



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

FIRST SECTION

CASE OF SHARKUNOV AND MEZENTSEV v. RUSSIA

(Application no. 75330/01)

JUDGMENT

STRASBOURG

10 June 2010

FINAL

10/09/2010

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

In the case of Sharkunov and Mezentsev v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 20 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 75330/01) 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 two Russian nationals, Mr Vyacheslav Viktorovich Sharkunov and Mr Aleksey Aleksandrovich Mezentsev (“the applicants”), on 20 August 2001.

2. The applicants were represented by Mr I. Timofeyev and then by Ms A. Demeneva, lawyers practising in Yekaterinburg. The Russian Government (“the Government”) were represented by Mr P. Laptev and then by Mr G. Matyushkin, respectively the former and current Representatives of the Russian Federation at the European Court of Human Rights.

3. By a decision of 2 July 2009 the Court declared the application partly admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1969 and 1971 respectively. They are serving their prison sentences in the Kurgan Region.

A. First applicant's arrest and detention

1. Alleged ill-treatment

5. On 5 May 1999 the first applicant (Mr Sharkunov) was brought to the Organised Crime Unit of the Kurgan Regional Department of the Interior in the town of Shadrinsk. He was suspected of a Mr M.'s murder. As can be seen from the arrest report drawn up at 2.25 a.m. on 6 May 1999, the applicant's family and next of kin were not informed. According to the applicant, the police officers placed a canvas bag on his head, beat him and administered electric shocks with the purpose of extracting a confession from him. The applicant made no confessions.

6. During the same night, from 2.35 to 3.15 a.m., the first applicant was brought before investigator P. The record of interview contains the following pre-typed standard wording:

“I have been informed that under Article 51 of the Russian Constitution, no one is required to testify against himself, his spouse or next of kin... I have also been apprised of the rights of the suspect during the preliminary investigation under Articles 52 and 64 of the RSFSR Code of Criminal Procedure:

A suspect has the following defence rights: to know the accusation against him; to make statements; to adduce evidence; to make requests; to have access to the records of investigative measures carried out in his presence and to have access to the file submitted to the court confirming the lawfulness of and reasons for remanding him in custody; to lodge challenges and complaints against the investigator's decisions and actions; to read this record after the interview, request its amendment and to make observations, which must be included in the record.

I have also been informed that under Articles 47-52 of the RSFSR Code of Criminal Procedure a suspect has a right of defence. For this investigative measure I required ___ counsel (appointed by an advocates' office; a lawyer named by me; if no counsel requested – indicate a reason...).”

The applicant made a handwritten statement indicating that he did not require counsel and that he would defend himself. This note bears his signature.

The record of the interview also contains another handwritten note by the applicant in the following terms:

“I have been apprised of the content of Article 51 of the Constitution. For the time being I refuse to speak.”

This note bears the applicant's signature.

7. On the same night a medical assistant in the local sobering-up centre carried out a medical check of the upper part of his body; no injuries were recorded. The applicant was then placed in the Shadrinsk temporary detention centre. The applicant was examined by a medical assistant and complained of “pain all over the body”. Blue bruises on the hip/thigh and

blue injection marks on his arms were recorded. The medical assistant ascribed the marks to drug addiction and withdrawal symptoms. As can be seen from the applicant's written statement made on the same day, he had been horse riding the day before and had no complaints against any public official.

8. On the investigator's order, on 7 May 1999 the applicant was examined by a medical expert. The examination was carried out in the presence of two convoy officers. The report drawn up on 7 May 1999 stated that the first applicant had no physical injuries.

9. On 8 May 1999 the applicant was examined by paramedics, who concluded that he was suffering from withdrawal syndrome. On 15 May 1999 the applicant was examined in relation to abdominal pains and pain in the neck and in the thoracic spine area. It appears that he was given unspecified medicines.

10. According to the Government, the applicant had access to counsel T. on 12 May 1999, and on 14 May 1999 he was interviewed in the presence of counsel and remained represented throughout the pre-trial investigation and trial.

11. On 17 May 1999 the applicant was transferred from the temporary detention centre to a remand centre.

2. Inquiry into the allegation of ill-treatment

12. On 17 May 1999 the applicant's mother lodged a complaint with the Supervising Prosecutor's Office of the Kurgan Region and the Shadrinsk town prosecutor, alleging that her son had been ill-treated in police custody:

“My son was arrested on 5 May 1999...I became aware later on that on 6 May 1999 he had been taken to section 6 of the town department of the Interior and had been severely beaten and tortured by electric shocks in order to obtain confessions... Ill-treatment continued later on...The above was confirmed by my son's former counsel D. who told me on 7 May that my son was being ill-treated. D. saw my son on 11 May and called me, asking me to bring my son clean clothes. On 12 May the lawyer told me that my son had been beaten again and had been given electric shocks... On the same day I unsuccessfully asked investigator P. to let me see my son... On 14 May the investigator told me that he would hand over the clean clothes to my son if I refused to take away the old ones, which might be needed for an expert examination... After the arrest my son named the lawyers he wanted to instruct; since they were not available the investigator should have appointed legal aid counsel instead... I was misled by the staff of the temporary detention centre about the withdrawal pains my son had allegedly been suffering from... This did not make any sense to me... On 8 May I had brought some pain killers and asked – in vain – to call for an emergency squad for my son...My son has a medullispinal hernia, which can be painful at times...”

13. The complaint was forwarded for examination by the Shadrinsk Inter-District Prosecutor's Office. A preliminary inquiry was ordered.

