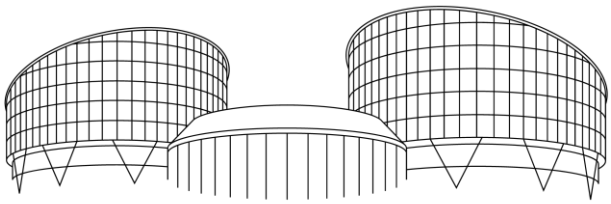

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

**CASE OF ANANYEV v. RUSSIA**

*(Application no. 20292/04)*

JUDGMENT

STRASBOURG

30 July 2009

**FINAL**

*21/02/2011*

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

**In the case of** Ananyev v. Russia**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 7 July 2009,

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

## PROCEDURE

1. The case originated in an application (no. 20292/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Sergey Mikhaylovich Ananyev ("the applicant"), on 22 April 2004.

2. The applicant, who had been granted legal aid, was represented by Ms O. Preobrazhenskaya and Ms K. Moskalenko, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had not been present or represented at the trial hearing and had not been represented at the appeal hearing, in violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention.

4. On 13 September 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1965 and is currently serving a prison sentence in the Smolensk region.

### A. First trial and ensuing appeal proceedings

7. On 22 December 2002 the applicant was arrested on suspicion of murder. Subsequently he was committed to stand trial by the Glinkovskiy District Court of the Smolensk Region. The trial was fixed for 22 July 2003.

8. In the morning of 22 July 2003 the applicant had a talk with legal-aid counsel appointed to represent him. He was dissatisfied with the result of that discussion and so refused counsel's services in writing.

9. The first witness on the stand was the applicant's sister. The applicant had an altercation with her and the judge ordered that he be escorted out of the room.

10. The applicant was brought back into the courtroom to make his final submissions. After that the judge declared the trial at an end and announced that the verdict would be handed down on 24 July 2003.

11. On 24 July 2003 the judge delivered the judgment, finding the applicant guilty of murder and sentencing him to fifteen years' imprisonment in a high-security colony.

12. On 28 July 2003 the applicant filed grounds of appeal. He submitted, in particular, that the entire trial had been conducted in his absence, that he had not been represented and, as a consequence, had not been able to defend himself. He asked that his case be re-heard and that a different legal-aid lawyer be appointed to represent him before the appeal court.

13. On 11 November 2003 the Smolensk Regional Court held the appeal hearing. The applicant was present but not represented, as he had requested. The Regional Court dismissed the appeal, finding that the conviction had been lawful and justified. In the Regional Court's view, there had been no violation of the applicant's right to defend himself because he had voluntarily refused the services of legal-aid counsel before the trial.

### B. Review of the applicant's conviction

14. On 15 June 2004 the Fokinskiy District Court of Bryansk reviewed the applicant's conviction in the light of recent amendments to the Russian Criminal Code and held that the applicant should serve a prison sentence in a colony with less strict conditions of detention.

15. On 27 December 2006 the Presidium of the Smolensk Regional Court quashed by way of supervisory review the appeal judgment of 11 November 2003. The Presidium found that the applicant's right to legal representation had been infringed in the appeal proceedings and remitted the case for fresh examination by the appeal court.

### C. New appeal proceedings

16. On 23 January 2007 the judicial authorities asked the President of the Smolensk Regional Bar Association to appoint counsel to represent the applicant in the proceedings before the appeal court.

17. On 29 January 2007 the applicant's case was assigned to Ms D. as counsel. The applicant was informed accordingly.

18. On 31 January 2007 the Smolensk Regional Court scheduled the appeal hearing for 13 February 2007. On the same day Ms D. studied the applicant's case file.

19. On 6 February 2007 the applicant informed the Regional Court of his decision not to participate in the appeal hearing. In his motion he further questioned the effectiveness of his legal representation referring to the state-appointed lawyer's failure to meet him to prepare his defence.

20. On 13 February 2007 the Smolensk Regional Court examined the case and upheld the applicant's conviction. Ms D. was present. She did not file any grounds of appeal and appeared to make oral submissions to the court on the basis of the grounds of appeal originally filed by the applicant. The applicant did not attend. The appeal court noted, *inter alia*, that the trial judge's decision to remove the applicant, who had disturbed order in the courtroom and made threats to persons present there, had been lawful and justified.

