



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

1959 · 50 · 2009

FIRST SECTION

CASE OF PASKO v. RUSSIA

(Application no. 69519/01)

JUDGMENT

STRASBOURG

22 October 2009

FINAL

10/05/2010

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

In the case of Pasko 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 Hajiyev,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 1 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 69519/01) 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 Grigoriy Mikhaylovich Pasko (“the applicant”), on 20 January 2001.

2. The applicant was represented by Mr F. Elgesem, a lawyer practising in Oslo. The Russian Government (“the Government”) were initially represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant complained, in particular, of his conviction on the basis of retrospective application of the relevant law and of a violation of his freedom of expression. He relied on Articles 7 and 10 of the Convention.

4. By a decision of 28 August 2008, the Court declared the application partly admissible.

5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1962 and lives in Vladivostok.

7. At the material time the applicant was a Navy officer and worked as a military journalist on the Russian Pacific Fleet's newspaper *Boyevaya Vakhta* ("Battle Watch"). The applicant's articles mainly focused on problems of environmental pollution and other issues related to the activity of the Russian Pacific Fleet.

8. According to the applicant, he also worked, on a freelance basis, for a Japanese TV station, NHK, and a Japanese newspaper, *Asahi Simbun*, and supplied their representatives, in particular accredited correspondents Mr T.Dz. and Mr T.O. with openly available information and video footage. The Government submitted in this connection, with reference to witness statements from the editor and deputy editor of *Boyevaya Vakhta*, that the applicant had not been entrusted with any task of cooperating with Mr T.O., apart from assisting the latter in visiting Russian military units and apprising him of the professional activities of *Boyevaya Vakhta*. According to the Government, any further contacts with Mr T.O. were maintained by the applicant of his own volition, and he did not report to his superiors on such contacts. The applicant insisted that his superiors had been aware of and accepted his contacts with Japanese journalists.

A. The applicant's arrest and pre-trial detention

9. On 13 November 1997 customs officers at Vladivostok Airport searched the applicant, who was about to leave on an official trip to Japan, and seized a number of his papers, on the ground that they allegedly contained classified information. Thereafter the applicant was allowed to continue his trip.

10. On 20 November 1997 the Federal Security Service (*Федеральная служба безопасности* – "the FSB") brought criminal proceedings against the applicant in connection with the above episode, and apprehended him on his return from Japan. The applicant was then escorted to pre-trial detention centre IZ 20/1 in Vladivostok, where he was detained until his first conviction on 20 July 1999.

11. During the night of 20 to 21 November 1997 the FSB searched the applicant's flat and seized his personal computer and a number of documents. The applicant's computer was returned to him some time later.

12. On 28 November 1997 the applicant was formally charged with treason through espionage. These charges were based on a preliminary expert opinion given by the Headquarters' 8th Department of the Pacific

Fleet (*Восьмое управление штаба Тихоокеанского флота*), which concluded that some of the documents seized on 13 and 20 November 1997 contained State secrets.

B. The applicant's indictment

13. On 29 September 1998 a bill of indictment was served on the applicant. It stated that the applicant had committed treason, through espionage, by having collected, kept and transmitted ten items of information classified as secret to two Japanese nationals in the period between 1996 and 20 November 1997. The information in question included a draft article by the applicant on the decommissioning of Russian nuclear submarines, a copy of a report on the financial situation of the Pacific Fleet, a copy of several pages of a manual on searching for and rescuing space craft by the Navy, a report on decommissioning and keeping afloat of Russian nuclear submarines, a questionnaire on re-processing of liquid rocket fuel, a list of accidents on Russian nuclear submarines, a copy of several pages of a report on decommissioning of weapons and armaments, a map of the territory of military unit no. 40752, and handwritten notes made by the applicant at a meeting held at the headquarters of the Pacific Fleet on 11 September 1997. The indictment further stated that the applicant had orally divulged information concerning the time and place of the departure of a trainload of spent nuclear fuel.

14. The indictment was based on reports of 22 December 1997 and 14 March 1998 prepared by four expert groups appointed by the General Headquarters' 8th Department of the Ministry of Defence (*Восьмое управление Генштаба Министерства обороны*).

C. First round of court proceedings

15. By a judgment of 20 July 1999 the Pacific Fleet Military Court reclassified the offence and convicted the applicant of abuse of power, having found it unproven that the applicant had actually transmitted State secrets to foreign nationals. The applicant was sentenced to three years' imprisonment. By virtue of an Amnesty Act of 18 June 1999 the applicant was discharged from serving this sentence and released in the courtroom.

16. The applicant, his lawyers and the prosecuting party appealed against the first-instance judgment.

17. On 21 November 2000 the Military Section of the Supreme Court of Russia (*Военная коллегия Верховного Суда РФ* – “the Supreme Court”) quashed the judgment of 20 July 1999 on the grounds of the trial court's failure to establish the essential circumstances of the case and its inconsistent conclusions and wrongful application of the law. The case was remitted to the Pacific Fleet Military Court for a fresh examination.

D. Second round of court proceedings

1. Proceedings before the trial court

18. On an unspecified date, following the Pacific Military Court's request, the General Headquarters' 8th Department of the Ministry of Defence appointed seven experts and the Ministry of Nuclear Energy appointed an expert. The experts were asked whether the items of information listed in the indictment contained State secrets.

19. On 14 September 2001 the experts submitted their report, stating that three out of the ten items in question were of "restricted distribution", whilst the other seven contained State secrets. According to the applicant, in defining whether the disclosed information contained State secrets, the experts had applied the Ministry of Defence's unpublished Decree no. 055 of 10 August 1996, Presidential Decree no. 1203:95 of 30 November 1995 and section 5 of the State Secrets Act, enacted on 21 July 1993 and amended on 6 October 1997. In the applicant's submission, he had access to Decree no. 055, read it and signed a document to the effect that he had read it in the autumn of 1996.

20. On 25 December 2001 the Pacific Fleet Military Court convicted the applicant of treason through espionage under Article 275 of the Russian Criminal Code.

21. As regards the *actus reus* of the offence, the court found that in 1996-1997 the applicant had established friendly relations with a Japanese journalist, Mr T.O., and provided him with information, at the latter's requests, in exchange for regular payments. In August-September 1997, in his telephone conversations with the applicant, Mr T.O. had repeatedly expressed his interest in the military exercises that were being conducted by the Pacific Fleet at that time, especially their particular features and any differences from previous exercises. The judgment further stated:

"On 10 September 1997, on an official invitation, [the applicant], as a representative of the *Boyevaya Vakh* newspaper, attended a meeting of the Military Council of the Pacific Fleet, where he learned that an appraisal of the results of the military exercises of the Pacific Fleet was scheduled for 11 September 1997.

