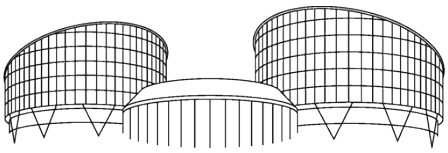

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KOZLITIN v. RUSSIA

(Application no. 17092/04)

JUDGMENT

STRASBOURG

14 November 2013

FINAL

14/02/2014

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

In the case of Kozlitin v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Khanlar Hajiyev,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 22 October 2013,

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

PROCEDURE

1. The case originated in an application (no. 17092/04) 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 Vitaliy Vyacheslavovich Kozlitin ("the applicant"), on 31 March 2004.

2. The applicant, who had been granted legal aid, was represented by Ms O.V. Preobrazhenskaya, a lawyer practising in Strasbourg. The Russian Government ("the Government") were represented by Ms V. Milinchuk, their former Representative at the European Court of Human Rights, and subsequently by Mr G. Matyushkin, their Representative.

3. The applicant alleged, in particular, that his right to defend himself in person had been violated in that the appeal court had dismissed his request to participate in the appeal hearing.

4. On 17 January 2008 the application was communicated to the Government.

5. The Government objected to the joint examination of the admissibility and merits of the case. The Court examined and dismissed their objection.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lived before his arrest in the Kaliningrad region. He is currently serving a prison sentence in a correctional colony in the Kaliningrad region.

7. The applicant stood trial on charges of robbery and murder before the Kaliningrad Regional Court ("the Regional Court").

8. On 10 June 2003 the Regional Court found the applicant guilty of robbery and aggravated murder, and sentenced him to twenty years' imprisonment with forfeiture of estate. The applicant's co-defendant, Sh., was found guilty of conspiring to commit robbery, incitement to commit robbery, aiding and abetting, and concealing evidence of murder.

9. Regarding the applicant's right to appeal against his conviction, the judgment of 10 June 2003 stated as follows:

> "The judgment may be appealed against to the Supreme Court of the Russian Federation by lodging grounds of appeal with the Kaliningrad Regional Court within ten days of the date of the pronouncement of the judgment. Convicted persons held in detention may appeal against the judgment within the same time-limit, which starts to run from the day when they received a copy of the judgment.
>
> If an appeal is lodged, the convicted persons are entitled to apply for participation in the examination of their case by the appeal court."

10. The record of the hearing before the trial court, which was issued on 16 June 2003, stated as follows:

> "The procedure for lodging an appeal against the judgment within ten days of its pronouncement was explained [to the parties], as was the procedure for convicted persons to lodge appeals within the same time-limit, starting to run from the date on which they received a copy of the judgment.
>
> The right to apply for leave to take part in the examination of the case by the appeal court was also explained".

11. On 17 June 2003 a copy of the judgment of 10 June 2003 was served on the applicant.

12. On 24 June 2003 the applicant's co-defendant appealed against the judgment of 10 June 2003 to the Supreme Court of the Russian Federation ("the Supreme Court"). He submitted that it was him and not the applicant who had committed the murder, but that the trial court had not verified his version of the events.

13. The Government submitted that on an unspecified date the applicant had appealed against the judgment of 10 June 2003. However, the Regional Court had returned his grounds of appeal to him for correction. In its accompanying letter the Regional Court advised the applicant that his

grounds of appeal should comply with the requirements of Article 375 of the Code of Criminal Procedure ("the CCrP"). The Government did not provide the Court with a copy of that letter.

14. On 5 July 2003 the applicant, who was detained in Kaliningrad remand prison, submitted a corrected version of his grounds of appeal against the judgment of 10 June 2003. He complained, in particular, that he had not committed the impugned crimes and had an alibi which the trial court had refused to verify; police officers had ill-treated him during the pre-trial investigation to extort a confession from him; and his conviction had been based on statements by witness P. and his co-defendant, Sh., given during the pre-trial investigation under pressure by police officers, and which they had refuted before the trial court. Moreover, Sh. had confessed before the trial court to having committed the murder himself. The applicant asked the appeal court to quash his conviction. When lodging his appeal, the applicant did not expressly state that he wished to take part in the appeal hearing.