21. On the same day the Smolensk Regional Court granted Ms D.'s request for the payment of her legal fees in the amount of 2,200 roubles and ordered the applicant to pay those expenses.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Code of Criminal Procedure

22. Article 51 of the Code of Criminal Procedure of the Russian Federation (the “Code”, in force from 1 July 2002) provides for mandatory legal representation if the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty. Unless counsel is retained by the accused, it is the responsibility of the investigator, prosecutor or the court to appoint a lawyer to represent him or her.

23. As provided for in Article 52 of the Code, the accused may refuse legal assistance at any stage of criminal proceedings. Such a waiver may only be accepted if made on the own initiative of the accused. The waiver must be filed in writing and recorded in the official minutes of the relevant procedural act. The investigator, prosecutor or the court might decide not to accept the waiver. The accused does not forfeit the right to subsequently ask for appointment of a lawyer to represent him in the criminal proceedings.

24. Pursuant to Article 258 of the Code, the penalties the judge may impose on any person, including the defendant, who acts in a manner that disturbs order in the courtroom are (1) a warning, (2) removal from the courtroom, or (3) a fine. Article 258 § 3 establishes that the trial, including the parties' closing arguments, may be conducted in the defendant's absence. In such a case, the defendant must be brought back to the courtroom to make the final submissions. The judgment must always be pronounced in the defendant's presence.

25. Article 373 of the Code provides that the appeal court's role is to review a conviction with a view to verifying its lawfulness, validity and fairness. Under Article 377 of the Code, the appeal court may examine evidence, including additional material submitted by the parties, directly.

26. Article 413 of the Code set out that the criminal proceedings may be re-opened on the basis of a finding of a violation of the Convention made by the European Court of Human Rights.

### B. Case-law of the Constitutional Court of the Russian Federation

27. In a case in which it examined the compatibility of Article 51 of the Code of Criminal Procedure with the Constitution, the Constitutional Court ruled as follows (decision no. 497-O of 18 December 2003):

> "Article 51 § 1 of the Code of Criminal Procedure, which describes the circumstances in which the participation of defence counsel is mandatory, does not contain any indication that its requirements are not applicable in appeal proceedings or that the convicted person's right to legal assistance in such proceedings may be restricted."

28. That view was subsequently confirmed and expanded upon in seven decisions delivered by the Constitutional Court on 8 February 2007. It found that free legal assistance for the purpose of appellate proceedings should be provided on the same conditions as during the earlier stages in the proceedings and was mandatory in the situations listed in Article 51. It further underlined the obligation of the courts to secure the participation of defence counsel in appeal proceedings.

29. With respect to the compatibility of Article 258 of the Code of Criminal Procedure with the Constitution, the Constitutional Court has ruled as follows (decision no. 3710 of 20 October 2005):

"The aim of Article 258 § 3 of the Code of Criminal Procedure is to secure the proper administration of criminal justice and to prevent the disturbance of order in the courtroom by a defendant. Even though this rule allows for the removal of the defendant from the courtroom as a way of dealing with his unruly conduct, it does not deprive him of the right to participate in a hearing and conduct his defence in accordance with the applicable rules. Its purpose is to prevent the abuse of the rights granted to the defendant.

...

The defendant's right to be present at his trial should not be understood as being guaranteed even when he disturbs order in the courtroom or obstructs the proper administration of justice or the enjoyment by other parties of their procedural rights guaranteed by the Constitution of the Russian Federation. When deciding to remove the defendant from the courtroom... the [judge] must indicate the factual circumstances of the defendant's unruly conduct and sufficiently justify the finding that the defendant's removal from the courtroom was necessary."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained under Article 6 of the Convention that the proceedings against him were unfair because he was neither present nor represented at the trial and was not represented on appeal. The relevant parts of Article 6 read as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal...

...

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(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..."

31. The Government did not make any comments in respect of the applicant's complaint about his exclusion from the trial. As regards the authorities' failure to appoint a legal-aid lawyer to represent him in the first set of appeal proceedings, the Government conceded that it could have affected their fairness. In this respect, they submitted that the Russian authorities had taken measures to remedy the violation of the applicant's rights set out in Article 6 at the domestic level and the applicant had lost his victim status. In particular, on 27 December 2006 the Presidium of the

Smolensk Regional Court had quashed by way of supervisory review the judgment of 11 November 2003 precisely on the ground that the applicant had not been represented before the appeal court. On 29 January 2007 Ms D. as counsel was appointed to represent the applicant, who was informed of that fact accordingly. When informing the appeal court that he would not be taking part in the appeal hearing, the applicant did not waive the services of Ms D. She duly and diligently prepared for the appeal hearing and provided a proper defence of the applicant's interests before the appeal court.

