



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

FIRST SECTION

CASE OF DAMIR SIBGATULLIN v. RUSSIA

(Application no. 1413/05)

JUDGMENT

This judgment was revised in accordance with Rule 80 of the Rules of Court in a judgment of 28 May 2014.

STRASBOURG

24 April 2012

FINAL

24/09/2012

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

In the case of Damir Sibgatullin 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 3 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 1413/05) 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 Damir Darifovich Sibgatullin (“the applicant”), on 6 December 2004.

2. The applicant, who had been granted legal aid, was represented by Mr M. Rachkovskiy, a lawyer practising in Moscow. The Russian Government (“the Government”) were represented by Mrs V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been tried and convicted by a jury certain members of which had been partial, and that he had been unable to confront any witness for the prosecution.

4. On 3 September 2007 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3 of the Convention). When communicating the application to the Government, the Court asked them to produce copies of the witnesses’ statements, for the purpose of clarifying the evidentiary basis for his conviction.

5. On 22 November 2007 the Government submitted their observations on the admissibility and merits of the application, enclosing a number of items from the applicant’s criminal case file, but not including the witnesses’ depositions. They informed the Court that the requested documents would be submitted as soon as the Government had received them “from the relevant bodies of the Russian Federation”.

6. By letter on 30 November 2007 the Court acknowledged receipt of the Government's observations, with the enclosures, and invited them to submit copies of the statements as soon as possible.

7. On 20 December 2007 the Government provided the Court with the English translation of their observations. No attachments were enclosed apart from those submitted by the Government on 22 November 2007.

8. Following the receipt of the applicant's observations in which he raised an issue of the Government's compliance with their obligations under Article 38 of the Convention, on 13 February 2008 the Court notified the Government that copies of the witnesses' statements had still not reached it. The Court once again reiterated its request for documents.

9. The Government requested an oral hearing. However, the Chamber decided not to hold a hearing in the case. The Government did not submit the documents required by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1974 and is serving a sentence in a correctional colony in Kineshemskiy District, Ivanovo Region.

11. Criminal proceedings were instituted against the applicant in Uzbekistan. The prosecution suspected that in February 1998 he and a Mr A. had robbed and murdered an elderly woman in Tashkent. After the murder they had allegedly packed the victim's body in a box and given the box to bus drivers at a local market to transport it to a supermarket in another town. The applicant and his accomplice had also allegedly sold the victim's property, including furniture, carpets, clothes, and household utensils, to a number of individuals in the days following the murder.

12. According to the Government, after committing the criminal offences the applicant fled Uzbekistan and returned to Russia. On an unspecified date Russian prosecution officials opened a criminal case against the applicant for crimes allegedly committed in Uzbekistan. On 17 November 2003 the applicant was arrested and placed in a detention facility in Ivanovo.

13. In 2004 the applicant was committed for jury trial.

14. On 24 April 2004 the Ivanovo Regional Court initiated the jury selection process. Twenty-five people reported for jury duty on that day.

15. Three potential jurors were excused for personal reasons. The prosecution successfully challenged one potential juror for cause and made

two successful peremptory challenges. The defence made two jury challenges for cause and two peremptory challenges, which were accepted.

16. A jury of twelve was selected and two alternates appointed. It appears from the record of the jurors' responses to the questions asked by the presiding judge that close relatives of five jurors worked for the police and at the Service for Execution of Sentences. In particular, the husband of juror no. 2 and the son of juror no. 4 worked as traffic police officers. The son-in-law of juror no. 3 was employed by the Service for the Execution of Sentences. The husbands of jurors nos. 11 and 13 worked for the police as telecommunications and radio operators respectively. In addition, two jurors on the panel had been victims of criminal offences. In 2000 juror no. 1 had been attacked by a drunk person, but the matter was subsequently settled out of court. In 1994 the son of juror no. 6 died as a result of a house collapse.

17. After the jury had been empanelled and sworn in, defence counsel challenged the entire jury venire upon account of partiality. The defence alleged that the fact that certain jurors had been victims of criminal offences could influence their judgment. The challenge for the array was dismissed.