15. According to the Government, on 3 November 2003 the Regional Court informed all the participants of the proceedings, including the applicant and his counsel, that the criminal case had been referred to the Supreme Court.

16. On 10 November 2003 the applicant submitted a request to take part in the examination of his appeal by the Supreme Court. On 17 November 2003 the applicant's co-defendant also applied for leave to take part in the appeal hearing. According to the Government, the Supreme Court received those requests on 26 November 2003.

17. On 26 November 2003 the applicant submitted additional grounds of appeal, which were received by the Supreme Court on 2 December 2003. However, he did not state in his additional grounds of appeal that he wished to take part in the appeal hearing.

18. On 18 December 2003 the Supreme Court of the Russian Federation ("the Supreme Court"), referring to Articles 375 § 2, 376 and 377 of the CCrP (see Relevant domestic law below), dismissed the requests submitted by the applicant and his co-defendant to take part in the appeal hearing. The Supreme Court held as follows:

> "... on 10 November 2003 Mr Kozlitin submitted a request to take part in the examination of his criminal case by the appeal court.
>
> It follows from the materials of the case that the judgment was delivered on 10 June 2003 and copies of that judgment were served [on the convicted persons] on 17 June 2003.
>
> ... on 5 July 2003 Mr Kozlitin submitted his grounds of appeal, in which he did not express his wish to take part in the appeal hearing.

> On 3 November 2003 the case, together with grounds of appeal submitted by the convicted persons, was forwarded to the Supreme Court of RF [Russian Federation] ... The case arrived at the Supreme Court on 10 November 2003.
>
> It was not until 10 and 17 November 2003 respectively that the convicted persons [the applicant and his co-defendant] submitted requests for participation in the appeal hearing.
>
> However, their requests should not be granted, since in accordance with Article 375 § 2 of the UPK RF [CCrP] if a convicted person expresses a wish to take part in the examination of his case by the appeal court, he should indicate this in his grounds of appeal.
>
> The convicted persons did not indicate in their grounds of appeal their wish to be brought to the Supreme Court of the RF [Russian Federation]. Instead they lodged such requests five months later, when their case had already arrived at the Supreme Court of the RF".

19. On the same date the Supreme Court examined the appeals lodged by the applicant and his co-defendant against the judgment of 10 June 2003 in their absence. The applicant was not represented at that hearing. The prosecutor was present at the hearing and supported upholding the applicant's conviction. He requested reclassification of the applicant's actions in accordance with amendments to the Criminal Code.

20. Having studied the materials of the case, the appeal court found that the trial court had verified Sh.'s version of the events whereby he and not the applicant had committed the murder. However, that version had not been confirmed by the materials of the case. The applicant's alibi had been verified and had been disproved by the statements of witness Shch., which had also been corroborated by other evidence. Furthermore, the defendants' complaints of unlawful pressure by the police were unsubstantiated and refuted by evidence in the case.

21. On the same date the Supreme Court reclassified the crimes committed by the applicant. In particular, it excluded a number of aggravating circumstances and amended the applicant's sentence to exclude forfeiture of his estate. The Supreme Court upheld the rest of the judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Russian Federation

22. Under the Constitution of the Russian Federation, all persons are equal before the law and the court (Article 19 § 1).

23. Any person convicted of a crime has the right to appeal against the verdict to a higher court in accordance with the procedure established by

federal law, as well as to request pardon or mitigation of the punishment (Article 50 § 3).

B. New Code of Criminal Procedure of the Russian Federation of 18 December 2001, in force since 1 July 2002 ("the CCrP")

1. Appeal proceedings (as in force until 1 January 2013)

24. A defendant in criminal proceedings is entitled to participate in the examination of the criminal case by the courts of first instance, second instance and supervisory instance, and in the proceedings in which the court examines the measure of restraint to be imposed (Article 47 §§ 4-16).

25. The appeal court will verify the legality, validity and fairness of the trial court judgment. The appeal court is empowered to reduce the sentence imposed on the convicted person or apply the law relating to a lesser offence, but has no power to impose a more severe penalty or apply the law relating to a more serious offence (Article 360).

