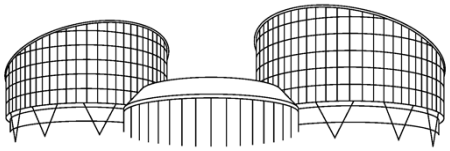

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MATYTSINA v. RUSSIA

(Application no. 58428/10)

JUDGMENT

STRASBOURG

27 March 2014

FINAL

27/06/2014

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

In the case of Matytsina v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 4 March 2014,

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

PROCEDURE

1. The case originated in an application (no. 58428/10) 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, Ms Veronika Viktorovna Matytsina ("the applicant"), on 22 September 2010.

2. The applicant was represented by Ms Ye. Karpova, a lawyer practising in Khabarovsk. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that her criminal conviction resulted from an unpredictable interpretation of the criminal law and that her trial was unfair.

4. On 14 December 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The incident involving Ms S.D. (April – June 2002)

5. The applicant was born in 1971 and lives in Khabarovsk.

6. In 1997 the Department of Justice of the Irkutsk Region registered a non-profit non-governmental association, "The Art of Living" (hereinafter

"the association"). The goals the association set out in its charter included the "promotion of social adaptation", the popularisation of a healthy lifestyle, helping people in stressful situations and improving social and family relations. In practical terms the activity of the association consisted of training sessions, lectures, personal consultations and the like. Participation in the "programmes" of the association was offered to anyone interested and was free of charge, although participants were encouraged to make voluntary contributions to support the activities of the association. The association also issued a number of brochures containing information about its goals and basic principles. The brochures explained that the association was inspired by the teachings of SriSri Ravi Shankar, a modern Indian spiritual leader. According to one of the brochures, participation in the programmes of the association would help its participants to fight insomnia and depression, strengthen their cardio-vascular systems, control their emotions and boost their natural defence mechanisms.

7. The association operated without a licence. On 2 February 2001 the association applied to the Committee on Sport and Recreation of the Administration of the Khabarovsk Region for a licence. On an unspecified date in February the Committee confirmed to the association that it did not require a licence to run its programmes, stating the following:

> "... Your type of activity, [namely] yoga seminars with application of the postures (asana) of Hatha Yoga, Bhakti Yoga, and Kriya Yoga (practising kriya pranayama, i.e. rhythmical breathing at different speeds) does not belong to the category of sports activities or health-improving gymnastics and is not listed in the Unified Russian Register of Sports Activities".

8. In the spring of 2002 Ms S.D., who was at the time a third-year student at the Institute of Pedagogy in Irkutsk (hereinafter – "the university"), enrolled in the basic programme of the association, "The Healing Breath Workshop". She enrolled together with her twin sister, Ms N.D. The applicant was one of the "instructors" of the association responsible for that programme. The course included elements of yoga, special breathing techniques, mantra singing, meditation, listening to music, aromatherapy and other similar practices. Participants were recommended to follow a certain diet and do exercises at home. The applicant claimed that she had been doing the exercises regularly herself since 1994.

9. In April 2002 Ms S.D. and her sister started to attend daily training sessions on the premises of the association. Ms S.D. contributed 700 roubles (about 20 euros) to the association as a gift. Upon completion of the course Ms S.D. was encouraged to enrol in an advanced course called "Eternity", which was run by a different instructor, Ms M.S.

10. At a certain point Ms S.D. started experiencing serious psychological problems. Her mother called the association and blamed the instructors for having turned Ms S.D. "into a zombie". According to the applicant, Ms S.D.'s mother was a fervent Orthodox Christian and did not

approve of her daughters' interest in a group which the mother described as a "sect".

11. According to Ms S.D.'s mother, after the training sessions Ms S.D. started having hallucinations and delusions, lost contact with her family, skipped classes at the university, and almost completely stopped eating. On 27 June 2002 Ms S.D.'s mother called the emergency psychiatric services for her daughter; a doctor administered an injection, which did not help. Shortly thereafter Ms S.D. fainted and was hospitalised.

12. In the following months Ms S.D. was hospitalised several times. The diagnosis initially made was "reactive psychosis". Later the doctors described her mental condition as a "stress-related schizoid disorder". The parties disagreed as to whether the disorder of Ms S.D. was serious enough to be characterised as "schizophrenia" according to the classifications of mental illness in use in Russia; subsequent expert opinions were not unanimous on that point.

13. According to the doctors at the clinic where Ms S.D. was treated, her mental condition was related to her participation in the programmes of the association, which was referred to in the medical record of 2 July 2002 as a "sect". Later entries in her medical record also mentioned the "religious" character of her delusions. Following the admission of Ms S.D. to the clinic, an internal inquiry was conducted, which concluded that her medical condition was of a "religious and occult nature" and had been caused by her participation in the programmes of the association.

14. In 2003 the association ceased its activities due to lack of funds.

15. In the years that followed, the diagnosis of Ms S.D. was re-formulated several times; in 2009 the doctors concluded that she was suffering from schizophrenia.

B. Criminal investigation; expert opinions obtained by the parties

1. Psychiatric examination of Ms S.D. (25 July 2003, report no. 1170) and opening of criminal proceedings

16. On 24 July 2003 an investigator from the Khabarovsk Region police force questioned Ms S.D. in connection with the events of April-June 2002. According to her testimony, the association received payment from the participants of the programme; the programme consisted of breathing techniques, listening to audio-recordings of the voice of the guru, and other similar practices which Ms S.D. characterised as brainwashing. Ms S.D. testified that she had almost stopped eating completely during the period she was attending the courses because the teachers had told her that food was poison. She had also dropped out of her course at the university. At some point she had lost track of the events and had returned to her normal self only in the clinic.

17. On an unspecified date in the first half of 2003 the police investigator ordered an expert examination of the alleged victim, Ms S.D.

18. On 25 July 2003 Ms S.D. was examined by a group of psychiatrists, including Dr Gul., Dr N., and Dr Ig. Dr Ig. acted as the "rapporteur" for the group of experts. In report no. 1170, the group concluded that Ms S.D. had developed an "acute schizoid psychotic disorder" which was related to her participation in the programmes of the association. The experts concluded that after 5 September 2002 Ms S.D. had regained her mental health and, at the time of examination, was capable of participating in the proceedings and giving accurate testimony to the investigator and before the court.

19. On 30 July 2003 an investigator from the Khabarovsk Region police department opened a criminal investigation under Article 235 of the Criminal Code ("Illegal medical practice"). The investigative authorities suspected that members of the association had been involved in quackery and had dispensed medical services to Ms S.D. ("the alleged victim") without the necessary licences and training. However, the investigative authorities did not charge anybody with that crime when opening the case.

2. First expert examination by the Medical Forensic Bureau (19 November 2003, report no. 197)

20. On 11 August 2003 the investigator ordered an expert examination of the activities of the association. In particular, the investigator sought to establish whether the association had been dispensing medical services to the participants of the programmes, and whether the alleged victim had suffered any damage to her health as a result of participating in those programmes. The examination was entrusted to the Medical Forensic Bureau (MFB) of the regional Public Health Department. An expert team was put together which consisted of Dr Chern. (the president), Dr Makh., Dr Bes., and Dr Ch.

21. On 17 September 2003 the investigative authorities searched the applicant's house and seized documents and literature related to the activities of the association.

22. On 19 November 2003 the MFB delivered the first report. The report was based on an examination of the materials in the criminal case file. The report noted that the techniques used by the association in its programmes were known both in conventional (scientific) and alternative ("folk") medicine circles. However, it did not answer the question as to whether those techniques were medical. It also concluded that the medical condition of the alleged victim was "most probably" related to her participation in the programmes of the association.

3. Second expert examination by the Medical Forensic Bureau (9 April 2004, no. 36)

23. On 10 December 2003 the investigator asked the MFB to carry out an "additional" (*dopolnitelnaya*) expert examination of the activities of the association. The MFB expert team was composed of Dr Chern. (the president), Dr Makh. and Dr Ch. Again, the experts did not examine Ms S.D. in person and based their conclusions on the written materials contained in the case file.

24. On 9 April 2004 the MFB delivered a second report as requested by the investigator (no. 36). The MFB again did not give a definite answer to the question of whether the association had been dispensing medical services. It noted that the charter of incorporation and other documents pertaining to the association did not contain any indication as to the medical nature of its programmes. In the opinion of the experts, it was important to distinguish between the "Eternity" programme and the other programmes of the association.

25. The experts also concluded that in the particular case of the alleged victim the techniques used by the association were at the origin of her mental disorder. The basic programme, referred to by the experts as "The Art of Living", had weakened the alleged victim physically. Her subsequent involvement in the "Eternity" programme had aggravated her somatic condition with a psychiatric disorder.

4. Position of the Ministry of Health

26. In April 2004 the investigator in charge of the case requested the opinion of the Ministry of Health of the Khabarovsk Region concerning the activities of the association. On 22 April 2004 the Acting Minister of Health replied in the following terms:

> "The practising of folk medicine ... is subject to the licensing requirement laid down in the Federal Law of 8 August 2001 "On the licensing of certain types of activities", Governmental Decree no. 499 of 4 July 2002 "On the licensing of medical activities", and Order of the Federal Ministry of Health no. 238 of 26 July 2002 "On the organisation of the licensing of medical activities", as well as on the basis of the "Basic Principles of the Legislation of the Russian Federation on Public Health" adopted on 22 July 1991.
>
> Order of the Ministry of Health no. 142 of 29 April 1998 ... is no longer in force. At present the list of medical services ... is set out in Order no. 238 of 26 July 2002.
>
> Breathing techniques and other methods listed in the list of medical services, as well as hypnotic infusion, belong to the category of 'medical activities' and must be licensed under the head 'psychotherapy' on the basis of:
>
> (1) Order of the Ministry of Health no. 438 of 16 September 2003 "On psychotherapeutic treatment";
>
> (2) Methodological recommendations ... which are annexed to Order no. 438;

(3) Psychotherapeutic Encyclopaedia by B. Karvasarskiy (2002).

The use of trancelike states as a part of Eriksonean psychotherapy is considered as a medical practice. However, that technique is not used in the 'Art of Living' programme; [the programme is based on the use of] relaxation on the basis of traditional meditation within the framework of spiritual practices, which do not require a license.

Physical exercises on the basis of yoga asanas [(postures)] are not medical activities and are not liable to the licensing requirement.

The term 'private medical practice' includes both medical services and services of folk medicine, so those notions are different."

5. Expert examination by Dr A. (5 May 2004)

27. On 22 April 2004 the investigator questioned Ms S.D. again. She largely confirmed her earlier testimony. She also explained that as a part of her participation in the "programme" she had had an obligation to practise special breathing techniques every evening for forty days in a row, and that she had not been allowed to eat meat or fish in any form. She described in detail the "Eternity" programme, which was conducted by the applicant's co-accused, Ms M.S., and described the effects that programme had had on her physical condition.

28. On 23 April 2004 the investigator ordered a new expert examination of the activities of the association. The examination was entrusted to Dr A., chief psychotherapist of the Khabarovsk Health Department.

29. The report was prepared on 5 May 2004. A copy of that report was submitted to the Court by the Government but is only partially legible.

30. The first question put to the expert concerned the licensing requirements for folk medicine. The expert replied that the licensing of folk medicine was regulated by Governmental Decree no. 238 of 26 July 2002.

31. The investigator further asked whether certain practices (such as "breath gymnastics", "hypnotic infusion", "physical exercises on the basis of yoga postures", and "entrancement") belonged to the methods of folk medicine and required a medical licence. As to "yoga postures", the expert concluded that they were not "medical activities" and did not require a licence. Concerning "breath gymnastics" and "hypnotic infusion", the expert confirmed that these were well-known psychotherapeutic methods, but they had not been used by the association. Elements of those programmes could be used by medical doctors as supplementary methods of psychotherapeutic treatment; however, the "Art of Living" programmes, according to the expert, did not have any medical purpose, were not aimed at curing ailments and, therefore, were not "medical".

6. First expert examination by Dr Iv. (23 November 2004)

32. On 12 August 2004 the investigator ordered a "forensic and legal examination" of the activities of the association. It was entrusted to the Ministry of Public Health of the Khabarovsk Region.

33. On 23 November 2004 Dr Iv., a doctor in psychiatry and the chief psychiatrist of the Health Department of the Jewish Autonomous Region, drew up a report in which he concluded that the activities of the association had been "medical" in nature and had thus required a licence.

7. Charging of the applicant and expert examination by the State Medical Academy of Krasnoyarsk

34. On 26 November 2004 the applicant was formally charged. She pleaded not guilty as from the first questioning.

35. On 16 December 2004 the defence obtained an expert opinion by four doctors from the State Medical Academy of Krasnoyarsk (including one professor of medicine). The expert team examined 118 people who had participated in the "Art of Living" programmes for at least three months. The team concluded that most of the people in the test group had observed various positive effects of the programmes, including easing of their chronic diseases, restoration of psychological balance and increased efficiency at work. The report emphasised that "moderate and consistent practice of yoga within the 'Art of Living' programme is not incompatible with chronic diseases or old age and can be recommended for rehabilitation after traumas, surgical operations and diseases". It is unclear whether that written opinion was added to the case file.

36. On 27 December 2004 the applicant's lawyer asked the investigator to carry out an additional forensic examination. From the materials in the case file it is unclear whether that examination was supposed to cover the activities of the association, the state of health of Ms S.D. or another issue. On 28 December 2004 the investigator replied that all the necessary expert examinations had already been carried out, that the applicant's guilt had been established, and that there was no need to carry out any new examinations.

