detention centre in Moscow, where the applicant was placed for the duration of the appeal proceedings, informing the Court that it was impossible to submit a copy of the summons to the appeal hearing due to the absence of the applicant's case file.

13. On 13 September 2002 the Supreme Court of Russia examined the applicant's appeal, modified the qualification of his crimes and reduced the sentence to nine years and six months. The appeal hearing was held by video link. The applicant was brought to IZ-77/3 detention centre, which was equipped with the necessary facilities to broadcast the hearing. He was not represented by a lawyer. The prosecutor was present in person in the court room.

14. According to the applicant, the quality of the video and audio transmission was very low. The applicant, who was suffering from partial deafness, could not follow the appeal hearing properly and when he asked

the warders to increase the volume his requests were allegedly refused in a rude manner. He further alleged that he had twice been interrupted by the judge when trying to defend himself and was not able to proceed with the defence due to his confusion and the negative psychological effect caused by the judge's attitude and the transmission by video link. He further alleged that the overall length of the hearing amounted to less than ten minutes.

15. According to the Government, the applicant stated his case at the appeal hearing. He did not mention his illness during the appeal examination. The Supreme Court examined his arguments concerning the excessive severity of punishment. The court took into account the applicant's family situation, his readiness to cooperate with the authorities and the factors which had induced him to commit the crime.

16. On 19 July 2005 the Rossoshanskiy District Court of the Voronezh Region brought the applicant's sentence into compliance with the amendments introduced into the Russian Criminal Code in December 2003 and reduced the applicant's sentence to eight years and six months' imprisonment.

17. On 24 August 2005 the Supreme Court of Russia refused to review the judgment of 12 November 2001 and the appeal decision of 13 September 2002 by way of supervisory review, having found no violations.

B. Conditions of the applicant's detention in IZ-36/2

18. The applicant was held in the detention facility IZ-36/2 in Borisoglebsk from 22 January to 8 March 2001 and from 27 August 2001 to 12 July 2002. The applicant does not complain about the conditions of his detention in other detention facilities where he was held from 8 March to 27 August 2001.

1. Detention from 22 January to 8 March 2001

19. The Government submitted that the applicant was held in cells nos. 9 and 11 during the above-mentioned period.

20. According to a certificate of 6 December 2007 issued by the facility administration, cell no. 9 measured 9.63 sq. m and cell no. 11 measured 14.58 sq. m. Another certificate of the same date indicated that two inmates were held in cell no. 9 and three inmates were held in cell no. 11 at the relevant period. The personal space afforded to the applicant was consequently over 4 sq. m in each cell. The cell was equipped with heating, ventilation, a window that could be opened, a drinking water container and a lavatory. The windows were covered by metal security shields which were removed in 2003. The applicant had an individual sleeping place and bedding. He received food three times a day in accordance with standard

norms. The applicant was given cutlery and personal hygiene items. He was able to shower once a week and exercise outside for one hour a day.

21. The applicant contested these statements on account of personal space and sanitary conditions. He claimed that the cells were small, dirty and damp. The metal security shields covering the windows blocked access to natural light and fresh air, especially bearing in mind that the cells were located in a semi-basement. The artificial light was never switched off. Drinking water was of poor quality and was supplied in rusty containers. Due to overcrowding in the cells the applicant did not have an individual bed. The lavatory in the corner of the cell had no flush system and was not separated from the living area; the applicant had to use the toilet in front of his cellmates and the wardens who observed them through a peephole in the door. The detainees were given ten to fifteen minutes to take a shower. Two to five detainees had to share one shower and had to wash themselves and their clothes during this short time.

2. Detention from 27 August 2001 to 12 July 2002

22. According to the certificates of 6 December 2007 issued by the facility director and the warders, the applicant was held in cells nos. 3, 7, 13, 14 and 23 during the above-mentioned period. The cells measured 11.8, 16.4, 11.8, 17.7, and 12.6 sq. m and housed two, four, two, four and three inmates respectively. The Government submitted consequently that the applicant was afforded no less than 4 sq. m of personal space in each cell.

23. As to the sanitary conditions, the Government submitted the same information as regards the period from 22 January to 8 March 2001 (see paragraph 20 above).

24. In support of their allegations the Government provided several certificates issued by the chief of IZ-36/2 on 6 December 2007, statements by the warders (not dated), a copy of the applicant's prison card stating that the applicant had been provided with bed sheets, cutlery and clothes, as well as a number of certificates concerning the food ration during the relevant period of time and disinfection activities conducted in the detention facility in 2002-2003.