18. On 24 November 2003 the President of the Ivanovo Regional Court sent a letter to Uzbek law-enforcement officials asking for assistance. The letter, in so far as relevant, read as follows:

"In compliance with the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993), which came into force for Uzbekistan on 19 March 1994 and for Russia on 10 December 1994, the Ivanovo Regional Court asks competent officials of the Republic of Uzbekistan to provide legal assistance in a criminal case...

According to the case-file materials all the witnesses the court wants to call to testify in the present case live in the Republic of Uzbekistan.

In this respect, [I] ask you to provide legal assistance in ensuring the appearance of the witnesses in the criminal case before the Ivanovo Regional Court... at 10 a.m. on 20 January 2004, by serving the individuals listed below with the enclosed summons and by providing [the Ivanovo Regional] court with documents confirming that the summonses have been served:

[The Ivanovo Regional Court enclosed a list of thirteen witnesses, including their dates of birth and home addresses. All but two of the witnesses, lived in Tashkent. The remaining two were registered in the town of Dzhizak]."

A similar letter was sent on 26 November 2003 by the Russian Ministry of Justice to the Ministry of Justice of the Republic of Uzbekistan.

19. On 20 February 2004 the Ivanovo Regional Court issued a decision, which read as follows:

"[The applicant] is accused of murdering, on 22 February 1998, together with Mr A., an elderly woman, Ms B., in Tashkent, with the intention of taking her property.

[The prosecution] included Mr A. on the list of those to be heard in court as witnesses for the prosecution... Mr A. [who had already been found guilty of those offences by a court in Uzbekistan and sentenced to eighteen years' imprisonment] is currently serving his sentence in [a correctional colony] in the town of Almalyk in the Tashkent Region of Uzbekistan.

Having regard to the fact that pursuant to Article 240 of the Russian Code of Criminal Procedure all items of evidence in a case, including statements by witnesses, are to be examined in open court, [I] consider it necessary to take steps to ensure the presence of that witness at a court hearing, in compliance with the requirements of international law.

Paragraph 5 of Article 456 of the Russian Code of Criminal Procedure, which defines how a person who is detained in a foreign State is to be called to a court hearing, refers to paragraph 3 of Article 453 of the Russian Code of Criminal Procedure, by virtue of which a request for legal assistance is to be submitted in accordance with an international agreement between the Russian Federation [and the foreign State]. The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993...)... plays the role of that international agreement in the present case.

Article 78.1 of the Convention provides for the possibility of conveying a person who is serving a sentence (if he agrees) to be questioned as a witness, following a decision by the Prosecutor General of the requesting State.

By virtue of Article 80 of the Convention the actions in question which require authorisation by a prosecutor (a court) are to be carried out by prosecuting authorities within the procedure defined by the Prosecutors General of the two States."

On the same day the President of the Ivanovo Regional Court, relying on the norms of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters ("the Minsk Convention"), sent similar letters to the offices of the Prosecutor General of the Russian Federation and that of the Republic of Uzbekistan. The court president asked the prosecuting authorities of the both countries to convey the applicant's associate, Mr A., to Russia for him to testify in open court in the criminal case against the applicant.

20. In January 2004 the Ivanovo Regional Court received information regarding attendance by two witnesses from the list. A judge from the Dzhizak Town Court in Uzbekistan informed the Regional Court that the whereabouts of one witness were unknown and that another witness could not travel to Russia in view of his difficult financial situation. The judge also noted that the second witness stood by the statements he had given to the investigating authorities.

On 17 and 19 April 2004 the Regional Court received e-mails from two other witnesses who, in similar wording and citing their difficult family situation and poor health, informed the court that they were unable to attend the trial. The witnesses also gave their full support to the statements made during the pre-trial investigation. A telegram from another witness arrived

on 23 April 2003. This witness refused to travel to Russia, citing poor health. The Regional Court did not receive any information pertaining to the remaining witnesses.

21. On 22 April 2004 the Ivanovo Regional Court held a trial hearing.

22. The prosecution requested the Regional Court to read out statements made by the prosecution witnesses and the applicant's associate, Mr A., to the Uzbek authorities, arguing that it was impossible to obtain their attendance. Four witnesses failed to appear for various personal reasons and the remaining witnesses lived in Uzbekistan. The applicant and his counsel objected, relying on the defendant's right to cross-examine witnesses testifying against him. The applicant noted that during the pre-trial investigation he had repeatedly asked the investigating authorities to hold confrontation interviews with the witnesses. However, his requests had been dismissed without any explanation.