8. Second expert examination by Dr Iv. (1 April 2005)

37. On 5 March 2005 the investigator commissioned a new expert examination on the activities of the association, which was again entrusted to Dr Iv. On 12 March 2005 the defence was handed a copy of the investigator's decision to order an expert examination.

38. The report was produced on 1 April 2005. It was based on the written materials of the case file. Dr Iv. started by analysing the applicable legislation. Section 57 of the Public Health Act of 1993 provided that the practising of alternative medicine (also referred to in the law as "folk

medicine", "traditional medicine" or "healing") required a "healer's diploma". Section 56 of the Public Health Act required a private practitioner to have a doctor's or paramedic's degree, a "specialist certificate" and a licence (for example, for practising "alternative medicine"). Decree no. 142 of the Ministry of Health of 29 April 1998 provided that folk medicine was subject to the licensing requirement.

39. The Licensing Act of 8 August 2001 (no. 128-FZ) and Government Decree no. 135 of 11 February 2002 included folk medicine in the list of activities subject to the licensing requirement.

40. Order of the Ministry of Public Health no. 113 of 10 April 2001 contained a glossary of "simple medical services", which included, amongst other activities, items nos. 13.30.005 ("psychotherapy") and 13.30.006 ("hypnotherapy"). The expert concluded that such services were covered by the licensing requirement and should be provided by specialists in the relevant fields.

41. Furthermore, referring to Government Decree no. 499 of 4 April 2002 on the licensing of medical services, the expert indicated that a person providing medical services was required by law to have, in addition to a special degree or training, a certain amount of work experience in their specific field of medicine. Decree of the Ministry of Public Health no. 238 of 26 July 2002 set out a list of what constituted "medical services", which included a section on folk medicine. The Decree stipulated that a licence was required to practise folk medicine. On 14 November 2003 the First Deputy Minister for Public Health issued a "Methodological Directive on the Licensing of Folk Medicine", which described certain activities as falling within the ambit of folk medicine; the list included "traditional systems of invigoration".

42. The expert also studied specialised medical literature. He concluded that the applicant had used psychotherapeutic methods which were described in the medical literature, such as "trance inducement", "breath control" and "therapeutic gymnastics". The latter, according to the Ministry of Public Health's recommendation no. 2001/13 of 14 March 2001, could include elements of yoga. The expert concluded that the use of such methods placed the applicant's activity within the scope of "private medical practice", which needed a licence under the heads of "psychotherapy" and "therapeutic gymnastics".

43. The expert referred to the Methodical Directive of the Ministry of Health of 26 February 2002, which characterised yoga as a "traditional method of healing". The same Directive noted that "traditional methods of healing", including yoga, were not officially recommended by the Ministry of Health for application in medical practice, and, therefore, were not covered by a licensing regime. From that, the expert inferred that in Russia "official application of traditional methods of healing" was not allowed. The expert further referred to the Decree of the Ministry of Health of 13 June

1996 which warned against the use of "occult practices" and other non-recommended healing techniques.

44. The expert noted that the charter of incorporation of the association did not mention that it had been created to dispense medical services. However, the brochures issued by the association described the effects of its "programmes" in medical terms, for example: "a complex of detoxicating dynamic exercises", "improved functioning of all internal organs", "harmonisation of all levels of the personality", "controlled meditation and certain other techniques which guarantee deep relaxation, appeasement of emotions, and help to overcome stress", and so on. The brochures referred to cases of seriously ill individuals suffering from, *inter alia*, insomnia and depression, having been cured following completion of the association's programmes. The techniques used in the programmes were described as a "synthesis of old wisdom and modern science". On 10 May 2003 SriSri Ravi Shankar obtained patent no. 2203645 "on the breathing technique" which specified that this technique could be used for medical purposes.

45. The expert further studied witness evidence from former participants of the programmes of the association. According to some of the participants, the instructors told them that they had medical diplomas and that the programmes were supposed to have healing effects. The participants were required by the instructors to fill in forms which contained questions about their health. The expert also analysed their description of the techniques used in the programmes, such as relaxation techniques, physical exercises, breathing techniques, meditation and so on.

46. To describe the activities of the association its brochures used terms such as "psychological adaptation", "autogenic training" and "relaxation" which could be found in specialised medical literature and were in fact techniques of psychotherapy and psychiatric treatment. The expert compared the techniques used by the instructors of the association with "holotropic therapy", which is a method used in psychotherapy, and pointed out a number of similarities.

47. On the strength of that evidence the expert concluded that the activities of the association could be characterised as "folk medicine", which required a license. The activities of the association, in the opinion of the expert, were medical in nature.

9. The attempts of the defence to have certain witnesses questioned

48. On an unspecified date in April 2005 the defence asked the investigator to question a number of witnesses in order to decide whether there was a need for a further psychiatric examination of the victim. On 29 April 2005 the investigator replied in the negative, stating that the personality of the victim had already been thoroughly examined and that the investigator had obtained an expert report and questioned one of the members of the expert team, Dr Ig.

10. Expert opinion of Prof. Z. from the Far East State Medical University (1 July 2007)

49. On 1 July 2007 Prof. Z. from the Far East State Medical University situated in Khabarovsk delivered an expert opinion at the request of the applicant's lawyer. Prof. Z. criticised the earlier expert assessments, which had characterised the activities of the association as "medical". Prof. Z. asserted that elements of the programmes of the association could be found in many traditional practices, such as yoga, qigong and various martial arts. He also cast doubt on the conclusions of the earlier expert reports that the mental condition of Ms S.D. had been caused by her participation in the association's programmes. He supposed that her interest in the activities and ideas practised within the association could have been caused by her mental condition.

11. Expert opinion by the Independent Association of Russian Psychiatrists

50. On an unspecified date the applicant's lawyer solicited the opinion of the Moscow-based Independent Association of Russian Psychiatrists (IAPR) in respect of the expert opinion of 25 July 2003. The applicant's lawyer provided the IAPR with copies of certain materials from the criminal case file, in particular, reports nos. 197 and 36 and the witness testimony of Dr Ig.

51. On 17 January 2006 a group of experts from the IAPR, composed of two psychiatrists, Dr Sp. and Dr Sav., and one psychologist, Dr Vin., delivered a written opinion. Their report criticised the methods used to carry out the expert examination of 25 July 2003 which resulted in report no. 1170 (see paragraphs 16 et seq.), and condemned the report as unreliable and incomplete.

C. Trial

1. First round of court proceedings

(a) Position of the defence

52. The applicant's case was heard by Judge Sh. of the Tsentralniy District Court of Khabarovsk.

53. At the trial the applicant and her co-defendant, Ms M.S., pleaded not guilty. They acknowledged that neither they nor the other instructors at the association had medical degrees. They also acknowledged that the alleged victim had been their apprentice and that she had had health problems after completing the two programmes. However, they denied having caused any harm to the alleged victim and insisted that her mental disorder was related to a pre-existing condition or other life circumstances.

54. In particular, they claimed that both the alleged victim and her sister had been born and raised in a very religious family, that they had both had problems fitting in at school, and that they had a difficult relationship with their mother. Several members of the alleged victim's family had a history of mental disorders, so her own problems could have been explained by a hereditary predisposition. She had started attending the programmes of the association because of her social and psychological problems.

55. Further, the applicant asserted that the "programmes" of the association could not be described as "medical treatment". Since its creation the association had been inspected several times by the Department of Justice, which had not detected anything illegal in its activities.

56. The defence also claimed that the programmes of the association were not "medical" in nature, and thus did not require any special education or licence. Their purpose was to help people to attain social and psychological harmony, discover the true meaning of life, and so on. The instructors did not receive any remuneration of their work and their participation in the programmes was voluntary.

(b) Evidence submitted by the prosecution

57. In the first round of the proceedings the court questioned several witnesses. They gave evidence about the mental and physical condition of the alleged victim before, during and after her participation in the programmes of the association. They all associated Ms S.D.'s health problems with her participation in the programmes.

58. From the materials and explanations produced by the Government it appears that neither Ms S.D. herself (the alleged victim) nor her twin sister, Ms N.D., appeared in court. Thus, at the hearing of 27 March 2007 Judge Sh. stated that according to the medical certificates of 19 January 2006 and 22 March 2007 the doctors did not recommend that Ms S.D take part in the trial as it could cause a relapse. Both medical certificates were issued at the request of Ms S.D. and contained no further information about her state of health or any examination conducted in that connection.

59. The court heard several other witnesses called at the request of the prosecution, namely, Ms O.L., the president of the association, Ms L.P., a member of the association and a former teacher of Ms S.D. at university, Ms E.B., a member of the association who had attended the programme together with Ms S.D. (the alleged victim), Ms S.Ch. and Ms V.Z. The testimonies of those witnesses were generally consonant with the case of the defence.

60. The court heard an expert for the prosecution, Dr N., who had participated in the expert teams which had earlier assessed the materials of the case. Dr N. was not categorical in her conclusions and testified that she had not been given information or materials about the alleged victim's character, social and family life or medical history, and that her conclusion

about the link between the programme and the ailments of Ms S.D. had been assumptive.

61. Dr Ig., who had participated in the preparation of report no. 1170, was summoned but failed to appear. The judge tried to secure her attendance for 27 March 2007 through the regional hospital where she worked. However, according to a letter from the hospital, Dr Ig. was on leave until 29 March 2007; after that date her contract with the hospital would be terminated since she planned to move abroad. At the hearing of 27 March 2007 the court, at the request of the prosecution, decided to read out Dr Ig.'s previous testimony. In her testimony Dr Ig. had asserted that the mental condition of Ms S.D. was directly linked to her participation in the programmes of the association.

62. The court examined written evidence from the case file submitted by the prosecution, in particular, records of the questioning of Ms I.G., a former teacher who had been Ms S.D.'s class tutor at school, other documentary evidence and official correspondence. The court examined a letter of 17 June 2003 from the acting chief of the Public Health Department of Khabarovsk. In that letter Ms S.D.'s problems were associated with the activities of the association, which was characterised as a "sect". The court examined search records and items seized during the searches, including brochures, books and audio-cassettes released by the association for its members. The court examined Ms S.D.'s medical history, the expert report by the MFB of 19 November 2003, the expert report of 23 November 2004 and the expert report by Dr Iv. of 1 April 2005.

63. The court also heard other witnesses, who gave circumstantial evidence about the case.

(c) Evidence submitted by the defence

64. The court questioned a number of witnesses proposed by the defence, namely, Ms D., a former member of the association and an acquaintance of Ms S.D., Ms K., the association's lawyer, and Dr L., who had been contacted by Ms S.D.'s mother in connection with the mental condition of the former. They all testified that the mental condition of Ms S.D. had been caused by pre-existing factors.

65. A similar statement was made by Dr A., who had prepared a written expert report on Ms S.D.'s case on 5 May 2004. Dr A. was questioned in the capacity of "specialist".

66. The court also examined the written opinion of Prof. Z.

(d) The first judgment and the appeal proceedings

67. On 23 July 2007 the Tsentralniy District Court of Khabarovsk acquitted the applicant and Ms M.S. In particular, the court concluded that the applicant and Ms M.S. had not realised that their activities might fall within the ambit of medical practice or that they could have been harmful to

the health of others. The court also found that the programmes of the association did not amount to medical practice.

68. The court excluded from evidence the expert reports of 25 July 2003, 19 November 2003, 9 April 2004[1] and 1 April 2005 as incomplete, self-contradictory and unreliable. The court also detected various irregularities in the way the expert examinations had been ordered and conducted. As to the expert opinion by Dr Iv. (reports of 23 November 2011 and 1 April 2005) the court noted, *inter alia*, that it had been based on legislation which had entered into force after the events imputed to the applicant and to Ms M.S.

69. The court also refused to admit the report by Prof. Z. in evidence as it had been obtained in breach of the domestic law, notably because Prof. Z. had not been informed by the investigator or the president of the court about criminal liability for false statement.

70. The prosecution appealed.

71. On 20 December 2007 the acquittal was quashed by the Regional Court and the case was referred back to the trial court. The Regional Court disagreed with the assessment of evidence by the trial court, and with its decision to declare some evidence, namely, expert reports, inadmissible. The Regional Court also pointed to various procedural shortcomings in the trial proceedings. The Regional Court noted that Dr A. should not have been questioned, since he had participated in the proceedings earlier in his capacity as an expert. Amongst other things, the Regional Court recommended that the trial court conduct new psychiatric examinations of Ms S.D., the alleged victim.

2. Second round of proceedings

72. In the second round of the trial proceedings the case was heard by the District Court in a single-judge formation: first by Judge Z. and subsequently by Judge M.

(a) Examination of evidence

(i) Trial by judge Z.

73. At the trial both the prosecution and the defence submitted their evidence to the court. The prosecution submitted written expert opinions and witness statements, items of documentary evidence and exhibits obtained at the previous trial or at the investigation stage. The prosecution also submitted medical certificates of 19 January 2006 and 22 March 2007 whereby the doctors recommended that the alleged victim refrain from attending court hearings in order to avoid a relapse.

74. The alleged victim (Ms S.D.) did not appear in court. As follows from the materials submitted by the Government, her name was on the list

[1] The date in the judgment indicated as 8 April 2004.

of prosecution witnesses to be called. Instead, Ms S.D. sent to the court a written declaration asking the court to discontinue the criminal prosecution of the applicant and her co-accused due to their "reconciliation". She also informed the court that she did not wish to participate in the proceedings.