25. The applicant contested these statements. He claimed, in particular, that he had been held in cells 7, 10, 12 and 13; that the cells were small, dirty and damp. The metal security shields covering the windows blocked access to natural light and fresh air, especially bearing in mind that the cells were located in a semi-basement. The artificial light was never switched off. The cells were dimly lit by a 75-watt bulb, fixed in the ceiling and covered with metal mesh. Drinking water was of poor quality and was supplied in rusty containers. According to the applicant inmates were allowed two to four square metres per person in each cell, and he did not have an individual bed. The lavatory in the corner of the cells had no flush system and was not

separated from the living area; it was allegedly located about one metre from the dining table; the applicant had to use the toilet in front of his cellmates and the wardens who observed them through a peephole in the door. The detainees were given ten to fifteen minutes to take a shower. Two to five detainees had to share one shower and had to wash themselves and their clothes during this short time. The applicant also complained about the appalling quality of nutrition, the large numbers of insects and rats, the lack of ventilation, the cold in winter (down to -10°C in the corner cells) and the inadequate supplies of detergent. In detention the applicant contracted shingles and scabies.

26. The applicant supported his allegations by statements from his four cellmates, Mr G., Mr K., Mr F. and Mr Sh. who were held in the same cells as the applicant during 2001-2002. Additional submissions supporting the applicant's description of IZ-63/2 in respect of overcrowding and poor sanitary conditions were lodged by Mr Ka., who had been detained in cells nos. 7 and 9 in 2000, Mr. Ki. who had been held in cells nos. 10 and 13 in 2001, Mr. KH. who had been held in cells nos. 8, 12, 21, 13 and 5 in 2002-2003 and Mr. G. who presented a general description of the detention building which had allegedly been built in the eighteenth century and not reconstructed since then. Although not all of the witnesses had been detained during exactly the same period of time as the applicant, their submissions relate to the same years and the same cells (nos. 7, 10, 12 and 13) and support the applicant's allegations.

27. The Government contested the statements of Mr G., Mr K., Mr F. and Mr Sh. as factually untrue, claiming that these statements were not supported by any evidence and reiterating their description of the conditions of detention. They did not dispute that the persons who had submitted their statements had been held in the same detention facility together with the applicant.

C. The applicant's hearing impairment and other health problems

28. On 23 January 2001 upon the applicant's arrival in the detention facility the applicant was examined by doctors. Following this examination, he was diagnosed with chronic otitis of the middle ear and given the necessary treatment in the detention facility.

29. On 27 August 2001 the applicant asked for medical help in the detention facility due to the same problem with his ears. The applicant was examined by a prison doctor and transported to the Borisoglebsk Central Hospital to consult an otolaryngologist where he was diagnosed with bilateral mesotimpanite, a type of chronic ear disease which causes partial hearing loss and periodic pus discharge from the ear. Anti-inflammatory treatment was prescribed to the applicant.

30. The applicant again complained about his ear problem to the facility administration on 16 September, 9 November, 17 December 2001 and 21 March 2002. It appears that in all cases the applicant was provided with some form of medical treatment.

31. While in detention, the applicant contracted scabies and shingles. In this respect he received the necessary medication from the facility's doctor.

32. After his arrival in the correctional colony IK-8 on 7 December 2002 the applicant received treatment for otitis. On 7 February 2003 at his request he was transported to a regional hospital of Voronezh where he stayed until 15 February 2003 and received anti-inflammatory treatment for his ears. Upon the medical examination conducted in the hospital the doctors diagnosed the applicant with bilateral chronic neural hearing loss.

33. On 20 February 2003 a medical certificate was issued by the colony administration indicating that the applicant was suffering from hearing impairment in both ears (*двусторонняя хроническая нейросенсорная тугоухость*).

D. The applicant's property

34. The applicant submits that on the day of his arrest he had a construction business and was the owner of a house and three imported cars of good quality.

35. Since the original judgment of 12 November 2001 provided for forfeiture of property, the applicant's property was apparently confiscated when the judgment became final. Later, following the changes in the Russian criminal law introduced in December 2003, the part of the judgment concerning the forfeiture of property was quashed in the proceedings for bringing the sentence in compliance with these changes (see paragraph 16 above). In any event, it appears that upon the applicant's release from prison his property was not available to him.

36. No civil claim was apparently lodged with the domestic authorities for compensation or restitution of property.

E. The alleged refusal to grant the applicant leave to attend his mother's funeral

37. On an unspecified date in February 2001 the applicant's mother died. According to the applicant, he asked the prison authorities to transport him to the funeral venue, which was just ten kilometres away from the prison. His request to attend the ceremony was allegedly refused. The applicant did not submit any decisions or further details in this respect.