14. During the inquiry the medical assistant of the sobering-up centre affirmed that no injuries had been recorded and that the applicant had made

no complaints or allegations on 6 May 1999 at or around 4 a.m. However, according to the on-duty officer of the temporary detention centre, on 6 May 1999 at 4 a.m. the applicant had been brought to the temporary detention centre; blue bruises and injections marks were visible on his body; the applicant explained that he had sustained the bruises while horse riding and that he was a drug addict. As can be seen from a statement issued on 20 May 1999 by the medical assistant of the temporary detention centre, on 6 May 1999 the applicant complained of pain in the body; the examination at 8 a.m. revealed blue bruises on the hip/thigh and blue injection marks on his arms; the medical assistant ascribed these to drug addiction and withdrawal symptoms. According to her statement, the applicant was also seen on 8 May 1999 for unspecified reasons, and on 15 May 1999 on account of his complaints of pain in the neck and the thoracic spine area; he had had no health-related complaints when transferred to the remand centre on 17 May 1999.

15. A number of officers made written statements. Officer E. stated that he had brought the applicant to the Unit on 6 May 1999 at or around 4 p.m.; investigative measures had been taken until around 2 a.m. in the presence of investigator P.; thereafter, the applicant had been brought to the sobering-up centre for an examination and then to the temporary detention centre; he had not witnessed any ill-treatment against the applicant (see also paragraph 52 below).

Officer Ba. stated that the applicant had been brought to the Unit on 5 May 1999; investigator P. had also been present while some measures were being carried out; no ill-treatment was inflicted on the applicant in the Unit and no signs of ill-treatment were visible on his body.

Senior officer Ya. made a similar statement (see also paragraph 51 below) indicating that the applicant had been brought to the Unit on 5 or 6 May 1999 in the afternoon.

Officer K. stated that the applicant had been present on the premises on 6 May 1999 in the afternoon and that he had seen investigator P. and officers E. and Ya. with the applicant at around 9 p.m. the same evening. Officer K. did not witness any ill-treatment.

Lastly, investigator P. stated that he had issued an arrest warrant against the applicant and questioned him; no ill-treatment had been inflicted on the applicant; a medical expert had examined him on 7 May 1999 and found no injuries.

16. By a decision of 1 June 1999 the Shadrinsk Inter-District Prosecutor's Office refused to institute criminal proceedings against the officers allegedly responsible for the first applicant's ill-treatment. It was established that the applicant had been arrested on 5 May 1999 and had been brought to the Organised Crime Unit for investigative measures. Thereafter, he had been examined by a medical assistant of the sobering-up centre; no injuries had been noted. The applicant was then brought to the

temporary detention centre and examined by an “on-duty” officer; the applicant explained that the bruising on his hips/thighs had been sustained before the arrest (probably from horse riding); no injuries had been found during his placement in the remand centre on 17 May 1999. In May 1999 the applicant made no complaint about his health and did not raise any allegations against any public official. Nor did he raise any allegations during the inquiry that had been initiated following his mother's complaint.

17. As can be seen from the decision of 1 June 1999, “the persons concerned should be informed of the decision and the procedure for appealing against it”. By a letter of the same date, the applicant's mother was notified of the decision and of the possibility of appealing to a higher prosecutor.

3. Related proceedings

18. On an unspecified date Mr T. was appointed as counsel for the applicant. On 15 June 1999 he sought a copy of a search order in respect of the applicant's flat; he also asked the investigator to allow the applicant visits from his family.

19. A medical certificate dated 17 September 1999, issued by the local drug addiction hospital, states that the first applicant did not suffer from alcohol or drug addiction and did not require any related treatment while in detention.

20. On 21 February 2000 the first applicant complained to the Kurgan prosecutor's office supervising detention facilities about the events of 5 and 6 May 1999 and the investigation. The applicant made the following statement:

“On 5 May 1999...I was interrogated in a particularly intensive manner, which I can describe if you so require. The officers tried to compel me to make confessions in respect of a criminal offence in which I was not involved and of which I knew nothing. At night investigator P. joined in. When physical violence temporarily ceased and the bag was taken off my head, investigator P. compelled me to make written statements... He told me that he had witness statements against me... For twelve days in the temporary detention centre I made statements concerning my alibi on the day of M.'s murder and the alleged animosity between myself and the above witness...”

21. By a letter of 28 February 2000 the applicant was informed that his renewed complaint had been dismissed by the Kurgan Regional Prosecutor's Office because the inquiry had already resulted in a decision not to initiate criminal proceedings in relation to the alleged ill-treatment.

22. On 6 May 2000 the applicant was interviewed in the presence of counsel, pleaded not guilty, sought a face-to-face confrontation with the second applicant and then chose to remain silent.

23. Between May and September 2000 the applicant sent several unspecified complaints from the detention facility to the Kurgan Town

Court. In April 2000 the applicant's mother complained to the regional prosecutor about the inquiry into the allegation of ill-treatment.

B. The second applicant's arrest and detention

1. Alleged ill-treatment

24. On 9 December 1999 the second applicant (Mr Mezentsev) was brought to the above-mentioned Organised Crime Unit in Shadrinsk from a detention facility in the town of Kurgan.

25. According to the applicant, he remained in the police car with a canvas bag on his head and received several blows from the convoy officers. In the Unit the officers connected wires to his little fingers and applied electric shocks. When he fainted they hit him on the head so that he would regain consciousness. A canvas bag was placed over his head, restricting the airflow. He could not bear the pain and admitted his complicity in the killing of a Mr K.

26. On the same day, between 7 p.m. and midnight, the second applicant was questioned by investigator P. The record of interview contains the following pre-typed standard wording:

“I have been informed that under Article 51 of the Russian Constitution, no one is required to testify against himself, his spouse or next of kin...I have also been apprised of the rights of the suspect during the preliminary investigation under Articles 52 and 64 of the RSFSR Code of Criminal Procedure:

A suspect has the following defence rights: to know the accusation against him; to make statements; to adduce evidence; to make requests; to have access to the minutes of investigative measures carried out in his presence and to have access to the file submitted to the court confirming the lawfulness of and reasons for remanding him in custody; to lodge challenges and complaints against the investigator's decisions and actions; to read this record after the interview, request its amendment and to make observations, which must be included in the record.

I have also been informed that under Articles 47-52 of the RSFSR Code of Criminal Procedure a suspect has a right of defence. For this investigative measure I required ___ counsel (appointed by an advocates' office; a lawyer named by me; if no counsel requested – indicate a reason...).”

