CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF KLIMENTYEV v. RUSSIA

(Application no. 46503/99)

JUDGMENT

STRASBOURG

16 November 2006

FINAL

23/05/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Klimentyev v. Russia,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr A. KOVLER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 23 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 46503/99) against the Russian Federation lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Andrey Anatolyevich Klimentyev ("the applicant"), on 11 August 1998.

2. The applicant was represented by Mrs K. Moskalenko, a lawyer practising in Moscow, and Mr G. R. Baum, a lawyer practising in Cologne. The respondent Government were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained about the unfairness of criminal proceedings against him, alleging, *inter alia*, that he had been unable to question some witnesses whose statements had been read out in court and to take part in the ordering of expert examinations, that the case-file had lacked translations of certain documents, that he had been denied proper access to some documents in the case-file, that the first instance court had failed to furnish him with an amended copy of the judgment of 27 May 1998, and that on 19 May 1998 he had been unable to replace a lawyer who fell sick.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By decision of 21 June 2005 the Court declared the application partly admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1). The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1954 and lives in the city of Nizhniy Novgorod.

1. First round of proceedings in the applicant's criminal case

8. On 7 March 1995 criminal proceedings were brought against the applicant on suspicion of his involvement in a number of economic crimes.

9. From 30 July to 28 October, on 15 November 1996 and on 15 and 16 January 1997 the applicant and his defence team studied the case-file.

10. On 21 April 1997 the Nizhniy Novgorod Regional Court ("the Regional Court", *Судебная коллегия по уголовным делам Нижегородского областного суда*) convicted the applicant of some charges and acquitted him of the rest, sentencing him to one and a half year of imprisonment and the forfeiture of part of his property.

11. The judgment of 21 April 1997 was quashed on appeal by the Supreme Court of the Russian Federation ("the Supreme Court", *Верховный Суд Российской Федерации*) on 17 July 1997. The case was remitted for fresh examination at first instance.

2. Fresh proceedings at first instance

12. Between 30 September and 20 November 1997 the applicant and his counsel were again given an opportunity to study the case-file.

13. On 24 November 1997 the hearings recommenced at first instance.

(a) Hearings of 6, 8 and 19 May 1998 and the applicant's request to admit Mrs Moskalenko

14. The applicant's civil defender Mr Chumak and his counsel Mr Kozlov failed to attend the hearing of 6 May 1998.

15. Mr Chumak excused himself by reference to his previous engagements in a different set of proceedings. It appears that Mr Kozlov was undergoing medical treatment in a hospital.

16. In view of their absence, the court adjourned the hearing until 8 May 1998. On 8 May 1998 Mr Chumak and Mr Kozlov were again absent and,

despite the applicant's proposal to continue the examination of the case in their absence, the court again adjourned the hearing, this time until 19 May 1998.

17. On 19 May 1998 both the civil defender and counsel Kozlov attended the hearing.

18. According to the transcript, at the hearing the applicant requested the court to admit Mrs Moskalenko as a "specialist in international law". The court considered the request unfounded and irrelevant as there was no need for advice on international law at that stage of proceedings.

19. According to the applicant, he requested to admit Mrs Moskalenko as a replacement counsel for Mr Kozlov who was present and unfit effectively to participate in the hearing due to his medical condition.

20. From the hearing transcript it does not transpire that either the applicant or his defence counsel objected to the decision rejecting the applicant's request with reference to Mr Kozlov's alleged inability to participate in the further examination of the case on medical grounds.

(b) Assessment of the witnesses' statements by the first instance court

21. During the trial the Regional Court heard more than thirty five witnesses in total, both for the prosecution and the defence.

22. The court refused the applicant's requests to call certain witnesses, including the former Regional Governor, the Regional Prosecutor and other officials, and admitted and considered five witness statements taken at the pre-trial stage of proceedings and during the first round of proceedings at first instance without hearing the respective witnesses in person.

i. Statements by witnesses R. and B.

