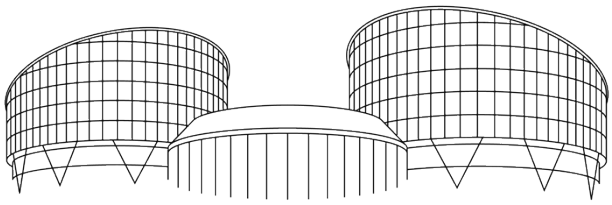

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 9445/06
Yevgeniy Ruslanovich SHESTAKOV against Russia
and three other applications
(see list appended)

STATEMENT OF FACTS

1. A list of the applicants is set out in the appendix.

A. 9445/06 Shestakov v. Russia, lodged on 11 November 2005

2. The applicant, Mr Yevgeniy Ruslanovich Shestakov, is a Russian national, who was born in 1983 and lived until his arrest in Mtsensk, Orlov Region. He is represented before the Court by Ms L.I. Kulpina, a lawyer practising in Mtsensk.

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

4. In 2004 the criminal proceedings were initiated against the applicant on suspicion of aggravated robbery with violence committed in a group of persons against a victim, Mr K. On 8 April 2004 he was remanded in custody.

5. On 9 March 2005 the Butyrskiy District Court of Moscow convicted the applicant. He was found guilty of aggravated robbery and aggravated robbery with violence and sentenced to seven years six months' imprisonment.

6. According to the judgment, on various dates in January – February 2004 the applicant together with other members of the group entered Mr K.'s apartment and with the use of violence and threats of use of violence deprived the victim of his money and property.

7. The judgment was based on the following evidence:

(a) pre-trial statements of Mr K. (victim) read out in open court. His statements provided a detailed account of the events, the amounts of money obtained from him by the accused, the threats and the violence used against him;

(b) testimony of Mr B. and Mr Sh. (policemen), who were cross-examined in open court and provided account of the initial police complaint of the victim and his physical condition (presence of abrasions and bruises);

(c) testimony of Ms V., who was cross-examined in open court and provided account of the one incident of robbery she witnessed and of the complaints of the victim regarding periodic attacks on him;

(d) testimony of Mr M. and Mr R., who were cross-examined in open court and provided an account of the scope of property, which was in the victim's possession before the attacks and relations between the victim and the accused;

(e) report of confrontation of the applicant and the victim, complaint of a crime recorded by the police, medical certificates, police line-up record, forensic examination report etc.

8. During the trial the victim's representative submitted to the trial court a notarised statement of the victim acknowledging that all his accusations against the applicant were slanderous. Since the victim did not attend the hearing in person, the prosecution insisted on reading out his pre-trial statements. The applicant and his defence lawyer objected to this. The Butyrskiy District Court of Moscow allowed the reading out of the statements. It reasoned that the notarised statement of Mr. K. could not be taken into consideration, because there was evidence that it had been procured by the relatives of the accused after they had privately paid compensation to the victim. Further, the court stated that the notary public authenticated the statement on the basis of the certificate of the loss of identity papers, while validity of this certificate could not be verified with the issuing body. In the view of the victim's absence at trial the District Court concluded that only pre-trial statements could be accepted as evidence and be read out.

9. The applicant and his defence lawyer lodged an appeal. On 15 June 2005 the Moscow City Court upheld the conviction and the sentence in full. The court considered the applicant's arguments concerning conflicting statements and the absence of Mr K., but dismissed them because the trial court had complied with the requirements of the domestic procedural law.

B. 25257/06 Ablayev v. Russia, lodged on 11 May 2006

10. The applicant, Mr Aydin Aydinovich Ablayev, is a Russian national, who was born in 1957 and lived until his arrest in Leninogorsk, Tatarstan Republic.

11. The facts of the case, as submitted by the applicant, may be summarised as follows.

12. In 2005 the criminal proceedings were initiated against the applicant on suspicion of multiple counts of aggravated illegal sale of drugs. On 11 July 2005 he was remanded in custody.

13. On 29 December 2005 the Leninogorskiy Town Court of Tatarstan Republic convicted the applicant. He was found guilty of five counts of illegal sale of drugs, aggravated illegal sale of drugs, and attempted illegal sale of drugs and sentenced to nine years and six months' imprisonment and

a fine of 20,000 Russian roubles (RUB). The applicant was acquitted of charges for one count of illegal sale of drugs.