On 11 September 1997 [the applicant], with the intention of obtaining classified information on the said exercises and subsequently transferring it to [Mr T.O.], arrived at the headquarters of the Pacific Fleet. Although he was not included in the list of persons authorised to participate in the appraisal of the tactical training exercises, the applicant attended the meeting and collected information disclosing the actual names of highly critical and secured military formations and units, including military-intelligence units, that had taken part in the exercises and information disclosing the means and methods of protection of classified data by radio electronic warfare units that had participated in the exercises. Under section 5 paragraphs 1 (6) and 4 (5) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997, paragraphs 13

and 77 of the List of Information classified as State Secrets approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995, [the impugned information] was classified as State secrets.

For the same purpose, namely for communicating it to [Mr T.O.], the applicant then unlawfully kept this information ... On 20 November 1997 the handwritten notes made by [the applicant] during [the meeting of 11 September 1997] were found and seized at his place of residence.

...

According to a report by a forensic expert, the handwritten text in those notes was made by [the applicant], which the latter has not denied in court.”

22. The court based its findings on statements by a number of witnesses, five recordings of the applicant's telephone conversations with Mr T.O. made by the FSB in June-September 1997, and the expert report of 14 September 2001, insofar as it stated that the applicant's handwritten notes contained information classified as secret. In particular, the court noted with regard to the expert report of 14 September 2001:

“... The experts concluded that [the applicant's] notes contained, in summary fashion, information on the composition of the groups of the naval forces which had taken part in the exercises, [such information] disclosing the actual names of highly critical and secured military formations and units, including military intelligence units, which constituted a State secret under section 5, paragraph 1 (6) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997 and paragraph 13 of the List of Information constituting State Secrets, approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995.

Also, the experts concluded that [the applicant's handwritten notes] in summary fashion ... disclosed information on the activities of radio electronic warfare units, and notably on means and methods of protection of classified data, which constituted a State secret under section 5, paragraph 4 (5) of the State Secrets Act of the Russian Federation, no. 5485-1 of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997 and paragraph 77 of the List of Information classified as State Secrets, approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995.

...

... The court finds that [the experts'] conclusions that [the applicant's] notes on the exercises contain information disclosing the actual names of highly critical and secured military formations and units of the Pacific Fleet, including military intelligence units and [information on] specific activities of radio electronic warfare units ... which constitutes State secrets, are consistent, well-reasoned and based on a correct application of the legislation ...”

23. The applicant confirmed that he had attended the meeting of 11 September 1997 and made summary notes of speeches and reports of its participants, but pleaded not guilty and argued that he had lawfully attended

the said meeting, since he had the right to receive and impart information as a journalist. The applicant insisted that he had had no intention of transferring this information to Mr T.O. and had kept it in order to enrich his own knowledge on the latest developments in the Navy and to inform his subordinates thereof, and to report on the results of the military exercises in the *Boyevaya Vakhta* newspaper. The applicant stated that all his activities had fully complied with Russian legislation.

24. As regards the applicant's argument that he had the right to freedom of expression, and was therefore entitled to attend the meeting of 11 September 1997, the court noted that the right to information was not absolute and could be limited by law for the protection of national security. Under national law, military personnel's right to information was limited in the interests of military service and, in particular, such personnel had an obligation not to disclose state or military secrets. As a serving officer, the applicant was bound by the legal provisions regulating the way in which servicemen accessed, collected, kept, imparted and published information classified as secret, and the way they communicated with foreign nationals.

25. The court also rejected the applicant's argument that he had made the impugned notes with a view to their publication in *Boyevaya Vakhta*. In this respect the court noted that the applicant had been fully aware of the relevant regulations which prohibited publication of information disclosing the actual names of military formations and units, and there had therefore been no practical use for such information in the applicant's publications.

26. The court further examined the conclusions of the expert report of 14 September 2001 in respect of the other items of information imputed to the applicant, compared them with the other materials of the case and rejected them as unreliable. In particular, the court stated that some of the pieces of information imputed to the applicant, including the list of accidents on Russian nuclear submarines and the map of the territory of military unit no. 40752, could be found in public sources, such as a military reference book on submarines, or a Greenpeace report. In this respect the court noted that receiving, keeping and disseminating publicly accessible information was not punishable under the Russian legislation in force and that there was no practical need to classify information which could be found in public sources.

27. The court thus acquitted the applicant of all the other charges listed in the indictment, some of them having been waived by the prosecuting party.

28. In view of the fact that the applicant had a minor child, no criminal record and positive professional references and decorations, and given that his offence had caused no damage, since he had not transferred the impugned information, the court referred to the "special-circumstances" clause of Article 64 of the Russian Code of Criminal Procedure and sentenced the applicant to a term below the statutory minimum, namely,

four years' imprisonment in a strict-security correctional colony, and deprivation of a military rank.

2. Appeal proceedings

29. In their appeal submissions the defence complained, *inter alia*, that the experts who had drafted the report of 14 September 2001 had relied on unpublished Decree no. 055 of the Ministry of Defence in asserting the classified nature of the impugned information. The defence argued that the use of Decree no. 055 by the experts had resulted in the incorrect application of the State Secrets Act by the first-instance court. They further argued that the State Secrets Act had been applied retrospectively, since there had been no list of information constituting State secrets at the time of the commission of the offence in question. The defence also contended that, in any event, the information contained in the applicant's notes had been accessible from public sources.

30. On 25 June 2002 the Supreme Court of Russia upheld the applicant's conviction on appeal, having excluded a reference to the unlawfulness of his presence at the meeting of 11 September 1997 and to the general unlawfulness of his off-duty contacts with foreign nationals.

31. The Supreme Court noted that the question whether the applicant's handwritten notes had contained State secrets had been thoroughly and objectively examined in the first-instance judgment. It confirmed that the trial court had based its judgment on the expert report of 14 September 2001, which had stated that "information disclosing the actual names of highly critical and secured military formations and units and information on the presence among the participants in the military exercises of the military intelligence units and information on the means and methods of protection of classified data [constituted] State secrets under section 5, paragraphs 1 (6) and 4 (5) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997, paragraphs 13 and 77 of the List of Information classified as State Secrets, approved by Decree of the President of the Russian Federation no. 1203 of 30 November 1995, and paragraphs 129 and 240-1 of ... Decree of the Ministry of Defence no. 055". The appellate court further noted that, when assessing the expert report of 14 September 2001, the trial court had rejected a number of its conclusions in which the experts had groundlessly stated that some of the impugned items of information had contained State secrets. The Supreme Court thus concluded that the first-instance court had critically assessed the expert report of 14 September 2001 and had only relied on those conclusions which had been objectively confirmed during the trial.