II. RELEVANT DOMESTIC LAW

A. Detention of Suspects Act

38. Section 22 of the Detention of Suspects Act (Federal Law no. 103-FZ of 15 July 1995) provides that detainees should be given free food sufficient to maintain them in good health according to standards established by the Government of the Russian Federation. Section 23 provides that detainees should be kept in conditions which satisfy sanitary and hygienic requirements. They should be provided with an individual sleeping place and given bedding, tableware and toiletries. Each inmate should have no less than four square metres of personal space in his or her cell.

B. The Code of Criminal Procedure

39. The Code of Criminal Procedure of the Russian Federation (in force from 1 July 2002) provides:

Article 51

“1. Participation of legal counsel in the criminal proceedings is mandatory if:

1) the suspect or the accused has not waived legal representation in accordance with Article 52 of this Code;

2) the suspect or the accused is a minor;

3) the suspect or the accused cannot exercise his right of defence by himself owing to a physical or mental handicap;

3.1) the court proceedings are to be conducted [in the absence of the accused] in accordance with Article 247 § 5 of this Code;

4) the suspect or the accused does not speak the language in which the proceedings are conducted;

5) the suspect or the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty;

6) the criminal case falls to be examined by a jury trial;

7) the accused has filed a request for the proceedings to be conducted [without a hearing] under Chapter 40 of this Code;

2. ...

3. In the circumstances provided for by paragraph 1 above, unless counsel is retained by the suspect or the accused, or his lawful representative, or other persons on request, or with consent, of the suspect or the accused, it is incumbent on the investigator, prosecutor or the court to ensure participation of legal counsel in the proceedings.”

Article 52

“1. The suspect or the accused may refuse legal assistance at any stage of criminal proceedings. Such a waiver may only be accepted if made on the own initiative of the suspect or the accused. The waiver must be filed in writing and must be recorded in the official minutes of the relevant procedural act.

...”

40. Article 373 of the Code provides that the appeal instance examines appeals with a view to verifying the lawfulness, validity and fairness of judgments. Under Article 377 §§ 4 and 5 of the Code, the appeal instance may directly examine evidence, including additional material submitted by parties.

41. Article 376 of the Code provides that upon receipt of the criminal case and the statements of appeal, the judge fixes the date, time and place for a hearing. The parties shall be notified of the date, time and place of the hearing no later than fourteen days before the scheduled hearing. The court determines whether the remanded convict should be summoned to the hearing. If the remanded convict has expressed the wish to be present at the examination of his appeal, he has the right to participate in person or to state his case via video link. The manner of his participation in the hearing is to be determined by the court

C. Case-law of the Constitutional Court of the Russian Federation

42. Examining the compatibility of Article 51 of the Code of Criminal Procedure with the Constitution, the Constitutional Court ruled as follows (decision no. 497-O of 18 December 2003):

“Article 51 § 1 of the Code of Criminal Procedure, which describes the circumstances in which the participation of defence counsel is mandatory, does not contain any indication that its requirements are not applicable in appeal proceedings or that the convict’s right to legal assistance in such proceedings may be restricted.”

43. That position was subsequently confirmed and developed in seven decisions delivered by the Constitutional Court on 8 February 2007. It found that free legal assistance for the purpose of appellate proceedings should be provided on the same conditions as during the earlier stages in the proceedings and is mandatory in situations listed in Article 51. It further underlined the obligation of courts to secure participation of defence counsel in appeal proceedings.

D. Case-law of the Supreme Court

44. In a number of cases (decisions of 13 October 2004 and 26 January, 6 April, 15 June and 21 December 2005) the Presidium of the Supreme Court of the Russian Federation quashed judgments of appeal courts and remitted cases for fresh consideration on the ground that the courts had failed to secure the presence of defence counsel in the appeal proceedings, although it was obligatory for the accused to be legally represented.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

45. The applicant complained that the conditions of his detention in the detention facility IZ-36/2 in Borisoglebsk and the lack of sufficient medical assistance had been in breach of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Submissions by the parties

46. The Government argued that the applicant had not exhausted the domestic remedies available to him. In particular, he had not complained to a court about the conditions of his detention. The Government further commented on the conditions of the applicant's detention. In particular, they submitted that the applicant had been afforded sufficient personal space, that he had been provided with an individual bunk and bedding at all times, and that the sanitary and hygienic norms had been met. Although the windows in the cells had been initially covered by metal security shields, these had been removed by January 2003. The applicant had received food of satisfactory quality and necessary medical assistance for his ear disease and shingles. In sum, the conditions of the applicant's detention in IZ-36/2 had been compatible with Article 3.

47. The applicant submitted that he had not applied to a prosecutor or court because he had considered that such a complaint would not have any prospect of success. Moreover, he did not lodge any complaints with the IZ-36/2 administration out of fear, since on several occasions other detainees had been punished for raising similar complaints. The applicant further challenged the Government's description of conditions in IZ-36/2 as being factually untrue. He maintained that the cells had been overcrowded,

dirty, dark and damp. He had had poor-quality drinking water and meals. He further alleged that the treatment received for his ear disease was insufficient and that he was given medication which had long passed the expiry date.