26. If a convicted person wishes to take part in the appeal hearing, he must indicate this in his statement of appeal (Article 375 § 2).

27. The parties will be notified of the date, time and place of an appeal hearing no later than fourteen days in advance. The court will decide whether to summon a convicted person held in custody. If the convicted person held in custody has expressed a wish to be present at the examination of the appeal, he or she is entitled to participate either directly in the court session or by video link. The court will decide the form of participation of the accused person in the court session. A defendant who has appeared before the court will always be entitled to take part in the hearing. If persons who have been given timely notice of the venue and time of the appeal hearing fail to appear, this will not preclude examination of the case (Article 376 §§ 2-4).

28. At the hearing the appeal court will hear the statement of the party who lodged the appeal and the objections of the opposing party. The appeal court will be empowered, if a party so requests, to directly examine evidence and additional materials provided by the parties in an attempt to support or disprove the arguments cited in the statement of appeal or in the statements of the opposing party (Article 377).

29. The appeal court may decide to dismiss the appeal and uphold the judgment, to quash the judgment and terminate the criminal proceedings, to quash the judgment and remit the case for a fresh trial, or to amend the judgment (Article 378).

2. Procedure for lodging applications and petitions

30. Chapter 15 sets out a procedure for lodging applications and petitions by participants of criminal proceedings. A suspect or defendant, or his or her defence counsel, has the right to lodge applications with the investigator, prosecutor or a court to conduct procedural actions or to take procedural decisions to establish the circumstances that are of importance for the criminal case and also for ensuring the rights and legitimate interests of the person lodging the application or the person he represents (Article 119). Applications can be lodged at any time in the course of the proceedings in a criminal case (Article 120).

3. Procedure for reopening of criminal proceedings

31. Chapter 49 of the Code sets out a procedure for reopening of the criminal case in view of new and newly discovered circumstances. It provides, in particular, that a judgment, a court finding or ruling that has taken legal effect may be reversed, and proceedings in the criminal case may be reopened in the event that the European Court of Human Rights has established that in the course of examining the criminal case, a court of the Russian Federation, has violated the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 413). There are no time-limits for reviewing a judgment of conviction in view of new or newly discovered circumstances in favour of the convicted person (Article 414).

C. Practice of the Russian Constitutional Court

32. The Constitutional Court has examined a number of complaints challenging the compatibility with the Constitution of provisions of the old Code of Criminal Procedure (in force until 1 July 2002) and the new Code of Criminal Procedure (in force since 1 July 2002) governing participation of a person convicted of a criminal offence by a first-instance court in the examination of his appeal against conviction by a second-instance court.

33. In its leading ruling of 10 December 1998 on a complaint lodged by Mr B., the Constitutional Court held as follows:

> "... implementation of constitutional guarantees of judicial protection ... implies that a convicted person who has expressed a wish to take part in a court hearing may not be deprived of the opportunity to file objections and lodge petitions, acquaint himself with the position of [other participants] expressed in the court hearing and additional materials of the case, if any, and to provide explanations, including in relation to the prosecutor's opinion.
>
> ... Those guarantees may be implemented not only by providing the convicted person with an opportunity to participate in the court hearing in person, but also in other ways. In particular, a convicted person may entrust his defence to a lawyer of

> his own choosing, and provide written replies to the arguments contained in the grounds of appeals, protests and submissions to the appeal court by other participants in the proceedings. What is significant in the constitutional context is that in the interests of justice a convicted person who has expressed a wish to take part in the court hearing should be provided with an effective opportunity to state his position regarding all aspects of the case and bring it to the attention of the court.
>
> ... The challenged provision of the [old] CCrP ... does not prevent the appeal court, which is under an obligation to verify the lawfulness and validity of the judgment, from finding that the participation of a convicted person in the court hearing is indispensable and taking measures to ensure his presence at the hearing. The court may also examine the case in the absence of the convicted person if he has not expressed the wish to take part in the court hearing.
>
> At the same time, those provisions allow the appeal court to dismiss the convicted person's request to participate in the hearing and to take a final decision in the case without providing him with any other legal means for implementation of his rights ... This results in a deviation from the principle of equality of all persons before the law and the court and in the limitation of the constitutional rights to judicial protection, examination of the case by a tribunal established by law, and review of the judgment by a higher court ... Moreover, this breaches Article 123 of the Constitution, which guarantees that court proceedings will be adversarial and will respect equality of arms. Those guarantees imply that the prosecution and the defence should be provided with equal procedural opportunities to state their position during the examination of the case by the appeal court ..."