23. Two of these witnesses were the Norwegian nationals R. and B. who had both been questioned by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime ("the Norwegian authority", ØKOKRIM) and the Russian investigators in Norway on 20 February 1996.

24. The trial court attempted to secure the presence of these witnesses in person by making an official request to that effect to the Norwegian authorities.

25. By letters of 26 and 27 January 1998 R. and B. refused to appear and give evidence to the court, and on an unspecified date the Norwegian authorities refused to secure their presence at the trial by force.

26. Consequently, the witnesses R. and B. did not attend the trial and the applicant could not cross-examine them.

ii. Statements by witnesses P., M. and A.

27. The third witness was a German national P. who gave evidence at the pre-trial stage of proceedings and during the first round of proceedings

in 1997. The applicant and his counsel were able to cross-examine him during the first round of proceedings.

28. The trial court unsuccessfully tried to secure his presence but P. was in Germany and could not be found.

29. The fourth and fifth witnesses, the Russian nationals M. and A., were also questioned during the pre-trial investigation and during the trial in 1997. The applicant and the defence team were able to cross-examine them during the proceedings in 1997.

30. From the case-file and the documents presented by the Government it transpires that during the hearings the court summoned these two witnesses and the authorities repeatedly undertook various measures, including questioning the close relatives and the witnesses' connections, with a view to securing their presence at the trial. Apparently these measures proved futile as the witnesses' whereabouts could not be established.

(c) Assessment of evidence in foreign languages by the first instance court

31. It appears that the prosecution case contained several documents in English and Norwegian.

32. All documents admitted by the court as evidence were translated either by certified translators or by the staff of the Norwegian embassy. Most of the translations were attached to the case-file prior to the beginning of the first instance hearings, whilst some of them on 24 April 1998 (numbering 28 pages) and 19 May 1998 (16 pages), were submitted already after the beginning of the trial.

33. According to the Government, on one occasion the defence requested translation of a document which had not been used by the prosecution or the court. The request was granted and the necessary translation was made.

(d) Assessment of expert examinations by the first instance court

34. The court also admitted a number of expert reports (technical, medical, graphologist and others) which had been ordered by the prosecution during the pre-trial stage of proceedings.

35. It follows from the case-file that the applicant was officially notified of most of the prosecution decisions to carry out expert examinations (counting more than twelve) within a month from the date on which such decisions had been taken.

36. The decisions of 22 December 1995, 18 and 22 January 1996 to carry out expert examinations were served on the applicant on 12 April 1996. The decision to carry out expert examination dated 28 March 1996 was served on him on 16 May 1996.

37. At the time when these decisions were served, both the applicant and his counsel were officially informed about the procedural rights of the

accused, including the right to challenge an expert, seek an appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions. The accused also had an opportunity to make related requests and motions in writing.

38. In respect of the decisions of 28 March and 30 April 1996 to carry out technical examinations, the applicant requested to provide him with copies of some documents. The copies were provided to him on 21 June 1996. As regards the decision of 22 January 1996 to carry out technical examinations, the applicant stated that it "might have been more objective" to carry out that examinations in Moscow or St Petersburg.

39. The copies of the notification reports state that the applicant and his counsel did not make any additional requests and motions.

(e) Judgment of 27 May 1998

40. On 27 May 1998 the Regional Court found the applicant guilty on charges of misappropriation, embezzlement, bribery and the attempt not to return money from abroad.

41. According to the judgment, the applicant and a co-accused Mr K., the director of a shipyard "Oka", had tampered with documents with a view to embezzling the shipyard's property. The director, acting on behalf of the shipyard, was found to have arranged large-scale money transfers under fraudulent contracts with the companies owned by the applicant, whereas the applicant was found to have bribed the director by opening bank accounts in the name of Mr K. in Norway and transferring the stolen money there. Among other things, the applicant was also convicted of having extorted money from a marketplace owned and run by the companies "Zhanto" and "NL TOP", and from a casino owned and run by a company "Slot".