14. According to the judgment, between March 2004 and July 2005 the applicant procured from unidentified sources approximately 10 grams of heroin, which he divided and packed as individual doses and handed over to Ms K., Ms N., and Ms Z. for distribution.

15. After the police became aware of the applicant's activities they organised in July 2005 two test purchases in the course of which an undercover policewoman purchased heroin from him. On 9 July 2005, during the second test purchase, the applicant was apprehended by the police.

16. The judgment was based on the following evidence:

(a) testimony of the undercover policewoman, who was cross-examined in open court and provided a detailed account of the events related to two counts of illegal sale of drugs by the accused;

(b) testimony of two policemen, who were cross-examined in open court and provided an account of the test purchase in which they took part;

(c) testimony of Ms N. (distributor of drugs), who was cross-examined in open court and provided a detailed account of the transfer of drugs to her by the applicant with the purpose of distribution;

(d) pre-trial statement of Ms K. (distributor of drugs) read out in open court. Her statement concerned transfer of drugs to her by the applicant with the purpose of distribution;

(e) statements of other policemen, police line-up records, forensic examination reports, documentary evidence etc.

17. The applicant and his defence lawyer objected to reading out Ms K.'s pre-trial statement and insisted on examining the witness. The Town Court allowed the reading out of the statements relying on 1) the fact that Ms K. was convicted and served her sentence in another region, and 2) request of Ms K. to read out her statements, because her transfer to Leninogorsk with the view of being examined in open court would be contrary to the interests of her newborn child to whom she provided care.

18. The applicant and his defence lawyer lodged an appeal. On 10 February 2006 the Supreme Court of Tatarstan Republic upheld the conviction and the sentence in full. It considered the applicant's arguments about inability to obtain attendance of Ms K. and to examine her, but dismissed them with reference to the reasons provided by the trial court.

C. 13789/11 Kuzmich v. Russia, lodged on 6 February 20011

19. The applicant, Mr Dmitriy Aleksandrovich Kuzmich, is a Russian national who was born in 1973 and lived until his arrest in Moscow. He is represented before the Court by Mr V. V. Okhramenko, a lawyer practising in Moscow.

20. The facts of the case, as submitted by the applicant, may be summarised as follows.

21. In 2009 criminal proceedings were initiated against the applicant on suspicion of aggravated extortion and robbery with violence committed

against three victims, Mr D., Mr F., and Mr Sh. On 5 February 2009 he was remanded in custody.

22. On 29 March 2010 the Basmanniy District Court of Moscow convicted the applicant. He was found guilty of aggravated extortion and robbery with violence and sentenced to nine years' imprisonment.

23. According to the judgment, on 29 January 2009 the applicant together with two unidentified persons conspired to criminally acquire property of Mr D., a musical producer, by threatening to use violence. After gaining access to the apartment of Mr D. under false pretences of using his services, they obtained from him the property worth RUB 238,000 and extorted the money by forcing him to sign a fraudulent loan receipt for RUB 1,800,000. Further, with the threat of use of violence they obtained from Mr F. and Mr Sh., who were in the apartment at the time, RUB 1,500 and RUB 73,360, respectively.

24. On 3 February 2009 the applicant went back to Mr D.'s apartment and demanded payments under the loan receipt he had procured. He was apprehended by the police on the spot.

25. The judgment was based on the following evidence:

(a) testimony of Mr D. (first victim), who was cross-examined in open court and provided a detailed account of the events related to extortion and violent acts of the accused;

(b) pre-trial statements of Mr F. and Mr Sh. (second and third victims) read out in open court. Their statements concerned the extortion which they witnesses and the robbery of which they were victims;

(c) testimonies of police officers, who were cross-examined in open court and provided an account of initial arrest, search, and interrogation of the applicant;

(d) reports of confrontations between the applicant and the victims, video surveillance records, forensic examination reports, documentary evidence etc.

26. The applicant and his defence lawyer objected to reading out the statements and insisted on examining the witnesses. The District Court allowed the reading out of the statements relying on the evidence presented by the prosecution that Mr F. and Mr Sh. were citizens of foreign countries and absent from the Russian Federation.