Taking the above considerations into account, the Constitutional Court held that the challenged provisions of the old CCrP were incompatible with the Constitution in so far as they allowed the appeal court, if it dismissed a convicted person's request to take part in the hearing, to take a final decision in the case without providing that person with an opportunity to acquaint himself with the materials of the court hearing and to state his position on the questions examined by the court.

34. In its further decisions on the complaints challenging the compatibility of the new CCrP with the Constitution, in particular of Article 375 § 2 of that Code, the Constitutional Court further developed its position regarding the participation of convicted persons in the examination of their case by the appeal court.

35. On 15 July 2010 the Constitutional Court refused to examine on the merits a complaint lodged by Mr S. challenging the compatibility with the Constitution of Article 375 § 2 of the new CCrP in so far as that provision allowed the appeal court to examine his grounds of appeal in his absence, since he had applied to participate in the examination of his criminal case by the appeal court not in his initial grounds of appeal but in additional grounds of appeal which were submitted later. The Constitutional Court held as follows:

> "In accordance with the legal position expressed by the Constitutional Court in its rulings of 10 December 1998, no. 27-П, 15 January 1999, no. 1-П and 14 February 2000, no. 2-П, and decisions of 10 December 2002, no. 315-O, 11 July 2006,

no. 351-O and 16 November 2006, no. 538-O, providing the parties with an effective opportunity to state their position regarding all aspects of the case is a necessary requirement of judicial protection and a fair trial. Depriving the convicted person of an opportunity to familiarise himself with all the materials of the case and to bring to the attention of the court arguments refuting the conclusions of the trial court, either by way of his personal presence at the appeal court hearing or by way of video link or any other way, would breach his right to judicial protection and the principle of equality of arms.

Article 375 § 2 of the [new] CCrP provides a convicted person with the right to apply for participation in the examination of his criminal case by the appeal court by indicating his wish to attend in his grounds of appeal. The provision's aim is to provide him with an opportunity to state his position on the case before the appeal court and shall not be regarded as limiting his right to judicial protection and other rights guaranteed by the Russian Constitution. In addition, the provision does not deprive the convicted person of the right to apply for participation in the appeal hearing if he makes such a request not in his grounds of appeal, but in accordance with the procedure provided for by Chapter 15 of the [new] CCrP of the Russian Federation, which places an obligation on the court to take a lawful, reasoned and duly motivated decision on such a request ..."

36. The Constitutional Court confirmed its interpretation of Article 375 § 2 of the [new] CCrP in its decision of 8 December 2011, by which it refused to examine on the merits a complaint lodged by Mr T. challenging the compatibility of that provision with the Constitution. Citing its decision of 15 July 2010, the Constitutional Court held as follows:

"... a different interpretation of Article 375 § 2 of the [new] CCrP would not only be contrary to Articles 46, 49 and 50 of the Constitution of the Russian Federation and the above-cited legal position of the Constitutional Court of the Russian Federation, but also, contrary to the general principle of equality guaranteed by Article 19 of the Constitution, it would unreasonably worsen the situation of convicted persons held in custody compared to that of the other participants of the criminal proceedings, including convicted persons who have not been deprived of their liberty, whose right to take part in the appeal court hearing is not limited (under Article 376 of the [new] CCrP a convicted person or a person acquitted of all charges who appears before the court will always be entitled to take part in the hearing).