42. In total, the court sentenced the applicant to six years' imprisonment and the confiscation of part of his property. The court also upheld civil claims for damages by the shipyard "Oka" and three other companies, "Zhanto", "NL TOP" and "Slot".

43. The applicant's conviction was based on various pieces of evidence, i.e. numerous documentary items, including accounting, financial and contractual papers reflecting the operation of sham companies owned and run by the applicant and Mr K. as well as oral and written evidence given by more than thirty-five witnesses and various expert examinations.

44. A copy of the judgment of 27 May 1998 was served on the applicant on 3 June 1998.

45. Later it was discovered that the copy contained errors and misprints.

46. On 8 June 1998 the Regional Court corrected a number of clerical and technical mistakes in the judgment and ordered that the applicant be furnished with the amended version.

47. The applicant claims that he did not receive the amended version.

48. The records in the case-file indicate that the amended copy of the judgment was served on the applicant against his signature on 11 June 1998.

(f) Trial records

49. The Government submit that the whole trial was taken down in shorthand and taped and that the respective records were all available to the interested parties, including the applicant and his counsel.

50. On 28 May 1998 the applicant requested to study records, audiotape recordings and shorthand records.

51. The applicant was provided with this opportunity on 10, 11, 15 and 16 June 1998.

52. On the last date a specialist of the Regional Court certified that the applicant had been given access to the trial record, though he had refused to study audio records and shorthand records.

53. On 17 June 1998 a judge of the Regional Court decided that the defence counsel should be given access to the records between 17 June and 23 June 1998.

54. The deadline for filing objections was set on 25 June 1998 accordingly.

55. It does not appear from the case-file that the applicant ever challenged the accuracy of the trial records.

(g) Separate rulings of 27 May 1998

56. On 27 May 1998 the Regional Court made a number of separate rulings (*частные определения*) in the case.

57. In one of these rulings the court noted that there had been breaches of the relevant rules of criminal procedure during the investigation and that these breaches had been remedied during the trial.

58. In particular, the court established that the defendants had been informed about the commissioning of expert reports in the case only after the respective examinations were over.

59. The court considered that this failure did not invalidate the conclusions of the experts' reports and that the applicant had failed to contest the results of the reports during the investigation or during the trial or request additional or repeated examinations to be carried out.

60. The court also noted that a number of documents in the case-file were in foreign languages, but considered that this did not violate the applicant's defence rights because the documents were similar to or copies of other documents in Russian and that in any event all relevant documents had been translated into Russian during the trial.

61. The court further noted that certain statements of witnesses had been admitted as evidence, even though they gave no indication as to the time or place of questioning. To verify the relevant points, these witnesses as well

as other witnesses had been questioned in the courtroom on the circumstances of the questioning.

3. Appeal proceedings

(a) Points raised by the defence on appeal

62. The defence appealed against the judgment of 27 May 1998 to the Supreme Court.

63. In their appeal, *inter alia*, the applicant's counsel contested the admissibility of certain evidence admitted by the court such as expert reports, documents in foreign languages, certain procedural documents, statements of witnesses made during the pre-trial investigation and at the first round of proceedings at first instance, statements of witnesses taken by the Norwegian police, and other evidence obtained in Norway, claiming that were allegedly in breach of the domestic procedural rules.

64. Furthermore, it was stated that the applicant's defence had not had due access to the trial records and the quality of the defence had been impaired by the Regional Court's refusal to admit Mrs Moskalenko as a replacement for a lawyer who was sick.

(b) Mrs Moskalenko's motions to adjourn an appeal hearing

65. On 16 June 1998 Mrs Moskalenko joined the defence team. In July and on 10 August 1998 she referred to various difficulties in organising the defence and made several requests to the Supreme Court to adjourn the hearing.

66. She also complained that the applicant had been served neither with the final copy of the judgment, nor with the rulings of 27 May 1998 and that the defence had had no access to the verbatim record and certain volumes of the case-file.