75. The District Court heard Ms Z.D. (the mother of the victim) and several other witnesses. Expert Dr Ig. did not appear; according to the court, the summons had not been handed to her and had returned by post. The defence insisted that Dr Ig. be contacted through her employer.

76. On 29 July 2008 the judge sent a request to the town psychiatric hospital concerning the state of health of Ms S.D., the victim. The hospital replied that they had lost contact with Ms S.D. in September 2007, and that Ms S.D. had refused to continue to receive out-patient treatment by the doctors of that hospital. The hospital also informed the judge that Ms S.D.'s brother (Mr Ye.D.) and sister (Ms N.D.) had previously been treated in the hospital in connection with certain mental disorders.

77. According to the hearing records, the prosecution asked permission to read out the testimony Ms S.D. had given at the investigation stage. The defence did not object to her testimony being read out. According to the applicant, the defence sought to question those witnesses in person. The court decided to read out the records of the questioning of Ms S.D., as well as the statements her mother, brother, and sister had made during the first round of the proceedings and before the investigative authorities.

78. Witness for the defence Ms E.K. testified in person before the court. The court also heard several other witnesses for the defence, namely, Ms E.D. and Ms E.Iv. They gave testimony consonant with the position of the defence.

79. The court questioned expert Dr N., who had participated in the expert examination of 25 July 2003 (no. 1170). The court also questioned expert Dr Ch., who had participated in the expert examinations of 19 November 2003 and 9 April 2004 (nos. 197 and 36). They confirmed the conclusions of the expert reports and provided further information on the case.

80. The defence sought to exclude the expert opinions produced by the prosecution on the ground that Ms M.S. (the co-defendant) had not been aware of the decision of the investigator to conduct the expert examination. However, the court refused to exclude those opinions on the ground that the defence had had the opportunity to challenge the experts and their conclusions after the completion of the reports or to seek additional expert examinations in the course of the court proceedings.

81. On 1 October 2008 the lawyer representing Ms M.S. (the applicant's co-defendant) asked the court to conduct an additional expert examination of the state of health of Ms S.D (the victim). It appears that a request in similar terms was lodged by the applicant's lawyer as well.

82. On 31 October 2008 the prosecutor asked the court to order another expert examination of the materials of the case in order to clarify whether the "programmes" of the association included medical services. The defence asked the judge to entrust the examination to a State institution in Moscow, but the judge refused and entrusted the examination to a local forensic centre in Khabarovsk. However, the court agreed to include an expert proposed by the defence on the team. The materials of the case were forwarded to the competent expert institution for examination.

83. On 14 April 2009 those materials were returned to the court without examination. The expert institution replied that it was impossible to reply to the questions as they had been formulated by the judge in overly broad terms, and that additional experts were needed to carry out that kind of examination.

(ii) Trial by Judge M.

84. In the first half of 2009 Judge Z. withdrew from sitting in the case for reasons which remain unknown. He was replaced by Judge M. The trial was resumed on 3 June 2009. It appears that due to the change of judge the case was heard again from the beginning (see Article 242 of the Code of Criminal Procedure in the "Relevant Domestic Law" part below).

85. At the hearing of 3 June 2009 the prosecution declared that they would agree to the discontinuation of the case on the ground that the statutory time-limits for prosecuting the defendants had expired. However, the applicant and Ms M.S. insisted on the continuation of the trial, stressing that they wished to prove their innocence.

86. Having examined the list of witnesses summoned to the hearing, Judge M. noted that Dr Ig. had been summoned but that the court had "received no information about her proper notification".

87. The prosecution again asked to read out the testimony of Ms S.D. and Ms N. D. obtained at the pre-trial investigation stage but the defence objected. They asked the judge to request information about the ability of those witnesses to testify in court in person.

88. On 2 July 2009 Judge M. decided to read out the testimony Ms S.D. had given at the pre-trial investigation stage. On the basis of the materials in the case-file and "information received", the judge ruled that the state of health of Ms S.D. prevented her from participating in the trial.

89. The judge also noted that it was impossible to hear expert witness Dr Ig., without, however, explaining why, and ordered the reading out of her testimony obtained by the investigator.

90. On 4 July 2009 Judge M. requested the opinion of the regional psychiatric hospital as to whether the state of health of Ms S.D. and Ms N.D. permitted them to take part in the proceedings. On 11 July 2009 the hospital replied that since Ms S.D. and Ms N.D. had not been treated in

that hospital, it was impossible to say whether they were fit to attend the trial.

91. Subsequently the judge read out testimony by several other witnesses who had been questioned at the earlier stages of the proceedings, including Ms Z.D. (the mother of the victim) and Mr Ye. D. (the brother of the victim).

92. It appears that at the subsequent hearings the judge heard oral evidence from several witnesses, namely, Ms Ye. Iv. and Ms D. However, the Government did not produce copies of the records of the relevant hearings.

93. On 7 December 2009 Judge M. heard two experts – Dr Ch. (who had participated in drafting expert opinions nos. 197 and 36) and Dr N. (who had participated in the drafting of expert opinion no. 1170). During his questioning Dr Ch. stated, *inter alia*, that lacunas in the previous expert examinations could have been filled by carrying out a new psychiatric examination of Ms S.D. Dr N. was of the same opinion.

94. The defence asked the judge to read out the testimony of expert Dr A., who had drafted the report of 5 May 2004 and who had been questioned at the first trial. The judge agreed and Dr A.'s recorded testimony was examined.

95. On the same day the defence requested the court to order an additional expert examination of the causes of the mental disorder of Ms S.D. and its relation to her participation in the programmes of the association. The defence stated that the expert examinations obtained earlier were inconsistent and did not address certain important issues.

96. That request was refused: the judge concluded that the previously obtained expert opinions were sufficient to reach a conclusion on the merits of the case. The examination of evidence was closed and the judge ordered the parties to proceed to the final pleadings.

(b) The second judgment and the appeal proceedings

97. On 25 December 2009 the Central District Court of Khabarovsk found the applicant and Ms M.S. guilty under Article 235 § 1 of the Criminal Code.

98. The District Court found that between 24 April and 23 June 2002, in the guise of "programmes" and "training courses", the applicant and Ms M.S. had dispensed to Ms S.D. the following medical services: "psychological adaptation"; "autogenic training", "dietetic therapy", "medicinal gymnastics", and "psychotherapeutic treatment". All those activities belonged to various fields of medicine (such as psychotherapy, psychiatry and narcology). The nature of the activities of the accused was in itself indicative of the deliberate and conscious nature of their actions. To dispense such services a special education and a licence were required. The defendants had operated without any licence and did not have any medical

training. There was a direct causal link between Ms S.D.'s participation in the programme and her health problems in 2003. Thus, the unlawful and careless behaviour of the applicant and Ms M.S. had caused Ms S.D. moderately serious health damage.

99. In support of its conclusions the court referred to the following evidence: the testimony of Ms S.D. given on 24 March 2003 and 22 April 2004, the testimony of Ms N.D., the sister of the alleged victim, given during the pre-trial investigation on 9 September 2003, and the testimonies of Ms Z.D. (the mother of the alleged victim), and Mr E. D. (the brother) given at the trial.

100. The court further referred to expert opinions, namely, the expert reports of 25 July 2003 (no. 1170), the reports of 19 November 2003 (no. 197) and 9 April 2004 (no. 36), the expert report by Dr Iv. of 1 April 2005, and the record of expert Dr Ig.'s questioning by the investigator. The court also referred to the oral testimony of experts Dr N. and Dr Ch. given at the trial.

101. The court also referred to other evidence, namely, the records of the testimonies of Ms E. K., Ms O.L., Ms E.B., Ms I.G. and others, given either to the investigator during the investigation stage of the proceedings or at the first trial. The court also relied on documentary evidence, including the medical history of Ms S.D., the charter of incorporation of the association and brochures and leaflets published by it.

102. The court dismissed as inconclusive witness statements by Ms K. (defence witness) and Ms D. (defence witness), and did not analyse the testimony of Dr L. The court also discarded the testimonies of those witnesses who had themselves participated in the programmes of the association on the ground that their opinion about the nature and effects of those programmes was "subjective".

103. Expert opinions proposed by the defence were declared inadmissible in evidence. In particular, the District Court held that the expert opinions of Prof. Z. and the IAPR were inadmissible on the ground that they had been obtained in breach of Articles 58, 251 and 270 of the CCrP. The court explained that under the law "a party cannot, on its own initiative and outside of the court hearing, solicit and obtain the opinion of a specialist" (page 25-26 of the judgment).

104. The written testimony of Dr A. was excluded on the ground that Dr A. had earlier produced an expert report on the case. Consequently, under the Article 72 § 2 of the CCrP he was precluded from being questioned in his capacity as a "specialist".

105. As to the references in the report of Dr Iv. of 1 April 2005 to the legal acts adopted after the events imputed to the applicant, the court noted that these references did not contradict the conclusions of Dr Iv. but only strengthened them, and that Dr Iv. had also referred to the legal acts in force at the time of the events at issue (page 27 of the judgment).

106. In the concluding paragraphs of the judgment the court noted as follows:

> "The court considers that the evidence [submitted by the parties] is admissible, relevant and reliable to the extent that it does not contradict the factual circumstances of the case, as established by the court".

The District Court sentenced the applicant to two years of imprisonment; however, she was relieved from serving the sentence owing to the expiry of the relevant statutory time-limit. Mr M.S. was sentenced to one year and six months of imprisonment.

107. The defence appealed. They complained, in particular, that judge M. had based the judgment on the testimony of witnesses he had not heard in person. They also complained about the refusal of the trial court to admit expert opinions submitted by the defence in evidence and obtain a new expert examination of the condition of Ms S.D. On 25 March 2010 the Khabarovsk Regional Court upheld the conviction. The court of appeal did not find any breach of the domestic substantive or procedural law in the proceedings before the trial court. The Regional Court ruled, *inter alia*, that the defence had conceded to the reading out of the previous testimony of the alleged victim and her relatives. The Regional Court noted that the record of Ms S.D.'s questioning by the investigator was a reliable source of information because when she had given that evidence she had not been suffering from a mental condition.

II. RELEVANT DOMESTIC LAW

A. Liability for quackery

108. Article 235 of the Criminal Code, as it stood at the relevant time, established liability for unlawful private medical or pharmaceutical practice. It was formulated as follows:

Article 235. Engaging in Illegal Private Medical Practice or Private Pharmaceutical Activity

> 1. Engaging in private medical practice or in private pharmaceutical activity without having a license for the respective type of activity, if this has entailed by negligence the infliction of harm on human health, shall be punishable by a fine ..., by restraint of liberty ..., or by deprivation of liberty for a term of up to three years.
>
> 2. The same act, that has entailed by negligence the death of a person, shall be punishable by restraint of liberty for a term of up to five years, or by deprivation of liberty for the same period."

109. Article 15 of the Public Health Act of 1993 (Federal Law No. 5487-I), as in force at the material time, established licencing requirement for medical activities, procedure and basic criteria for obtaining such a licence. The Government's decree of 21 May 2001 (in force until

4 July 2002) established further rules and guidance on the procedure for obtaining a medical licence. In addition, it contained a list of "medical activities" which included *inter alia* remedial gymnastics, psychotherapy, and nutritional science. Article 57 of the 1993 Public Health Act defined "folk medicine" as "methods of health improvement, prophylactic, diagnostic, and healing methods based on the experience of many generations of people and enrooted in the folk traditions and not registered in accordance with the law". That Article provided that to start practicing as a "healer" one needed a special diploma delivered by the official public health bodies at the regional level. According to the last paragraph of Article 57, "unlawful practicing of folk medicine" was criminally punishable.

B. Expert evidence and documentary evidence

110. Article 74 of the CCrP contains a comprehensive list of sources of information which can be used as evidence in a criminal trial. That list mentions, *inter alia*, expert reports and expert testimony, as well as "other documents" (Article 74 §§ 2 and 6). Article 84 § 1 of the CCrP provides that "other documents" can be admitted as evidence if they contain information which may be important for establishing the facts which need to be established within the criminal proceedings.

111. The CCrP (Articles 57 and 58) distinguishes between two types of expert witnesses: "experts" *proprio sensu* [*experty*] and "specialists" [*spetsialisty*]. Their role in the proceedings is sometimes similar, albeit not identical. Whereas the "experts" are often engaged in carrying out complex forensic examinations prior to the trial (for example, dactyloscopic examinations or post-mortem examinations), a "specialist" is summoned to help the prosecution or court in handling technical equipment, examining an item of material evidence, understanding the results of "expert examinations", assessing the methods employed by the "experts", their qualifications, and so on. Both can submit written reports to the court and/or testify in person (Article 80 of the CCrP). Under Article 57 of the CCrP (with further references) the right to order an expert examination belongs to the investigator or to the trial court. The court may order an expert examination on its own initiative or at the request of the parties.

112. Article 58 § 1 of the CCrP defines the functions of a "specialist" (in so far as relevant to the present case) as follows:

> "A specialist is a person possessing special knowledge, who is brought in to take part in the procedural actions ..., to assist in locating, securing and seizing items of evidence ..., in the use of technical equipment ..., to put questions to the expert and also to explain to the parties and to the court matters which come within his professional competence".

113. Article 58 § 2 of the CCrP stipulates that the summoning of a specialist and his participation in the trial proceedings is governed by Articles 168 and 270 of the Code (see below).

114. Article 58 § 4 of the CCrP states that a specialist summoned by the investigator, prosecutor or the court cannot refuse to appear before them.