B. The Court's assessment

1. Admissibility

48. The Court notes the Government's argument that the applicant failed to lodge an action before a court complaining about the conditions of his detention. In this connection, the Court observes that it has already on a number of occasions examined the same objection by the Russian Government and dismissed it. In particular, the Court held in the relevant cases that the Government had not demonstrated what redress could have been afforded to the applicant by a prosecutor, a court, or another State agency, bearing in mind that the problems arising from the conditions of the applicant's detention were apparently of a structural nature and did not only concern the applicant's personal situation (see *Moiseyev v. Russia* (dec.), no. 62936/00, 9 December 2004, and *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001). The Court sees no reason to depart from that finding in the present case and therefore considers that this complaint cannot be rejected for a failure to exhaust domestic remedies.

49. The Court further observes that the applicant was held in the detention facility IZ-36/2 from 22 January to 8 March 2001 and from 27 August 2001 to 12 July 2002 (see paragraph 18 above).

50. The first period of the applicant's detention in that facility ended on 8 March 2001 when he was transferred to another detention facility, the conditions of which were not complained of, whereas the present application was lodged on 11 November 2002. It follows that all complaints relating to first period in IZ-36/2 have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

51. The Court notes that the applicant's complaint about the period from 27 August 2001 to 12 July 2002 is introduced within the six-month time-limit and is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

52. The applicant claims that the conditions in which he had been held during his pre-trial detention in IZ-36/2 from 27 August 2001 to 12 July 2002 did not meet the requirements of an adequate minimum standard compatible with human dignity.

53. The Government contested this argument.

54. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). However, to fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Valašinas v. Lithuania*, no. 44558/98, §§ 100-01, ECHR 2001-VIII). When a person is held in detention, the State must ensure that he is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Valašinas*, cited above, § 102, and *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI). When assessing conditions of detention, one must consider their cumulative effects as well as the applicant's specific allegations (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The duration of detention is also a relevant factor.

55. The Court notes that in the present case the parties have disputed certain aspects of the conditions of the applicant's detention. However, there is no need for the Court to establish the veracity of each and every allegation, because it finds a violation of Article 3 on the basis of facts presented to it which the respondent Government have failed to refute (see, *mutatis mutandis*, *Guliyev v. Russia*, no. 24650/02, § 39-41, 19 June 2008).

56. The main characteristic which the parties did not agree upon was the number of inmates in the cells. The Court also notes that the cell numbers where the applicant had allegedly been kept are indicated differently in the parties' submissions. The applicant claimed that in the cells where he was kept there had usually been twice as many inmates as the number they had been fit to accommodate. The Government, relying on the certificates issued by the chief of IZ-36/2 and the written statements by the warders of that facility (see paragraph 22 above), argued that the applicant had always had at least four square metres of personal space in each cell.

57. The Court notes that the Government, in their plea concerning the number of detainees, cited statements by the warders and the facility's director indicating the number of the applicant's fellow inmates. The Court considers it extraordinary that in December 2007, that is almost five and a half years after the applicant's detention in that facility had come to an end, the officials were able to recollect the exact number of inmates who had

been detained together with the applicant and indicate five cell numbers where he had been held during the relevant period of time. The Court observes that the Government did not refer to any source of information on the basis of which they had made the assertion on the average numbers of inmates in the cells and did not submit any documents on the basis of which that assertion could be verified. The Court observes that it was open to the Government to submit copies of registration logs showing names of inmates detained together with the applicant in the relevant period. However, no such documents were presented. The directors' and warders' certificates issued in December 2007 are therefore of little evidential value for the Court. Finally, the Court notes that the Government did not refute the fact that the applicant's cellmates who had given their statements in support of his allegations concerning the detention condition had been held together with the applicant during the relevant period of time.

58. The Court finds consequently that the Government failed to corroborate their statements pertaining to the applicant's detention (see, *mutatis mutandis*, *Guliyev*, cited above, § 39, and *Sudarkov v. Russia*, no. 3130/03, § 43, 10 July 2008).

59. In this connection, the Court reiterates that Convention proceedings such as the present application do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation), as in certain instances the respondent Government alone have access to information capable of corroborating or refuting allegations. A failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004).

60. Having regard to the principle cited above, together with the fact that the Government did not submit any convincing relevant information and that the applicant provided the Court with written statements by eight of his former inmates corroborating his assertions (see paragraph 26 above), the Court will examine the issue concerning the number of inmates in the cells in IZ-36/2 on the basis of the applicant's submissions.