27. The applicant and his defence lawyer lodged an appeal. On 18 August 2010 the Moscow City Court upheld the conviction in part related to extortion, but annulled the part related to robbery with violence as excessive. The sentence was reduced to seven years and six months' imprisonment.

28. It appears from the summary of the applicant's arguments contained in the appellate court's judgment that he complained about inability to obtain the attendance of Mr F. and Mr Sh. However, the Moscow City Court did not specifically address this complaint.

D. 57248/11 Loginov v. Russia, lodged on 30 August 20011

29. The applicant, Mr Dmitriy Olegovich Loginov, is a Russian national, who was born in 1976 and lived until his arrest in Saint Petersburg.

30. The facts of the case, as submitted by the applicant, may be summarised as follows.

31. In 2008 criminal proceedings were initiated against the applicant on suspicion of aggravated embezzlement. Subsequently, the charge was altered to aggravated fraud. On 31 July 2008 he was remanded in custody, but was released on 5 September 2008 on his own recognizance.

32. On 20 December 2010 the Tsentralniy District Court of Sochi convicted the applicant. He was found guilty of aggravated fraud and sentenced to five years' imprisonment. He was arrested in the courtroom.

33. According to the judgment, between December 2005 and December 2006 the applicant, acting as a director of AT Ltd., conspired with Mr R. and other unidentified persons to fraudulently appropriate money of one of the shareholders, Mr B. In order to achieve that goal they convinced Mr B. to entrust them monetary funds, which would have been invested in development of a network of filling stations and storages in Abkhazia. Pursuing this plan the applicant and his associates fraudulently appropriated RUB 57,105,203 from Mr B. In July – December 2006 the applicant, Mr R., and other unidentified persons destroyed the accounting and financial records of AT Ltd. and replaced them with forged documents certifying that the money was loaned to the company by Mr R. Subsequently, Mr R. lodged a lawsuit against the company before a court in Abkhazia and recovered the money by producing the forged documents.

34. The judgment was based on the following evidence:

(a) testimony of Mr B. (victim), who was cross-examined in open court, and his pre-trial statements on the various aspects of the events;

(b) testimony of Mr M. (legal counsel of AT Ltd.) who was cross-examined in open court and provided an account of the judicial proceedings initiated by Mr R. and transfer of money from Mr B. to the applicant;

(c) pre-trial statements of Ms K. and Ms T. (accountants of AT Ltd.) read out in open court. Their statements concerned financial activities of the company and transfer of money from Mr B. to the applicant;

(d) pre-trial statement of Mr K. (bodyguard of Mr B.) read out in open court. His statement concerned the manner in which the money were transferred by Mr B. to the applicant;

(e) pre-trial statements of Mr Sh., Mr S., Ms M., Ms S. (directors and accountant of affiliated companies) read out in open court. Their statements concerned financial activities and accounting of AT Ltd., the contacts between the applicant and Mr B., and the transfer of money;

(f) pre-trial statements of Mr Kh. and Ms K. (financial consultant and auditor, respectively) read out in open court. Their statements concerned attempts to conduct independent assessment of the financial activities and accounting of AT Ltd.;

(g) pre-trial statements of twelve other witnesses (employees of AT Ltd. and affiliated companies) read out in open court. Their statements concerned various aspects of the events mentioned above;

(h) records of searches and seizure of documents, reports of ten pre-trial confrontations, fourteen forensic examination reports and expert statements, multiple other documentary evidence etc.

35. The applicant and his defence lawyer objected to the reading out of the statements and insisted on examining the witnesses. The Tsentralniy District Court of Sochi allowed reading out the statements relying on the evidence presented by the prosecution that the witnesses' presence could not be ensured.

36. The applicant and his defence lawyer lodged an appeal. On 2 March 2011 the Krasnodar Regional Court upheld the conviction and the sentence in full. It considered the applicant's arguments about inability to obtain attendance of the witnesses and to examine them, but dismissed them because the trial court had complied with the requirements of the domestic procedural law.

B. Relevant domestic law and practice

1. Code of Criminal Procedure

37. The Code of Criminal Procedure of the Russian Federation of 2001 (CCrP), which entered into force on 1 July 2002, provides that a victim or a witness of a crime shall normally be examined in court.