115. Article 168 of the CCrP deals with the participation of a specialist in investigative actions at the pre-trial investigation stage at the request of the investigator. It stipulates, with reference to Article 164 § 5, that the investigator must notify the specialist about his rights and responsibilities, verify his professional qualifications and check his affiliation with the parties.

116. According to Article 251 of the CCrP a specialist summoned to the court must take part in the trial in accordance with Articles 58 and 270 of the CCrP.

117. Article 270 of the CCrP provides that the presiding judge at the trial should inform the specialist of his rights and responsibilities before questioning.

118. Under Article 75 of the CCrP, evidence obtained in breach of the provisions of the Code is inadmissible. By virtue of Article 50 § 2 of the Russian Constitution, in the administration of justice evidence obtained in violation of the federal law cannot be used.

119. Article 286 of the CCrP provides that the court may add documents produced by the parties to the case file.

C. Expert reports obtained by the investigation

120. Chapter 27 of the CCrP regulates obtaining expert opinions at the investigation stage (i.e. before the trial). Article 195 § 2 provides that the "judicial expert examination" (that is, for use in court) must be carried out by "State forensic experts or other experts who have specialist knowledge". Article 193 § 3 stipulates that the investigator must notify the criminal defendant about the decision to order an expert examination. Pursuant to Article 198, the defendant has the right to challenge the expert, ask to entrust the examination to another expert institution, ask the investigator to put additional questions to the expert, and, with the approval of the investigator, participate in the examination and provide comments to the expert involved.

D. Collection of evidence by the defence

121. The old CCrP (in force before 2002) provided that the duty to obtain evidence fell to the investigative bodies. The new CCrP (applicable to the case) recognises the defence's right to collect evidence, albeit with important limitations. Thus, Article 53 § 2 of the Code provides that the

defence lawyer has a right "to collect and submit evidence necessary for providing legal assistance, in accordance with Article 86 § 3 of the Code". Amongst the other powers of the defence lawyer Article 53 § 3 mentions "engaging [the services of] a specialist in accordance with Article 58 of the Code". However, it does not allow the defence to commission and produce "expert reports".

122. Article 86 of the new CCrP formulates the rules on collecting evidence as follows:

> "1. In the course of the criminal proceedings evidence shall be collected by ... the investigator, the prosecutor and the court by means of investigative measures and other procedural actions provided by the present Code.
>
> 2. [An accused] ... and his representatives may collect and produce written documents ... to be added to the case file as evidence.
>
> 3. The defence lawyer may collect evidence by:
>
> (1) obtaining objects, documents and other information;
>
> (2) questioning individuals with their consent; or
>
> (3) requesting ... documents from the authorities ... and other organisations which are obliged to produce such documents or copies of them."

123. The defence lawyer's right to obtain expert evidence is defined in section 6 § 3 (4) of Federal Law no. 63-FZ of 2002 "on advocacy":

> "... 3. The advocate can ... (4) engage specialists on a freelance basis in order to obtain explanations on the issues relevant to [his task of providing] legal assistance".

124. Article 271 § 4 of the CCrP stipulates that the court cannot refuse to hear a witness or a "specialist" who has come to court at the request of one of the parties.

E. Position of the Supreme Court on expert evidence

125. On 21 December 2010 the Plenary Supreme Court of the Russian Federation issued Decree no. 28 "On court expert examinations in criminal proceedings". That Decree replaced a very old Decree issued by the Supreme Court of the USSR in 1971, which was based on the old Soviet Code of Criminal Proceedings.

126. According to point 1 of the Decree, where the judge needs special scientific, technical, artistic, etc. knowledge, he must seek an "expert examination" of the matter (*sudebnaya ekspertisa*). Where an expert examination is not needed, the court may seek the opinion of a "specialist" (*spetsialsit*). The court may seek the assistance of non-governmental expert institutions or individual experts but the Decree establishes additional conditions for such expert examinations. Under point 6 of the Decree, certificates, acts, written conclusions and other similar documents issued by

expert institutions at the request of the investigative authority and the courts are not regarded as "expert examinations".

127. Under point 19 of the Decree, the court, of its own motion or at the request of a party, may employ a "specialist" to assist the court in interpreting a written expert report or questioning the expert. The "specialist" may deliver his opinion orally or in writing. Under point 20 the opinions of "specialists" and "experts" can be used as evidence; however, the Supreme Court emphasised that specialists "cannot conduct a direct examination of physical evidence" and "cannot formulate conclusions but only express an opinion on the questions put to him by the parties". The Supreme Court concludes that where there is a need for "examination" of a matter, the court must order an examination by "experts".

128. Under point 22 of the Decree, the courts must hear a "specialist" who appears in court on the initiative of one of the parties. However, the court may refuse to hear that person if his professional competencies are insufficient to answer the questions which the party seeks to address to him.

F. Reading out of witness testimony in court

129. Article 281 of the CCrP ("Reading out of the testimony of the victim and of the witness) reads, in so far as relevant, as follows:

> "2. If the victim or the witness did not appear in court, the court shall be entitled at the request of a party or on its own initiative to decide to read out the testimony previously given by them, in the event of:
>
> 1) the death of the victim or witness,
>
> 2) their very poor health, impeding their appearance in court,
>
> 3) the refusal of a victim or witness who is a foreign citizen to appear in court
>
> when summoned,
>
> 4) a natural disaster and other extraordinary circumstances impeding their appearance in court.
>
> 3. At the request of a party the court may decide to read out the testimony of a witness ... where there are serious discrepancies between his [oral] testimony given to the court and his earlier testimony."

G. Replacement of a judge

130. Article 242 of the CCrP ("Immutability of court composition") reads as follows:

> "1. The case must be examined by one and the same judge or by a court bench in one and the same composition.
>
> 2. If one of the judges is no longer able to take part in the hearing he or she must be replaced by another judge, and the court hearing must restart from the beginning."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

131. The applicant complained that the trial in her case was not fair and that the defence was in a disadvantageous position vis-à-vis the prosecution in respect of the taking and examination of evidence. The applicant relied on Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ....
>
> ...
>
> 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. The parties' submissions

1. The Government

132. The Government contested that argument.

133. The Government acknowledged that the alleged victim, Ms S.D., had not been heard in person by the trial court or by the court of appeal. When she was questioned by the investigator, the defence was not present. However, the defence did not object to the prosecution reading out the record of Ms S.D.'s previous testimony during the trial. Furthermore, the court decided not to call her as a witness because the doctors had concluded that her participation in the trial might have had a traumatising effect on her. Ms S.D. had been informed about the time and the venue of the hearing before the court of appeal; however, she failed to appear for reasons unknown. The Government maintained that the defence had not sought the questioning of Ms S.D. in person at the hearing before the court of appeal.

134. The mother and brother of the victim (Ms Z.D. and Mr E.D.) testified in person before the trial court in the first round of court proceedings. Therefore, the defence had an opportunity to question them. When the court, in the second round of the trial, decided to read out the record of questionings of those witnesses, the defence did not object.

135. As to the expert examinations ordered by the investigator, the Government observed that they had been conducted on 25 July 2003 (report no. 1170), from 1 to 19 November 2003 (no. 197), from 10 January to 9 April 2004 (no. 36), and on 1 April 2005. The applicant was charged on 26 November 2004; as a result, she took active part only in the last examination, that of 1 April 2005.

136. However, in the course of the trial the defence had the opportunity to question two experts, Mr Ch., who had participated in drafting reports nos. 197 and 36, and Ms N., who co-authored report no. 1170 (see paragraphs 18, 20 and 23 above).

137. The Government indicated that under the Russian law the defence and the prosecution are equal before the court. However, that did not mean that the defence had an unrestricted choice of means to present their case: thus, the CCrP defined the forms in which the defence could seek the presentation of expert evidence at the trial. Articles 197-207 and 283 of the CCrP and Articles 19-25 of the Federal Law "On State expert examinations" provided that an expert examination in a State expert institution had to be carried out at the request of the investigative bodies, the prosecution or the court. The defence had no power to seek an expert opinion from those institutions.

138. The law provided certain procedural guarantees which secured the participation of the defence in expert examinations: thus, the defence could ask the investigator to order an expert examination. Once the examination was ordered, the defence could obtain a copy of the investigator's decision, ask for the expert institution or individual experts in charge of the examination to be changed, ask for additional questions to be put to the experts, and so on. The defence could also challenge the actions or omissions of the investigator before the court. Where the original expert report was unclear or controversial, the defence could seek an additional examination or full re-examination of the issue by another expert body. The Government argued that the defence had enjoyed all those rights in the proceedings.

139. More generally, the Government argued that the defence were able to present their evidence at the trial. Thus, the court heard two witnesses for the defence: Ms K. and Ms D. The domestic court (at the first trial) relied on evidence given by those witnesses in its judgment.

140. As to the written opinions of Prof. Z. and the IAPR, which criticised the conclusions of the report of 25 July 2003 (no. 1170), the Government indicated that they were not admissible in evidence pursuant to Article 75 § 2 point 3 of the CCrP. Those "specialists" were invited to give their opinion in breach of the procedure provided for by Articles 58, 251 and 270 of the CCrP.

141. On 7 December 2009 the court refused to conduct an additional expert examination, referring to Articles 283 and 207 of the CCrP. At the hearing before the court of appeal the defence did not try to adduce any new material or reports by "specialists".

142. The Government concluded that the applicant's trial was "fair" within the meaning of Article 6 of the Convention.

2. The applicant

143. The applicant confirmed that the victim, Ms S.D., had not testified in person before the court at the trial or in the appeal proceedings. The defence had been unable to question her before the court or at the investigation stage of the proceedings.

144. There was no evidence that any serious illness prevented Ms S.D. from appearing in court throughout the duration of the proceedings. Under Article 196 of the CCrP the judge had been obliged to order a special psychiatric examination of the state of health of Ms S.D. in order to decide whether she was fit to testify orally, but this had not been done. It was unclear why Ms S.D. and her relatives failed to appear before the court of appeal.

145. Although the defence had agreed to the reading out of the written testimony of certain witnesses, that could not be interpreted as a waiver of the right to examine those witnesses in person. The defence had been able to question Ms Z.D. and Mr Ye.D. in the previous round of court proceedings, but this had been insufficient, since the judge who convicted the applicant did not assess their testimony directly. Furthermore, in the first round of court proceedings the defence had not been aware that the brother and the sister of the applicant suffered from certain mental disorders.

146. The defence had not been able to participate in the preparation of the expert opinions at the investigation stage of the proceedings. All the defence's requests for additional expert examinations to be carried out had been dismissed by the investigator.

147. The applicant also gave their own interpretation of the provisions of the CCrP which regulated the collection of evidence by the parties and the status of such evidence. The applicant stressed that the Government had conceded that while the defence had no power to obtain an expert opinion, the investigator and the court had such powers. When the defence had tried to introduce an expert opinion by Prof. Z., the court had refused to admit it in evidence. Furthermore, on 7 December 2009 the court had refused to commission an additional expert opinion. In its judgment the court had failed to consider the expert opinion of Dr A.

148. The applicant further argued that the worsening mental health of Ms S.D. in 2002 was related to pre-existing circumstances and not to her participation in the programmes of the association. The applicant further criticised the court for not distinguishing between her acts and the acts of her co-defendant, Ms M.S., who was the sole person responsible for the programme "Eternity", which immediately preceded the deterioration of Ms S.D.'s mental condition.

149. The applicant concluded that the proceedings in her case had been unfair and insisted on the reopening of the case.

B. Admissibility

150. The Court notes that the Government did not put forward any formal objections to the admissibility of this complaint. The Court further observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. Absence of Ms S.D. from the trial

(a) General principles

151. The Court reiterates that it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and the defence, which means that both the prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Dowsett v. the United Kingdom*, no. 39482/98, § 41, ECHR 2003-VII, and *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II).

152. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II; and *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X; *Al-Khawaja and Tahery*, [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). In the context of absent witnesses, the Grand Chamber of the Court set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, it had to be established that there was a good reason for the non-attendance of the witness. Second, even where there was a good reason, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had had no opportunity to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, when the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the

reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 119 and 147).

153. The Court further reiterates that the right of the defence to examine witnesses and test other evidence introduced by the prosecution should be read in the light of the more general guarantee of adversarial proceedings enshrined in the concept of a fair trial under Article 6 § 1 (see, among many other authorities, *F.C.B. v. Italy*, 28 August 1991, § 29, Series A no. 208 B; and *Poitrimol v. France*, judgment of 23 November 1993, § 29, Series A no. 277 A; *Al-Khawaja and Tahery*, cited above, § 118). Even where the defence was able to cross-examine a witness or an expert at the stage of the police investigation, it cannot replace cross-examination of that witness or expert at the trial before the judges. It is an important element of fair criminal proceedings that the accused is confronted with the witness "in the presence of the judge who ultimately decides the case" in order for that judge to hear the witness directly, to observe his demeanour and to form an opinion about his credibility (see *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002; see also, *mutatis mutandis*, *Milan v. Italy* (dec.), no. 32219/02, 4 December 2003 and *Pitkänen v. Finland*, no. 30508/96, §§ 62-65, 9 March 2004; see also *Pichugin v. Russia*, no. 38623/03, § 199, 23 October 2012, and, *mutatis mutandis*, *Valeriy Lopata v. Russia*, no. 19936/04, § 128, 30 October 2012).

(b) Application to the present case

154. It is not disputed by the parties that Ms S.D. did not testify in court, and that she was not examined by the defence. Instead, the District Court used her testimony obtained in the course of the police investigation.