32. The Supreme Court also upheld the first-instance finding that the applicant's intent to transfer the impugned information to Mr T.O. had been proved by the recordings of his telephone conversations with the latter. The

court further rejected the applicant's argument that the information in his handwritten notes could have been found in public sources. In that connection it stated – with reference to the trial court's finding – that “no data concerning the actual names of highly critical and secured military units, ships and formations, and, in particular, military intelligence units, the means and methods of radio electronic warfare, as contained in [the applicant's] handwritten notes, [was] openly published”.

33. The court also rejected the applicant's argument that Decree no. 055 had been unlawfully applied in his case, holding that this decree had been operative on the date that the applicant had committed his offence and was still in force.

34. Finally, as regards the applicant's argument that the law had been applied retrospectively in his case, the Supreme Court noted:

“According to the decision of the Constitutional Court of Russia of 20 December 1995, ... the requirements of Article 29 § 4 of the Constitution of the Russian Federation are implemented in the State Secrets Act of the Russian Federation of 21 July 1993, which defines the notion of State secrets and lists the information classifiable as State secrets. Later, on 30 November 1995, the List of Information classified as State secrets was enacted by Decree no. 1203 of the President of the Russian Federation.

Since collecting and keeping secret information for its transfer to a foreign citizen, committed by [the applicant], [was] a continuing criminal offence which was brought to an end on 20 November 1997, the [first-instance] court rightly applied the aforementioned legal instrument as well as the State Secrets Act, as amended on 6 October 1997, in the examination of his case.”

35. The applicant unsuccessfully applied for supervisory review of his conviction.

36. On 23 January 2003 the applicant was released on parole.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal liability for disclosure of State secrets

37. Article 275 (High Treason) of the Russian Criminal Code, in force as of 1 January 1997, provides that high treason, that is, espionage, disclosure of State secrets, or assistance otherwise provided to a foreign state, a foreign organisation, or their representatives, by way of hostile activities undermining the external security of the Russian Federation, committed by a Russian citizen, shall be punishable by twelve to twenty years' imprisonment and confiscation of property.

B. Laws and regulations concerning State secrets

1. The Russian Constitution of 12 December 1993

38. Article 29 § 4 of the Russian Constitution provides that everyone has the right to freely search, obtain, impart, generate and disseminate information by all lawful means and that a list of information constituting State secrets is to be defined by a federal statute.

2. The Federal Law on State Secrets

(a) Period prior to 6 October 1997

39. Federal Law on State Secrets no. 5485-1 (“the State Secrets Act”) was enacted on 21 July 1993 and entered into force on 21 September 1993. Section 5 provided:

“The following information may be classified as State secrets:

(1) information in the military field:

...

[information] about the location, actual names, organisational structure, armament, numerical strength of troops ...

...

(4) information in the field of intelligence, counter-intelligence and operational and search activities:

...

[information] about the means and methods of protection of classified data ...”

40. Section 9 set out the procedure for classifying information as State secrets. Authority to classify information was delegated to heads of State agencies. The law itself did not contain the list of such officials which was to be approved by the Russian President. The latter was also to approve the List of Information classified as State secrets, which was to be officially published. State agencies whose heads were competent to decide to classify information were to draw up extended lists of information that was to be classified as State secrets. The State Secrets Act did not specify whether such “extended lists” could be made public.

41. On 16 March, 26 and 27 October 1995 the State Duma, noting that the absence of the list of classified information “deprived the law-enforcement agencies of a legal basis for the performance of their duty to protect the security of the State, community and individuals”, repeatedly

petitioned the Government to prepare for the President's approval a draft decree containing the list of classified information.

42. On 30 November 1995 the President approved Decree no. 1203 on the List of Information classified as State Secrets. Paragraphs 13 and 77 of the list provided for the classification of “information disclosing the location, actual names, organisational structure, armament and numerical strength of troops, which is not subject to open declaration in accordance with the international obligations of the Russian Federation” and “information disclosing measures which are planned and/or being carried out to protect information from unauthorised access, foreign technical intelligences services and leaks through technical channels”. They also designated the Ministry of the Interior, the Ministry of Defence and several other State agencies as bodies authorised to classify such information.

(b) Period after 6 October 1997

43. On 6 October 1997 Federal Law no. 131-FZ amending the 1993 State Secrets Act was enacted. The amendment was published and became operative on 9 October 1997. Section 5 of the State Secrets Act was amended to read:

“State secrets shall include: ...

(1) information in the military field:

...

[information] about the location, actual names, organisational structure, armament, numerical strength of troops ...

...

(4) information in the field of intelligence, counter-intelligence and operational and search activities:

...

[information] about the means and methods of protection of classified data ...”

3. Case-law of the Russian courts

44. On 20 December 1995 the Russian Constitutional Court examined the compatibility of the Criminal Code of the RSFSR, then in force, with the Russian Constitution, in so far as the former established criminal liability for State treason, and stated:

“... It follows that the State may classify as State secrets information in the field of defence and economic and other activities, disclosure of which is capable of undermining the national defence and security of the State. In this connection Article 29 § 4 of the Russian Constitution provides that the list of information

constituting State secrets is to be enacted in the form of a federal statute. The State may also determine the means and methods for the protection of State secrets, including by way of establishing criminal liability for its disclosure and communication to a foreign State.

However, by virtue of the above Constitutional provision, criminal liability for disclosure of State secrets to a foreign State is justified only on condition that the list of information constituting State secrets is established in an officially published and publicly accessible federal statute. Pursuant to Article 15 § 3 of the Constitution, no law-enforcement decision, including conviction by a court, may be grounded on an unpublished legal instrument.

The requirement of Article 29 § 4 of the Russian Constitution is implemented in the State Secrets Act of 21 July 1993, which defines the notion of State secrets and lists the information classifiable as State secrets.

Accordingly, establishing criminal liability for disclosure of State or military secrets to a foreign State is not incompatible with Articles 15 § 3, 29 § 4 and 55 § 3 of the Russian Constitution.”

45. On 29 December 1999 the St Petersburg City Court acquitted Mr Nikitin, a former naval officer, of charges under Articles 275 (High treason) and 283 § 1 (Divulging of information constituting State secrets) of the Russian Criminal Code (case no. 78-000-29). Mr Nikitin was accused, in particular, of having collected in August 1995, and having transferred in September 1995, information constituting State secrets. The court held as follows:

“... By virtue of the constitutional provisions, a list of information constituting State secrets was to be defined by a federal statute ...

There was no such statute at the time that Mr Nikitin committed the alleged offences; Decree no. 1203 of the President of the Russian Federation of 30 November 1995 was the only legal instrument which began regulating legal relations in the field of the protection of State secrets.

...

The State Secrets Act of the Russian Federation of 21 July 1993, which was subsequently subjected to considerable amendments, constitutes the federal statute mentioned in Article 29 § 4 of the Russian Constitution.

...