38. Article 240 of the Code provides as follows:

> "1. All the evidence should normally be presented at a court hearing ...The court should hear statements of the defendant, victim, witnesses ... and examine physical evidence ...
>
> 2. The reading of pre-trial depositions is only permitted under Articles 276 and 281 of the Code ..."

39. Pre-trial statements of a victim or a witness, who is absent during the trial, may be read out in the court upon the motion of one of the parties or upon the own motion of the court (Article 281 § 1-2). Article 281 § 2 of the Code provides for the list of grounds for pre-trial statements to be read out. In the relevant part it reads as follows:

> "2. In case of absence at the court hearing of a victim or a witness the court may upon the motion of a party or upon its own motion decide to read out the previously given statements, in case of:
>
> 1) death of a victim or a witness;
>
> 2) grave illness precluding appearance in court;
>
> 3) refusal of a victim or a witness who is a foreign citizen to appear under the summons of the court;
>
> 4) natural disaster or other exceptional circumstances precluding appearance in court."

2. Supreme Court

40. The Plenum of the Supreme Court of the Russian Federation has clarified that under Article 281 § 1 of the CCrP the reading out of the pre-trial statements of absent witnesses is in principle possible with the consent of both prosecution and defence. However, in exceptional cases prescribed by Article 281 § 2, the statements may be read out without the consent of

both parties (see Decree of the Plenum of the Supreme Court of the Russian Federation of 5 March 2004 No. 1).

3. Constitutional Court

41. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading out of pre-trial depositions should be considered as an exception to the court's own assessment of evidence and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insists on calling a witness whose testimony may be important to the case, the court should take all available measures to ensure the presence of the witness in court. When that witness is available for questioning, the reading out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, when the witness is not available for questioning, the defence should still be provided with appropriate procedural safeguards such as challenge to the read-out deposition, a request for challenge by way of examining further evidence, as well as pre-trial face-to-face confrontation between that witness and the defendant when the latter was given an opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

COMPLAINTS

The applicants complain under Article 6 § 3 (d) of the Convention about inability to obtain attendance of witnesses against them and to examine these witnesses during trial.

Further, the applicants complain under Articles 3, 5, and 6 of the Convention about various other aspects related to the criminal proceedings against them.

QUESTIONS TO THE PARTIES

1. Did the applicants have a fair hearing in the determination of the criminal charge against them, in accordance with Article 6 § 1 of the Convention? Specifically, were the applicants able to examine the witnesses against them as required by Article 6 § 3 (d) of the Convention?

2. Responding to the questions above the Government are requested to address the following points:

(a) Were the applicants' convictions based solely or to a decisive degree on the statements of the witnesses absent from trial? (see *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II)

(b) Did the competent national courts assess the impact of the absence of witnesses on the fairness of the proceedings?

(c) Were the applicants able to examine the witnesses against them during the pre-trial proceedings? Specifically:

(i) Were they able to put questions to these witnesses and to submit their objections?

(ii) Were the applicants assisted by defence lawyers in examining the witnesses against them during the pre-trial proceedings?

(iii) Did the confrontation procedure conducted by the State officials meet the requirements of independence and impartiality? (see *Melnikov v. Russia*, no. 23610/03, § 80, 14 January 2010)

(d) Was there a good reason for the absence of the respective witnesses during trial?

(e) Did the national authorities make reasonable effort to secure presence of these witnesses during trial as requested by the applicants? Were these efforts duly reviewed by the domestic courts? (see *Bonev v. Bulgaria*, no. 60018/00, § 43 with further references, 8 June 2006)

3. The Government are invited to provide where available:

(a) the copies of reports on pre-trial confrontations of the applicants with the witnesses absent from trial;

(b) the copies of police reports and other relevant documents on the attempts to secure presence of these witnesses during trial.

APPENDIX

No	Application No	Lodged on	Applicant Date of birth	Represented by
1.	9445/06	11/11/2005	**Yevgeniy Ruslanovich SHESTAKOV** 19/02/1983	Larisa Ivanovna KULPINA
2.	25257/06	11/05/2006	**Aydin Aydinovich ABLAYEV** 29/06/1957	
3.	13789/11	06/02/2011	**Dmitriy Aleksandrovich KUZMICH** 23/02/1973	Vladimir Vladimirovich OKHRAMENKO
4.	57248/11	30/08/2011	**Dmitriy Olegovich LOGINOV** 03/11/1976	