23. The Regional Court agreed to read out statements by the four prosecution witnesses who had failed to appear for personal reasons, finding those reasons to be valid. As regards statements by the remaining witnesses and Mr A., the Regional Court held as follows:

"During the last six months the court has taken all lawful steps to ensure the witnesses' presence, and certain witnesses have sent in information which confirmed that they had been summoned properly. Due to the fact that other witnesses live in another State, and taking into account that they confirmed their statements in a court hearing in the Tashkent City Court [during the trial against Mr A.], [the court] considers that the present extraordinary circumstances preclude their attendance [and] decides to read out the statements of the ... witnesses who failed to appear."

The Regional Court read out statements by the remaining six prosecution witnesses and by Mr A. It also announced the results of photo-identification parades conducted by the Uzbek investigating authorities during which the witnesses had identified the applicant and Mr A.

24. A copy of the court hearing records presented to the Court by the parties show that in addition to the witnesses' depositions the Regional Court studied the records of the crime scene examinations of 15 and 20 March 1998, an autopsy report, a document confirming the victim's identity, a search report, a warrant for the applicant's arrest and records of pre-trial confrontation interviews between Mr A. and the witnesses whose statements had been read out by the Regional Court. The Court further heard the applicant and his parents, who denied the applicant's involvement in the robbery and murder and insisted that at the time of the crime he was staying with his family in Russia.

25. At the same hearing the applicant accused the prosecution of jury tampering and sought the discharge of the entire panel. He claimed that juror no. 1 had tapped the prosecutor on the hand and the prosecutor had responded with a nod of the head. Defence counsel supported the accusation claiming that he had witnessed the incident. The prosecutor denied the

incident, stating that he was not acquainted with juror no. 1. Juror no. 1, in response to questions from the presiding judge, stated that he had not known the prosecutor before the trial and that he had never had a conversation with him. The presiding judge, without giving any reasons, dismissed the applicant's challenge to the empanelled jury.

26. The parties' closing arguments followed. The defence argued that there was no material evidence, such as fingerprints, bloodstains and so on, linking the applicant to the criminal offences, and that the applicant had been denied an important right to cross-examine witnesses against him.

27. On 7 May 2004 the jury, by eight to four votes, found the applicant guilty of aggravated murder and robbery.

28. On 12 May 2004 the Ivanovo Regional Court accepted the verdict and sentenced the applicant to eighteen years' imprisonment.

29. The applicant and his lawyer appealed, arguing that the jury had not been fair and impartial because certain jurors had been victims of criminal offences and the prosecution had tried to exert improper influence on at least one of the jurors. They further alleged a violation of the applicant's rights, having regard to the fact that at no stage of the proceedings had either he or his lawyer been offered the opportunity to question the prosecution witnesses.

30. On 8 July 2004 the Supreme Court of the Russian Federation upheld the conviction, finding that the investigating authorities and the Regional Court had not committed any serious violations of the criminal procedural law.

II. RELEVANT DOMESTIC LAW

A. Jury selection process

31. The Russian Code of Criminal Procedure provides that an officer of a court or a judge's assistant has to compile a list of jury candidates for the trial. The candidates are to be drawn at random from the district or regional list of jurors. The candidates' names are entered in the list in the order in which their lots were drawn. The list of jury candidates is then served on the parties. The parties have the right to make an unlimited number of challenges for cause and two peremptory challenges to potential jurors. The presiding judge decides on the challenges. After deleting the names of the successfully challenged candidates, the court secretary or the judge's assistant makes up the list of the remaining jury candidates, whose names are to appear in the same order as in the first list. The twelve candidates whose names appear first on the list form the jury, and the two candidates whose names appear next become substitutes. Before the jury is sworn in, the parties may challenge the entire panel if they argue that due to particular

features of a criminal case the panel will be unable to render an objective verdict. The presiding judge is to decide on any such challenge to the empanelled jury (Articles 326–330).