32. The applicant maintained his complaints. He submitted that after being removed from the courtroom he was unable to participate in the examination of witnesses and the assessment of other evidence, in violation of Article 6 of the Convention. Nor had the court appointed a lawyer to represent him during the trial despite his requests. In response to the Government's submissions regarding his victim status, the applicant argued that the measures taken by the Russian authorities did not constitute adequate redress. According to the applicant, such redress should have included monetary compensation since the appeal judgment had not been quashed until three years later. Nor had his rights been restored in full. Merely appointing a lawyer to represent him during the appeal hearing had not been sufficient to restore his rights.

## A. Admissibility

33. The Court notes that the Government's argument relating to the loss of victim status by the applicant is closely linked to the merits of his complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention. Accordingly, the Court finds it necessary to join it to the merits of the applicant's complaint and will revert to it subsequently (see *Sakhnovskiy v. Russia*, no. 21272/03, §§ 34-36, 5 February 2009).

34. The Court further notes that the applicant's complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

### *1. General principles*

35. The Court notes at the outset that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under Article 6 §§ 1

and 3 should be examined together (see *Vacher v. France*, 17 December 1996, § 22, *Reports of Judgments and Decisions* 1996-VI).

36. While it is of capital importance that a defendant in criminal proceedings should be present during his or her trial, proceedings held in the absence of the accused are not incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact (see, among other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 82 *in fine*, ECHR 2006-II).

37. The proceedings as a whole could be said to have been fair if the defendant was allowed to appeal against the conviction *in absentia* and entitled to attend the hearing in the court of appeal entailing the possibility of a fresh factual and legal determination of the criminal charge (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

38. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Furthermore, it must not run counter to any important public interest (see, among other authorities, *Sejdovic* cite above, § 86 *in fine*, ECHR 2006-II).

39. The Court has also held that before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones*, cited above).

40. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Sejdovic*, cited above, § 83).

41. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see *Mariani v. France*, no. 43640/98, § 40, 31 March 2005). It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series

A no. 297-A, and *Pelladoah v. the Netherlands*, 22 September 1994, § 40, Series A no. 297-B).

*2. Application of the above principles to the instant case*

42. In deciding whether the criminal proceedings against the applicant were fair, the Court will examine them as a whole (see *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B).

**(a) Exclusion from the trial**

43. Turning to the circumstances of the present case, the Court notes that during the trial the applicant was excluded from the courtroom for making threats against persons present in court. The judge directed that the applicant should be brought back to the courtroom at the end of the trial to make his final submissions. As a result, all the evidence, including, but not limited to, the testimony of the witnesses, was examined in his absence. At that point of the proceedings, the applicant was not represented by a lawyer whose services he had previously waived.

44. The Court observes at the outset that it is essential for the proper administration of justice that dignity and order in the courtroom be the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither could nor should have been tolerated.

45. The Court accepts that the applicant's behaviour was of such a nature that it might have been justifiable to remove him from the courtroom and to continue the trial in his absence. However, it remained incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his conduct would be (see *Jones*, cited above).

46. The Court discerns nothing in the materials in its possession to show that the applicant was made aware of the consequences of his removal from the courtroom, and, in particular, of the fact that, if the court decided to proceed to try him in his absence, it would do so without appointing counsel to represent him. In such circumstances, the Court is unable to conclude that, notwithstanding his disruptive and unruly behaviour, the applicant had unequivocally waived his right to be present or represented by counsel at the trial. His removal from the courtroom meant that he was not in a position to exercise either of those rights when the judge decided to proceed with the examination of the evidence in his absence.

47. Accordingly, the Court must now determine whether the appeal court made reparation for the violation of the applicant's right to be present and to defend himself at his trial (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86).

**(b) Appeal proceedings**

48. The Court observes that in Russia the jurisdiction of appeal courts extends both to legal and factual issues. The Regional Court thus had the power to fully review the case and to consider additional arguments which had not been examined in the first-instance proceedings. It would have also been open to the applicant to ask the Regional Court to question witnesses or examine other evidence.

49. Given the seriousness of the charges against the applicant and the severity of the sentence to which he was liable, as well as the precariousness of his situation as a result of his removal from the courtroom, the Court considers that the assistance of a legal-aid lawyer at this stage was essential for the applicant, as the lawyer would be able effectively to draw the appeal court's attention to any substantial argument in the applicant's favour which might influence its decision.