However, the Russian Constitution prescribes the definition of the list of information *constituting State secrets* by a *federal statute*. This requirement of the Constitution was only complied with in full when the State Secrets Act was amended in November 1997 to include in section 5 the list of information *constituting State secrets* instead of the list of information *which could be classified as State secrets*, which was mentioned in the [original version] of the Law.

By virtue of section 9 (4) of the Act, the list of information constituting State secrets must be approved by the President. ... By virtue of section 9 (4) of the Act in its version of 21 July 1993 and as amended on 6 October 1997 [the list] will be published and may be revised as and when needed.

...

An analysis of section 5 of the Act (irrespective of its different versions) indicates that [the Act] itself does not establish any degree of secrecy; in other words it does not classify any information, since it is in accordance with a *special* procedure provided for in section 9 of the Act that information can be classified as secret ...

This also means that, in its original version, section 5 of the Act cannot serve as the sole basis for charging [a person] with espionage or disclosure of State secrets. It must be supplemented with other legal instruments.

It is [in particular] Decree no. 1203 of the Russian President of 1995 which [was] used in the present case as [a legal instrument] in addition to section 5 [of the State Secrets Act] ...

The materials of the case reveal that Mr Nikitin ended his activity ... in September 1995.

The Presidential Decree of 30 November 1995 had not yet entered into force ...

Accordingly, section 5 of the Act (in the version that existed at the time when the defendant committed the acts imputed to him) cannot be used as a basis for bringing formal charges without supplementary legal instruments which would have formed a proper legal basis for an accusation ... such legal instruments can be applied on condition that they were officially published and entered into force prior to the commission of the acts imputed to Mr Nikitin.

... In view of the above, the court finds that any citizen of the Russian Federation... does not (did not) have any real possibility of determining whether information constitutes a State secret unless such information is included in the list of information constituting a State secret defined by a federal statute or approved by a decree of the Russian President ...

...

The new version of the State Secrets Act ... of 6 October 1997 brought the Act into compliance with the requirements of the Constitution, and consequently, only then did it become possible to apply section 5 of the State Secrets Act *independently*, that is, *without referring* to the List of Information classified as State Secrets enacted by decree of the Russian President on 30 November 1995.

Accordingly, in the period from 12 December 1993 until 30 November 1995 there was no statutory definition of information constituting State secrets, and therefore classifying any information as secret during the period under consideration ... was arbitrary and not based on law.”

46. On 17 April 2000 the Supreme Court of Russia upheld Mr Nikitin's acquittal in the following terms:

“Having acquitted Mr Nikitin for the lack of constitutive elements of a criminal offence in his acts, the [first-instance] court proceeded from the premise that between 12 December 1993 and 30 November 1995 there had been no statutory definition of information constituting State secrets, with the result that the qualification of Mr Nikitin's acts by the investigating bodies had not been based on law.

...

By virtue of Article 29 § 4 of the Russian Constitution, which was enacted on 12 December 1993 and was in force during the period when Mr Nikitin committed the alleged offences, the list of information constituting State secrets was to be defined in a federal statute. Such a list was first defined in the federal law introducing changes and amendments to the State Secrets Act of the Russian Federation of 6 October 1997.

Taking into account that during the period when Mr Nikitin committed the alleged acts, there was no list of information constituting State secrets that met the requirements of the Constitution, the information that he had collected... and disclosed ... cannot be said to have contained State secrets ... As the *actus reus* of the offences under Articles 275 and 283 of the Criminal Code refers only to acts involving State secrets, the same acts involving other information cannot be held to be high treason and disclosure of State secrets ...

...

... The [State Secrets] Act [in its 1993 version] could not have been applied to Mr Nikitin as it did not contain the list of information constituting State secrets, since section 5 of that Law referred only to information that could be classified as State secrets. However, Article 29 § 4 of the Constitution required that the said list be established in a federal statute. As section 5 of the State Secrets Act of 21 July 1993 and Article 29 § 4 of the Constitution refer to different subjects, the court cannot agree with the argument of [the prosecuting party] to the effect that the difference between these provisions is merely semantic ...”

47. On 25 July 2000 the Supreme Court of Russia quashed on appeal, and remitted for a fresh examination to a trial court, the sentence of Mr Moiseyev, a former employee of the Russian Ministry of Foreign Affairs, who had been charged with offences under Article 275 of the Russian Criminal Code. It found as follows:

“In finding [the applicant] guilty of the offence under Article 275 of the Criminal Code, the [first-instance] court noted that ... between early 1994 and 3 July 1998 [the applicant] had ... communicated information and documents containing State secrets to the South Korean intelligence service. The [first-instance] court only gave a general list of information and documents ..., without specifying which information and documents [the applicant] had communicated, and when. As the offences imputed to [the applicant] were continuous and spanned the period from 1992-1993 to July 1998, during which time the Russian laws evolved, the determination of these issues is of crucial importance for the case.

Pursuant to Article 29 § 4 of the Constitution ... the list of information constituting State secrets was to be defined in a federal statute. Such a list was first established in the federal law of 6 October 1997 introducing changes and amendments to the State Secrets Act of the Russian Federation. Hence, until that date there was no list of

information constituting State secrets that met the requirements of the Constitution. As there is no indication in the judgment about the time when [the applicant] transmitted the information and documents, it is impossible to reach the correct conclusion as to which of the offences imputed to the applicant were committed during the period when the federal law containing the list of State secrets and compatible with the requirements of the Constitution was in force.”

THE LAW

ALLEGED VIOLATION OF ARTICLES 7 AND 10 OF THE CONVENTION

48. The applicant complained under Article 7 of the Convention that the domestic courts had retrospectively applied and extensively construed the State Secrets Act in his case. He further complained under Article 10 of the Convention of a violation of his freedom of expression. The applicant claimed that he had been subjected to an overly broad and politically motivated criminal persecution as a reprisal for his critical publications. In particular, he had never transferred any information containing State secrets to Mr T.O., a Japanese journalist. Nevertheless, he had been convicted for his alleged intention to transfer his handwritten notes, which had been found to contain State secrets, to Mr T.O., the only basis for such a finding being the fact that he had previously legitimately communicated information to the Japanese journalist on several occasions. The applicant further complained that in so far as his handwritten notes had been found to have contained the actual names of military formations and units and the activities of radio electronic warfare units, this information had been publicly accessible from a number of public sources, including internet sites, and that he had been unable to foresee that this information had constituted State secrets, as this finding had been based on the unpublished – and therefore inaccessible – Decree no. 055 of the Ministry of Defence. The respective Convention provisions, in their relevant parts, provide:

Article 7

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ...