67. On 29 June 1998 the Supreme Court granted one of her requests to adjourn the hearing. The hearing initially scheduled for 29 June 1998 was postponed.

68. Thereafter Mrs Moskalenko failed to appear at the hearing on 30 July 1998.

69. On 10 August 1998 Mrs Moskalenko requested to postpone a further hearing claiming that the defence had not been properly notified of the judgment and separate rulings.

70. In response to her request for adjournment, the Supreme Court ruled that both the defence in general and Mrs Moskalenko in particular had had sufficient time to examine the trial records, study the first instance judgment and prepare for the case at least between 16 June and 30 July 1998 and turned down the request as unfounded.

71. The appeal hearing took place on 10 August 1998.

(c) Decision of 10 August 1998

72. On 10 August 1998, in the presence of the applicant's defenders, Mrs Moskalenko and Mr Chumak, and the prosecution, the Supreme Court examined the appeals and, with minor alterations, confirmed the judgment of 27 May 1998.

73. The court concluded that there had been no significant breaches of national procedural law or international standards during the trial.

74. As to the complaints about the handling and assessment of the evidence, the court found that the lower court had properly admitted and considered the evidence in the case and that the conclusions of the lower court had been reasonable and substantiated. It also noted that the defence had been furnished with Russian translations of foreign documents during the hearing.

75. The court further considered that the applicant had been adequately represented throughout the pre-trial investigation and the trial, and that at no time during the proceedings had he been deprived of professional legal advice.

76. In respect of the events of 19 May 1998, the court noted that the applicant's lawyer had never applied for an adjournment of the hearing for health reasons and the Regional Court's refusal to admit Mrs Moskalenko as a further lawyer did not constitute a violation of the applicant's right to defence.

II. RELEVANT DOMESTIC LAW

1. Expert examinations

77. According to Sections 78 and 80 of the Code of Criminal Procedure of the RSFSR (the Russian Soviet Federal Social Republic) of 1960, as in force at the relevant time, in cases requiring special knowledge of science, technology, art or particular skill, an investigative authority or a court may appoint an expert to carry out an expert examination. The conclusions of an expert are not binding on an investigating authority or a court but any disagreement with them must be motivated. By Sections 81 and 290 of the Code incomplete, unclear, unjustified or dubious expert conclusions may trigger a decision by a court or an investigator ordering additional or repeated expert examinations. In such cases the court takes the decision having heard the opinions of the participants of the proceedings (Section 276 of the Code).

78. Section 185 of the Code states that an accused and his counsel have the right to challenge an expert, seek an appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert

conclusions. In case the respective request was granted, an investigation alters its decision to carry out the examination accordingly.

79. By Section 193 of the Code, expert conclusions should be presented to the applicant who has the right to respond or object to these conclusions as well as the right to request the authority to put additional questions to the expert or carry out an additional or a repeated expert examination.

2. Access to the case-file by the defence

80. Having decided that the collected evidence is sufficient to prepare the bill of indictment, an investigator informs the accused that the investigation is terminated and that the accused has the right to study the entirety of the case personally and with the assistance of his defence counsel and to request the investigator to carry out an additional investigation (Sections 201, 202 and 203 of the Code). The investigator should draw up a report reflecting the progress of the defence in studying the case. The investigator cannot limit the time for study, except in cases where the accused and his counsel manifestly protract the process.

3. Translation of documents in the case-file

81. According to Section 17 of the Code, criminal proceedings are conducted in Russian. The contents of documents relating to court proceedings and investigation are made available to the accused in a language that he understands.

82. A translator appointed by a court or an investigator is under an obligation to make correct translations and may be held criminally liable for incorrect translations under Section 57 of the Code and Section 307 of the Criminal Code of Russia.

83. By Section 276 of the Code of Criminal Procedure, participants in the proceedings, including the accused and his defendants, have the right to make requests to summon new witnesses, experts and specialists or retrieve items of evidence and documents etc. A court, having heard other participants in the proceedings, should examine each such request and either grant it or give a motivated decision refusing it.