Therefore, Article 375 § 2 of the [new] CCrP, taken together with the provisions of chapter 15 of that Code, does not prevent a convicted person from applying for participation in the examination of his criminal case by the appeal court after submitting his grounds of appeal. This implies that the court has an obligation to take a lawful, reasoned and duly motivated decision on such a request ...".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 6 § 3 (c) THEREOF

37. The applicant complained under Article 6 § 3 (c) of the Convention that he had been deprived of an opportunity to defend himself in person during the examination of his appeal against the judgment of 10 June 2003 because the appeal court refused his leave to attend the appeal hearing of 18 December 2003. The relevant parts of Article 6 provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... 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 or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ..."

A. Admissibility

1. Exhaustion of domestic remedies

38. The Government argued that the applicant had not exhausted the domestic remedies available to him in respect of the above complaint. In particular, he had not lodged an application for a supervisory review of the decision of 18 December 2003 by which the appeal court refused his leave to attend the appeal hearing of his case.

39. The applicant contested the Government's submissions.

40. The Court has previously found that a supervisory review exercised under the Code of Criminal Procedure in force from 1 July 2002 could not be considered an "effective remedy" within the meaning of Article 35 § 1 of the Convention (see *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts), and *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 42-45, 2 November 2010). It follows that the Government's objection as to non-exhaustion of domestic remedies must be dismissed.

2. Compliance with the six-month rule

41. The Government considered that the above complaint had been introduced out of time. The statement of facts prepared by the Registry of the Court indicated that the application had been introduced on 31 March 2004. However, the application form submitted by the applicant indicated

that he had filled it in on 8 July 2004, that is more than six months after the final decision taken in the applicant's case. That application was received by the Court on 2 August 2004.

42. The Court reiterates that Article 35 § 1 of the Convention permits it to deal with a matter only if the application has been lodged within six months of the date of the final decision in the process of exhaustion of domestic remedies. The Court further observes that under Rule 47 § 5 of the Rules of the Court, "The date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the subject matter of the application".

43. Turning to the present case, the Court observes that the final decision in the criminal proceedings against the applicant was taken on 18 December 2003. In a letter of 31 March 2004 addressed to the Court, the applicant set out a set of facts which gave rise to the present application and the complaint, under Article 6 § 3 of the Convention, that his right to defend himself in person before the appeal court had been violated. It appears from the postmark that the administration of the colony in which the applicant was held dispatched that letter on 2 April 2004. The Government were provided with a copy of the letter. On 8 July 2004 the applicant sent the completed application form to the Court, raising the same complaint. Given that the applicant submitted the completed application form without excessive delay, the Court decides that the date of his first letter to the Court is the date of the introduction of the application (see, by contrast *Kleyn and Aleksandrovich v. Russia*, no. 40657/04, § 39, 3 May 2012). It follows that the applicant's complaint under Article 6 § 3 was submitted within the six-month period after the final decision in the case. Accordingly, the Court dismisses the Government's objection to this effect.

3. Conclusion

44. Having regard to its conclusions in paragraphs 40 and 43 above, the Court considers that the applicant's complaint about the dismissal of his request to take part in the appeal hearing of 18 December 2003 and to defend himself in person 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

1. The parties' submissions

(a) The Government

45. The Government considered that the examination of the applicant's appeal against the judgment of 10 June 2003 complied with the requirements of Article 6 of the Convention.

46. The procedure for lodging an appeal against the conviction was clearly described in the domestic law, which set a time-limit of ten days for lodging an appeal as well as a request for taking part in the appeal hearing. The applicant was duly apprised of that procedure by the trial court at the pronouncement of the judgment and in the judgment itself.

47. Therefore, if the applicant had wished to take part in the appeal hearing, he should have followed the procedure provided for in the domestic law and lodged such a request together with his grounds of appeal within ten days of receiving a copy of the judgment on 17 June 2003. However, the applicant did not ask the appeal court to grant him leave to attend the appeal hearing either in his initial grounds of appeal which were returned to him for corrections, in his new grounds of appeal lodged on 5 July 2003 or in the additional grounds that he lodged on 26 November 2003. Instead, he submitted such a request separately on 10 November 2003, namely five months after lodging his grounds of appeal. Therefore, the Supreme Court dismissed his request for leave to appear before the appeal court on the grounds that it had not been submitted together with his grounds of appeal, as required by Article 375 § 2 of the new CCrP, but had been submitted five months after the applicant had been served with the judgment. Granting a request which was submitted with such a significant delay would have protracted the proceedings and breached the right of other participants to a hearing within a reasonable time.

