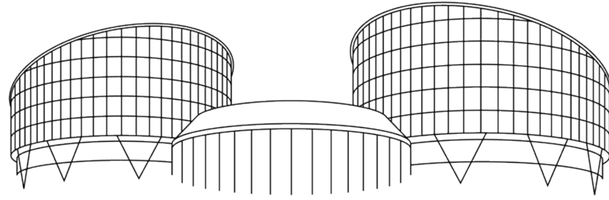

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BORISOV v. RUSSIA

(Application no. 12543/09)

JUDGMENT

STRASBOURG

13 March 2012

FINAL

13/06/2012

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Borisov v. Russia,

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 21 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 12543/09) 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 Vyacheslav Viktorovich Borisov (“the applicant”), on 13 January 2009.

2. The applicant was represented by Mr A. Burkov, a lawyer practising in Yekaterinburg. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, that the conditions of his pre-trial detention had been inhuman and degrading. He also claimed that his right to defend himself in person had been violated.

4. On 30 November 2009 the Court decided to apply Rule 41 of the Rules of Court and to give notice of the application to the Government. The Court further decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Yekaterinburg.

A. Criminal proceedings

6. On 1 September 2008 the Chkalovskiy District Court, Yekaterinburg, convicted the applicant of aggravated fraud and sentenced him to seven years' imprisonment. The operative part of the judgment provided:

> "The judgment may be appealed against in the Sverdlovskiy Regional Court... If an appeal is lodged, the convicted person has the right to ask for leave to appear before the appeal court".

7. According to the applicant, on 7 September 2008 he lodged a preliminary statement of appeal, in which he sought, among other things, leave to appear before the appeal court. It appears that the statement was lost and that the applicant became aware of that fact no later than 13 October 2008.

8. On 20 October 2008 the applicant introduced a full statement of appeal, followed by two addenda on 27 October and 14 November 2008. None of these documents referred to his request to appear in person.

9. On 21 November 2008 the Sverdlovsk Regional Court held an appeal hearing and upheld the conviction. Counsel for the applicant, though not the applicant himself, was present and made oral submissions.

B. Conditions of detention

10. On 1 September 2008 the applicant was placed in Yekaterinburg remand centre IZ-66/1. It appears that he was held there at least until 7 June 2010, the date of the latest correspondence with the Court.

11. The Government produced, among others, three documents dated 14 January 2010 from the director of remand prison IZ-66/1, which stated that the applicant was an inmate in cells 327, 413, 424 and 425.

12. According to the documents, the applicant was detained in cell 327 from 1 September to 9 December 2008 and from 22 December 2008 to 29 April 2009. The cell measured 31 sq. m and was equipped with twelve bunk beds. During the above periods it held from thirteen to twenty-nine and from eight to twenty detainees respectively.

13. Cell 413, occupied by the applicant from 9 to 22 December 2008, measured 9 sq. m and had two bunk beds. During the indicated period it held two inmates.

14. Cell 424, where the applicant was detained from 29 April to 2 September 2009 and from 3 September 2009 to at least 7 June 2010, measured 27 sq. m and was equipped with ten bunk beds. It held from three to twelve and from five to eleven detainees during these periods.

15. Cell 425 was occupied by the applicant from 2 to 3 September 2009. It measured 15 sq. m and was equipped with four bunk beds. A total of two inmates stayed in the cell during that period.

16. The applicant disputed the Government's submissions concerning the number of inmates and the number of bunk beds. He claimed that cell 327 had contained up to forty-five and cell 424 up to sixteen detainees. He also alleged that cell 327 had had eighteen bunks, and that cell 424 had been equipped with eight sleeping places. The applicant pointed out that he had frequently had to share his bunk with other inmates.

17. According to the applicant, the cells were poorly lit and ventilated. The toilet pan was not separated from the living area by any partition. He was not provided with any toiletries or individual bedding, and a shower was allowed only every ten days. The diet was inadequate.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS

18. For a comprehensive summary of the domestic and international standards of conditions of detention in remand prisons, see *Benediktov v. Russia* (no. 106/02, §§ 20 and 21, 10 May 2007).