B. Witnesses

1. General provisions

(a) Code of Criminal Procedure of 2001 in force since 1 July 2002

32. Earlier statements made by a victim or witness may be read out if the parties give their consent to it and if (1) there are substantial discrepancies between the earlier statement and the later statement before the court or (2) the victim or the witness has not appeared before the court (Article 281 § 1).

33. The court may, without seeking the consent of the parties, read out earlier statements by the defaulted a victim or witness in case of (1) death, (2) serious illness, (3) the refusal to appear by a victim or the witness who is a citizen of another States or (4) natural disaster or other *force majeure* circumstances (Article 281 § 2).

34. Chapter 5 of the Code determines steps to be taken when asking foreign authorities for legal assistance. In particular, Article 453 provides that a prosecutor, an investigator or a court, when they need to carry out an interrogation, a search, seizure or any other procedural action in the territory of a foreign State, may ask assistance from investigating or judicial officials of that State to organise/perform that procedural action. Records of procedural actions performed by foreign officials on a request by Russian authorities will have the same evidentiary weight as evidence received by Russian officials in the territory of the Russian Federation (Article 455). Article 456 deals with the issue of summoning witnesses who live outside the Russian Federation to give statements regarding a criminal case pending before Russian authorities.

2. Law on measures aimed at ensuring the attendance of witnesses and victims

(a) The 1993 Minsk Convention

35. The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (signed in Minsk on 22 January 1993 and amended on 28 March 1997, “the 1993 Minsk Convention”), to which both Russia and Uzbekistan are parties, provides that a witness and a victim who are subjects of one Contracting Party can be summoned, for the purpose of their examination, by a “body of justice” of another Contracting Party. The

witness and the victim are entitled to reimbursement of travel, and certain other, costs and expenses incurred in connection with their participation in the criminal proceedings (Section 9).

(b) Code of Criminal Procedure

36. If a witness or a victim does not obey a summons to appear without a valid reason, they may be brought to a courtroom under escort (Article 113).

37. Witnesses and victims are entitled to reimbursement of costs and expenses incurred in connection with their participation in criminal proceedings (Article 131).

38. Witnesses and victims who live abroad may be summoned, with their consent, to criminal proceedings conducted in the Russian Federation (Article 456 § 1).

C. Reopening of criminal proceedings

39. Article 413 of the Russian Code of Criminal Procedure, setting out the procedure for reopening of criminal cases, reads, in so far as relevant, as follows:

“1. Court judgments and decisions which became final should be quashed and proceedings in a criminal case should be re-opened due to new or newly discovered circumstances.

...

4. New circumstances are:

...

(2) a violation of a provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms committed by a court of the Russian Federation during examination of a criminal case and established by the European Court of Human Rights, pertaining to:

(a) application of a federal law which runs contrary to provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(b) other violations of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms;

(c) other new circumstances.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

40. The applicant complained, under Article 6 §§ 1 and 3 (d) of the Convention, that he had been denied a fair hearing in that he had not been given an opportunity to confront any witness testifying against him. He further complained of irregularities in the jury selection process and prosecution's attempts to tamper with the jury, as well as various procedural violations allegedly committed by the trial court. Article 6 reads, in so far as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law....

...

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

...

(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. Admissibility

41. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 6 of the Convention on account of inability to confront witnesses

(a) Submissions by the parties

42. Having cited the Court's judgments in the cases of *Isgrò v. Italy* (19 February 1991, Series A no. 194-A), and *Lüdi v. Switzerland* (15 June 1992, Series A no. 238), the Government argued that the Convention does not preclude the use of statements by witnesses who have only been interviewed by investigating authorities and whose appearance before a trial

court cannot be obtained. The Government further turned to the assessment of the circumstances in the present case. In particular, they stated that the applicant was responsible for the investigating authorities' inability to set up confrontation interviews with the witnesses, as he had absconded and left Uzbekistan. The applicant had asked for an opportunity to question the prosecution witnesses only after the criminal case against him had been opened in the Russian Federation. The Government stressed that the Russian authorities had taken every reasonable step to obtain attendance by the witnesses. They had sent requests for legal assistance to Uzbek officials, asking for the witnesses to be summoned. However, the witnesses had been unable to attend, for family or health reasons. The whereabouts of one witness had been unknown. Given the fact that it had taken the Russian officials almost six months to settle the issue of the witnesses' attendance, the Government considered it logical that the Ivanovo Regional Court had accepted a request from the prosecution for reading out of the pre-trial statements, despite the applicant's and his lawyer's objections. Furthermore, the Government insisted that, when summoned for the hearings in Russia and questioned on the reasons for their inability to attend, the witnesses had also been asked to corroborate or dispute their statements made during the pre-trial investigation. The witnesses had fully supported their account of the events, of which the Regional Court had been notified by electronic mail messages. The Government concluded by noting that the Russian courts had assessed the entire set of evidence and had taken the correct decision on the applicant's guilt. The Government reminded the Court that the assessment of evidence was within the exclusive competence of the domestic courts.