84. Section 292 of the Code provides that documents adduced to the case or presented by a party during a hearing and containing description of relevant facts should be read out.

4. Notification of the defence of a first instance judgment

85. By Section 320 of the Code, a copy of the first instance judgment should be served on an accused or an acquitted within three days from its delivery.

5. The status of defender in criminal proceedings

86. By Section 249 of the Code, a defender takes part in examination of the body of evidence, gives his opinion on various issues arising during the court proceedings, including the substance of accusations, any mitigating circumstances as well as the penalty and civil liability for the commission of a crime.

87. By Section 47 of the Code, advocates (counsel) and representatives of professional or other social unions may act as defenders. According to Section 250 of the Code, representatives of social organisations and staff may act as "civil defenders" (*общественные защитники*). As such they have the right to present evidence, take part in examination of evidence, make motions and challenges, participate in arguments as well as give their opinion on any mitigating or acquitting circumstances and the penalty.

6. Questioning of witnesses at a trial

88. Section 73 of the Code imposes an obligation on a witness to attend and to give truthful evidence to the best of his knowledge as well as to respond to questions. In case of failure to respect this obligation the witness may be brought before the authority by force and punished by a fine of up to a third of a monthly minimum wage and/or be held liable of a criminal offence.

89. According to Sections 240 and 245 of the Code, a trial court must carry out a first-hand examination of all evidence in the case, including, among other things, hearing of witnesses, the participants in criminal proceedings (a prosecutor, an accused, a defender, a victim, a civil claimant and a civil respondent and their representatives) having equal procedural rights concerning submission and examination of evidence as well as making of various requests.

90. Sections 277 and 286 of the Code state that in case of a witness's objective inability to attend a court, having heard the participants of the proceedings, may decide to read out the statements given by the witness at earlier stages of the proceedings.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Article 6 § 1 of the Convention (equality of arms)

91. The applicant complained that he had been unable to take part in the decision-making process leading to the ordering of the expert examinations.

92. This complaint falls to be examined under Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

1. The applicant's submissions

93. The applicant submitted that he had been prevented from taking part in the ordering of the expert examinations because the notifications of the decisions had been delayed.

2. The Government's submissions

94. The Government responded that the applicant and his defence counsel had been properly notified of all decisions ordering expert examinations and that the defence had had an ample opportunity to make related requests and objections. All requests made by the defence were granted and it does not appear that on any of the occasions the defence objected to decisions to carry out expert examinations as such, that they challenged the experts or that any of their requests for additional expert examinations were refused. Furthermore, the issue of admissibility of expert examinations was examined in detail by the trial court which gave a reasoned decision in this connection. In view of the above, the Government concluded that there had been no violation of Article 6 in this respect.

3. The Court's assessment

95. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see e.g. *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 34; *Bulut v. Austria*, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, p. 380-381, § 47).

96. On the facts, the Court observes that the case for the prosecution rested, *inter alia*, on a number of expert reports (technical, medical, graphological and other) ordered by the prosecution during the pre-trial stage of proceedings in 1995 and 1996. Four out of more than sixteen decisions ordering such reports were served on the applicant with delays ranging from two to three and a half months, whilst the remaining twelve decisions were served within a month from the respective dates of their delivery (see paragraphs 34-37 in the summary of facts). The applicant

principally argued that the late notification of these decisions had effectively deprived him of the possibility to participate in the ordering of the expert examinations and that the subsequent admission of the respective expert examinations had been in breach of Article 6.

97. Having regard to the circumstances of the case, the relevant domestic law and the parties' submissions, the Court cannot subscribe to the applicant's argument. To begin with, the Court observes that at the time of service of these sixteen decisions both the applicant and his counsel were officially informed about the procedural rights of the accused, including the right to challenge an expert, seek the appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions (see paragraph 37 above). The applicant and his counsel had an unrestricted opportunity to make related requests and motions in writing and, indeed, there is no indication in the case-file that any of the requests of the defence were turned down as belated or otherwise inadmissible. On the contrary, the authorities granted and implemented all of the applicant's requests in this respect. Moreover, there is nothing in the case-file to suggest, and indeed the applicant has not alleged that he was unable, personally or with the assistance of his defence counsel, to study the impugned expert examinations beforehand, contest them throughout the trial and appeal proceedings or avail himself of his rights under Sections 89 and 290 of the Criminal Procedure Code by requesting the trial court to order additional or repetitive expert examinations.