The applicant made a handwritten statement indicating that he did not require counsel and that he was not waiving his right on account of lack of means. This note bears his signature.

The record of interview also contains another handwritten note by the applicant in the following terms:

“I have been apprised of the content of Article 51 of the Constitution. I agree to testify on the substance of the suspicion against me”.

This note bears the applicant's signature. During this interview the applicant confessed to having been an accessory to K.'s murder, committed, according to the second applicant, by the first applicant (Mr Sharkunov). The record ended with a handwritten note stating that the second applicant had read the record, that it was correctly transcribed, that the applicant had no comment or objection to make, that he had been made aware of the video recording and had no comment to make on it. The interview was videotaped by officer Ba.

27. On 15 December 1999 the applicant was again taken to the Organised Crime Unit, where the ill-treatment, namely beating him on the head, allegedly resumed. According to the applicant, while in a cell he cut the veins in both his arms, allegedly as a protest at the beatings and pressure put on him. According to the Government, the second applicant mutilated himself because the first applicant had put pressure on him while in Shadrinsk remand centre no. 2.

28. After the second applicant had been provided with medical assistance, at an interview on the same day he was informed of his rights and pleaded innocent; he declined legal assistance "for this interview" and refused to testify.

2. Inquiry into the allegation of ill-treatment

29. On 17 December 1999 the second applicant lodged a complaint with the Regional Prosecutor's Office, alleging that he had been forced to confess to the murder and to make false accusations against other persons:

"I urge you to carry out an inquiry and to stop the unlawful methods of investigation used against me by the officers of the Organised Crime Unit. As a result of these, I was forced to make confessions on 9 December 1999. I complained to the regional prosecutor's office but subsequently learnt that the complaint had not been forwarded... On 15 May 1999 I was brought to the Unit again and was forced to incriminate myself and others of various crimes. To overcome my resistance, the officers offered a visit from my family in exchange for a confession; this was a form of psychological pressure... Since I could not stand the pressure I cut my veins with a razor blade I found in the cell..."

30. On 19 January 2000 the applicant amended his statement, alleging that electric shocks had been administered on 9 December 1999; that the waiver of legal assistance had been imposed on him; that he had been told to be natural during the videotaping and to answer in line with the previously discussed version of the relevant events.

31. An inquiry was ordered in relation to the second applicant's allegation of ill-treatment. Officer E. stated that the applicant had been brought to the Organised Crime Unit for interview with investigator P.; the interview was videotaped; no ill-treatment or pressure had been used against the applicant (see also paragraph 52 below). A similar statement was made by senior officer Ya. (see also paragraph 51 below). To a statement in

similar terms investigator P. added that while the applicant had not requested counsel for the interview on 15 December 1999 he had expressed the wish to have a consultation with a lawyer later on in the remand centre. Officer Ba. confirmed that he had videotaped the interview on 9 December 1999 and that he had seen no beatings.

32. The prosecutor also obtained a written statement from the applicant alleging that during his transfer to the Unit on 9 December 1999 he had a canvas bag on his head; in the Unit he had cables attached to his fingers and that electric shocks had been administered. The applicant alleged that on 15 December 1999 he had received several blows from Unit officers; that he could not identify them as he had a canvas bag on his head; and that in reply to his request for counsel investigator P. had told him to write to the local bar association.

33. On 27 January 2000 the applicant was examined by a medical expert who found scars on his forearms and concluded that these scars could have been self-inflicted on 15 December 1999. The expert did not record any traces of electric torture or blows to the second applicant's head.

34. On 28 January 2000 the Shadrinsk District Prosecutor's office refused to institute criminal proceedings in relation to the alleged ill-treatment. The prosecutor relied on the above-mentioned statements and the expert report. He also noted that the applicant had not made any complaint while in the remand centre and that no injuries had been recorded there. The decision states that "the persons concerned should be informed of the decision and the procedure for appealing against it".

3. *Related proceedings*

35. On 31 January 2000 the second applicant asked for legal-aid counsel, referring to the lack of means to retain one. The applicant was questioned in the presence of counsel on 4 February 2000 and retracted the confession made on 9 December 1999 as given under duress.

36. On 5 May 2000 investigator M., who was also in charge of the criminal case against the applicant, refused to institute criminal proceedings, dismissing as unsubstantiated the second applicant's renewed complaint of ill-treatment.

37. On 10 May 2000 the second applicant was interviewed in the presence of counsel and, having been apprised of the privilege against self-incrimination, asserted his innocence and remained silent.

38. On 5 June 2000 the investigator rejected a number of applications by the defence, indicating, *inter alia*, that the allegation of ill-treatment had previously been dismissed after the inquiries and that the case file contained the relevant decisions not to institute criminal proceedings.

39. The applicant sent unspecified complaints to the Shadrinsk Town Court from the detention facility in March 2000 and to the Kurgan Town Court between June and December 2000.

C. Other relevant facts and the trial

1. Pre-trial proceedings

40. In November 1999 and February 2000 the police questioned a Mr V. in the framework of unrelated criminal proceedings. It appears that he was informed of his rights and declined the legal assistance offered to him. In substance, he stated that he had served as a driver for the applicants on the day when K.'s murder had been committed and that he had heard about another murder, allegedly committed by the first applicant. V. also stated that "in winter 1998-1999" the second applicant had set a car on fire on the first applicant's instructions; the latter had unsuccessfully tried to extort a sum of money from the car owner; the first applicant had then allegedly told V. that the second applicant had broken the car window, thrown a bottle of gasoline in the car and set it on fire. V. confirmed his earlier statements during a face-to-face confrontation with the second applicant. However, on 19 April 2000 V. retracted his statement, alleging ill-treatment in November 1999 and February 2000. It appears that the authorities refused to initiate a criminal case against the officers.