43. Having denied responsibility for the absence of confrontation interviews between him and the witnesses, the applicant submitted that, even assuming that his leaving Uzbekistan had made it impossible for the Uzbek authorities to set up such interviews, he could not bear responsibility for the Russian authorities' failure to comply with their obligation under Article 6 § 3 (d) of the Convention. The applicant further argued that the witnesses the Uzbek authorities had been able to find when requested to do so by the Ivanovo Regional Court and who lived in different towns, had sent similar e-mails at the same time. The e-mails had not been signed and it was impossible to verify whether they were authentic and whether, in fact, the witnesses had been able to recollect and confirm their statements made during the pre-trial investigation. The applicant insisted that the only direct evidence implicating him in the crimes he had been found guilty of was the statements by the prosecution witnesses. Therefore, it was important for the trial court to hear the witnesses in person and to provide the applicant with an opportunity to cross-examine them.

(b) The Court's assessment

44. Given that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1, it is appropriate to examine these complaints under the two provisions taken together (see *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203).

45. The Court observes that the Ivanovo Regional Court read out statements by ten prosecution witnesses and Mr A., the applicant's alleged accomplice in the murder and robbery. Neither the witnesses nor Mr A. appeared before the jury or gave statements in open court. At this juncture the Court would like to note that Mr A. in this case should, for the purposes of Article 6 § 3 (d), be regarded as a "witness", a term to be given an autonomous interpretation (see *Asch*, cited above, p. 10, § 25), because his written depositions made during the pre-trial investigation were read out in court and used as evidence against the applicant.

i. Waiver of the right to examine witnesses

46. The first question to be decided is whether by leaving Uzbekistan, where the majority of the pre-trial investigative actions, including interviewing witnesses, had been carried out, the applicant had, as the Government put it, waived his right to have those witnesses examined, and thus exempted the Russian authorities from their commensurate obligation under the Convention. On this point, the Court reiterates its constant case-law 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, including the right to examine or have examined witnesses testifying against him (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII, with further references, and, more recently, *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007). However, a waiver must not run counter to any important public interest, must be established in an unequivocal manner and requires minimum guarantees commensurate to the waiver's importance (see *Blake v. the United Kingdom*, no. 68890/01, § 127, 26 September 2006).

47. The Court does not interpret the applicant's alleged actions as an express or implied waiver of his right to confront the witnesses against him. It is not convinced by the Government's argument that if the applicant had stayed in Uzbekistan he could have had an opportunity to take part in confrontation interviews with the prosecution witnesses, and there could accordingly have been no issue as regards the witnesses' absence from the trial. Firstly, the Court reiterates that the very fact of the participation of an accused person in confrontation interviews with witnesses during the pre-trial stage cannot of itself strip him or her of the right to have those witnesses examined in court (see *Melnikov v. Russia*, no. 23610/03, §§ 79-81, 14 January 2010). Should it be otherwise, prosecution authorities would be left with virtually unlimited powers and would replace courts in

their truth-finding function, with the fundamental requirement for a fair trial having little reality or worth. Furthermore, in the Court's view, there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights. The conclusion is more salient in a case of a person without sufficient knowledge of his prosecution and of the charges against him and without the benefit of legal advice to be cautioned on the course of his actions, including on the possibility of his conduct being interpreted as an implied waiver of his fair trial rights. The Court reiterates that the applicant was only notified in person of the criminal proceedings against him upon his arrest in Russia in November 2003. It thus could not be inferred merely from his status as a fugitive from justice, which was founded on a presumption with an insufficient factual basis, that he had waived his right to a fair trial (see *Sejdovic v. Italy* [GC], no. 56581/00, §§ 99-101, ECHR 2006-II).