98. In view of the foregoing, the Court concludes that the late notification of the decisions in question did not place the applicant at a substantial disadvantage *vis-à-vis* the prosecution or otherwise interfere with his rights under Article 6. There has, therefore, been no violation of that provision in this respect.

B. Article 6 §§ 1 and 3 (b) of the Convention

99. The applicant complained about the denial of access to the entirety of the case-file, including the documents admitted by the first instance court during the trial, both at the first instance and on appeal. He further alleged that the trial court had admitted certain documents without translation and that the court had failed to furnish him with an amended copy of the judgment of 27 May 1998.

100. These complaints fall to be examined under Article 6 §§ 1 and 3 (b) of the Convention which, insofar as relevant, read as follows:

> "1.In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence...”

1. The applicant's submissions

101. In respect of the lack of access to the case-file, the applicant argued that he had not been given the documents relating to his seized property, that, more generally, the time for study of the case-file had been insufficient, and that he had been refused proper access to the trial records.

102. The applicant furthermore alleged that following the termination of the preliminary investigation, the case-file had contained numerous untranslated documents in foreign languages, that some of these documents had been translated only during the trial, whilst others had been left without translation. The applicant also contested the translations of the documents as they had allegedly been made by incompetent translators and that they were unlawful and inadmissible.

103. Finally, the applicant insisted that the first instance judgment of 27 May 1998 had not been properly served on the defence and that in view of the fact that the judgment had contained numerous errors and had been generally unlawful, the appeal court ought to have quashed it as unlawful.

2. The Government's submissions

104. As to the applicant's allegedly impaired access to the entirety of the case-file, the Government submitted copies of relevant parts of the case-file and noted that both the applicant and his defence had had a proper and timely access to the case-file after the pre-trial stage of proceedings, during the first and second trial as well as after the first instance judgment of 27 May 1998. In respect of the latter period, the Government underlined that the applicant's lawyer Mrs Moskalenko had had time at least between 16 June and 20 July 1998 to study the amended version of the first instance judgment of 27 May 1998, the first instance transcripts and the case-file.

105. As regards the applicant's complaint about the admission of untranslated documents, the Government observed that during the preliminary investigation of the case the authorities had seized a large number of documents in foreign languages most of which had been translated into Russian. Furthermore, the defence was given an opportunity to request the trial court to order translations of any of these documents and at least on one occasion the applicant availed himself of this right, and the required translation was ordered. As regards the documents in Norwegian, their translation was added to the case-file on 24 April 1998, i.e. already after the beginning of the trial, and was fully available to the parties for study after that date. In addition, the Regional Court discussed in detail the decision to join to the case-file a number of untranslated documents taken at the pre-trial stage of the proceedings and concluded that all relevant documents had been translated into Russian during the trial which had

remedied violations of the criminal procedure. In accordance with Sections 240 and 292 of the Code of Criminal Procedure, all translations were examined by the trial court in the presence of the applicant and his defence team who had ample opportunities to contest them. The Government concluded that there been no breach of Article 6 of the Convention in this respect.

106. As to the alleged failure to serve an amended copy of the judgment of 27 May 1998 on the applicant, the Government submitted copies of the documents from the case-file certifying that this document had been served on the applicant on 11 June 1998.