61. According to the applicant, he was afforded from two to four square metres of personal space throughout his detention in IZ-36/2. The number of detainees varied but was most of the time greater than that of available bunks. It follows that the detainees including the applicant had to share the sleeping facilities, taking turns to rest.

62. The Court has frequently found a violation of Article 3 of the Convention on account of a lack of personal space afforded to detainees (see *Khudoyorov v. Russia*, no. 6847/02, §§ 104 et seq., ECHR 2005-X; *Labzov v. Russia*, no. 62208/00, §§ 44 et seq., 16 June 2005; *Novoselov v. Russia*, no. 66460/01, §§ 41 et seq., 2 June 2005; *Mayzit v. Russia*, no. 63378/00,

§§ 39 et seq., 20 January 2005; *Kalashnikov*, cited above, §§ 97 et seq.; and *Peers v. Greece*, no. 28524/95, §§ 69 et seq., ECHR 2001-III). By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court has noted other aspects of the physical conditions of detention as being relevant to its assessment of compliance with that provision. Such elements included, in particular, the opportunity to use the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. Thus, even in cases where a larger prison cell was at issue – measuring in the range of three to four square metres per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting or other factors (see, for example, *Trepashkin v. Russia*, no. 36898/03, § 94, 19 July 2007, and *Peers*, cited above, §§ 70-72). The Court will thus examine other elements complained of.

63. As regards the applicant's allegations of inadequate medical treatment for his ear disease while in detention, the Court notes that following the applicant's complaints to the facility's administration he had apparently at all times been given the opportunity to consult a doctor. On two occasions the applicant was transported to a hospital to consult an otolaryngologist (see paragraphs 29 and 32 above). On four other occasions he was apparently offered some anti-inflammatory treatment for his ears. Taking into consideration the information provided by both parties in this respect, the Court finds that in the present case the authorities took the necessary measures to provide the applicant with adequate medical assistance.

64. However, as regards the sanitary conditions, it appears that the detention authorities had failed to provide for conditions meeting the standard requirements. First, the Court notes that the detention facility IZ-36/2 was located in premises built during the eighteenth century and that the applicant's cells were located in the semi-basement of this building. While in the present case it cannot be established "beyond reasonable doubt" that the ventilation, heating, lighting or sanitary conditions in the facilities were unacceptable from the standpoint of Article 3, the Court nonetheless notes that the cell windows had been covered with metal shields blocking access to fresh air and natural light. They were obviously removed some time after the applicant's transfer out of the detention facilities (see paragraph 23 above).

65. The Court considers that these aspects, while not in themselves capable of justifying the notion of "degrading" treatment, are relevant in addition to the focal factor of the overcrowding, to show that the applicant's detention conditions went beyond the threshold tolerated by Article 3 of the Convention (see *Novoselov*, cited above, § 44).

66. There has therefore been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention in IZ-36/2 which must be considered to be inhuman and degrading within the meaning of this provision.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

67. The applicant complained that he had not been provided with legal-aid counsel during the appeal hearing of 13 September 2002. He further alleged that his hearing impairment had prevented him from participating in the appeal hearing and from defending himself adequately, especially with regard to the video link by which his appeal had been examined. He relied on Article 6 §§ 1 and 3 (c) and Article 13 of the Convention.

68. Since Article 6 constitutes a *lex specialis* in relation to Article 13 in the circumstances (see *Kudla*, cited above, § 146), the Court will examine the applicant's complaint under this provision which reads in so far as relevant as follows:

Article 6 (right to a fair hearing)

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public 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 ..."

A. Admissibility

69. The Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The Government

70. The Government first submitted that in the applicant's case there were no legal grounds for mandatory appointment of counsel for the applicant in the appeal hearing. They referred to Article 51 of the Code of Criminal Procedure which provided for mandatory appointment of counsel

in situations different from that of the applicant. They further claimed that the applicant had failed to ask the court to appoint legal-aid counsel and had not mentioned that he was in need of representation for health reasons in any of his numerous applications to the court.

71. As regards the manner of conducting the hearings, the Government stated that over 2000 cases were examined by use of video link in Russia each year and that transmission in these cases was carried out using advanced equipment complying with necessary technical requirements. No complaints about the quality of operation of such equipment had been received in the relevant period. The applicant was able to state his case and to follow the transmission. All the arguments in his appeal had been examined and duly assessed.

(b) The applicant

72. The applicant submitted that his ear disease continued at least from 23 January 2001, when he was first diagnosed with otitis by the prison doctor, until 15 February 2003 when he left the hospital; therefore he experienced hearing difficulties during the whole proceedings, including the period when the appeal hearing took place.