48. The Court further observes that as a matter of principle the waiver of the right must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003). It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly renounce them and agree to proceed with the trial without, for instance, being afforded an opportunity to examine witnesses against him. The Court, however, considers that the right to confront witnesses, being a fundamental right among those which constitute the notion of fair trial, is an example of the rights which require the special protection of the knowing and intelligent waiver standard. The Court is not satisfied that sufficient safeguards were in place in the present case for it to be considered that the applicant had decided to relinquish his right. There is no reason to conclude that the applicant should have been fully aware that by leaving Uzbekistan he was abandoning his right to confront witnesses, or, for that matter, that he understood the nature of that right and could reasonably have foreseen what the consequences of his conduct would be (see *Bonev v. Bulgaria*, no. 60018/00, § 40, 8 June 2006, with further references, and *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 66, 10 November 2005).

ii. Inability to confront witnesses and use of their pre-trial statements as the basis for conviction

49. The Court must further establish whether the use of the statements by the prosecution witnesses made during the pre-trial investigation,

coupled with the fact that the applicant was not able to confront them in court, amounted to a violation of his right to a fair trial.

50. According to the Court's case-law, the right to a fair trial requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her, either when the statements were made or at a later stage of the proceedings (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). The Court reiterates the principles laid down in its judgment of *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 119 and 147, 15 December 2011), according to which where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

51. The Court further observes that the rights of the defence require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when the statements were made or at a later stage of the proceedings (see *Saïdi*, cited above, § 43; and *A.M.*, cited above, § 25). The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. In particular, in the event that the witnesses cannot be examined and that this is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (see *Artner v. Austria*, 28 August 1992, § 21 *in fine*, Series A no. 242-A; *Delta v. France*, 19 December 1990, § 37, Series A no. 191-A; and *Rachdad v. France*, no. 71846/01, § 25, 13 November 2003).

52. Turning to the facts of the present case, the Court reiterates that the applicant's conviction was based on the pre-trial depositions by the eleven witnesses for the prosecution, including the applicant's alleged accomplice Mr A., and material evidence. The applicant and his parents, heard by the trial court, argued that the fact that he was in Russia at the time of the crime rendered it impossible for him to be the guilty party.

53. As to the material evidence, the records, materials and exhibits presented by the prosecution were proof that the murder and robbery had, in fact, taken place. They did not have any probative value allowing the conclusion that the applicant had committed the criminal offences in question (see paragraph 24 above).

54. The Court notes that it was not able to study the content of the statements by the eleven prosecution witnesses, because the Government had failed to furnish the said records. Drawing inferences from the

Government's conduct (see *Velikova v. Bulgaria*, no. 41488/98, § 77, ECHR 2000-VI) and taking into account the evidential value of the material evidence, the Court concludes that the depositions made by the eleven witnesses during the pre-trial investigation and read out by the Regional Court constituted virtually the sole direct and objective evidence on which the court's findings of guilt were based.

55. The Court observes that the witnesses, who were all in Uzbekistan, did not appear at the trial for various reasons: Mr A. was serving a sentence, the whereabouts of one witness could not be established, and the remaining nine witnesses, according to the Government, failed to appear for personal reasons, such as lack of financial means, family situation or poor health (see paragraph 20 above). The Court, however, notes that the Regional Court did not have information explaining the reason for the absence of five of the eleven witnesses from the prosecution list. In fact, the trial court was not even aware whether the witnesses had been summoned (see paragraphs 20 and 23 above). It also appears that it never received a response from the Uzbek authorities regarding Mr A.'s attendance. The Regional Court, nevertheless, proceeded with the reading out of the depositions by those five witnesses and Mr A., having noted that attempts to obtain their presence had already taken six months (see paragraph 23 above). While the Court is not unmindful of the domestic courts' obligation to secure the proper conduct of the trial and avoid undue delays in the criminal proceedings, it does not consider that a stay in the proceedings for the purpose of obtaining witnesses' testimony or at least clarifying the issue of their appearance at the trial, in which the applicant stood accused of a very serious offence and was risking a lengthy prison term, would have constituted an insuperable obstacle to the expediency of the proceedings at hand (see *Vladimir Romanov v. Russia*, no. 41461/02, § 104, 24 July 2008, with further references, and, most recently, *Krivoshapkin v. Russia*, no. 42224/02, § 60, 27 January 2011). The authorities chose to eschew that stay. As a result, those witnesses never appeared to testify before a court in the presence of the applicant.