48. Furthermore, the applicant's absence from the appeal hearing did not prejudice the fairness of the proceedings, since in any event the appeal court examined the arguments submitted by both the prosecutor and the defence. The applicant thoroughly explained his position on the case in his detailed grounds of appeal. The appeal court carefully examined each of those grounds and found them unsubstantiated.

49. The Government further submitted that counsel who had represented the applicant before the trial court had not submitted any grounds of appeal against conviction on the applicant's behalf. The applicant did not ask the appeal court to provide him with legal assistance for the appeal hearing and therefore the appeal court examined his appeal in the absence of defence counsel.

(b) The applicant

50. The applicant submitted that the appeal court examination of his criminal case had been as important for him as the trial proceedings, given that the appeal courts in the Russian legal system were entitled to review the case in its entirety. He lodged a special request for leave to attend the appeal hearing on 10 November 2003, having received notification that his case had been forwarded to the appeal court. However, it took the Supreme Court more than twenty-two days to examine his request. It then dismissed his request on the very date of the appeal hearing, thereby depriving him of an opportunity to appoint a representative to defend him before the appeal court. The applicant had had good reason to expect that the appeal court would either allow his participation at the appeal hearing or notify him in advance that his application had been refused so that he could have sufficient time to appoint a representative. As a result, the hearing was not adversarial since the appeal court heard the prosecutor, whereas the applicant was neither present nor represented.

51. The applicant argued that granting him leave to take part in the appeal hearing would not have delayed the proceedings, since he could have taken part in the hearing by means of video link without being transported to the court.

2. The Court's assessment

(a) General principles

52. The Court reiterates that the object and purpose of Article 6 taken as a whole implies that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89). Based on that interpretation of Article 6, the Court has held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005).

53. The personal attendance of the defendant does not necessarily take on the same crucial significance for an appeal hearing as it does for the trial (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account

must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appeal court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134).

54. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, even though the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that he had been heard by a first-instance court (see, among other authorities, *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 58, Series A no. 115, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, p. 13, § 30, as regards the court of cassation).

55. In appeal proceedings reviewing a case as to both facts and law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, judgment of 29 October 1991, Series A no. 212-C, p. 68, § 33). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appeal court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see among many other authorities, *Kremzow v. Austria*, 21 September 1993, § 59, Series A no. 268-B; *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II; and *Hermi v. Italy* [GC], no. 18114/02, § 62, ECHR 2006-...). For instance, where an appeal court has to make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).

56. The Court further reiterates that the principle of equality of arms is another feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations made and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66-67, Series A no. 211).

57. The Court also 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, entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...), and it must be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November

1993, § 31, Series A no. 277-A). Furthermore, in view of the prominent place held in a democratic society by the right to a fair trial, Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to know of the date of the hearing and the steps to be taken in order to take part where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV, and *Hermi*, cited above, § 76).

(b) Application of the above principles to the instant case

58. The Court reiterates that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. Therefore, it will examine the applicant's complaints under these provisions taken together (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

59. The Court notes at the outset that the proceedings before the trial court comprised a public hearing during which the applicant, his co-defendant and several witnesses were heard in person. Furthermore, it is not disputed that the appeal court also held a hearing at which the prosecutor was heard. The main issue to determine is whether, in the particular circumstances of the case, holding that hearing in the applicant's absence infringed his right to a fair hearing under Article 6 of the Convention.

60. The Government's main argument was that the applicant, by his own fault, lost the opportunity to be present at the appeal hearing because he had failed to inform the authorities of his wish to take part in the hearing by lodging a special request together with his grounds of appeal within ten days of the date on which he received a copy of the judgment. In other words, he had waived his right to be present at the hearing. The applicant admitted that he had lodged his request separately from his grounds of appeal, but considered that the appeal court could have granted his request.

61. The Court will first examine whether the departure from the principle that an accused should be present at the hearing could, in the circumstances of the case, be justified at the appeal stage by the special features of the domestic proceedings, viewed as a whole. It will then determine whether the applicant waived his right to be present at that hearing.