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 10

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Submissions by the parties

1. The applicant

49. In so far as his complaints under Article 7 of the Convention were concerned, the applicant insisted that he had been convicted on the basis of retrospective application of the State Secrets Act. He argued, in particular, that between 11 September 1997, the date on which he had collected the information in question, and 9 October 1997, the date on which the amendment to the State Secrets Act incorporating the list of information classified as secret had become operative, there had been no such list defined in a federal statute, and therefore there had been no legal basis for his conviction for the alleged offence for that period. The applicant contended that Presidential Decree no. 1203 of 30 November 1995, approving the list of information classified as State secrets, could not be regarded as a proper legal basis for his conviction, given that Article 29 § 4 of the Constitution clearly stated that “a list of information constituting State secrets shall be defined by a federal statute”. He also insisted that in the absence of such a list he had been unable to foresee that his actions had been criminally liable.

50. In that respect, the applicant relied on the case-law of the Russian courts in the cases of *Nikitin v. Russia* (no. 50178/99, ECHR 2004-VIII) and *Moiseyev v. Russia* (no. 62936/00, 9 October 2008). In particular, he pointed out that the Supreme Court of Russia in its decision of 17 April 2000, given in the case of *Nikitin*, and in its decision of 25 July 2000, given in the case of *Moiseyev*, had consistently stated that the list of information constituting State secrets should be defined in a federal statute, and that such a list had first been established in the federal law of 6 October 1997 introducing changes and amendments to the State Secrets Act of the Russian Federation.

51. The applicant further contended that the domestic courts had relied on unpublished Decree no. 055 of the Ministry of Defence, which, in his

opinion, had lead to an extensive interpretation and overly broad application of the State Secrets Act. Whilst he accepted that the trial court had not referred to Decree no. 055 directly, he considered that the court had relied on it indirectly by using the expert report of 14 September 2001. According to the applicant, the report in question had established the classified nature of his handwritten notes on the basis of the above-mentioned unpublished decree. In his view, this was confirmed by the formula “the activities of radio electronic warfare units during the exercises” used by the trial court in his conviction and taken word for word from Decree no. 055, rather than from section 5 of the State Secrets Act. In the applicant's submission, the formula employed in the Act was narrower and covered only one type of the activities of radio electronic warfare units, namely information concerning “the means and methods of protection of classified data”. The applicant also pointed out that the use of Decree no. 055 in his case had been acknowledged by the appellate court, which had stated in its decision of 25 June 2002 that the expert report of 14 September 2001 had been based on the State Secrets Act, Presidential Decree no. 1203 and Ministerial Decree no. 055.

52. The applicant thus argued that, in any event, he could not have foreseen that the information which he had collected at the meeting of 11 September 1997 could have been of a classified nature, as none of the participants at the said meeting had informed the others about the secret nature of the information which had been distributed at the meeting. He also insisted that the information which he had collected and kept at home was of minor importance.

53. The applicant further maintained his complaint under Article 10 of the Convention. He insisted that the authorities had persecuted him for his journalistic activity and his publication of articles on serious environmental issues. He also contended that the impugned information could have been found in public sources, and in particular in reports by various environmental organisations, that it was of minor importance and that it could not therefore be regarded as a State secret.

2. The Government

54. The Government argued that in the applicant's case the domestic courts had not applied the domestic law retrospectively, nor had they construed it extensively.

55. They submitted that the courts' assessment of the applicant's actions and, consequently, his conviction had been based on Article 275 of the Russian Criminal Code, the State Secrets Act as amended on 6 October 1997 and Decree no. 1203 of the Russian President of 30 November 1995, which approved the List of Information classified as State Secrets. They referred to the decision of 25 June 2002 in which the appellate court confirmed that the trial court had lawfully applied the said legal instruments

in the applicant's case, given that the offence imputed to the applicant had been of a continuous nature, had commenced on 11 September 1997, when the applicant collected the imputed notes, and had been halted on 20 November 1997, when the notes had been seized from the applicant. According to the Government, in a situation where there was a criminal offence of a continuing nature, it was legislation in force at the moment when such an offence was halted that was applicable. The Government contended that the applicant could not but have foreseen the application of the above-mentioned legal instruments, as all of them had been duly published and had therefore been accessible to him.

56. The Government disputed the applicant's argument that at the time when he had committed the offences imputed to him the information classified as secret had not been defined by law. In the Government's submission, the decision of the Constitutional Court of Russia dated 20 December 1995 had established that the requirements of Article 29 § 4 of the Constitution of Russia had been fulfilled by enactment of the State Secrets Act of 21 July 1993, which had defined the notion of State secrets and listed the information classifiable as State secrets. They also submitted that, subsequently, Presidential Decree no. 1203 of 30 November 1995 had enacted the list of information classified as State secrets. The Government pointed out that, in any event, the amendment of 6 October 1997 had not changed the provisions of section 5 of the State Secrets Act which had formed the basis for the applicant's conviction.

57. In so far as the applicant complained that the domestic courts had relied on a secret Decree no. 055 of the Ministry of Defence, which had allegedly lead to an extensive interpretation and overly broad application of the State Secrets Act, the Government contended that the said decree only defined the degree of secrecy of information classified as State secrets under federal law and had not prescribed any rules of conduct for individuals, but had been intended only for establishing the manner and criteria for defining the degree of secrecy of information classified as State secrets, and therefore had not pertained to a category of legal instruments which were to be published. The Government thus insisted that Decree no. 055 had been relied on in the applicant's case only in so far as it had been necessary to assess the degree of importance and secrecy of the information collected by the applicant rather than for determining whether that information had constituted a State secret, this latter question having been decided on the basis of the State Secrets Act and Presidential Decree no. 1203.

58. The Government further argued that the applicant's case was distinguishable from the *Nikitin* case referred to by the applicant. They pointed out that in the latter case, the offences imputed to Mr Nikitin had been committed before 5 October 1995, that is, before Presidential Decree no. 1203 had been enacted, whereas in the present case the actions imputed to the applicant had been halted on 20 November 1997, when the said

decree was already in force. The Government further contended that the applicant's reference to the case of *Moiseyev* was also incorrect, given that the decision of the Supreme Court of Russia on which the applicant relied had been quashed and Mr Moiseyev had been convicted of espionage in a new set of court proceedings. The Government pointed out that legal arguments concerning the allegedly retrospective application of the State Secrets Act deployed by the appellate court in its final decision in the case of *Moiseyev* had been similar to those of the appellate court in its decision of 25 June 2002 in the applicant's case, and therefore there had been no conflict on that issue in the practice of the domestic courts.

59. They also pointed out that the applicant could not but have realised that the information which he had recorded in his written notes had been classified, since it had been disclosed among a limited group of persons at the meeting of 11 September 1997 on condition that it would be kept secret. The Government concluded that the provisions of Article 7 of the Convention had not been infringed in the applicant's case.