56. The Regional Court excused the remaining witnesses, considering their absence to be justified either in view of their personal circumstances or because Uzbek officials had been unsuccessful in their attempts to find them. Regard being had to the circumstances of the case, the Court has serious doubts that the decision to accept the explanations and to excuse the witnesses could indeed be accepted as warranted. It considers that the Regional Court's review of the reasons for the witnesses' absence was not convincing. Whilst such reasons as inability to bear the costs of travel to Russia, poor health or a difficult family situation are relevant, the trial court did not go into the specific circumstances of the situation of each witness, and failed to examine whether any alternative means of securing their depositions in person would have been possible and sufficient. It also does

not escape the Court's attention that under the relevant provisions of the Russian law witnesses were afforded a right to claim reimbursement of costs and expenses, including those of travel, incurred as a result of their participation in criminal proceedings (see paragraphs 35 and 37 above). The Court reiterates that paragraph 1 of Article 6 taken together with paragraph 3 requires the State to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). The Court is concerned with the Regional Court's failure to look beyond the ordinary means of securing the right of the defence to cross-examine witnesses, for instance by setting up a meeting between the applicant's lawyer and witnesses in Uzbekistan (see paragraph 34 above and, *mutatis mutandis*, *Mirilashvili v. Russia*, no. 6293/04, § 223, 11 December 2008) or using modern means of audio-visual communication to afford the defence an opportunity to put questions to the witnesses. Furthermore, while the Court understands the difficulties encountered by the authorities in terms of resources, it does not consider that reimbursing travel costs and expenses to the key witnesses for them to appear before the trial court would have constituted an insuperable obstacle (see *Krivoshapkin*, cited above, § 60, with further references). Having regard to the above considerations, the Court finds that the decision to excuse witnesses from appearing was not sufficiently convincing, and that the authorities failed to take reasonable measures to secure their attendance at the trial.

57. The Court would also like to address the Government's argument regarding the fact that those witnesses whom the Uzbek authorities had been able to contact on the Regional Court's behalf had entirely corroborated their statements given on previous occasions. The Court finds it of relevance that the applicant was never provided with an opportunity to follow up the manner in which the witnesses had been questioned by the investigator or to test the credibility of his accusers and the reliability of their statements during a face-to-face confrontation. Furthermore, as the witnesses' statements to the investigator were not recorded on video, neither the applicant nor the jury was able to observe their demeanour under questioning and thus form their own impression of their reliability (see, *a contrario*, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-II). The Court does not doubt that the domestic courts undertook a careful examination of the witnesses' statements, took into account the fact that they had not changed their account of events, and gave the applicant an opportunity to contest them at the trial, but this can scarcely be regarded as a proper substitute for a personal observation of the leading witnesses giving oral evidence (see *Vladimir Romanov*, cited above, § 105).

58. In these circumstances, the Court finds that the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witnesses' statements, which were of decisive importance for his conviction and consequently he did not have a fair trial. There has thus been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) on that account.

2. Other alleged violations of Article 6 of the Convention

59. The Court reiterates that the applicant raised additional complaints under Article 6 of the Convention, having alleged various procedural violations on the part of the trial court, including those that called into question its composition and partiality. In this connection the Court reiterates its finding that the fairness of the criminal proceedings against the applicant was undermined by the limitations imposed on the rights of the defence due to the absence of an opportunity to confront the witnesses. It therefore considers it unnecessary to examine separately whether the fairness of the proceedings was also breached in view of other irregularities complained of by the applicant (see *Komanický v. Slovakia*, no. 32106/96, § 56, 4 June 2002).