41. At the pre-trial stage, a Ms S. was interviewed as a witness regarding the arson charges against the applicants. She identified the second applicant from his general facial traits, in a line-up of three persons, as the person she had first seen "in or around March 1998" when he had tried to set a car on fire in the yard of the block of flats where she lived; the second time was when he broke the car window and spilt gasoline in it. A lawyer and two attesting witnesses were present at the line-up.

42. The applicants and V. were accused of several criminal offences, including murder and arson. The first applicant was charged with two counts of murder, two counts of instigation to destruction of property by arson, unlawful possession of firearms and extortion. The second applicant was charged with murder and two counts of destruction of property by arson. The first count of destruction of property by arson was based on the statement of the victim of the arson attack who alleged that he had had "tensions" with the first applicant. That statement was partly confirmed by witness Ch. The second count was based, in particular, on S.'s statement, an eyewitness who had identified the second applicant as the arsonist.

2. Trial

43. On 19 July 2000 the Kurgan Regional Court held the first hearing. The applicants pleaded not guilty to the murder and arson charges. The second applicant stated that his confession of 9 December 1999 had been obtained under duress after hours of torture. The applicants' co-defendant V. also stated that he had been severely beaten by police officers and, in consequence, had falsely denounced the applicants. He submitted that the

officers had beaten him on the upper part of his body but that the blows had left no traces.

44. Ms S. was called to testify at the trial in relation to the second arson case (concerning the events in February 1998). According to a report dated 21 July 2000, a bailiff came to her home but she refused to appear before the trial court, alleging that she had to nurse her underage child.

45. By a judgment of 4 September 2000 the Regional Court found the first applicant guilty on two counts of murder, unlawful possession of firearms and on the second count of instigation to destruction of property by arson and sentenced him to twenty years' imprisonment. The second applicant was found guilty on the second count of the destruction of property by arson and of complicity in the above murder, and sentenced to sixteen years' imprisonment. The court acquitted the second applicant of another arson count (concerning the events in January 1998) and discontinued the related prosecution on that count against the first applicant.

46. On the murder charges the trial court relied on the second applicant's confession, various testimonies by other persons, certain forensic reports and physical evidence. The court dismissed the defendants' allegations of ill-treatment as unsubstantiated because "no injuries had been identified on the applicants' bodies during the preliminary investigation".

47. On the second arson charge, the trial court relied on V.'s pre-trial statement (see paragraph 40 above), S.'s pre-trial identification report of the second applicant as the arsonist (see paragraph 41 above); the victim's and a witness's statements that there had been "tensions" between the first applicant and the victim.

48. The applicants appealed, alleging, *inter alia*, that the trial court had failed to summon various witnesses and had wrongly assessed some pieces of evidence, including the self-incriminating statements made by the second applicant and other persons. On 2 April 2001 the Supreme Court of the Russian Federation upheld, in essence, the judgment of 4 September 2000. The charge against the first applicant of unlawful possession of a gas pistol was dropped. The appeal court considered that the trial court had rightly referred to S.'s statement because that person had seen the second applicant set fire to the victim's car and had identified him as the arsonist. The appeal court also noted that S.'s statement and a statement from another person confirmed that there had been tensions between the first applicant and the victim.

49. On 19 September 2001 the Presidium of the Supreme Court, sitting in its supervisory-review capacity, acquitted the first applicant of unlawful possession of firearms and reduced his sentence to nineteen years and six months.

D. Subsequent events

50. In 2005, in reply to requests from the deputy President of the Regional Court, the Kurgan Town Court and the Shadrinsk Town Court stated that in 1999 and 2000 they had not received any complaints from the applicants against the administrations of remand centres, investigating or prosecuting authorities or the police department or its units (see also paragraphs 23 and 39 above).

51. In June 2005 Mr Ya., senior officer of the Organised Crime Unit at the relevant time, made a written statement (see also paragraphs 15 and 31 above), indicating that Mr V. had named the applicants as his accomplices in a number of offences. Thereafter, the second applicant was brought from Kurgan remand centre no. 1 to Shadrinsk and made confessions in respect of murdering victim K. and some other offences. The second applicant was questioned by investigator P. in relation to the murder; Officer Ya. was in charge of the video recording of the interview; Officer Ba. was also present. The second applicant was then brought to Kurgan remand centre no. 2. A week later he was brought to the Unit for questioning and a visit from his family. However, in the meantime, he cut his veins and was admitted to hospital for treatment. On the same day he was brought back to the Unit and retracted his earlier confessions in the presence of investigator P. and chose to remain silent. The applicant was brought back to the remand centre. Subsequently, it was established that the first applicant had tried to compel the second applicant to retract his confessions. Officer Ya. also stated that in May 1999 the first applicant had been brought in for questioning. After his refusal to testify, he had been taken for a medical examination (for unspecified reasons) and had then been placed in the temporary detention centre of Shadrinsk. Both applicants had lodged numerous complaints against various officers of the Organised Crime Unit. However, the inquiries had disclosed no unlawful actions on their part. Except for the murder of K., the other episodes of criminal activity had been dealt with by the Shadrinsk office of the Interior.

52. In June 2005 Mr E., a police officer in 1999, made a written statement (see also paragraphs 15 and 31 above) according to which he had arrested the first applicant in May 1999 and brought him to the Organised Crime Unit for questioning. No physical force had been used against him. Mr E. stated that he might have convoyed the second applicant from Kurgan remand centre no. 1, but without recourse to any physical force or pressure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Judicial review

53. The Constitution of the Russian Federation provides, in so far as relevant:

Article 46

“Everyone shall be guaranteed judicial protection of his or her rights and freedoms.”

“Decisions and actions or lack of action of State bodies, bodies of local self-government, public associations and officials may be appealed against in court...”