60. The Government further disputed as unsubstantiated the applicant's argument that he had been a victim of political persecution because of his journalistic activities and critical articles and pointed out that his conviction had been based on various pieces of evidence relied on by the Pacific Fleet Military Court in its judgment of 25 December 2001. The Government argued that the interference with the applicant's freedom of expression had been justified under Article 10 § 2 of the Convention. They submitted that, in accordance with the domestic legislation on the media, divulging information containing State secrets was prohibited and that information must be received and imparted lawfully. They further pointed out that at the material time the applicant had been a serving military officer and by virtue of the relevant legal provisions he had been entitled to have access to any classified information only in so far as this had been rendered necessary by his professional duties and only to write down classified information on the source material that had been registered by a competent authority. Moreover, he had been under an obligation to keep secret any classified information he had received and prevent any leaks of such information. It had also been prohibited to take secret materials outside the premises of the headquarters or to keep them in an inappropriate place. They insisted that, by virtue of his status of a serviceman, the applicant had been fully aware of all those limitations and could have clearly foreseen the negative consequences of a breach of the relevant regulations.

61. The Government conceded that the applicant had indeed been convicted not for the transfer of the imputed information to Mr T.O., but rather for his intention to transfer it. In this connection, however, they pointed out that the elements of an offence punishable under Article 275 of the Russian Criminal Code included not only the transfer itself but also the collection, theft or storage with the intention to transfer of information

constituting State secrets and that the applicant's intention to transfer the imputed information to Mr T.O. had been proven by evidence examined by the trial court, namely by the recordings of the applicant's telephone conversations with Mr T.O.

62. The Government further contested the applicant's allegation that the information contained in his handwritten notes had been available from public sources. They submitted that these arguments had been thoroughly examined by the domestic courts and rejected as unfounded. The Government pointed out that the materials of the criminal case against the applicant had contained several publications, including that of the applicant, which had reported on the results of the tactical training exercises but did not disclose any classified information, in particular any information concerning the actual names of military units, or the means and methods of radio electronic warfare. Having compared those publications and the applicant's handwritten notes, the courts rightly concluded that the information in the applicant's handwritten notes had not been accessible from public sources.

63. Lastly, the Government disputed the applicant's assertion that by collecting the impugned information, he had carried out his usual journalistic activity. In this connection they referred to the recordings of the applicant's telephone conversations with Mr T.O., which clearly showed that the latter had expressed an interest only in information of a classified nature.

B. The Court's assessment

64. The Court observes that the applicant was convicted of having collected on 11 September 1997 and kept until 20 November 1997, the date on which he was arrested, information containing State secrets. The applicant complained, in essence, that his conviction had been unlawful, since in so far as the period between 11 September 1997 and 8 October 1997 was concerned, there had been no statutory list of information constituting State secrets, whilst with regard to the period from 9 October 1997, the date on which an amendment incorporating such a list into domestic law had become effective, until 20 November 1997, the domestic courts had extensively interpreted the applicable domestic law and based his conviction on an unpublished ministerial decree. The applicant argued that he had therefore been unable to foresee criminal responsibility for his conduct during either of these periods.

65. Having regard to the circumstances of the present case, the Court considers that the crux of it is the alleged violation of the applicant's right to freedom of expression. It is therefore considers it appropriate to examine the applicant's complaints under Article 10 of the Convention.

66. Bearing in mind that the applicant was a serving officer, the Court reiterates that the freedom of expression guaranteed by Article 10 of the Convention applies to servicemen just as it does to other persons within the jurisdiction of Contracting States. Also, the information disclosure of which was imputed to the applicant does not fall outside the scope of Article 10, which is not restricted to certain categories of information, ideas or forms of expression (see *Hadjianastassiou v. Greece*, 16 December 1992, § 39, Series A no. 252). The Court is therefore satisfied that Article 10 of the Convention is applicable in the present case and that the sentence imposed on the applicant constituted an interference with his right to freedom of expression. Such interference infringes Article 10 unless it was “prescribed by law”, pursued one or more of the legitimate aims set out in paragraph 2 of Article 10 and was “necessary in a democratic society” in order to attain those aims.

1. Whether the interference was lawful

67. The Court reiterates that the expression “prescribed by law”, within the meaning of Article 10 § 2 of the Convention, requires first of all that the impugned measure should have some basis in domestic law; however, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must be able to foresee the consequences of his or her actions, and that it should be sufficiently precise.

(a) Basis in national law

68. As regards the first aspect, the Court observes that the Russian Constitution of 12 December 1993 in its Article 29 § 4 states that “the list of information constituting State secrets shall be defined by a federal statute”. Until 9 October 1997, section 5 of the State Secrets Act, which predated the Russian Constitution by a few months, only referred to a list of information that “may be” classified as State secrets, following the relevant procedure. Authority to classify information was conferred on the heads of State agencies, and the power to approve such a list was delegated to the President. The latter enacted the relevant decree on 30 November 1995. On 6 October 1997 section 5 of the State Secrets Act was amended so as to incorporate the list of information constituting State secrets, and the amendment was published and entered into force on 9 October 1997 (see paragraphs 38-43 above).

69. Against this background, the applicant suggested that two consecutive periods should be distinguished: the period between 11 September 1997 (the date on which the applicant collected the information in question) and 8 October 1997; and between 9 October 1997 (the date on which the amendments to the State Secrets Act became operative) and 20 November 1997, the date on which the applicant was arrested. The Government and the domestic courts, on the contrary,

considered this distinction immaterial because the criminal offence of which the applicant was convicted was classified as “continuous perpetration” that is punishable under the law in force at the time that the applicant was intercepted by the authorities. However, their principal argument was that in any event the applicant's conduct constituted a criminal offence even before 9 October 1997. The Court will therefore begin by examining the legal basis for the applicant's conviction in these two periods.

(i) 11 September-8 October 1997

70. In so far as the first period is concerned, the parties disagreed as to whether the applicant's conviction for the offence imputed to him had a formal basis in national law, or whether the applicant's actions were punishable under the Russian law then in force. The applicant contended that there had been no such basis during the relevant period as the State Secrets Act contained only a list of information that “may be” – rather than “shall be” – classified as State secrets, whereas the enactment of that list in Presidential Decree no. 1203 of 30 November 1995 was in contravention of Article 29 § 4 of the Russian Constitution, which clearly required such list to be defined by a federal statute. The Government insisted that the State Secrets Act of 21 July 1993, together with Presidential Decree no. 1203 of 30 November 1995, formed a sufficient legal basis for the applicant's conviction for the imputed offence during the relevant period, given that both documents had been duly published and were accessible to him.