(i) Whether the defence waived the right to examine Ms S.D.

155. The Government claimed that the applicant's agreement to the use of the record of Ms S.D.'s testimony in the proceedings before Judge M. (see paragraph 77 above) was tantamount to a waiver of her right to obtain Ms S.D.'s examination in court.

156. The Court reiterates that Article 6 does not rule out a tacit waiver of one of the guarantees of a fair trial (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007). However, such a waiver must be*, inter alia*, established "unequivocally" (see *Sejdovic v. Italy [GC]*, no. 56581/00, § 86, ECHR 2006-II).

157. A witness's testimony may be introduced at the trial in one of two forms: as a recorded speech (written, audio- or video-recorded) or directly, by means of the oral questioning of that witness by the parties before the court. As follows from the text of Article 6 § 3 (d), the Convention attaches particular importance to the direct adversarial examination of a witness before the judges. However, it does not exclude that the parties may also use records of that witness's earlier statements and testimony in evidence, for

example, to uncover inconsistencies in his oral evidence or cast doubt on his trustworthiness (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261‑C). From this point of view, the use of statements previously made by a witness is not inconsistent with Article 6 § 3 (d), at least not by itself.

158. Therefore, it is conceivable that a written record of testimony by a witness could be presented at the trial along with his oral examination. The CCrP stipulates that the testimony of a witness may be read out at the trial where that witness has failed to appear in person, but it does not rule out the questioning of that witness in person (see Article 281 § 3 of the CCrP, cited in paragraph 129 above). A witness may be absent on a particular day of the trial, but attend a later hearing. Similarly, oral questioning of a witness at the trial may be followed by reading out of his earlier testimony.

159. The facts of the present case show that the judge still considered the option of summoning Ms S.D. to the court despite the fact that her testimony had already been read out (her testimony was read out on 2 July 2009, whereas on 4 July 2009 the judge asked the opinion of the doctors as to whether Ms S.D. was fit to testify in person (see paragraphs 88 et seq. above)). Furthermore, the prosecution included Ms S.D. in the list of witnesses to be called. In such circumstances it is clear that the decision of the defence not to object to the reading out of Ms S.D.'s previous testimony in the proceedings conducted by Judge Z. cannot be interpreted as an unequivocal waiver of their right to examine her in person under Article 6 § 3 (d).

160. More importantly, the Court notes that at the hearing before Judge M. (that of 2 July 2009) the defence objected to the reading out of Ms S.D.'s statements obtained at the investigation stage (see paragraph 87 above). Judge M. started the hearing of the case anew, and it was Judge M. who rendered the impugned judgment. Therefore, it is not crucial that in earlier proceedings before Judge Z. the defence conceded to the reading out of Ms S.D.'s previous testimony.

161. The Government did not refer to any other episode in the proceedings when the defence waived their right to examine Ms S.D. The Court concludes that the defense did not waive their right to obtain the examination of Ms S.D. in person at the trial.

(ii) Reasons for the absence of Ms S.D. from the trial and her importance as a witness

162. The Court reiterates that the trial judge only had the written records of the evidence given by Ms S.D at his disposal. That testimony had been obtained by the police without the defence's participation.

163. According to Judge M., who examined the case and rendered the contested judgment, Ms S.D.'s fragile mental condition prevented her from participating in the trial. The Court observes that, indeed, Ms S.D. suffered from a mental disorder which was allegedly related to the actions of the

applicant and Ms M.S. The Court accepts that the interests of a witness, and in particular the physical and mental integrity of the alleged victim of the crime, are important factors which may sometimes call for the limitation of the rights of the defence under Article 6 § 3 (d). The decision of the national judges not to call Ms S.D. to testify was based on two medical certificates issued in January 2006 and March 2007, which stated that her appearance in court was not recommended since it might cause a relapse (see paragraphs 58 and 88 above). Thus, the judge's decision not to call Ms S.D. to testify in person was based on the known facts of the case and supported by the doctors' opinion. The Court is prepared to accept that the decision at issue was not arbitrary (cf. *Vronchenko v. Estonia*, no. 59632/09, §§ 62 and 63, 18 July 2013, in the context of the questioning of a minor victim of sexual abuse).

164. More importantly, the Court considers that Ms S.D.'s evidence yielded no conclusive evidence against the applicant. Thus, the defence did not deny that Ms S.D. had participated in the programmes, as she described, and that she had had health problems afterwards. They also accepted Ms S.D.'s account of the activities and practices in which she had been involved. It thus appears that the defence did not try to refute the essential elements of Ms S.D.'s testimony. Their case was built upon other arguments which pertained to the examination of medical issues (namely, the existence of a causal link between Ms S.D.'s mental disorder and her participation in the programme) and legal issues (determination of the "medical" nature of the practices used by the associations). It is unlikely that Ms S.D., as a lay person, would have been able to elucidate on either of those points. Accordingly, the Court does not find that the testimony of Ms S.D. was "sole and decisive" evidence against the applicant (see *Al-Khawaja and Tahery*, § 152, and compare to *Vronchenko*, § 59, both cited above).

165. In the circumstances, and in particular given the low level of importance of Ms S.D.'s testimony as a witness, the Court is prepared to conclude that her absence from the trial did not prejudice the interests of the defence in any significant manner and was outweighed by genuine concern for her well-being. Thus, there was no violation of Article 6 § 3 (d) of the Convention on that account.

2. Handling of expert evidence

166. The applicant also complained about the taking and examination of "expert evidence" by the trial court. She claimed that the reports by the prosecution experts had been accepted for examination by the District Court, whereas reports and opinions by the experts suggested by the defence had been rejected as inadmissible. She also complained that the defence had been unable to participate in the preparation of the expert reports.

167. In addressing those complaints the Court will concentrate on "expert evidence" in the broad meaning of the term, that is, sources of

information which do not describe the particular facts of a case but instead provide a scientific, technical, or other similar analysis of those facts (which can also be defined as "opinion testimony"). At the same time, the Court will not lose sight of a distinction which is made in the Russian law between two forms of expert evidence: opinions by "experts" and opinions by "specialists", both oral and written (see the "Relevant domestic law" part above, paragraph 111).

(a) General principles

168. The Court reiterates that witnesses and experts play a different role in proceedings and have a different status. The latter cannot be fully associated with "witnesses", at least not for all purposes (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 711, 25 July 2013). In analysing whether the personal appearance of an expert at the trial was necessary, the Court will therefore be primarily guided by the principles enshrined in the concept of a "fair trial" under Article 6 § 1 of the Convention, and in particular by the guarantees of "adversarial proceedings" and "equality of arms". That being said, some of the Court's approaches to the personal examination of "witnesses" under Article 6 § 3 (d) are no doubt relevant in the context of examination of expert evidence and may be applied *mutatis mutandis*, with due regard to the difference in their status and role (see *Bönisch v. Austria*, 6 May 1985, § 29, Series A no. 92, with further references).

169. It is primarily for the national courts to decide whether a particular piece of evidence is formally admissible (see *Garcia Ruiz v. Spain* [GC] no. 30544/96, ECHR 1999-I, § 28). Similarly, under Article 6 it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not (see *Khodorkovskiy and Lebedev*, cited above, § 700). Subject to some exceptions, the general rule is that the domestic judge has a wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence may sometimes run counter to the principles of equality of arms and adversarial proceedings, or affect the fairness of the proceedings otherwise (see, for example, *Tamminen v. Finland*, no. 40847/98, §§ 40-41, 15 June 2004). In the context of expert evidence, the rules on its admissibility must not deprive the defence of the opportunity to challenge it effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, §§ 38 et seq., 5 April 2007).

(b) Application to the present case

170. Turning to the present case, the Court notes that the second judgment, that is, the judgment of the District Court whereby the applicant was found guilty, referred to several expert reports, namely, the report of 27 July 2003 (no. 1170), the report of 19 November 2003 (no. 197), the report of 9 April 2004 (no. 36), and the second report by Dr Iv. of 1 April 2005. In its conclusions the court also relied on the records of Dr Ig.'s questioning by the investigator.

171. In addition, it relied on the oral testimony of experts Mr Ch. and Ms N., as well as on the medical history of Ms S.D.

172. Expert evidence submitted by the prosecution to the court sought to address the two key questions of the case, namely (1) whether Ms S.D. suffered any physical or mental harm as a result of her participation in the programmes of the association, and (2) whether those programmes were "medical" in nature. Report no. 1170 of 25 July 2003 was supposed to address the first question; reports nos. 197 and 36 (of 19 November 2003 and 9 April 2004 accordingly) concerned both aspects of the case. Other reports obtained by the investigator mostly covered question no. 2.

(i) How expert evidence concerning Ms S.D.'s mental condition was obtained

173. The Court observes that all expert reports relied on in the judgment had been obtained by the investigator at the stage of pre-trial investigation. Where an investigator orders an expert examination, Article 198 of the CCrP confers on the defence a right to participate in its preparation by suggesting experts and putting questions to them, and so on. The fact that the defence may play certain role in the preparation of the report at this early stage constitutes an important procedural safeguard (see paragraph 120 above). However, that option was not available to the defence, since expert opinions had been obtained before the applicant was given the status of a defendant in those proceedings (see 19 and 34 above). By the time the applicant had formally acquired the status of defendant the investigator had already obtained several expert reports – namely, reports nos. 1170, 197, and 36, referred to in the final judgment, plus two reports which were not mentioned in the judgment: the report of Dr A. (of 5 May 2004) and the first report of Dr Iv. (of 23 November 2004).

174. The Court observes that the defence tried to obtain an additional expert examination of the victim (see paragraph 48 above). However, in this occasion the investigator replied, in a summary manner, that there was no need for further examinations.

175. In sum, when the trial started the court had before it only expert reports obtained by the prosecution without any participation of the defence. As such, this is not contrary to the Convention, provided that in the trial proceedings the defence had sufficient procedural tools to examine that evidence and effectively challenge it before the court.

(ii) How expert evidence concerning Ms S.D.'s mental condition was examined at the trial.

(α) Inability of the defence to question a key expert for the prosecution

176. The Court reiterates that Ms S.D.'s mental health was examined in report no. 1170. It was the only report based on a personal examination of the alleged victim, all subsequent examinations being based on the documents of the file only. Therefore, the evidentiary value of report no. 1170 was particularly high.

177. The Court accepts that the defence had sufficient knowledge of the content of the report and was able, therefore, to criticise its conclusions at the trial. However, the rights of the defence did not stop there. It is the Court's well-established case-law that the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it, by direct questioning (see, amongst other authorities, *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211; *Doorson v. the Netherlands*, 26 March 1996, §§ 81-82, *Reports of Judgments and Decisions* 1996-II; and *Mirilashvili v. Russia*, no. 6293/04, § 158, 11 December 2008).

178. Report no. 1170 was prepared by three experts. One of them, namely, Dr Gul., never testified before the court, for reasons which remain unknown. Another member of the expert team, Dr N., did testify in person before Judge M. However, as follows from his oral testimony at the trial, he believed that the expert team had had incomplete information about the character and medical history of Ms S.D., and that the conclusions of report no. 1170 had been based on assumption. At the second trial she expressed the opinion that another psychiatric examination of Ms S.D. was needed to fill the lacunas in the original report (see paragraphs 60 and 93 above). The Court concludes that the oral testimony of Dr N. did not provide sufficient support for the prosecution case and even went in the opposite direction.

179. In these circumstances it was of crucial importance for the defence to hear in person Dr Ig. – the only expert who, while being questioned by the investigator, firmly asserted that, in her opinion, there had been a direct causal link between the mental disorder of Ms S.D. and her participation in the programmes of the association (see paragraph 61 above). In addition, the Court stresses that Dr Ig. acted as rapporteur in the expert team which prepared report no. 1170. Therefore, questioning her in person was important for the interpretation of the conclusions of that report.

180. The Court observes that Dr Ig. did not appear before the court in the second round of the proceedings (see paragraphs 61 and 89 above). As follows from the trial record, the defence insisted that Dr Ig. be questioned in person; however, for reasons which are unclear from the trial record, the courts considered that "impossible". In the absence of further explanations from the Government on this point, and in view of the brevity of the entry in

the trial record, the Court concludes that Judge M. failed to verify what the reason for the absence of Dr Ig. was, and whether it was possible to secure her attendance and questioning. The Court further notes that Dr Ig. was not questioned in the first round of the trial proceedings either. This was explained by the fact that she was about to move to another country (see paragraph 61 above). However, Dr Ig. was available for cross-examination at least until 29 March 2007. When the court decided to read out her previous statement (on 27 March 2007) she was still in the country. Thus, it had been possible to examine that witness at the first trial, but the authorities missed that opportunity. Finally, the Court observes that the defence was not able to question Dr Ig. at the stage of the preliminary investigation – again, for reasons which remain unknown.

181. In these circumstances the Court considers that the absence of Dr Ig. from the trial proceedings constituted a serious handicap for the defence.

(β) Inability of the defence to obtain new expert examination of Ms S.D. through the court

182. The Court observes that cross-examination of experts at the trial was not the only tool available to the defence for challenging report no. 1170. Another course of action open to the defence was to obtain a new expert examination of Ms S.D. through the court. The defence made such an attempt on 7 December 2009 (see paragraphs 95 et seq.). In support of their request they referred to the opinions of Dr N. and Dr Ch., who had testified before the court earlier on that day and who had suggested that another psychiatric examination of the alleged victim would be advisable (see paragraph 93 above). However, the court refused to order a new expert examination.