54. The 1993 Judicial Review Act (Federal Law No. 4866-1 on appeals against acts and decisions infringing individual rights and freedoms), as amended in 1995, provides for a judicial avenue for claims against public authorities, except for those for which the Constitutional Court is competent or for which another procedure is prescribed (section 3). The Act states that a decision or omission by a public authority or official can be challenged before a court if it encroaches on an individual's rights or freedoms or unlawfully imposes an obligation or liability on that individual. In such proceedings the court is entitled to declare the impugned act, decision or omission unlawful, to order the public authority to act in a certain way vis-à-vis the individual, to lift the liability imposed on the individual or to take other measures to restore the infringed right or freedom. If the court finds the impugned act, decision or omission unlawful, this gives rise to a civil claim for damages against the State.

55. Under the 1960 Code of Criminal Procedure (CCrP), as in force at the relevant time, a prosecutor, investigator or judge was competent to examine complaints and information about any offence committed and to open or refuse a criminal investigation, or to transmit the matter to a competent authority (Article 109). A prosecutor's refusal to open a criminal investigation could be appealed to a higher prosecutor; a judge's refusal could be challenged before a higher court (Article 113 § 4).

56. On 29 April 1998 the Constitutional Court of the Russian Federation invalidated Article 113 § 4 of the Code because it did not allow for judicial review of a prosecutor's or investigator's refusal to institute criminal proceedings. The Constitutional Court ruled that Parliament should amend the legislation on criminal procedure by inserting a possibility of review. It also held that until such amendments were enacted, the national authorities, including courts, should directly apply Article 46 of the Constitution requiring a judicial review of administrative acts. The ruling was published in May 1998.

57. In a ruling of 14 January 2000 the Constitutional Court declared unconstitutional several provisions of the RSFSR CCrP authorising the courts to initiate criminal proceedings of their own motion. In the same ruling the Constitutional Court reiterated that a court could carry out a judicial review of an investigating authority's decision to open a criminal case, to refuse to initiate criminal proceedings or to discontinue such proceedings, in particular on a complaint of a person that his or her constitutional rights had been breached by such a decision. The ruling was published in February 2000.

B. Legal assistance in criminal proceedings

58. Under Article 52 of the RSFSR CCrP, a suspect has the following rights: a right to know the accusation against him; to make statements; to have access to the record of investigative measures; to lodge complaints; from the time of the arrest to have meetings with counsel, his next of kin or other persons.

59. Article 47 of the RSFSR CCrP provided that counsel could participate in the proceedings from the time when a person was informed of the charges against him or her. If a suspect was arrested or detained, counsel could participate in the proceedings from the time when the suspect was given access to the arrest record or detention order. In its ruling of 27 June 2000 (no. 11-II) the Constitutional Court held that Article 47 of the CCrP was contrary to the Constitution in so far it excluded the possibility of legal representation at the very first stages of the proceedings, that is, before any charges were brought or before access was given to the arrest/detention record.

60. The participation of counsel was mandatory in pre-trial proceedings from the date on which charges were brought in respect of offences punishable by the death penalty and in the court proceedings concerning such offences (Article 49 of the RSFSR CCrP). If counsel was not retained by the person concerned, the authority in charge of the case had to appoint one (*ibid*). The defendant could waive legal assistance; such a waiver could be opposed by the authority in charge of the case if the case concerned offences punishable by the death penalty (Article 50 of the Code).

61. Article 59 of the Criminal Code provided for the death penalty as a punishment for particularly serious criminal offences against human life, such as aggravated murder.

C. Admissibility of evidence

62. Article 21 of the Constitution guarantees the protection of human dignity and prohibits torture, violence and inhuman and degrading treatment and punishment. Article 117 of the Criminal Code punishes torture, in

particular when inflicted in order to compel the person concerned to make statements or to perform other acts contrary to the person's will, as a punishment or for other ends. Article 20 of the RSFSR Code of Criminal Procedure prohibited compelling another to make a statement through the use of violence, threats or other unlawful means against the accused or other persons involved in the proceedings.

63. Article 50 § 2 of the Russian Constitution prohibits reliance in a court of law on evidence obtained in breach of federal law. In a ruling of 31 October 1995 the Plenary Supreme Court of Russia held that such a breach occurred when the gathering and admission of evidence resulted in a violation of the constitutional rights and freedoms or of the criminal law procedure, as well as when the gathering and admission of evidence was carried out by an authority lacking competence or acting in breach of the applicable procedural rules (point 16).

64. Article 69 § 3 of the RSFSR Code of Criminal Procedure provided at the time that evidence obtained unlawfully should be declared devoid of legal force and should not serve as a basis for a prosecution or for proving relevant circumstances such as the damage caused by the criminal offence.

D. Reopening of criminal proceedings

65. Article 413 of the 2001 Code of Criminal Procedure provides that criminal proceedings may be reopened if the European Court of Human Rights has found a violation of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

66. The applicants complained that they had been ill-treated while in police custody and that there had been no effective investigation into their complaints, in breach of Article 3 of the Convention. This provision reads as follows:

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

A. Exhaustion of domestic remedies

67. The Government submitted that the applicants had failed to exhaust domestic remedies (see also paragraph 50 above). In the Government's

submission, the applicants “should have exercised their right under Article 46 of the Russian Constitution by way of an action under the 1993 Judicial Review Act against the refusals to prosecute [officers]”.

68. The applicants argued that at the relevant time there had been a judicial practice of declining jurisdiction under the Judicial Review Act in relation to appeals against refusals to institute criminal proceedings.

69. In the admissibility decision of 2 July 2009 the Court decided to join this matter to the merits.

70. The Court first observes that it is uncontested between the parties that the applicants raised their grievances in substance at the national level, thus affording the national authorities an opportunity to redress any alleged violations (see *Satık v. Turkey (no. 2)*, no. 60999/00, §§ 27-29, 8 July 2008).

71. Second, as regards the Judicial Review Act, the Court notes that the parties did not clarify whether the applicants or their counsel had been able to obtain in good time a copy of the relevant decisions not to prosecute the officers regarding the allegations of ill-treatment. However, this matter is not determinative because the Government have neither submitted any evidence that this remedy had any prospect of success in view of the then existing judicial practice nor any explanation as to how it could have provided the applicants with adequate redress. Therefore, the Government have not substantiated their contention that the remedy the applicants had allegedly failed to use was an effective one (see *Khamila Isayeva v. Russia*, no. 6846/02, § 100, 15 November 2007). Thus, the Government's objection should be dismissed. Lastly, it is noted that the Government did not put forward any argument concerning any remedies under the Russian criminal-law procedure. The Court is thus not called upon to make any findings in that regard.