71. The Court observes that under Article 29 § 4 of the Russian Constitution the list of information classified as secret was to be defined by a federal statute. The said constitutional provision presupposed that in the absence of such a statute there was no legal basis for the criminal prosecution of a person for disclosure of State secrets. However, the State Secrets Act as in force at the relevant time only listed information classifiable – and not classified – as secret, and could not therefore be said to have clearly provided a list of such information. On the other hand, during the relevant period such a list was defined by Presidential Decree no. 1203 of 30 October 1995. The domestic courts relied on those two legal instruments as the basis for the applicant's conviction. The question to be decided in the present case is therefore whether, in view of the relevant requirements of the Russian Constitution, a sufficient legal basis for the alleged interference with the applicant's rights under Article 10 of the Convention can be established in a situation where a federal statute's reference to a list of information that “may be” classified as State secret was detailed in a presidential decree – a legal instrument of a lower rank than a statute.

72. The respondent Government advanced an argument to the effect that the Constitutional Court of Russia (“the Constitutional Court”) in its decision of 20 December 1995 had held that the requirements of Article 29

§ 4 of the Russian Constitution had been fulfilled by the State Secrets Act of 21 July 1993. In the circumstances of the present case, the Court does not consider it necessary to address the question of whether during the period under examination the State Secrets Act, taken alone, could have constituted a sufficient legal basis for the applicant's conviction, as in any event it was not applied in his case alone, but in conjunction with the Presidential Decree of 30 November 1995.

73. The Court further reiterates that, according to its settled case-law, the concept of “law” must be understood in its “substantive” sense, not its “formal” one. It therefore includes everything that goes to make up the written law, including enactments of lower rank than statutes and the court decisions interpreting them (see *Association Ekin v. France*, no. 39288/98, § 46, ECHR 2001-VIII). In the present case, the Court notes that the Russian Constitution established a principle that a list of classified information should be defined by a federal statute and that amendments were subsequently made to the State Secrets Act so as to bring it into conformity with the relevant constitutional requirement. It is clear that in the period between 12 December 1993, the date on which the Russian Constitution entered into force, and 9 October 1997, the date on which the amendments to the State Secrets Act became operative, there was a pressing need for a legal instrument which would have provided the competent authorities with a legal basis “for the performance of their duty to protect the security of the State, community and individuals” (see paragraph 41 above). The Court is inclined to consider that the Russian authorities were justified in responding to that need through the enactment of a presidential decree – the procedure for the adoption of such a legal instrument being less complicated and more speedy than that of a federal statute – given in particular their margin of appreciation in regulating the protection of State secrecy (see *Stoll v. Switzerland* [GC], no. 69698/01, § 107, ECHR 2007- ...). The adopted decree clearly listed categories of information classified as secret and was accessible to the public so that any individual, including the applicant, could coordinate their conduct accordingly.

74. The Court further notes that in support of his argument that the State Secrets Act in its original version and Presidential Decree no. 1203 of 30 November 1995 could not be regarded as a proper legal basis for his conviction, the applicant referred to two decisions by the Supreme Court of Russia in two other criminal cases concerning disclosure of State secrets, namely those of *Nikitin* and *Moiseyev*, in which the Supreme Court had consistently stated that the list of information constituting State secrets should be defined in a federal statute, and that such a list had first been defined in the federal law of 6 October 1997 introducing changes and amendments to the State Secrets Act of the Russian Federation.

75. In so far as the applicant referred to Mr Nikitin's case, the Court notes the Government's argument that the offences imputed to Mr Nikitin

were committed in August and September 1995, when Presidential Decree no. 1203 was not yet in force. The first-instance court in its judgment of 29 December 1999 directly referred to this circumstance as the ground for Mr Nikitin's acquittal, stating that the classification of information as a State secret prior to 30 November 1995 had been arbitrary and not based on law. However, the first-instance court does not seem to have doubted that from that date onwards there was a sufficient legal basis for criminal prosecution for disclosure of State secrets. Admittedly, the trial court stated that the respective requirement of Article 29 § 4 of the Russian Constitution was complied with in full only when the amendment of 6 October 1997 entered into force, but it also consistently held that the State Secrets Act in its original version, applied in conjunction with the Presidential Decree of 30 November 1995, could have constituted a proper legal basis for bringing charges for disclosure of State secrets (see paragraph 45 above).

76. When giving its ruling on appeal, the Supreme Court confirmed that during the period that Mr Nikitin committed his acts there had been no list of information classified as State secrets, and therefore the information that he had collected and disclosed could not be said to have contained State secrets. It is true that the appellate court also stated that such a list had first been defined following the enactment of the amendment of 6 October 1997 to the State Secrets Act; however, it did not express any opinion as to whether prior to the enactment of the amendment, the application of the State Secrets Act, taken together with the Presidential Decree of 30 November 1995, would have sufficed for a criminal prosecution for disclosure of State secrets (see paragraph 46 above).

77. Secondly, as regards Mr Moiseyev's case, the latter was accused of offences that spanned the period from 1992-1993 to July 1998. The decision of the Supreme Court of 25 July 2000 in Mr Moiseyev's case, referred to by the applicant, stated that the first-instance court had failed to determine the precise timing of the commission of the offences, and that it was therefore unclear which of those offences had been committed during the period when the State Secrets Act had complied with the requirements of Article 29 § 4 of the Russian Constitution. As in Mr Nikitin's case, the Supreme Court did not say anything concerning the Presidential Decree of 30 November 1995 (see paragraph 47 above). The Court is not therefore convinced that the court decisions relied on by the applicant are directly relevant in his situation, or that they should be interpreted in the way suggested by him, particularly as those indicating that the State Secrets Act in its original version and the Presidential Decree of 30 November 1995 had not constituted a sufficient legal basis for his conviction.

78. Lastly, the Court notes that the domestic courts in the applicant's case consistently referred to the State Secrets Act and the Presidential Decree of 30 November 1995 as the basis for the applicant's conviction. It reiterates in this connection that it is primarily for the national authorities,

notably the courts, to interpret and apply domestic law and that the Court will not express its opinion contrary to theirs unless their interpretation appear arbitrary or manifestly unreasonable. In the light of the foregoing considerations, the Court sees no reasons to depart from the interpretation given by the domestic courts. It therefore considers that the State Secrets Act of 21 July 1993 listing categories of information that may be classified as secret, and which was supplemented by Presidential Decree no. 1203 of 30 November 1995, listing information classified as secret with sufficient precision – both documents being publicly available so as to enable the applicant to foresee the consequences of his actions – constituted a sufficient legal basis for the interference with the applicant's rights under Article 10 of the Convention with regard to the period between 11 September and 8 October 1997.

(ii) 9 October-20 November 1997

79. As regards the second period, the Court notes that it is not in dispute between the parties that the State Secrets Act in its amended version constituted a legal basis for the applicant's conviction.

(iii) Overall

80. In view of the above the Court finds that there existed sufficient legal basis for the applicant's conviction throughout the whole period between 11 September and 20 November 1997. Furthermore, the Court gives weight to the undisputed existence of such basis as of 20 November 1997 which, given the continuous nature of the offence, was sufficient under the domestic law to bring the applicant's conduct within the provision of the Criminal Code applicable in his case.