50. The Court further notes that, under the Russian Constitutional Court's interpretation of the Russian Code of Criminal Procedure, the onus of appointing a legal-aid lawyer lay on the relevant authority at each stage of the proceedings. Thus it was incumbent on the judicial authorities to appoint a lawyer for the applicant to ensure that he received effective protection of his rights.

51. The Government have acknowledged that the first set of appeal proceedings, which ended on 11 November 2003, failed to provide full guarantees in respect of legal assistance. However, they contended that this procedural defect had been rectified since the relevant appeal judgment had been quashed by way of supervisory review on 27 December 2006 and the applicant had subsequently been provided with legal aid at a new appeal hearing.

52. In this respect, the Court reiterates that the appointment of defence counsel in itself does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). A mere nomination does not ensure effective assistance since a lawyer appointed for legal-aid purposes may be prevented from performing, or shirk his or her duties. If they are notified of the situation, the authorities must either replace the lawyer or oblige him or her to fulfil those duties (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

Nevertheless, a State cannot be held responsible for every shortcoming of a lawyer appointed for legal-aid purposes. It follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal-aid scheme or be privately financed. The Court considers that the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some

other way (*Kamasinski v. Austria*, 19 December 1989, § 67, Series A no. 168,).

53. Turning to the circumstances of the present case, the Court notes that the State-appointed legal counsel, Ms D., took certain steps to prepare the applicant's defence pending the appeal hearing. She studied his case file and then attended the appeal hearing, where she made oral submissions to the court on the applicant's behalf on the basis of the grounds of appeal lodged by the applicant.

54. The Court further notes that, even though she had ample opportunity to do so, Ms D. never met or otherwise communicated with the applicant. Similarly, even though the applicant made the appeal court aware of that situation, it took no measures to remedy that shortcoming. The Court does not accept the Government's argument that the applicant failed to ask the appeal court to replace Ms D. The said shortcoming was manifest and the onus was on the domestic authorities to intervene.

55. In the circumstances of the case, the Court considers that the lack of personal contact with the applicant and the absence of any discussion with him in advance of the hearing, combined with the fact that the State-appointed lawyer did not prepare any grounds of appeal of her own and pleaded the case on the basis of grounds of appeal lodged some four years earlier by the applicant, irreparably impaired the effectiveness of the legal assistance provided by Ms D.

56. The foregoing considerations are sufficient to enable the Court to conclude that the Smolensk Regional Court failed to ensure the applicant's effective legal representation in the appeal hearing on 13 February 2007.

#### (c) Conclusions

57. In view of the above findings, the Court concludes that the criminal proceedings against the applicant were unfair. The applicant's right to be present and to defend himself at the trial has been infringed. This defect was not cured on appeal owing to the authorities' failure to ensure the applicant's effective legal representation before the appeal court.

58. Accordingly, the applicant may therefore still claim to be a victim within the meaning of Article 34 of the Convention. The Court therefore rejects the Government's objection under this head and finds that there has been a violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention.

## II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

59. The applicant further complained under Article 6 §§ 2 and 3 of the Convention that the trial court had used inadmissible evidence and that the judge had been biased against him because he had previously convicted him on two other counts.

60. However, having regard to all the material in its possession, the Court finds that the events complained of do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Articles 35 § 3 and 4 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed 300,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

63. The Government submitted that there had been no violation of the applicant's rights set out in the Convention. In any event, they considered the applicant's claims excessive and suggested that the acknowledgment of a violation would constitute adequate just satisfaction.

64. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. The Court considers that the applicant suffered non-pecuniary damage, which would not be adequately compensated by the finding of a violation alone. Making its assessment on an equitable basis, it awards the applicant EUR 2,000, plus any tax that may be chargeable. The Court further notes that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention.

### B. Costs and expenses

65. The applicant also claimed compensation, without specifying the amount, for the legal advice provided by his representatives on a *pro bono* basis in the proceedings before the Court.

66. The Government submitted that the applicant had failed to substantiate his claims for compensation of costs and expenses and that they should be rejected in full.

67. 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 amount of EUR 850 has already been paid to the applicant by way of legal aid. In such circumstances, the Court does not consider it necessary to make an award under this head.

### C. Default interest

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

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's objection concerning the victim status of the applicant and *rejects* it;

2. *Declares* the complaint concerning unfairness of the criminal proceedings against the applicant admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Søren Nielsen<br>Registrar | Nina Vajić<br>President |