62. The Court observes that in accordance with Russian criminal procedure, as it existed at the material time, the appeal courts had jurisdiction to deal with questions of law and fact pertaining both to criminal liability and to sentencing. They were empowered to directly examine the evidence and additional materials submitted by the parties. As a result of the examination, the appeal courts could dismiss the appeal and uphold the judgment, quash the judgment and terminate the criminal proceedings, quash the judgment and remit the case for a fresh trial, or

amend the judgment (see "Relevant domestic law and practice" above, paragraphs 25, 28 and 29).

63. In his grounds of appeal the applicant contested his conviction on factual and legal grounds. He submitted, in particular, that he had not committed the impugned crimes and had an alibi which the trial court had refused to verify; he also complained that his conviction had been based on inadmissible evidence obtained under duress by police officers and that his co-defendant, Sh., had confessed before the trial court to having committed the murder himself. The applicant asked the appeal court to quash his conviction; the prosecutor asked it to uphold the applicant's conviction. Consequently, the issues to be determined by the appeal court in deciding the applicant's liability were both factual and legal. The appeal court was called on to make a full assessment of the applicant's guilt or innocence regarding the charges against him.

64. The Court further observes that the proceedings at issue were of utmost importance for the applicant, who was sentenced by the first-instance court to twenty years' imprisonment and was not represented at the appeal hearing of 18 December 2003. It does not lose sight of the fact that the prosecutor was present at the appeal hearing and made submissions.

65. Having regard to the criminal proceedings against the applicant in their entirety and to the above elements, the Court considers that the appeal court could not properly determine the issues before it without a direct assessment of the evidence given by the applicant in person. Neither could it ensure equality of arms between the parties without giving the applicant the opportunity to reply to the observations made by the prosecutor at the hearing. It follows that in the circumstances of the present case, it was essential to the fairness of the proceedings that the applicant be present at the appeal hearing.

66. The Court further observes that on 10 November 2003 the applicant unequivocally expressed his wish to take part in the appeal court examination of his criminal case. However, the Supreme Court dismissed his request on the grounds that it had been submitted separately from his grounds of appeal and five months after he had received a copy of the judgment.

67. In this regard the Court notes that under Russian criminal procedure law, as in force at the material time, the applicant was entitled to participate in the hearing in person or by video link, on condition that he made a special request to that effect (see paragraph 27 above). The Court has already held that a requirement to lodge a special request to take part in the appeal hearing would not in itself contradict the guarantees of Article 6 of the Convention if the procedure was clearly set out in the domestic law (see *Samokhvalov v. Russia*, no. 3891/03, § 56, 12 February 2009 and *Sibgatullin v. Russia*, no. 32165/02, § 45, 23 April 2009).

68. In the case of *Borisov v. Russia* (no. 12543/09, §§ 35-41, 13 March 2012) the Court found that the applicant, who had been assisted by a professional lawyer of his own choosing and had been duly apprised of the requirement to request participation in the appeal hearing, but failed to do so, through his own conduct implicitly waived that right. In the case of *Samokhvalov* (cited above, § 60), the Court found that the applicant, who was not assisted by legal counsel, had not been duly notified of the procedure to follow in order to apply for participation in the appeal hearing, and therefore it could not be said that he had waived his right to take part in the appeal hearing in an unequivocal manner.

69. In the case of *Sayd-Akhmed Zubayrayev v. Russia* (no. 34653/04, §§ 30-31, 26 June 2012) the Court had regard to the domestic practice on the issue and came to the conclusion that the procedure requiring a defendant to request participation in an appeal hearing was not clearly set out in the domestic law. The Court found as follows:

> "30. Regard being had to the domestic practice, the Court cannot subscribe to the Government's opinion that it was, indeed, incumbent on the applicant to lodge such a request within ten days following his receipt of the copy of the verdict. The Court does not lose sight of the fact that the Supreme Court of Russia provided two irreconcilable opinions on the issue. While the ruling of the Presidium of the Supreme Court of Russia of 12 April 2006 confirms the Government's assertion, a decision by the Supreme Court's Military Chamber unambiguously found such reasoning without merit ...
>
> 31. In these circumstances, the Court finds that the procedure requiring a defendant to lodge a request for participation in an appeal hearing is not clearly set out in the domestic law. Accordingly, it accepts that the applicant had duly notified the domestic judicial authorities of his intent to participate in the appeal proceedings. It is also prepared to accept that two weeks' notification does not appear unreasonable and would have allowed the appeal court sufficient time to take the necessary steps to provide for such participation".