(b) Quality of law

81. The applicant also complained that the domestic courts' finding that information collected by him had contained State secrets had been based on Decree no. 055 of the Ministry of Defence, a secret and therefore inaccessible document relied on by the experts in their report of 14 September 2001, which had led to an extensive interpretation and overly broad application of the State Secrets Act and Presidential Decree no. 1203. He insisted that in such circumstances he could not have foreseen that the information he had collected had been classified and that his actions had been criminally liable. The Government conceded that the ministerial decree referred to by the applicant had been applied in his case, but argued that it had only been used to assess the degree of importance and secrecy of the information collected by the applicant rather than for deciding whether that information constituted a State secret.

82. The applicant disputed, in essence, that the domestic law applied in his case had met the criteria of foreseeability and accessibility, or, in other

words, that his conviction had been “lawful” within the meaning of Article 10 of the Convention. In this connection, the Court notes firstly that, as it has already held above, the State Secrets Act, taken together with Presidential Decree no. 1203, were in themselves sufficiently precise to enable the applicant to foresee the consequences of his actions. In so far as the applicant complained of the extensive and therefore unforeseeable interpretation of the said legal instruments by the domestic courts, which had allegedly relied on an unpublished ministerial decree, it is clear from the facts of the present case that the applicant, by virtue of his office, had access to Decree no. 055, read it and signed a document to that effect in autumn 1996 (see paragraph 19 above), that is, prior to the commission of the offences imputed to him. Against this background, the Court rejects the applicant's argument concerning the alleged lack of accessibility and foreseeability of the domestic law applied in his case.

83. Overall, the Court is satisfied that in the circumstances of the present case the domestic law met the qualitative requirements of accessibility and foreseeability, and that therefore the alleged interference with the applicant's rights under Article 10 of the Convention was lawful, within the meaning of the Convention.

2. Whether the interference pursued a legitimate aim

84. The Court further has no difficulties in accepting that the measure complained of pursued a legitimate aim, namely protection of the interests of national security.

3. Whether the interference was necessary in a democratic society

85. As regards the proportionality of the interference at issue, the Court notes first of all that the applicant's argument that his intent to transfer the impugned information was not proven and that the said information could be found in public sources appear unconvincing. The domestic courts carefully scrutinised each of the applicant's arguments and corroborated their findings with several items of evidence. They relied, in particular, on several recordings of the applicant's telephone conversations with a Japanese national, proving his intention to transfer the information in question to Mr T.O. (see paragraphs 22 and 32 above). The domestic courts also gave due consideration to, and rejected as unreliable, the applicant's argument that the information collected by him was publicly accessible. Indeed, they critically assessed the expert report of 14 September 2001, having compared the experts' conclusions with other materials of the case, and rejected those conclusions which listed as classified information that could be found in public sources, such as a military reference book on submarines or a Greenpeace report (see paragraph 26 above). In respect of

the information collected by the applicant, they noted, however, that it was not openly published (see paragraph 32 above).

86. The Court further cannot but accept the arguments of the domestic courts and the Government that, as a serving military officer, the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties (see *Hadjianastassiou*, cited above, § 46). The Court also considers that the disclosure of the information concerning military exercises which the applicant had collected and kept was capable of causing considerable damage to national security. It is true that the applicant did not in fact transfer the information in question to a foreign national; on the other hand, the Court does not overlook the fact that his sentence was very lenient, much lower than the statutory minimum, and notably four years' imprisonment as compared with twelve to twenty years' imprisonment and confiscation of property (see paragraphs 28 and 37 above).

87. Overall, the Court observes that the applicant was convicted as a serving military officer, and not as a journalist, of treason through espionage for having collected and kept, with the intention of transferring it to a foreign national, information of a military nature that was classified as a State secret. The materials in the Court's possession reveal that the domestic courts carefully examined the circumstances of the applicant's case, addressed the parties' arguments and based their findings on various items of evidence. Their decisions appear reasoned and well-founded. On balance, the Court considers that the domestic courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security (see *Hadjianastassiou*, cited above, § 47). Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. There is nothing in the materials of the case to support the applicant's allegation that his conviction was overly broad or politically motivated or that he had been sanctioned for any of his publications.

88. In the light of the foregoing, the Court finds that there has been no violation of Article 10 of the Convention in the present case.

89. The Court further notes that the applicant's complaints under Article 7 of the Convention concern the same facts as those examined under Article 10 of the Convention. Having regard to its findings under this latter provision, the Court considers that it is unnecessary to examine those complaints separately.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 10 of the Convention;
2. *Holds* unanimously that the applicant's complaints under Article 7 of the Convention raise no separate issue.

Done in English, and notified in writing on 22 October 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 dissenting opinion of Judge Giorgio Malinverni is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE MALINVERNI

1. Unlike the majority, I am of the opinion that there has been a violation of Article 10 in respect of the period between 11 September and 8 October 1997. The Court should have strictly interpreted the requirement of Article 29 § 4 of the Russian Constitution and held that in the absence of a federal statute complying with that requirement, there was no proper basis in domestic law for the applicant's conviction.
2. The reasons why I have serious doubts that the State Secrets Act in its original version, taken alone, could be regarded as a legal basis for the applicant's conviction are the following.
3. Firstly, the Supreme Court of Russia, in its decisions on appeal in the cases of Nikitin and Moiseyev of 17 April and 25 July 2000 respectively, noted that the requirements of Article 29 § 4 of the Russian Constitution had been met only after the amendments of 6 October 1997 were made to the State Secrets Act (see paragraphs 46 and 47). Moreover, the fact that on 30 October 1995 the Russian President enacted Decree no. 1203 on the List of Information classified as State Secrets suggests that the Russian authorities acknowledged the existence of a legal lacuna in this field.
4. As regards Presidential Decree no. 1203, it is true that this document, officially published and publicly available, established the list of information classified as State secrets. Nevertheless, I am not convinced that the relevant constitutional requirements were met by the enactment of this legal instrument, given that Article 29 § 4 of the Russian Constitution clearly referred to “a federal statute” – a legal act adopted by the national parliament as the result of a legislative process – rather than any enactments of lower rank such as presidential or governmental decrees. The fact that the necessary amendments were eventually made to the State Secrets Act to bring it into conformity with Article 29 § 4 of the Russian Constitution indicates, in my view, that the Russian authorities did not themselves consider that the relevant requirements of the Russian Constitution had been met by the adoption of a presidential decree.
5. In the light of the above considerations I am unable to conclude that the State Secrets Act in its original version and the presidential decree of 30 November 1995 could be regarded as a sufficient legal basis for the alleged interference with the applicant's rights under Article 10 of the Convention with regard to the period between 11 September and 8 October 1997.