73. In respect of the manner of examination of his appeal, the applicant first alleged that he had not been informed about the date and time of the appeal examination, that it had been impossible to concentrate at the appeal hearing due to the inferior transmission of sound, that he had drawn the court's attention to his poor state of health and hearing impairment and asked it for permission to be present in person both in advance (on 26 August 2002) and during the appeal hearing but to no avail, that his speech had been twice interrupted by the presiding judge and that he ceased to understand what he was supposed to say due to his nervousness and the disturbance caused by the use of the video link. Finally, the applicant submitted that the time needed for the appeal examination by video link had been determined by the court in advance and that only around ten minutes had been allowed for the examination of his appeal, which made it impossible to carry out a thorough examination of his arguments.

74. The applicant further submitted that no documents existed to prove that the appeal examination had been conducted by video link.

2. The Court's assessment

75. The Court notes at the outset 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, and therefore the applicant's complaints under Article 6 §§ 1 and 3 should be examined together (see *Vacher v. France*, 17 December 1996, § 22, *Reports* 1996-VI, and *Shulepov v. Russia*, no. 15435/03, § 31, 26 June 2008).

76. The Court reiterates that the manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 is to be applied in relation to appellate or cassation courts depends upon the particular features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and the role of the appellate or cassation court therein (see *Twalib v. Greece*, 9 June 1998, § 46, *Reports* 1998-IV, and *Granger v. the United Kingdom*, 28 March 1990, § 44, Series A no. 174).

77. The Court further reiterates that even where an appellate court has full jurisdiction to review the case on questions of both fact and law, Article 6 does not always entail a right to be present in person. Regard must be had 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 appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant (see *Helmerts v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A; *Belziuk v. Poland*, 25 March 1998, § 37, *Reports* 1998-II; *Pobornikoff v. Austria*, no. 28501/95, § 24, 3 October 2000; and *Kucera v. Austria*, no. 40072/98, § 25, 3 October 2002).

78. The right of an accused under Article 6 to effective participation in his or her criminal trial generally includes not only the right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained, in particular, in sub-paragraph (c) of paragraph 3 of Article 6 – “to defend himself in person” (see, among others, *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988, § 78, Series A no. 146; *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A; and *S.C. v. the United Kingdom*, no. 60958/00, § 28, ECHR 2004-IV). “Effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. The defendant should be able, *inter alia*, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (see, for example, *Stanford*, cited above, § 30; *V. v. the United Kingdom* [GC], no. 24888/94, §§ 85, 89, 90, ECHR 1999-IX; and *S.C. v. the United Kingdom*, cited above, § 29).

79. The circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings (see *Liebreich v. Germany* (dec.), no. 30443/03, 8 January 2008).

80. As regards, more particularly, situations where the hearing of the accused is impaired, the Commission found that this fact could not as such be allowed to block the prosecution or lead to the conclusion that an accused with such a handicap could not have a fair trial (see *Roos*

v. Sweden, no. 19598/92, Commission decision of 6 April 1994). In the *Roos* case the Commission noted that the applicant had had a hearing aid and had been represented, and concluded that he had been able to hear and follow the proceedings.

81. In the case of *Stanford v. the United Kingdom* the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial due to poor acoustics in the courtroom, in view of the fact that his counsel, who could hear everything that was said and was able to take his client's instructions at all times, chose for tactical reasons not to bring the accused's hearing difficulties to the attention of the trial judge (see *Stanford*, cited above, §§ 24-32).

82. In a recent judgment in the case of *Timergaliyev v. Russia* (no. 40631/02, 14 October 2008) the applicant suffered from the same type of hearing impairment as the applicant in the present case (chronic bilateral hearing impairment). He did not receive a hearing aid despite his requests and was not represented by a lawyer while facing serious charges of aggravated murder. The Court found that there had been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c).

83. As regards the use of the video link, the Court reiterates that this form of participation in proceedings is not as such incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and effective and confidential communication with a lawyer must be provided for (see *Marcello Viola v. Italy*, no. 45106/04, ECHR 2006-... (extracts)).

84. Turning to the circumstances of the present case, the Court first observes that it is not disputed by the parties that the applicant's hearing was deficient. The applicant submitted a medical certificate indicating that he suffered from chronic bilateral hearing impairment (see paragraph 33 above). The Court is therefore persuaded that the applicant's ability to hear and follow the proceedings was reduced. However, it remains to be verified whether the domestic courts were aware of the applicant's hearing difficulties.

85. The Court notes that it is disputed between the parties whether the applicant brought his hearing difficulties to the attention of the appeal court. The applicant submitted that he had made an application to be present in person, referring, *inter alia*, to his poor hearing (see paragraph 10 above). He also alleged that he had raised this issue before the Supreme Court in the appeal proceedings conducted by video link. The Government disputed that the applicant had on any occasion mentioned his hearing difficulties to the court.