72. The Court will now turn to the substance of the complaints made by the applicants, namely, the allegations of ill-treatment by agents of the State.

B. Merits of the complaints

1. First applicant (Mr Sharkunov)

73. The Government submitted that the first applicant had not been ill-treated, and explained his injuries with reference to his drug addiction.

74. The first applicant alleged that he had been ill-treated by way of electric shocks and suffocation in a canvas bag. The ill-treatment had been aimed at obtaining his confession regarding M.'s murder and had been carried out in the presence of investigator P. As a result, the applicant had sustained scratches and bruises on the inside of his thighs and injuries on the forearms. Contrary to the authorities' findings, there had been no convincing proof of any drug addiction or withdrawal syndrome.

75. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. In assessing evidence in a claim of a violation of Article 3 of the Convention, the Court adopts the standard of proof “beyond reasonable doubt” (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 161, Series A no. 25). The Court is sensitive to the subsidiary nature of its task and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, among others, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, the Court applies a particularly thorough scrutiny for allegations of proscribed treatment in breach of Article 3 of the Convention (see *Avşar*, cited above, § 283).

76. The ill-treatment complained of by the first applicant consisted of a canvas bag being put on his head, beatings and electric shocks. The certificate issued by a medical assistant in the temporary detention centre noted blue bruises on his legs and injection marks on his arms. Nonetheless, a number of elements in the case raise doubts as to whether the applicant suffered ill-treatment in May 1999.

77. The Court observes at the outset that the applicant did not complain about the alleged ill-treatment immediately after it had allegedly occurred. The complaint was lodged by the applicant's mother. She did so on 17 May 1999, that is, some eleven days after the alleged ill-treatment. Although the Court accepts that detainees may have reasons to fear reprisals for their complaints against officers under whose control they find themselves at the time, no explanation was given in the present case for the passive attitude on the part of the applicant. Moreover, it appears that on 14 May 1999 at the latest the applicant was able to see counsel and could thus have conveyed via him his grievances regarding the alleged ill-treatment.

78. In that connection, it is noted that the applicant's mother's complaint did not contain any detailed description of the alleged ill-treatment based on first-hand experience by the applicant (see paragraph 12 above). Nor is it apparent from the material in the case file before the Court that after that date the applicant amended his mother's statement to make it more detailed and consistent (see paragraphs 12, 20 and 45 above; see also *Çevik v. Turkey* (dec.), no. 57406/00, 10 October 2006). There is no match between any available description of the beatings and the injuries identified. Moreover, the applicant himself explained at the national level that the bruises had resulted from horse riding. Thus, the available material was not sufficient to substantiate the ill-treatment described, in brief and general terms, by the applicant's mother (see *Ahmet Mete v. Turkey* (no. 2), no. 30465/02, § 33, 12 December 2006).

79. Lastly, the Court does not have to take a stance on the issue of the alleged drug addiction since as such it does not corroborate or refute the allegation of ill-treatment made by the applicant. In other words, there is insufficient information to determine whether the marks on the applicant's arms resulted from the application of electric shocks or injections.

80. In the circumstances, there is no material in the case file which could call into question the findings in the certificate of the temporary detention centre or add probative weight to the allegations before the Court. In particular, it does not appear that the applicant requested or was refused permission to see another doctor during or at the end of his custody period in the temporary detention centre, that is, after 17 May 1999. In conclusion, the material before the Court is not sufficient to enable it to conclude that the applicant was subjected to ill-treatment as alleged.

81. The Court also reiterates that Article 3 of the Convention requires the authorities to investigate allegations of ill-treatment when they are “arguable” and “raise a reasonable suspicion” (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, §§ 101 and 102, *Reports of Judgments and Decisions* 1998-VIII). The Court considers that the investigation carried out in the present case was acceptable. The inquiry was opened as soon as the national authorities became aware of the matter and was carried out promptly. The Court concludes that the procedural obligation of the authorities of the respondent State under Article 3 of the Convention cannot be said to have been breached.

82. There has accordingly been no violation of Article 3 of the Convention in respect of Mr Sharkunov.

2. Second applicant (Mr Mezentsev)

83. The Government submitted that the second applicant's allegation of ill-treatment had been investigated and that the allegations concerning events on 9 December 1999 were unfounded. On 15 December 1999 the applicant had inflicted injuries on himself with a razor blade; the medical examination had revealed no other injuries on his body. The above-mentioned allegations had also been examined and rejected as unfounded by the national courts during the determination of the criminal charges against him.

84. The second applicant submitted that he had had no suicidal tendencies and that the self-inflicted injuries had resulted from previous ill-treatment at the hands of police officers. The first applicant had not compelled the second applicant to change his plea because they had been detained in different facilities at the time. The medical examination had been carried out belatedly so that no traces of the electric shocks remained. No special medical devices such as an encephalograph had been used for the examination. One of the complaints about the ill-treatment was examined by

investigator M., who was also in charge of the criminal case against the second applicant.

85. The ill-treatment complained of by the second applicant consisted of a canvas bag being put on his head, beatings and electric shock treatment. Nonetheless, applying the principles cited in paragraph 75 above and having examined the available material, the Court considers that it has not been established beyond reasonable doubt that the applicant was subjected to degrading or inhuman treatment in breach of Article 3 of the Convention. Nor is there any sufficient basis to support his claim that he caused himself injuries due to previous ill-treatment (see paragraph 27 above). In view of the above, the Court considers that the measures taken by the national authorities in relation to his complaints were sufficient in the circumstances of the case.