183. The Court accepts that where the defence asks the court to have a certain issue or item re-examined by an expert, or where the defence tries to introduce a second opinion on certain matters, it remains primarily for the national court to judge whether it would serve any useful purpose (see *H. v. France*, 24 October 1989, §§ 60-61, Series A no. 162-A). On the other hand, the Court retains supervisory power in this field: in exceptional circumstances the need to obtain a second expert opinion on an important aspect of the case may be self-evident and the failure of the court to obtain expert evidence sought by the defence may make the trial unfair (see, for example, *G.B. v. France*, no. 44069/98, § 69, ECHR 2001-X).

184. The Court considers that in the circumstances of the present case, where the defence had not participated in the preparation of the original expert report, where the key expert for the prosecution had never been questioned by the defence (in an open court or otherwise), and where two other experts in the field who had testified orally had recommended a further psychiatric examination of Ms S.D., the domestic court's refusal to

order such an examination is questionable. This conclusion is strengthened by the fact that in the first round of the domestic proceedings, which ended with the applicant's acquittal, the court refused to consider the impugned report which was used against the applicant in the second round of the proceedings. Even though the judge in the second trial was not bound by the decision of his predecessor, the unqualified reliance on that report in the second trial, without additional verification recommended by two experts, appears unjustified.

(γ) Inability of the defence to introduce a second opinion by their own experts

185. Finally, the Court observes that the defence had yet another option to counter the findings of report no. 1170, namely, to introduce an opinion by their own experts (as opposed to experts chosen by the prosecution or by the court).

186. The Court observes that in 2006 the defence requested an expert opinion from the IAPR and submitted it to the court as a "written opinion by specialists" (see paragraph 51 above). The report by the IAPR criticised the conclusions of report no. 1170 and was therefore relevant to the question of whether Ms S.D.'s mental disorder had been caused by her participation in the programme of the association. However, the district court refused to consider the opinion of the IAPR (see paragraph 103) on the ground that it had allegedly been obtained in breach of Articles 58, 251 and 270 of the Code of Criminal Proceedings. The court explained that under the law "a party cannot, on its own initiative and outside of the court proceedings, solicit and obtain the opinion of a specialist".

187. In this regard the Court agrees with the Government that the "equality of arms" principle enshrined in Article 6 § 1 does not require that the defence should have exactly the same powers as the prosecution when it comes to collecting evidence. The ways in which the defence and the prosecution may participate in the collection of evidence are often different (see *Mirilashvili v. Russia*, cited above, § 225). However, what is important is that those differences do not place the defence at a net disadvantage *vis-à-vis* the prosecution. The rules on taking evidence and producing it at the trial should not make it impossible for the defence to exercise the rights guaranteed by Article 6 of the Convention. In *Khodorkovskiy and Lebedev v. Russia* (no. 2), cited above, § 731, the Court stressed as follows:

> "[I]t may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively the defence must have the same opportunity to introduce their own 'expert evidence'."

188. The Court observes that under the Russian law the defence does not have the same rights as the prosecution insofar as obtaining expert opinions is concerned. A proper "expert examination" may be obtained either

through an investigator (who is the main procedural opponent of the defence) or through the court (see Article 57 of the CCrP, summarised in paragraph 111 above). The defence only has the right to ask for an expert examination and to suggest experts and questions to them (see paragraph 120 above). The power to order an expert examination, to choose the experts, to provide them with the authentic materials and physical evidence, and to formulate questions belongs to the investigator or to the judge. As is demonstrated by the facts of the present case, the prosecution or the court may dismiss a request for further expert examination of a person or an item without much explanation, because, in their view, the case is clear as it is (see, in particular, the answer of the investigator to such a request quoted in paragraph 36 above).

189. Alternatively, the defence have the right to seek the assistance of "specialists" (see paragraphs 121 and 122 above). However, it is clear that the status of a "specialist" in Russian law is different from that of an "expert". Although a specialist may "explain to the parties and to the court matters which come within his or her professional competence", his primary role is to assist the court and the parties in carrying out investigative actions which require special skills or knowledge. The difference between the "expert" *stricto sensu* and the "specialist" is well illustrated by Decree no. 28 of the Supreme Court, summarised in paragraphs 125 et seq. above. Although that Decree was adopted several months after the end of the applicant's trial, it interpreted the same legal provision which had been applied in the applicant's case and reflects how the Supreme Court understood the status of "specialists" under the CCrP. Thus, the opinion of a "specialist" cannot replace a full-scale examination of the matter by an expert (see point 1 of the Decree). The specialist cannot examine physical evidence directly; he may only give an "opinion", whereas the expert delivers "conclusions" (see point 20 of the Decree). Where an examination of a complex technical or scientific matter is needed, the court must appoint an "expert", not a "specialist". In sum, although opinions by "specialists" and "experts" can be used in evidence, and both may be professionals in a particular field, the role of a specialist and the weight of his opinion is not, in the opinion of the Supreme Court, identical to that of an "expert".

190. Finally, even assuming that an "expert report" produced by the prosecution can be counter-balanced by the opinion of a "specialist", it is unclear whether the defence, in the circumstances of the present case, was capable of introducing such evidence in the proceedings. As to the oral examination of the "specialists", the Court notes that the IAPR was a Moscow-based expert institution, whereas the trial took place in Khabarovsk, over six thousand kilometres away. Therefore, it would have been difficult and onerous for the defence to ensure the personal attendance of their "specialists" at the trial. In addition, a specialist must appear at the

request of the investigator or the court (see paragraph 114 above), whereas he has no such obligation where the defence seeks his questioning.

191. The remaining option was to introduce the written report by the IAPR in order to challenge the "expert reports" produced by the prosecution. However, the trial court refused to accept the report by the IAPR on the ground that it had allegedly been obtained in breach of the applicable procedural rules. In support of that conclusion Judge M. referred to three provisions of the CCrP: Articles 58, 251 and 270 (see paragraph 103 above). Judge M. did not explain how those provisions had been breached. The Court, for its part, does not see why they should have prevented the court from adding the written opinion of the IAPR to the case file. Thus, Article 58 does not prohibit the defence from seeking and obtaining written opinions by "specialists", at least not in explicit terms. Articles 251 and 270 are not directly applicable since they concern the questioning of a specialist in person, and not the examination of his written opinion.

192. On the other hand, the Court notes that Judge M. held that "a party cannot, on its own initiative and outside of the court hearing, solicit and obtain an opinion of a specialist". Indeed, Article 53 § 3 of the CCrP refers to Article 58, which, in turn, refers to Articles 168 and 270 of the CCrP, which regulate the participation of specialists at the request of the prosecution or the court. It is difficult to see how Article 58 of the CCrP can be reconciled with its Articles 53 § 3 and 86 and with section 6 § 3 (4) of the Advocacy Act of 2002 (see paragraphs 122 and 123 above), which provide that the defence may engage the services of a specialist within criminal proceedings. Be that as it may, it is not the Court's task to explain how the domestic law should be read *in abstracto*. It appears that Judge M. interpreted the CCrP as prohibiting the defence from obtaining written opinions of specialists otherwise than through the prosecution or the court. Thus, the defence was unable to obtain and produce written opinions by "specialists" to challenge the written opinions of the "experts" collected and presented by the prosecution.

(δ) Overall assessment of the handling of expert evidence on the effects of the programme on the mental condition of Ms S.D.

193. The Court stresses that the distinction between the procedural status of a "specialist" and an "expert" in the Russian law would not lead to a violation of Article 6 § 1 automatically in all cases. Moreover, as a matter of principle it is legitimate for the national legislator to set certain rules on how the defence may collect and introduce their own expert evidence at the trial.

194. However, in the present case this distinction, in combination with other handicaps which the defence experienced throughout the proceedings in connection with expert evidence, put it at a net disadvantage *vis-à-vis* the prosecution. The Court reiterates that expert evidence, and in particular

report no. 1170, played a central role in the case of the prosecution. The key expert for the prosecution, Dr. Ig., was never questioned by the defence. The defence did not participate in the process of obtaining expert reports at the investigation stage. The prosecutor and the court refused, in a summary manner, to conduct additional examinations, contrary to the opinion of two professionals examined at the trial and to the position of the court in the first round of the proceedings. And, lastly, the defence had virtually no possibility of challenging those reports with their own counter-evidence. The defence could only seek the assistance of "specialists", whose status was lower than that of "experts", and, in addition, the defence was not allowed to introduce written opinions by "specialists" at the trial, whereas the prosecution and the court relied on the written opinions of the "experts" collected by the investigator at the pre-trial investigation stage.

195. The Court concludes that, in so far as the handling of expert evidence concerning the mental condition of Ms S.D. was concerned, the defence was in a such a disadvantageous position *vis-à-vis* the prosecution that it cannot be reconciled with the requirements of the principle of equality of arms under Article 6 § 1 of the Convention.

(iii) Handling of expert evidence concerning the "medical" nature of the programmes of the association

196. The Court will now turn to the expert evidence which addressed the second question in the present case, namely, whether or not the activities of the association were "medical" in nature.

197. The Court notes that the handling of that group of expert evidence was tainted with the some of the defects examined above. Thus, the first four examinations of the programmes of the association (reports nos. 197, no. 36, the first report by Dr Iv., and the report of Dr A.) were conducted without the involvement or even knowledge of the defence. That being said, the defence was in a somehow better situation as regards the second group of evidence, and that is for the following reasons.

198. First, the Court notes that the defence was informed about the last expert examination by Dr Iv., which resulted in the report of 1 April 2005 (see paragraph 37 above). The defence was therefore able to exercise its rights provided by Article 198 of the CCrP. Even though respect for those rights depended on the investigator, the defence might have at least tried asking the investigator to put additional questions to the expert or appoint another expert.

199. Second, the Court observes that in the second round of the proceedings judge M. heard oral evidence from only one of the four experts who had participated in the preparation of reports nos. 197 and 36, relied on in the judgment. Furthermore, Dr Iv., who prepared the expert report of 1 April 2005, was not examined in person. However, from the materials of the case it is unclear whether the defence solicited the examination of the

absent experts in person (cf. to the situation pertaining to Dr Ig., the rapporteur of the group who had prepared report no. 1170, whose presence was sought by the defence). In the circumstances, it appears that their presence was not regarded by the defence as necessary.

(α) Inability of the defence to introduce a second opinion by their own experts

200. Still, the Court is not persuaded that the principle of equality of arms has been respected in relation to the second group of expert evidence. Thus, the defence was unable to challenge the conclusions of Dr Iv. by submitting an alternative report by Prof. Z. (which defined the notion of "medical activities" and thus related to question no. 2). The court refused to admit his report in evidence for the very same reason it did not accept the report by the IAPR (see paragraphs 49 and 103 above). Thus, the defence did not have an option of an "active defence": they were unable to introduce written opinions of their own "specialists" and, in any event, any opinion of a "specialist" would be of a lesser weight than that of the "expert".

(β) Exclusion by the court of the testimony of Dr A.

201. Lastly, what is particular about the second group of expert evidence is how the prosecution and the courts dealt with the expert opinion by Dr A. (see paragraph 29 above). The Court observes that the expert opinion of Dr A. was obtained at the pre-trial investigation stage on the initiative of the investigator. The report by Dr A. was clearly favourable to the defence. However, there is no reference to that expert report in either of the two judgments rendered in the present case. It appears that either the report of Dr A. was never produced in court, or it was produced but the courts disregarded it. The Court considers that in either scenario the authorities breached the fundamental principles of a fair trial. The Court's case-law states that the prosecution must disclose to the defence "all material evidence in their possession for or against the accused" (see, amongst many other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 36, Series A no. 247-B). Certain exceptions to that rule are permissible, but the Government did not refer to them. *A fortiori*, the rule of disclosure of exculpatory evidence requires the prosecution to submit such evidence to the court for consideration. However, that rule would make no sense if the courts were allowed to leave such evidence without any consideration and not even mention it in their judgments.

202. The Court further observes that the defence tried to introduce the expert opinion of Dr A. in another form: thus, at the first trial (which ended with the applicant's acquittal) he was questioned as a "specialist". However, in subsequent proceedings the oral submissions of Dr A. were excluded from the body of evidence on the ground that Dr A. had already participated in the trial in the capacity of an "expert" (see paragraph 104 above).

203. The exclusionary rule applied by the domestic courts in the circumstances meant that by employing a person as an "expert", the prosecution were capable of neutralising him as a prospective "specialist" for the defence. And if the prosecution did not like the opinion of their "expert", they were free not to refer to it at the trial. As a result, Dr A.'s opinion was excluded from examination at the trial, in any form, and that was to the detriment of the defence.

204. The exclusion of Dr A.'s opinion from the body of evidence appears especially inopportune in the light of the courts' inconsistent approach to expert evidence. The Court notes that Judge Z., who received the case from the court of appeal, considered that a new expert examination of the question concerning the "medical" nature of the activities of the association was necessary (see paragraph 82). However, Judge M., who stepped into the proceedings after the withdrawal of Judge Z., proceeded without having obtained the report requested earlier by Judge M. (see paragraphs 83 et seq.).

205. Again, the Court is not well placed to indicate to the national judge the best course of action. Judge M. had several options: for example, he could have obtained a fresh expert examination of the matter, could have allowed the defence to submit a written opinion by one of their "specialists", or could have examined Dr A.'s written report or his oral submissions. Instead, Judge M. contented himself with relying on the same written opinions by the prosecution's experts which had earlier been rejected by another judge as inadmissible, unreliable and inconclusive, that is, without any meaningful verification of their credibility.