70. The Court further observes that since its leading ruling of 10 December 1998, the Russian Constitutional Court has constantly held that providing the parties with an effective possibility to state their position regarding all aspects of the case was one of the necessary requirements of judicial protection and a fair trial. Depriving a convicted person of an opportunity to familiarise himself with all the materials of the case and to bring to the attention of the court arguments refuting the conclusions of the trial court, either by way of his personal presence at the appeal court hearing or via video link or any other way, would breach his right to judicial protection and the principle of equality of arms (see paragraph 33 above). Moreover, in other decisions the Constitutional Court has expressly stated that Article 375 § 2 did not deprive the convicted person of the right to apply for participation in the examination of his appeal if he made a such a request not in his grounds of appeal, but in accordance with procedure provided for by chapter 15 of the CCrP of the Russian Federation, which

placed an obligation on the court to take a lawful, reasoned and duly motivated decision on such a request (see paragraph 35 above).

71. Having regard to the above interpretation of Article 375 § 2 of the CCrP by the Constitutional Court, the Court finds that the applicant duly informed the domestic courts of his wish to take part in the examination of his case by the appeal court and that therefore it cannot be said that he waived his right to take part in the appeal hearing. The Supreme Court was under an obligation to take a lawful, reasoned and duly motivated decision on his request in order to provide him with an effective opportunity to familiarise himself with all the materials of the case and to bring his arguments to the attention of the appeal court.

72. However, the Supreme Court – aware that the applicant, who had been sentenced to twenty years' imprisonment by the first-instance court, denied his guilt and would not be assisted by legal counsel at the appeal hearing – dismissed his request to take part in the hearing without providing him with any other opportunity effectively to defend himself before the appeal court. The Court concedes that the applicant was detained in Kaliningrad remand prison, whereas the appeal hearing was to be held in Moscow. In order for the applicant to participate in the appeal hearing in person, certain security measures would have needed to be arranged in advance of his transfer. The Court notes, however, that it was open to the domestic judicial authorities to ensure the applicant's participation in the appeal hearing by means of a video link prescribed by the domestic rules of criminal procedure and earlier found by the Court to be compatible with the requirements of Article 6 of the Convention (see *Marcello Viola v. Italy*, no. 45106/04, §§ 63-77, ECHR 2006-XI (extracts), and *Sakhnovskiy v. Russia* [GC], cited above, § 98).

73. Having regard to its findings in paragraphs 65, 71 and 72 above, the Court considers that the criminal proceedings against the applicant in the present case did not comply with the requirements of fairness. There has therefore been a breach of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The Court has examined the remainder of the complaints raised by the applicant. However, in the light of the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearances of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage. He also claimed reinstatement of his rights at the domestic level.

77. The Government contested the applicant's claims. They considered that in the event that the Court found a violation of the applicant's rights in the present case, such a finding would constitute an adequate just satisfaction.

78. The Court considers that the applicant must have suffered feelings of injustice and frustration as a result of the violation of his right to a fair hearing. However, the amount claimed appears to be excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage. The Court further refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights 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 requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see*, mutatis mutandis, Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides the basis for the reopening of the proceedings in the event of the finding of a violation by the Court (see paragraph 31 above).

B. Costs and expenses

79. The applicant, who was granted legal aid, did not claim reimbursement of any possible further costs and expenses incurred before the domestic authorities and the Court. Accordingly, the Court considers that there is no call to award him any sum on this account.

C. Default interest

80. 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 complaint under Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) thereof concerning examination of the applicant's appeal against the judgment of 10 June 2003 in his absence admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) thereof;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 14 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President