3. The Court's assessment

107. Insofar as the applicant is dissatisfied with the allegedly insufficient time to study the case-file, the Court notes that from the copies of the relevant parts of the case-file it transpires that the defence, including the applicant and his counsel, studied the case-file extensively on at least three occasion, i.e. immediately after the investigation, during the first round of proceedings at first instance and after the applicant's initial conviction of 21 April 1997 had been quashed on appeal by the Supreme Court (see paragraphs 9-12 above). In respect of the period between the first instance judgment of 27 May 1998 and the appeal proceedings on 10 August 1998, the Court observes that the applicant and his defence team had sufficient time at least between 10 June and 20 July 1998 to study the amended version of the first instance judgment of 27 May 1998, the first instance transcripts and the case-file. The applicant was provided with this opportunity on 10, 11, 15 and 16 June 1998, whilst the defence counsel had access to the records between 17 June and 23 June 1998 (see paragraphs 51-53). In the Court's view, this time was sufficient for the defence to prepare its appeal arguments. This being so and given the lack of evidence of any unjustified limitations on the applicant's ability to study the case-file, the Court concludes that the time afforded by the authorities to study the case-file was not as such insufficient and that the applicant's rights under Article 6 have not been breached in this respect.

108. As regards his complaint about the fact that certain translations of the documents in foreign languages were joined to the case after the beginning of the trial and that the translations had been prepared by incompetent translators, the Court reiterates that the principle of equality of arms, which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see the references in paragraph 96 as well as *Ankerl v. Switzerland*, judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1567-68, § 38 and *Helle v. Finland*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2928,

§ 53). In addition, the Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility and assessment of evidence, which are primarily a matter for regulation under national law (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

On the facts, the Court notes that trial court indeed joined 28 pages of translations on 24 April 1998 and 16 pages of translations on 19 May 1998 which was already after the beginning of the first instance hearings in the case (see paragraph 32 in the summary of facts). The Court observes however that there is nothing in the case-file or the parties' submissions to suggest that these translations were not read out at the hearings, as required by Section 292 of the Code of Criminal Procedure, and there is nothing in the case-file or in the parties' submissions to suggest that they were not fully available to the defence for study afterwards. Furthermore, as of these dates and until 27 May 1998 which is the date of the delivery of the first instance judgment, the applicant, personally and through his defenders, had ample time and opportunity to challenge the contents of these documents as well as call into question the competence of those who translated them or arrange for additional or alternative translations of relevant documents. In view of the above, the Court finds that both the prosecution and the defence had equal opportunities to make use of the evidence in question. The Court is therefore unable to conclude that the admission of these translations after the beginning of the trial placed the defence at a substantial disadvantage *vis-à-vis* its opponents or adversely affected the fairness of the proceedings.

109. Insofar as the applicant complains about the presence of documents in the prosecution case-file which remained untranslated during the proceedings, the Court observes that in contrast to cases where an applicant could not understand or speak the language used in court (see, e.g. *Luedicke, Belkacem and Koç v. Germany*, judgment of 28 November 1978, Series A no. 29, § 40), there is no indication in the present case that either the bill of indictment or the applicant's first instance conviction relied on any of these documents or that their presence in the prosecution case-file could have otherwise undermined the fairness of the proceedings. On the contrary, the presence of these materials was fully compatible with the prosecution's duty of disclosure which requires the investigative authorities to disclose to the defence all material evidence both for and against the accused (see e.g. *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, p. 417, § 36). Throughout the proceedings the defence in the present case was given an opportunity to request the investigator and the trial court to order translations of any of these documents and, according to the Government, at least on one occasion the applicant availed himself of

this right and necessary translation was ordered. In view of the foregoing, the Court concludes that the presence of non-translated documents in the prosecution case-file was not incompatible with Article 6 of the Convention.

110. In respect of the complaint about the trial court's failure to serve on the applicant an amended copy of the judgment of 27 May 1998, the Court, having regard to the documents presented by the parties, finds that a copy of the judgment of 27 May 1998 was initially furnished to the applicant on 3 June 1998. Thereafter the authorities discovered that the copy had contained certain errors and misprints and by decision of 8 June 1998 the Regional Court amended these mistakes. The amended version of the judgment of 27 May 1998 was again served on the applicant against his signature on 11 June 1998 (see paragraphs 44-48 above). In view thereof, the Court finds that also in respect of this part of the procedure there was no unfairness contrary to Article 6 of the Convention.