206. In sum, the Court concludes that, insofar as the handling of expert evidence concerning the nature of the activities of the association was concerned, the defence was placed in a disadvantageous position *vis-à-vis* the prosecution and the proceedings were not truly adversarial. That situation is contrary to the requirements of Article 6 § 1 of the Convention.

(c) Summary of the Court's conclusions under Article 6 of the Convention

207. The Court is mindful of the fact that Judge M. heard a number of witnesses for the defence, examined several expert opinions and studied various documents. However, the question of whether or not the defence enjoyed "equality of arms" with the prosecution and whether the trial was "adversarial" cannot be addressed solely in quantitative terms. In the present case it was very difficult for the defence to effectively challenge the expert evidence submitted to the court by the prosecution. The Court stresses that the case against the applicant was built upon that expert evidence. In those circumstances, the way in which expert evidence was handled made the applicant's trial unfair. Therefore, the Court does not need to address the other procedural violations alleged by the applicant.

208. On the strength of the above the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

209. The applicant complained that her conviction had been unforeseeable and had been based on legal acts adopted after the events at the heart of the case. She relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

210. The Government contested that argument. They claimed that criminal liability for illegal medical practice was established in the Criminal Code with sufficient clarity. The domestic courts, in convicting the applicant, had relied on provisions of Russian legislation on public health which pre-existed the events which led to the applicant's conviction.

211. The applicant maintained her complaints.

212. The Government did not put forward any formal objection to the admissibility of this complaint. The Court further observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

213. Turning to the merits, the Court considers that in order to decide whether or not the acts imputed to the applicant could be characterized as "illegal medical practice" – a crime punishable under Article 235 of the Criminal Code – the courts needed to address certain questions of fact, in particular those related to the nature of the activities of the association in the light of the applicable legal norms. As demonstrated above, the procedure in which the court examined those questions, which required the help of the professionals in this field, was deficient. The applicant's conviction was therefore unsafe. In these circumstances, and in view of its findings under Article 6, the Court considers that it is not necessary to examine separately whether there has been a violation of Article 7 of the Convention on account of the applicant's conviction.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

214. 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

215. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

216. The Government claimed that a finding of a violation would constitute sufficient just satisfaction "since, in such case, the applicant's sentence would be quashed pursuant to the procedure established by the Criminal Procedure Code of the Russian Federation within the Court's judgment execution proceedings".

217. The Court considers that the re-opening of the case would be the most appropriate measure to restore the applicant's rights under Article 6 of the Convention and notes that this possibility is available to the applicant under the domestic law. However, it does not consider that a re-opening constitutes, by itself, sufficient compensation in the circumstances, given the duration of the criminal proceedings and the seriousness of the procedural violations found in the present case. On the other hand, the Court considers that the amount sought by the applicant is excessive. In light of the materials in its possession and on an equitable basis the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be charged on this amount.

B. Costs and expenses

218. The applicant also claimed 500,000 Russian roubles (RUB; approximately EUR 11,350) for legal costs incurred before the Court. She submitted to the Court an agreement between her and her lawyer, Ms Karpova, dated 1 August 2010, which stipulated that a part of that amount (RUB 90,000) was payable within six months after the communication of the case to the Government, whereas the remaining amount was payable within two years after the Court's decision on admissibility. Under that agreement the applicant also had to cover the lawyer's travel expenses, postal expenses and translation costs separately. The applicant produced payment slips confirming receipt of RUB 90,000 by her lawyer and RUB 12,500 by her translator. She also submitted a calculation of the travel expenses of her lawyer covering a three-day trip from Khabarovsk to Strasbourg.

219. The Government claimed that the applicants failed to produce documents showing that the amounts claimed had been incurred. As to the costs related to the applicant's lawyer's trip to Strasbourg, those costs had not "actually and necessarily" been incurred.

220. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court rejects the claim for travel expenses, as the lawyer's trip to Strasbourg was not necessary. Furthermore, the Court observes that the applicant's lawyer did not indicate her hourly/daily rate and did not produce a detailed description of the work done in this case and the time spent on it. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000 covering costs under all heads plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

221. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of unfair handling of expert evidence in the proceedings;

3. *Holds*, by six votes to one, that there has been no violation of Article 6 § 3 (d) of the Convention on account of absence of Ms S.D. from the trial;

4. *Holds*, by five votes to two, that there is no need to examine the complaint under Article 7 of the Convention;

5. *Holds*, unanimously,
   (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, the following amounts, to be converted into the Russian roubles at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Isabelle Berro-Lefèvre
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint partly dissenting opinion of Judges Pinto de Albuquerque and Turković;

(b) Partly dissenting opinion of Judge Pinto de Albuquerque.

I.B.L.
A.M.W.

JOINT PARTLY DISSENTING OPINION OF JUDGES PINTO DE ALBUQUERQUE AND TURKOVIĆ

1. We regret that the majority did not deal with the most important substantive issues of the *Matytsina* case, namely the unforeseeable and retroactive application of a blanket criminal provision and the waiver of the statute of limitations in criminal law. The novelty and gravity of these two issues should have merited the attention of the Chamber.

The deficient application of a blanket criminal provision

2. The applicant was convicted of the criminal offence of quackery provided for in Article 235 ("Engaging in Illegal Private Medical Practice or Private Pharmaceutical Activity") of the Russian Criminal Code and sentenced to two years' imprisonment. She did not serve the sentence since the prosecution was time-barred. The facts of the case occurred during a period of three months, from April 2002 to June 2002.
3. The legal framework at the material time was extremely confusing, so confusing that seventeen experts engaged during the domestic proceedings could not agree whether the practices imputed to the association constituted "medical services," "scientific medicine" or "folk medicine" or something else. In fact, the following reports were produced before the domestic authorities: (1) report no. 1170 of 25 July 2003, which concluded that the alleged victim had developed an "acute schizoid psychotic disorder" related to the alleged victim's participation in the programmes of the association, without expressing a view on the nature of these programmes; (2) report no. 197, of 19 November 2003, based on written material in the file, which did not answer the question as to whether the techniques of the association were medical; (3) report no. 36, of 9 April 2004, based on written material in the file, which did not give an answer to that question either; (4) the opinion of 22 April 2004, which considered that techniques used by the association such as relaxation and yoga postures, did not require licensing; (5) the report of 5 May 2004, which concluded that the techniques of the association were not "medical"; (6) the report of 16 December 2004, which did not express an opinion on the nature of the association's practice; (7) the report of 17 January 2006, which criticised the methods of report no. 1170 of 25 July 2003; and finally, (8) the report of 1 July 2007, which concluded that the association's activities were not "medical" and that no clear link could be established between the alleged victim's mental condition and the association's programmes.
4. Even more strange is the fact that only one expert, Dr Iv., affirmed that the association's activities could be characterised as "folk medicine", which required a licence, and that the activities of the association were

medical in nature. She stated this opinion in her two reports of 23 November 2004 and 1 April 2005, but never appeared in court to be questioned and cross-examined as to her conclusions. Moreover, she expressed her opinion only on the basis of written material, without ever examining the alleged victim or questioning the defendant. Worse still, her opinion referred to various laws and regulations which entered into force after the relevant events, such as the decree of the Ministry of Public Health no. 238 of 26 July 2002, and the Minister of Public Health's directive of 14 November 2003.

5. It is indeed incomprehensible that the domestic courts accepted this sole expert's opinion as convincing evidence and found the respondent guilty as charged. The total unpredictability of the domestic courts' interpretation of the legal framework is compounded by the fact that the most important commentaries on the Russian Criminal Code do not refer to any previous cases regarding the application of its Article 235.
6. Above all, the case raises an issue of principle. The criminal provision of Article 235 of the Russian Criminal Code is a blanket legal norm, which makes the punishability of the criminal offence of quackery dependent on non-criminal laws and regulations. In the case at hand, both the experts and the courts referred to several administrative laws and regulations that allegedly defined and circumscribed "medical practice". While the compatibility of blanket criminal provisions with the principle of legality (*nullum crimen sine lege praevia, certa et stricta*) has been a subject of heated discussions, it is nonetheless generally accepted that these provisions are, in principle, necessary in certain fields of criminal law, namely where complex technical details of the constitutive elements of the offence are provided for by other non-criminal laws and regulations. Thus, the blanket criminal provision is applied in conjunction with the supplementing non-criminal provisions. In any case, these non-criminal laws and regulations which supplement the constitutive elements of the offence missing in the blanket criminal provision must themselves comply with the requirements of the principle of legality. An individual must know from the wording of the criminal provision, interpreted in conjunction with the relevant non-criminal provisions and, if need be, with the assistance of a third person's legal expertise, what acts and omissions will make him or her criminally liable and what penalty will be imposed for his or her acts or omissions[1]. Thus, the non-criminal laws and regulations which supplement the blanket

[1] In the Court's case-law, see *Cantoni v. France*, 15 November 1996, §§ 29-32, Reports 1996‑V; *Radio France and Others v. France*, no. 53984/00, §§ 18-20, 30 March 2004; *Liivik v. Estonia*, § 101-104, 25 June 2009; *Soros v. France*, no. 50425/06, §§ 55-62, 6 October 2011; and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 791-815, 25 July 2013; and in the European Court of Justice's case-law, see *Koenecke*, case 117/83, 25 September 1984, and *Vandemoortele NV*, case C-172/89, 12 December 1990.

criminal provision must comply with the requirements of *lex praevia*, *certa et stricta*. Otherwise the State could punish conduct that no one could have foreseen as criminal at the material time.

7. That was exactly the case here. The administrative laws and regulations that were supposed to supplement Article 235 of the Russian Criminal Code lacked clarity. In fact, a careful analysis of the legal framework at the time of the facts (i.e., from April 2002 to June 2002) shows that no law, regulation or directive provided for a clear definition of the legal concepts of "medical practice", "scientific medicine", "scientific medical procedure" or "folk medicine" for the purposes of the criminal-law provision of Article 235 of the Russian Criminal Code. The laws and regulations in force at the material time only governed the administrative organisation of several health services, without any concrete and detailed reference being made to the specific characteristics of the acts and practices performed within the fields of "scientific medicine" and "folk medicine".
8. Admittedly, in the area of regulation under consideration it may be difficult to couch laws with absolute precision and a certain degree of flexibility may be called for to enable courts to follow scientific developments. Indeed, there is an inevitable element of judicial interpretation of every legal norm, however clearly drafted it may be, but in its interpretation courts may not go beyond what could reasonably have been foreseen in the circumstances[2]. Nonetheless, in the present case, owing to the vagueness of the administrative regulatory framework of "health services", it was not foreseeable at the material time that the unlicensed practices of the association would constitute a criminal offence. From the wording of the relevant administrative provisions, read in conjunction with the Criminal Code, the defendant could not have known, even with the assistance of expert interpretation, as testified by the conflicting expert's reports, that the unlicensed association's practices would make her criminally liable[3].
9. Moreover, although it is in the first place for the national authorities to interpret and apply national law, in the present case the wide and overreaching judicial interpretation of the administrative provisions was not even consistent with the essence of the criminal offence of "Engaging in Illegal Private Medical Practice"[4]. The administrative law provisions were arbitrarily construed by the second trial court to the defendant's detriment, since it labelled practices like yoga, breathing techniques,

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[2] For example, *Baskaya and Okcuoglu v. Turkey*, nos. 23536/94 et al., §§ 39-40, 8 July 1999.

[3] See *mutatis mutandis*, *Baskaya and Okcuoglu*, cited above, § 36.

[4] See *mutatis mutandis*, *CR v. the United Kingdom*, no. 2190/92, § 37, 22 November 1995, and *Kafkaris v. Greece*, no. 21906/04, § 141, 12 February 2008.

mantra singing, meditation, aromatherapy and other similar practices as "medical services".

10. In addition, some of the administrative laws, regulations and directives mentioned by the expert Dr Iv. and the domestic courts entered into force only after the material time, thus representing an inadmissible retroactive application of the blanket criminal provision. As the Tsentralny District Court of Khabarovsk rightly pointed out in its decision of 23 July 2007, the expert opinion of Dr Iv. was based on legislation which had entered into force after the events imputed to the applicant. The same happened with other expert's reports, which also relied on the same *ex post facto* provisions in coming to their, albeit opposite, conclusions.
11. The obvious conclusion is that the administrative provisions existing at the material time were not sufficient to supplement the constitutive elements of the offence, and the second trial court had to refer to *ex post facto* administrative provisions, which were not only applied retroactively, but were in addition themselves prone to conflicting interpretations. In short, by labelling the practices of the association and the defendant as "medical services" requiring licensing, the courts extended the scope of the existing criminal offence of the Russian Criminal Code to acts which previously had not been criminal offences. For the reasons stated above, the applicant could not reasonably have foreseen that her acts would constitute the criminal offence of "Engaging in Illegal Private Medical Practice or Private Pharmaceutical Activity" under the Criminal Code as supplemented by the administrative provisions in force at the material time[5]. Thus, the finding reached by the first-instance court in its judgment of 27 July 2007 was entirely correct: there was simply no legal basis for the applicant's conviction.