19. The Code of Criminal Procedure requires appeal courts to verify the legality, validity and fairness of first-instance judgments (Article 360 § 1). A convicted person held in custody who expresses a wish to be present at the examination of an appeal shall be entitled to participate either directly in the court session or to state his case by video link. The court shall make a decision with respect to the form of participation of the convicted person in the court hearing. A convicted person who has appeared before the court shall always be entitled to take part in the appeal hearing (Article 376 § 3).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

20. The applicant complained that the conditions of his pre-trial detention violated Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

21. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

22. The Government submitted that the applicant had not been subjected to torture, inhuman or degrading treatment or punishment during the period of his detention, and that the conditions of his detention had been compatible with Russian law and the requirements of Article 3 of the Convention.

23. The applicant submitted that the cells had been severely overcrowded. With the exception of the short periods spent in cells 413 and 425, he was afforded no more than 3 sq. m of personal space and had to take turns with other detainees to sleep.

24. The Court observes that there are certain discrepancies in the parties' submissions concerning the number of sleeping places and the actual number of detainees, as demonstrated by the documents submitted by the Government (see paragraphs 11-15 above) and the by applicant's account (see paragraph 16 above). However, both parties agree that the occupancy rate regularly exceeded the design capacity of the cells and that most of the time the applicant was afforded less than 3 sq. m of personal space.

25. The Court reiterates that in many cases in which detained applicants had at their disposal less than three square metres of personal space, it has already found that the lack of personal space afforded to them was so extreme as to justify in itself a finding of a violation of Article 3 of the Convention (see, among many others, *Pitalev v. Russia*, no. 34393/03, § 47, 30 July 2009; *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, § 98, 12 February 2009; *Vlasov v. Russia*, no. 78146/01, § 81, 12 June 2008; *Kantyrev v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Andrey Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005; *Mayzit v. Russia*, no. 63378/00, § 40, 20 January 2005; *Tsarenko v. Russia*, no. 5235/09, § 51, 3 March 2011; and *Nisiotis v. Greece*, no. 34704/08, § 39, 10 February 2011). The Court is also mindful of the fact that the cells in which the applicant was detained contained some furniture and fittings, such as bunk beds and the lavatory, which must have further reduced the floor area available to him. The Court finds that the applicant was detained in those cramped conditions for more than one year and ten months.

26. The Court notes that even though there is no indication that there was a positive intention to humiliate or debase the applicant, the Court finds that the fact that he was obliged to live, sleep and use the toilet in the overcrowded cell was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and to arouse in him feelings of anguish and inferiority capable of

humiliating and debasing him (see *Tsarenko,* cited above, § 52, and *Nisiotis*, cited above, § 37).

27. Having regard to its case-law on the subject and the material submitted by the parties, the Court concludes that the conditions of the applicant's detention in Yekaterinburg remand prison IZ-66/1 were inhuman and degrading and thus violated Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

28. The applicant complained that his right to take part in the appeal hearing had been violated. He relied on Article 6 §§ 1 and 3 (c) of the Convention, the relevant part of which read as follows:

> "1. ...[E]veryone is entitled to a fair... hearing... by an independent and impartial tribunal... .
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing..."

29. The Government contested that argument, claiming that at no point had the applicant informed the authorities of his wish to participate in the appeal hearing. In any event, the applicant had been represented by counsel, who had attended the hearing and represented his position to the court.

30. The applicant maintained his complaint. He argued that he had made an explicit request to attend the appeal hearing personally in his preliminary statement of appeal, which had been lost. The applicant further claimed that since Russian appeal courts can examine questions both of law and of fact, his presence at the hearing would have been essential even if he had not made such a request, otherwise the proceedings could not be considered adversarial.