86. The Court notes that no relevant documents such as the applicant's requests to be present in person at the appeal hearing or his statements of appeal were submitted to it by either party. It further notes that no record of

the appeal hearing is usually drawn up. This makes it difficult for the Court to establish that the applicant had actually brought his hearing problem to the attention of the appeal court. It is true that the prison authorities should have been aware of the applicant's hearing impairment, since during his detention pending investigation and trial the applicant was on several occasions taken to otolaryngologists and diagnosed with ear diseases causing partial hearing loss. However, the prison authorities were under no obligation to inform the domestic courts about the applicant's hearing problem. Thus, having regard to the lack of sufficiently strong evidence to the contrary, the Court is not persuaded that the judicial authorities knew or should have known about the applicant's partial hearing loss.

87. Other complaints raised by the applicant in respect of the court proceedings concerned the lack of legal assistance and the use of a video link during the appeal hearing. The Court will, consequently, examine whether these two elements impaired the fairness of the proceedings to such a degree as to violate the applicant's right to a fair trial enshrined in Article 6 of the Convention.

88. The Court observes that in Russia the jurisdiction of appeal courts extends both to legal and factual issues. The Supreme Court thus had the power to fully review the case and to consider additional arguments which had not been examined in the first-instance proceedings.

89. The Court reiterates that under Article 6 § 3 (c) of the Convention the accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require" (see *Vaudelle v. France*, no. 35683/97, § 59, ECHR 2001-I, and *Padalov v. Bulgaria*, no. 54784/00, §§ 54 and 55, 10 August 2006). The Government considered that the applicant's case was not of the kind where mandatory legal representation was warranted. They, furthermore, argued that the applicant was capable of arranging his own legal representation in the appeal hearing, as he did in the first instance proceedings; otherwise he should have drawn the court's attention to any difficulty encountered by him in doing so. The Court, however, does not share the Government's opinion that mandatory representation was not called for in this case. It notes that Article 51 of the Code of Criminal Procedure states that legal representation is mandatory unless expressly waived by the suspect or the accused, with the exception of certain categories of cases where this right cannot be waived at all (see paragraph 39 above). In the present case, the applicant was represented in the first-instance proceedings by privately retained lawyers. While he apparently did not make similar arrangements for the appeal proceedings, there is no indication that he intended to refuse legal assistance either. The Court notes in this respect that any waiver would have to be filed in writing and entered in the official records (Article 52 § 1 of the Code). No implicit waiver would therefore follow from the fact that the counsel who

represented the applicant in the first-instance proceedings was absent in the appeal hearing.

90. Turning to the Government's argument that it was for the applicant to inform the court of any difficulty in retaining a lawyer, the Court considers that this cannot be taken into account. On the contrary, the effectiveness of the guarantee of legal representation by default ("unless waived") contained in Article 51 of the Code would be undermined without a corresponding obligation on the part the court to verify in each individual case whether it is lawful to proceed with the hearing in the absence of a legal counsel for the accused. Indeed, the persons incapable of conducting their own defence before the court (such as those listed in subparagraphs 2-4 of Article 51 § 1 of the Code) may also be unable to draw the court's attention to the lacking legal assistance unless the question is raised by the court itself.

91. The Court therefore concludes that it was incumbent on the appeal court to verify whether there had been a valid waiver of legal assistance by the applicant and, if there was none, to appoint a lawyer as required by Article 51 §§ 1(1) and 3 of the Code. Given the seriousness and the volume of the charges against the applicant and the severity of the sentence to which he had been liable, the court's compliance with this guarantee took ever greater importance.

92. Moreover, the Court reiterates that the exercise of the right to legal assistance takes on particular significance where the applicant communicates with the courtroom by video link (see *Marcello Viola*, cited above; *Golubev v. Russia* (dec.), no. 26260/02, 9 November 2006; and *Shulepov v. Russia*, no. 15435/03, § 35, 26 June 2008). In the present case, the appeal hearing was conducted by video link, yet another factor that should have prompted the appeal court to verify the reasons for the absence of the defence counsel for the applicant.

93. In view of the Supreme Court's failure to do so in the present case the Court concludes that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

94. As regards the complaint concerning the conduct of the appeal hearing by video link, it largely overlaps with the complaint concerning the lack of legal assistance at the appeal hearing. Given the finding above that there has been a breach on account of the latter, the Court does not consider it necessary to examine separately the question whether in the circumstance of this case the applicant's participation in the appeal hearing by video link complied with Article 6.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

95. Lastly, the applicant complained under Article 6 of the Convention that the law had been misapplied by domestic courts, that their conclusions

as to the applicant's guilt were wrong, and that the sentence was too severe. Under Article 8 he complained that he had been refused permission to attend his mother's funeral. He also complained under Article 1 of Protocol No. 1 that his property had been plundered following his conviction. Finally, he relied also on Articles 8, 13 and Article 3 of Protocol No. 7.

96. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed 102,000 United States dollars in respect of non-pecuniary and pecuniary damage sustained as a result of violations of his Convention rights.

99. The Government considered this claim to be excessive and unreasonable.

100. The Court notes that the applicant's claim for pecuniary damage relates to the complaint concerning the alleged damage to his house while he was in detention that has been found inadmissible (see paragraphs 95-96 above); it therefore rejects this claim. However, the Court considers that the applicant must have suffered humiliation and distress because of the inhuman and degrading conditions of his detention. His suffering cannot be sufficiently compensated for by a finding of a violation. In addition, the Court found that he did not have a "fair hearing" in the determination of criminal charges against him. Making its assessment on an equitable basis, the Court awards the applicant 6,000 euros in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant on that amount.

B. Costs and expenses

101. The applicant requested the Court to reimburse him the expenses incurred in the proceedings before the Court but did not indicate the amount sought.

102. 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. Having noted that the applicant's request contained no particulars and was not accompanied by any supporting documents, the Court dismisses the claim under this head.

C. Default interest

103. 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 under Article 3 concerning the conditions of the applicant's detention in detention facility IZ-36/2 in Borisoglebsk and the complaint concerning the lack of representation at the appeal hearing admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention from 27 August 2001 to 12 July 2002 in detention facility IZ-36/2 in Borisoglebsk;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 6 § 3 (c) of the Convention as regards the appeal hearing before the Supreme Court of Russia;
4. *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 6,000 (six thousand euros) plus any tax that may be chargeable to the applicant on that amount, 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;

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

Done in English, and notified in writing on 9 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge A. Kovler is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE KOVLER

I share the Chamber's conclusions that there has been a violation of Article 6 § 1 and Article 6 § 3 (c) of the Convention in this case, but for reasons different to those developed in the Court's assessment of the appeal hearing before the Supreme Court of Russia.

In the first Russian case concerning a defendant's participation in a hearing via a video communication system, the Court pointed out that "the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole" (see *Golubev v. Russia* (dec.), no. 26260/02, 9 November 2006).

It is precisely the proceedings "taken as a whole" that should be examined by the Chamber, because, in my opinion, there were three linked elements to the appeal hearing of 13 September 2002: firstly, the applicant was not informed about the date and time of the appeal hearing in due time, or even 14 days in advance as suggested by Article 376 (2) of the Code of Criminal Procedure, but learned of it only on the day of the appeal hearing (see paragraph 23 of the judgment); secondly, he was not represented by a lawyer, yet the prosecutor was present in person in the courtroom (paragraph 13); thirdly, the applicant, who suffered from partial deafness, could not properly follow the appeal hearing by video link (for details, see paragraph 14). In my view, all three of these elements constitute a violation of the right to a fair hearing.

It goes without saying that the applicant's communication with the court by video link without any representation in the courtroom placed him at a certain disadvantage (see *Shulepov v. Russia*, no. 15435/03, 24 June 2008, § 35; see also, *a contrario*, *Marcello Viola v. Italy*, no. 45106/04, § 75, ECHR 2006-... (extracts), and *Golubev*, cited above). The respondent Government's argument that the participation of a defence lawyer was not mandatory under either of the grounds in Article 51 of the CCP is not relevant in such cases, because Article 52 of the CCP provides that although a suspect or accused may refuse legal assistance at any stage of the criminal proceedings, such a waiver may only be accepted if filed in writing on the accused or the suspect's own initiative. Even accepting the Government's argument that the applicant did not submit any petition, either for the appointment of a lawyer or for refusal of legal assistance (this is contradicted by the applicant, see paragraph 73), it is useful to remind ourselves of the Court's conclusions in another similar Russian case: "the ultimate guardian of the fairness of the proceedings was the judge, who, when confronted with the lawyers' failure to appear, was required under domestic law to appoint counsel for an accused who was incapable of defending himself due to a physical impairment" (see *Timergaliyev v. Russia*, no. 40631/02, § 59, 14 October 2008). I am satisfied that the

requirements of a fair hearing were secured in the *Golubev* case. On the contrary, nothing in the present case file indicates that the presiding judge's attitude was aimed at securing a fair hearing for the applicant. In the circumstances as described in paragraphs 13-14 of the judgment, the lack of real contact with the applicant, combined with other facts mentioned above, reduced Mr Grigoryevskikh's on-screen appearance at the appeal hearing to a mere formality.