The waiver of the statute of limitations in criminal law

12. To aggravate the lack of clarity of the criminal law framework, the prosecution was time-barred but the applicant was nevertheless convicted and sentenced. Article 27 § 2 of the Russian Code of Criminal Procedure provides that, if the defendant objects to the termination of the proceedings owing to the expiry of the statutory time-limits set out in Article 24 §§ 1-3 of the Code of Criminal Procedure, the proceedings must continue and the court must decide the case on the merits. The legal interpretation of Article 27 § 2, of the Code of Criminal Procedure is unclear as to whether the courts may impose a criminal sentence, besides finding the person guilty. The most important commentaries on the Code of Criminal Procedure are not unanimous on this point: if the person is found guilty of the prescribed offence, some commentators say that

[5] See, *mutatis mutandis*, *Liivik v. Estonia*, cited above, §§ 100-104.

courts cannot in any case impose any penalties on the convicted person, whereas others say that the judge has a choice to impose or not to impose a sentence, thereby granting judges unlimited discretion, which is unacceptable under the principle of legality. The case-law in this respect is not uniform either. Owing to the lack of clarity in the law and the unfettered discretion granted to judges in applying such law, the applicant did not have an advance fair warning, as required by the principle of legality, as to what consequences the waiver of the statute of limitations would entail for her and it was thus impossible for her to make a proper informed decision related to a waiver of her right. Although she might have had some understanding of the risk she was taking by waiving the statute of limitations, the degree of risk was completely unforeseeable. The principles of advance notice and limitation of official discretion, as embodied in the principle of legality guaranteed under Article 7 § 1, of the Convention, should be considered the minimum requirement for the rule of law to be upheld.

13. Moreover, the solution set out in Article 27 § 2 of the Russian Code of Criminal Procedure is in itself censurable from a human rights perspective. The waiver by the defendant of his or her legal right to terminate time-barred criminal proceedings is a voluntary submission to a trial court, which can take place at any time in the future, regardless of the applicable law on the statute of limitations. The practical result is that any person may agree to be tried, and ultimately punished, for any crime, even minor offences, committed a long time ago, where criminal prosecution and conviction no longer serve any legitimate purpose, no penological needs justify punishment and the evidence may have already vanished. In our view, such a waiver is *per se* incompatible with the Convention, since it defeats both the remedial purpose and the mixed – both substantive and procedural – nature of the statute of limitations.

14. The statute of limitations consists in the extinction of an offence which deprives the State of jurisdiction to prosecute, try, convict and sentence the alleged offender. Statutes of limitation in criminal law are not only designed to bar prosecutions based on facts that have become obscured by the passage of time, but also specify a time-limit beyond which an irrebuttable presumption arises that no further danger to society results from the criminal act and a defendant's right to a fair trial would be prejudiced. Hence, its assessment is a substantive prerequisite of the State's right to prosecute offenders and punish criminal conduct. This prerequisite goes to the heart of the State's sovereign power to punish and thus relates to the substance of the case, not merely its admissibility.

15. The Court's initial approach to the issue of the nature of the statute of limitations was hesitant. In *Coëme and Others v. Belgium*[6], the question whether Article 7 of the Convention would be breached where a law lengthened a limitation period after it had expired was left open, although the Court did accept the legitimacy of a law that lengthened the limitation period if it entered into force before the limitation period had expired. In *Previti v. Italy*[7] the Court interpreted this passage of *Coëme and Others* as if it had stated that the statute of limitations had an exclusively procedural nature and was not under the guarantees of Article 7. But this approach was rightly abandoned in *K.-H.W. v. Germany* [GC] and *Kononov v. Latvia* [GC][8]. The Court's present approach is clear and unambiguous. It can be summed up as follows: the statute of limitations sits alongside, with equal force, the conditions of the existence of a criminal offence and therefore shares the substantive nature of the constituent elements of the offence, with the logical consequence of the full applicability of Article 7, including the prohibition of the retroactive application of criminal laws with harsher statute of limitations provisions to the detriment of the defendant. Thus, the statute of limitations has, in the light of the Convention, a mixed nature, being both procedural and substantive at the same time.
16. The aforementioned understanding of the statute of limitations has various legal consequences. Firstly, courts are empowered, and even obliged, to decide upon the applicability of the statute of limitations of their own motion, in view of the paramount public policy reasons for the enactment of statutes of limitation. Secondly, since the statute of limitations relates to the State's right to prosecute, try, convict and sentence citizens, the principle of legality fully applies to its regime. The grounds for limitation, suspension or interruption of the effect of the lapse of time, and any exceptions to or extensions of the statute of limitations, are a legislative responsibility, and can neither be determined by courts nor manipulated by the defendant. Thirdly, the statute of limitations cannot be waived: the running of the statute of limitations extinguishes the court's power to try the case and punish the defendant, and no waiver by the defendant can supply the requisite jurisdiction. In a State governed by the rule of law and human rights, criminal jurisdiction cannot be conferred upon the court by a unilateral act of the defendant. Any punishment for a time-barred act or omission, even when he or she expressed his or her wish to be tried, is not only irrevocably disproportionate, but furthermore contrary to the requirements of the

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[6] *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §§ 149-150, ECHR 2000 VII.
[7] *Previti v. Italy* (dec.), no. 1845/08, §§ 80-85, 12 February 2013.
[8] *K.-H.W. v. Germany* [GC], no. 37201/97, §§ 107-112, 22 March 2001, and *Kononov v. Latvia* [GC],no. 36376/04, §§ 228-233, 17 May 2010.

principle of legality. The statute of limitations is not a mere waivable defence, but a substantive guarantee of a rational use of State power to enforce criminal law.

Conclusion

17. In sum, we believe that the applicant was not only deprived of her right to contest the expert evidence and was therefore unfairly convicted, but she was also sentenced under an uncertain and retrospective legal framework. Justice would have required laying a stone over this procedure, and not leaving the door open for the continuation of these totally groundless criminal proceedings. Accordingly, we conclude that there has been a flagrant violation of Article 7 of the Convention, and consequently dissent on the decision not to assess this complaint.

PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. In addition to the violation of Article 6 § 1 of the Convention, I find that there has also been a violation of Article 6 § 3 (d) of the European Convention on Human Rights ("the Convention") owing to the unfair handling of the testimonial evidence in the criminal proceedings in question. The unfairness of the handling of the expert evidence was compounded by the additional lack of cross-examination of the alleged victim during both the first and the second trial.

2. The alleged victim was never heard by a court, as her testimony was read out in open court in the first and second trials. Since she informed the court before the second trial that she had already been "reconciled" with the accused persons and even withdrew her complaint, no psychological or physical danger could be feared in the event of her being confronted with the defendant during the court hearing. Whilst the two medical certificates issued on 19 January 2006 and 22 March 2007, stating that her appearance in court was not recommended since it might cause a "relapse", could possibly have justified her absence at the first trial, they could certainly not ground the decision of the court not to call Ms S.D. to testify at the second trial in June 2009, more than two years later, when new relevant information on her state of mind and her relationship with the defendant had been made known to the court. The mention of undetermined sources of information, such as "information received" (paragraph 88) by the trial court is the crowning touch of arbitrariness in a decision already lacking any plausible factual and legal grounds.

3. Furthermore, the alleged victim's cross-examination was crucial in view of the fact that the imputed offence referred to a negligent result of harm caused to the victims of illegal private medical practice or private pharmaceutical activity. The trial court had to assess whether the alleged victim had suffered any psychological or physical harm during the material time from April to June 2002 and, if so, whether that harm was caused by the applicant's practices. Both the criminal harm and the link of causality could and should have been ascertained on the basis of the alleged victim's direct testimony before the court. Neither the domestic courts nor the sole expert (Dr Iv.), whose report was used by the domestic courts to ground the conviction, ever saw, let alone questioned, the victim or evaluated whether she had suffered any harm caused by the applicant's practices. Thus, the alleged victim's testimony was capable of enlightening the court as to essential points of fact which were disputed by the defence.

4. The decision of the defence not to object to the reading-out of Ms S.D.'s previous testimony in the proceedings conducted before the first trial court cannot be interpreted as an unequivocal waiver of its right to examine her in person. The same applies to the reading-out of the testimony

of other witnesses submitted by the prosecution. The irrefutable fact is that, at the hearing before the second trial court on 2 July 2009, the defence objected explicitly to the reading-out of statements from Ms S.D. and from other witnesses for the prosecution that had been obtained during the previous stages of the proceedings. The position of the defence was clear, and moreover justified: they wanted to question the witnesses about the facts of the case in view of the new evidence, such as the history of mental problems among members of the alleged victim's family, together with the "reconciliation" and the withdrawal of the complaint by the alleged victim. The defence had the right to assess what was in its best interest and its judgment should have been respected by the court for the sake of the fairness of the trial, including the basic right to examine or have examined witnesses for the prosecution. The trial court simply assumed that the defence's input to the trial was pointless – a form of conduct not much different from the police investigator's conduct at the investigation stage of the proceedings.

5. No counter-balancing measures whatsoever were taken by the public prosecutor or the court for the benefit of the defendant when the alleged victim was questioned during the pre-trial stage of the proceedings, in order to allow for some procedural safeguards to ensure the fairness of the proceedings and the reliability of the evidence. For example, the defence lawyer was not allowed to be present at the police questioning of the witness.

6. The argument that the alleged victim's testimony was not the sole and decisive evidence against the defendant is not convincing. In addition to the expert opinion of Dr Iv and some documentary evidence, including the medical history of Ms S.D., the charter of incorporation of the association, its brochures and leaflets, the second trial court based its factual findings on the records of the testimony of the alleged victim Ms S.D., given on 24 March 2003 and 22 April 2004, and the testimony of Ms N.D. (the sister of the alleged victim) given on 9 September 2003, all three statements having been taken during the pre-trial investigation by the police, the testimony of Ms Z.D. (the mother of the alleged victim) and Mr E.D. (the brother of the alleged victim) given at the first trial, together with the records of the testimony of Ms E. K., Ms O.L., Ms E.B., Ms I.G. and others, given either to the police investigator during the investigation stage of the proceedings or at the first trial. The whole case against the defendant was based on untested evidence given by the victim, corroborated by one sole expert who had never seen the victim and who was never cross-examined in a court hearing, as well as other witnesses whose testimony was not cross-examined before the second trial court either. In straightforward words, the core of the prosecution's case was not weak. It simply did not exist. Any court of law would have thrown out the prosecution's case on the grounds of a lack of reliable evidence. As the first trial court rightly did.

7. The facts described above call for some reflections of a general nature. The principle of the fair trial and the principle of cross-examination of the evidence require that testimonial evidence be produced before the judge who is responsible for returning the verdict. The assessment of the reliability of that evidence depends on the judge's immediate perception of it. The immediacy of the relationship between the judge and the testimony (or the *Unmittelbarkeitsprinzip*, as the German doctrine calls it) is a constituent element of the adversarial proceedings inherent in the concept of fair trial. Thus, as a matter of principle, the trial court may not base a criminal conviction on testimonial evidence produced prior to the trial, even where the evidence has been produced in a previous trial before the same or other court and its judgment has subsequently been quashed and the case remitted for a fresh trial, and regardless of whether or not the composition of the first and second trial courts is different. *A fortiori*, this conclusion applies also to testimonial evidence that was produced at the pre-trial stage of the criminal proceedings. The obvious consequence of this principle is that only exceptionally may the testimonial evidence produced at the pre-trial stage of criminal proceedings or at the trial stage, in the event of remittal for a fresh trial, be considered admissible and used as a ground in the judgment.

8. In order to comply fully with the principle of a fair trial and the principle of cross-examination of the evidence, there must be an exhaustive legal catalogue of grounds for the reading-out of an absent witness's testimony in open court, such as death, physical or mental incapability, disappearance, travel abroad and need to protect the life, safety or health of the witness. Furthermore, the catalogue of these grounds must distinguish between the evidence produced before the judge, the public prosecutor or the police. For the purposes of an adversarial and fair examination of the evidence, the evidence produced before the police or the prosecutor cannot be equated with the evidence produced before the judge at the pre-trial stage. The catalogue of the grounds for reading out the absent witness's testimony in open court must be more expansive when a judicial authority collects the evidence and less expansive when it is collected by a non-judicial authority. For the same purposes, when deciding whether the absent witness's testimony should be read out, courts must take into consideration the presence or absence of the defence lawyer at the witness's hearing. Experience shows that the intervention of the defence lawyer at a later stage is often too late, and may not suffice to remedy the shortcomings of a previous non-adversarial hearing of the witness. The catalogue of the grounds for reading out the absent witness's testimony in open court must be more expansive when the defence lawyer participated, or had the opportunity to participate, in the pre-trial hearing of the witness, and less expansive when he or she did not have such opportunity.

9. Accordingly, the legal standard of the Court, which was set out most recently in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, must be further refined, based on the joint assessment of the following criteria: (1) the nature of the ground hindering the witness's presence at the trial hearing; (2) the kind of public authority before which the witness's prior testimony was given; (3) the presence or absence of the defence lawyer at that specific hearing; (4) the existence of other mechanisms to safeguard the defence's right to impugn the fairness of the gathering of testimony, the credibility of the witness and the reliability of his or her testimony; (5) the weight of the read-out testimony of the non-cross-examined witness in the trial court's judgment; and (6) the waiving of the right to cross-examine the absent witness.

10. To sum up, by repeatedly denying the defence any possibility of challenging the prosecution evidence and subsequently relying on the reading-out of testimonial and expert evidence gathered at the pre-trial stage of the proceedings or during the first trial, in spite of the firm opposition of the defence, the second trial court emptied the principle of cross-examination of any practical meaning and ultimately turned the judgment into a farce, where the defendant's conviction seemed from the very start of the trial like a self-fulfilling prophecy, confirmed by each new interim decision taken against the interests of the defence and the final predictable conviction of the defendant. No remedy for this blatant unfairness was provided by the appellate court.