86. There has therefore been no violation of Article 3 of the Convention in respect of Mr Mezentsev.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

87. The applicants complained under Article 6 of the Convention that the criminal proceedings against them had been unfair. They referred to the absence of legal counsel during their initial interrogations; the trial court's reliance on the second applicant's confession allegedly made under duress at the pre-trial stage of the proceedings and without legal advice, in connection with the murder charges. The applicants also referred to the impossibility of obtaining the attendance and examination of witness S. in relation to the arson-related charges.

88. Article 6 of the Convention, in the relevant parts, reads as follows:

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

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

...

(b) to have adequate time and facilities for the preparation of his defence;

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

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...”

A. The parties' submissions

1. The applicants

89. The applicants submitted that the waiver of legal assistance at the initial stage of the investigation had not been valid since the participation of counsel had been mandatory under the national legislation (see paragraph 60 above). The investigator could have rejected the above waiver. In any event, the applicants had not been provided with any counsel whose services they could waive. Nor could any counsel be retained at night time, when the applicants were arrested and interviewed.

90. The applicants also argued that the authorities had not made a reasonable effort to bring the prosecution witness S. before the trial court for examination as a witness. The excuse put forward by S. should not have been accepted. Moreover, the bailiff's report in respect of Ms S. had not been signed by S. or any witnesses.

2. The Government

91. The Government submitted that after his arrest the first applicant had been informed of his rights, including the right to be represented and to remain silent. He had acknowledged in writing that he waived legal representation. On the same day he had pleaded innocent and refused to give any further statements. On 12 May 1999 he had been interviewed in the presence of counsel and had remained represented throughout the pre-trial investigation and trial.

92. As to the second applicant, the Government submitted that the officers had duly informed him of his right to legal assistance and the privilege against self-incrimination, as required under Article 52 of the RSFSR Code of Criminal Procedure (see paragraph 58 above). Despite this notice, he had waived his right to legal assistance. This fact was confirmed by his signature on the interview record of 9 December 1999. The second applicant had reiterated his waiver on 15 December 1999. Later on, he had been provided with counsel D. The second applicant's confession had been examined by the trial court together with the other evidence. As the confession was corroborated by that evidence, the court had declared it reliable and valid.

93. Lastly, the Government submitted that S. had been served with the summons for the hearing on 19 June 2000. As she had defaulted, the court had ordered that she be brought to the hearing. However, in view of the need to look after her child, she had been exonerated from the obligation to appear before the court. The applicants had filed no objections or applications in that respect. In any event, S.'s pre-trial statement had not been read out at the trial as it had lost most of its evidentiary value in view of her failure to appear before the court. The court had delivered its

judgment on the basis of the “other relevant, reliable and sufficient evidence”.

B. The Court's assessment

1. General principles

94. The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see, as a recent authority, *Bykov v. Russia* [GC], no. 4378/02, § 88, ECHR 2009-...).

95. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found (*ibid*, § 89).

96. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (*ibid*, § 90).

97. Furthermore, the Court reiterates that in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 of the Convention requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police

interrogation without access to a lawyer are used for a conviction (*ibid.*; see also *Panovits v. Cyprus*, no. 4268/04, §§ 84-86, 11 December 2008, and *Pishchalnikov v. Russia*, no. 7025/04, §§ 90-92, 24 September 2009).

2. Application of the principles in the present case

(a) Legal assistance in police custody and use of evidence at the trial

98. The Court will first examine the applicants' allegations concerning the absence of legal counsel for the initial questioning, and the trial court's reliance on the second applicant's confession made at the pre-trial stage of the proceedings allegedly under duress and without legal advice.

99. The Court reiterates that in the present case it has been alleged that the second applicant made self-incriminating statements under physical duress and psychological pressure exerted on him by police officers and interrogators. However, the Court has found no violation of Article 3 of the Convention in that connection (see paragraph 85 above). In so far as Article 6 is concerned, the Court notes that when convicting the applicants on the murder charges the trial court relied on the second applicant's confession together with testimonies by witnesses, certain forensic reports and physical evidence. The court dismissed the defendants' allegations of ill-treatment as unsubstantiated because "no injuries had been identified on the applicants' bodies during the preliminary investigation".

100. The Court observes at the outset that Russian law at the time prohibited reliance on evidence obtained by ill-treatment (see paragraphs 62 - 64 above). The Court finds no reason to consider in the present case that the available procedure for contesting the relevant evidence on this account and for opposing its admission and use was ineffective or failed to provide sufficient procedural guarantees. Thus, the Court is not ready to conclude that the second applicant's pre-trial statement was tainted by the alleged physical violence or threats.

101. The Court notes that the applicants also argued that there had been a violation of their right to legal assistance at the initial stage of the investigation and it was thus unfair to rely on the second applicant's admissions made in the absence of legal assistance.

102. The Court reiterates in that connection that in the admissibility decision it decided to join to the merits the Government's objection concerning the waiver of the right to legal assistance at the initial stage of the criminal investigation.

103. The Court observes that the second applicant was brought from a detention facility to the Organised Crime Unit for questioning by the investigator on 9 December 1999. He made confessions which were prejudicial to himself and the first applicant. As can be seen from the interview record, the second applicant waived his right to legal assistance, adding that the waiver was not related to a lack of financial means. He was

interviewed again on 15 December 1999, waived legal assistance “for this meeting” and chose to remain silent. It appears, however, that in reply to his request for counsel the investigator told him to write to the local bar association (see paragraphs 31 and 32 above). On 31 January 2000 he asked for free legal assistance, referring to a lack of means. He was provided with counsel soon afterwards.

104. The Court notes that as a matter of principle Russian law at the time, as interpreted by the Constitutional Court, afforded a right to legal assistance from the time of arrest (see paragraph 59 above; compare *Dayanan v. Turkey*, no. 7377/03, §§ 32 and 33, ECHR 2009-..., and *Bouglame v. Belgium* (dec.), no. 16147/08, 2 March 2010). It is further noted that as can be seen from the interview record of 9 December 1999 the second applicant was informed of the privilege against self-incrimination and the right to legal assistance. The record contains his handwritten note to this effect. As also follows from this note, the applicant chose to waive legal assistance for this interview for reasons unrelated to his financial situation. This note was signed by the second applicant. The waiver on 9 December 1999 concerned a specific “investigative measure”, namely, the applicant's interview with the investigator.