II. THE GOVERNMENT'S COMPLIANCE WITH ARTICLE 38 OF THE CONVENTION

60. Relying on Article 38 of the Convention, the applicant alleged that the Government had not cooperated sufficiently with the Court. The relevant provisions of Article 38 § 1, as they stood at the material time, read as follows:

“If the Court declares the application admissible, it shall

(a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;”

61. The applicant complained that the Government had failed to submit copies of the statements by the prosecution witnesses, which were necessary for the examination of the application. He also denounced the fact that the Government had not even indicated the date by which they had intended to provide the requested documents.

62. By a letter of 3 March 2008 containing their further observations in the case, the Government stressed that they had submitted their observations on 22 November 2007 and the attachments on 27 November 2007. Although, according to the Government, the attachments had been sent a week after the observations, they had, nevertheless, submitted them within the time-limit set out by the Court in its communication letter. The

Government thus considered that they had complied with their obligations under the Convention.

63. Noting that Article 29 § 3 of the Convention, as that provision stood at the material time, was applied at the time of communication of the present application (see paragraph 4 above), the Court considers that in the absence of a separate decision on admissibility it retained jurisdiction under Article 38 of the Convention, as it read at the material time, to examine the relevant events which took place during the subsequent proceedings (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 295, 26 April 2011).

64. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrikulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government's part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (see *Medova v. Russia*, no. 25385/04, § 76, 15 January 2009, and *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI).

65. The Court notes that on 22 November 2007 it received the Government's observations, with ten documents attached. The attachments did not include copies of the witness statements requested from the Government by the Court in the communication letter of 6 September 2007. The Government's initial explanation for their failure to enclose the statements was that the documents were in the possession of unspecified authorities in the Russian Federation. The Government also insisted that they had fulfilled their obligation under the Convention, as they had submitted the attachments on 27 November 2007.

66. However, the Court, received no further documents related to the present case after the Government's letter of 22 November 2007. On 30 November 2007, noting that the Government had not complied with the request to provide copies of the witness statements, the Court asked them to send those documents as soon as possible. The Court notes that upon receipt of the repeated request for the documents the Government did not contact the Court to clarify the issue, as, according to them, by that time the documents were already in the Court's possession.

67. The Court also does not overlook the fact that the Government's letter of 20 December 2007, with the English translation of their observations and enclosures, did not list copies of the witness statements

among the documents which the Government had sent to the Court. It was not until March 2008, following the applicant's complaint under Article 38 of the Convention and the Court's third request to submit copies of the witness statements, that the Government replied that they had submitted the documents as attachments on 27 November 2007. However, the Court observes that the Government formulated their reply in general terms and did not explicitly state that the witness statements had been among the attachments. It was also open to the Government to resubmit the records of the witness statements or to enclose a copy of the letter which had allegedly been sent to the Court on 27 November 2007. However, they did not do so. The Court therefore cannot but conclude that the Government failed to produce a copy of the witness statements, despite repeated requests to that effect.

68. Having regard to the importance of cooperation by the respondent Government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court finds that the Russian Government's failure to respond diligently to the Court's requests for the evidence it considered necessary for the examination of the application, such as witness statements, cannot be reconciled with the Government's obligations under Article 38 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government submitted that the claim was excessive and unreasonable.

72. The Court considers that an award of just satisfaction must be based in the present case on the fact that the applicant did not have a fair trial because he had no opportunity to examine the witnesses against him. He undeniably sustained non-pecuniary damage as a result of the breach. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

73. Lastly, the Court refers to its settled case-law to the effect that, where it finds that an applicant has been convicted despite a potential 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 trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006; and *Vladimir Romanov*, cited above, § 118). The Court notes in this connection that by virtue of Article 413 of the Russian Code of Criminal Procedure the applicant has the right to have the criminal proceedings against him reopened when the Court finds a violation of the Convention.

B. Costs and expenses

74. The applicant did not make any claims for costs and expenses incurred before the domestic courts and the Court.

75. Accordingly, the Court does not award anything under this head.

C. Default interest

76. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) on account of the absence of a proper and adequate opportunity to challenge the statements by the prosecution witnesses;
3. *Holds* that it is not necessary to examine separately the applicant's further complaints under Article 6 pertaining to the impartiality of the jury and various procedural irregularities at the trial;
4. *Holds* that there has been a violation of Article 38 of the Convention;

5. *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 4,000 (four thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable on the date of the settlement, plus any tax that may be chargeable;

(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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President