A. Admissibility

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

32. The Court has previously established that the guarantees of Article 6, in particular the right to be present and to participate effectively in a hearing, apply not only to first-instance trial, but also to proceedings in courts of appeal (see, among other authorities, *Kulikowski v. Poland* (revision), no. 18353/03, § 59, 21 December 2010).

33. This is particularly important for the Russian legal system, where the appeal courts have jurisdiction to deal with questions of law, as well as questions of fact pertaining both to criminal liability and to sentencing. They are empowered to examine evidence and additional materials submitted by the parties directly, with the effect that they may uphold a first-instance judgment, quash or amend it, or remit the case for a fresh trial (see paragraph 19 above).

34. However, the guarantees of Article 6 are not absolute. According to the Court's case-law, neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, entitlement to the guarantees of this provision (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII). But such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner, be attended by minimum safeguards commensurate with its importance, and should not run counter to any important public interest (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003, and *Sejdovic v. Italy* [GC], no. 56581/00, § 87, 1 March 2006; *Hermi*, cited above, § 74; and *Panovits v. Cyprus*, no. 4268/04, § 68, 11 December 2008).

35. It remains to be determined whether, in the circumstances of the case, the applicant can be said to have implicitly, through his conduct, waived his right to appear before the appeal court.

36. Under Russian law, the applicant's right to participate in the appeal hearing, directly or by video link, was conditional on making a request to that effect (see paragraph 19 above). Such a requirement does not in itself contradict the Convention, if the procedure is clearly set out in the domestic law and complied with by all participants of the proceedings (see *Kononov v. Russia*, no. 41938/04, § 40, 27 January 2011).

37. It is not disputed by the parties that the applicant was aware that he had to ask for leave to appear. He had been apprised of this requirement in the operative part of the first-instance judgment (see paragraph 6 above). Furthermore, a request to that effect appears to have featured in his preliminary statement of appeal.

38. After the applicant learned that his preliminary statement had been lost, he introduced a new statement of appeal and two addenda, which were duly received and examined by the domestic courts. However, the applicant, who was assisted by a professional lawyer of his choosing, did not reiterate

his request to attend personally in any of the subsequent documents without giving any explanation as to why he omitted to do so.

39. In such circumstances, the Court concludes that the applicant failed to inform the Russian authorities of his wish to attend the appeal hearing personally, and thus, through his conduct, he implicitly waived that right.

40. As to the adversarial character of the proceedings, the Court notes that the applicant was represented by counsel at all stages of the proceedings, including the appeal hearing. Moreover, the applicant did not explain in his submissions why it was important for him to be personally present in the courtroom and what specific statements or evidence, distinct from those made by counsel, he wished to lay before the appeal court. Accordingly, there is no indication that the adversarial character of the proceedings was compromised.

41. In the light of the foregoing considerations, the Court concludes that there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) as regards the applicant’s absence from the appeal hearing.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant complained under Article 6 of the Convention about the outcome of the criminal proceedings and alleged violations of the presumption of innocence and of his right to adequate time and facilities to prepare his defence. Also, he complained under Article 13 of a lack of effective domestic remedies and, with reference to Article 14, of discrimination on the ground of his political opinions.

43. Having considered his submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

44. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 15,000 euros (EUR) in compensation for non-pecuniary damage incurred as a result of the infringement of his Convention rights.

47. The Government contested the claim for compensation for non-pecuniary damage, considering the amount excessive.

48. Making an assessment on an equitable basis and taking into account its case-law, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

49. The applicant also claimed EUR 2,275 for costs and expenses incurred before the Court.

50. The Government did not comment.

51. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant did not submit any documents confirming that the expenses to which he refers have actually been incurred, and rejects his claim for costs and expenses.

C. Default interest

52. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the conditions of the applicant's pre-trial detention and his absence from the appeal hearing admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention as regards the inhuman and degrading conditions of the applicant's detention in Yekaterinburg remand prison IZ-66/1;

3. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the applicant's absence from the appeal hearing;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant, to be converted into Russian roubles at the rate applicable on the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President