105. The Court also observes that the national courts discussed the matter of legal assistance. Having found no violation of the applicable rules, the trial judge admitted the second applicant's pre-trial admission as evidence and referred to it together with other physical and witness evidence presented at the trial.

106. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (*ibid*).

107. The Court considers that the circumstances of the case disclose that the second applicant expressly and unequivocally waived the privilege against self-incrimination and the right to legal assistance on 9 December 1999 (see, by contrast, *Savaş v. Turkey*, no. 9762/03, §§ 65-71, 8 December 2009).

108. The Court further observes that the second applicant does not complain that he was unrepresented between 15 December 1999 and 4 February 2000 (see paragraphs 31, 32 and 35 above). The Court notes in that connection that the second applicant made it clear only on 31 January 2000 that he had insufficient means to retain counsel, as opposed to his earlier statement on 9 December 1999. In any event, it is not apparent from the case file that the second applicant made any statement or admission between 15 December 1999 and 4 February 2000.

109. The foregoing considerations have led the Court to conclude that there has been no violation of Article 6 of the Convention on that account.

110. In so far as the first applicant made no statement or admissions after his arrest in May 1999, the Court considers that there is no need to make separate findings in respect of him in so far as the issue of legal assistance is concerned.

(b) Examination of a witness

111. Turning to the matter of the examination of a witness in connection with the arson-related charges against the applicants, the Court observes at the outset that S. did not testify at a court hearing. However, she should, for the purposes of Article 6 § 3 (d) of the Convention, be regarded as a witness because her statement during the identity parade procedure, as taken down by the investigating authority, was used at the trial. In the circumstances, the Court considers that there was no material difference between a recorded deposition by a witness and the result of an identity parade since both are capable of furnishing evidence against a defendant in a criminal trial (see also *Mirilashvili v. Russia*, no. 6293/04, § 159, 11 December 2008).

112. In finding the second applicant guilty of destruction of property by arson, the trial court relied on S.'s identification of him as the arsonist. The trial court also referred to the pre-trial statement by the applicants' accomplice (see paragraph 40 above). The remaining witness statements referred to by the trial court without any further discussion of their probative value were secondary, in particular in so far they mostly concerned the assessment of the relationship between the victim and the first applicant.

113. The Court reiterates that the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with those provisions, provided that the rights of the defence have been respected. As a general rule, they require that the defendant be given an adequate opportunity to examine a witness against him or have that witness examined, either when he or she makes statements or at a later stage (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports* 1997-III, and *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238). Indeed, it may prove necessary in certain circumstances to refer to statements made before the trial. If the defendant has been given an adequate opportunity to challenge the statements, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d) of the Convention (see, for instance, *Belevitskiy v. Russia*, no. 72967/01, § 117, 1 March 2007).

114. However, where a conviction is based solely or to a decisive extent on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined at some stage of the proceedings, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger*

v. Austria, 24 November 1986, §§ 31-33, Series A no. 110; *Saïdi v. France* 20 September 1993, §§ 43-44, Series A no. 261-C; *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X). The Court also reiterates that where the impossibility of examining witnesses or having them examined is due to the fact that they are absent or otherwise missing, the authorities must make a reasonable effort to secure their presence (see *Bonev v. Bulgaria*, no. 60018/00, § 43, 8 June 2006).

115. The Court notes that S. made her pre-trial statements during an interview to the investigating authority and also during the identity parade (see paragraph 41 above). Indeed, as submitted by the Government, the trial court did not refer to the record of her pre-trial interview with the investigative authority. Instead, the trial court relied on the identification report. It has not been submitted, and the Court does not consider, that besides seeking S.'s examination at the trial the second applicant failed to use any other procedural means for effectively contesting the incriminating evidence received from S. (see, *mutatis mutandis*, *Craxi v. Italy (no. 1)*, no. 34896/97, §§ 90-93, 5 December 2002). The available material before the Court does not disclose that every reasonable effort was made to bring S. before the trial court (see paragraph 44 above). Nor do the circumstances of the case disclose any valid excuse for failure to comply with the court summons. This being so, the second applicant was not afforded an effective opportunity to examine S. or have her examined at another stage of the proceedings (see *Melnikov v. Russia*, no. 23610/03, §§ 74-81, 14 January 2010).

116. There has therefore been a violation of Article 6 §§ 1 and 3 (d) of the Convention in relation to the impossibility to examine or have examined witness S. in connection with the arson-related charges.

117. As regards the first applicant, in the Court's view, it cannot be said that S.'s testimony served for convicting him of instigation to destruction of property by arson. Indeed, the first applicant made no specific submissions as to the way in which the alleged impossibility to examine her at the trial impinged upon the fairness of the proceedings in respect of him.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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

119. Each applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

120. The Government contested that claim.

121. Having regard to the nature of the violation found, the Court awards the second applicant EUR 1,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

122. In addition, as regards the findings under Article 6 §§ 1 and 3 (d) of the Convention, the Court also reiterates that when an applicant has been convicted despite an infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the relevant proceedings if requested (see *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV, and *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 82, 10 November 2005). The Court notes in this connection that Article 413 of the Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court has found a violation of the Convention.

B. Costs and expenses

123. The applicants made no claim for reimbursement of any costs or expenses. The Court is thus not called to make any award under this head.

C. Default interest

124. 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. *Dismisses* the Government's argument concerning exhaustion of domestic remedies in respect of the applicants' complaints regarding ill-treatment;
2. *Holds* that there has been no violation of Article 3 of the Convention in respect of the first applicant;
3. *Holds* that there has been no violation of Article 3 of the Convention in respect of the second applicant;
4. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention in respect of the second applicant;
5. *Holds*
 - (a) that the respondent State is to pay the second applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President