111. Accordingly, the Court concludes that there has been no violation of Article 6 on account of the alleged denial of access to the entirety of the case-file, the trial court decision to admit certain documents without translation, and the authorities' alleged failure to furnish him with an amended copy of the judgment of 27 May 1998.

C. Article 6 §§ 1 and 3 (c) of the Convention

112. The applicant also complained that one of his lawyers fell sick and the applicant had not been permitted to appoint another one during the hearing of 19 May 1998.

113. This complaint falls to be examined under Article 6 §§ 1 and 3 (c) of the Convention which read in its relevant parts as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."

1. The applicant's submissions

114. The applicant contended that on 19 May 1998 Mr Kozlov had been unable effectively to participate in the proceedings due to his medical condition and that he had requested the appointment of Mrs Moskalenko as a replacement but had been refused.

2. The Government's submissions

115. The Government submitted that the applicant's defence team, Mr Kozlov and Mr Chumak, had failed to appear at the hearing of 6 May 1998 and that the trial court had decided to adjourn the examination of the case until 8 May 1998. Since Mr Kozlov was unable to attend on the latter date due to his medical condition, the court yet again adjourned the case until 19 May 1998. Both Mr Kozlov and Mr Chumak were present on that latter date. Furthermore, Mr Kozlov did not allege that he was unfit to participate in the proceedings and did not make any motions in this connection. As regards Mrs Moskalenko, the defence requested her participation as a "specialist in international law" and not as a replacement for the allegedly sick Mr Kozlov. Since the court decided that there was no need for advice on international law, the request was turned down. Accordingly, the Government concluded that the applicant's right to defend himself in person or through legal assistance of his own choosing had not been breached.

3. The Court's assessment

116. Whilst it is true that Article 6 §§ 1 and 3 (c) guarantee to everyone charged with a criminal offence the right to represent himself through legal assistance of his own choosing, this right, as the Court has ruled on several occasions, is not absolute and may be subject to reasonable restrictions (see e.g. *Croissant v. Germany*, judgment of 25 September 1992, Series A no. 237-B, § 29; *X v. the United Kingdom*, Commission decision of 9 October 1978, Decisions and Reports (DR) 15, p. 242)

117. Turning to the circumstances of the present case, the Court, having studied the minutes of the first instance hearing of 19 May 1998, agrees with the Government in that Mr Kozlov did not allege that he was unfit to participate in the proceedings and did not file any motions in this connection. Furthermore, the Court also finds that irrespective of the procedural status which the defence claimed for Mrs Moskalenko, the applicant did not request her participation as a replacement for the allegedly sick Mr Kozlov (see paragraphs 14-20 in the summary of facts).

118. In the absence of any indication that the applicant raised the argument relating to Mr Kozlov's alleged illness before the trial court or indeed any evidence that the applicant's defence team consisting of counsel Kozlov and civil defender Chumak could not adequately represent him and effectively participate in the hearing of 19 May 1998, the Court is unable to conclude that the applicant was inadequately represented at that hearing and that the trial court's refusal to admit Mrs Moskalenko with reference to the fact that there was no need for advice on international law constituted an unreasonable and disproportionate limitation on the applicant's right to represent himself through legal assistance of his own choosing.

119. In these circumstances, the Court finds no breach of Article 6 on that account.

D. Article 6 §§ 1 and 3 (d) of the Convention

120. The applicant complained he had been unable to question witnesses whose statements had been read out in court.

121. These complaints fall to be examined under Article 6 §§ 1 and 3 (d) of the Convention which, insofar as relevant, read as follows:

> "1.In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (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..."

1. The applicant's submissions

122. The applicant submitted that his inability to question some of the witnesses was contrary to Article 6 of the Convention. According to the applicant, the evidence given by witnesses R. and B. was clearly inadmissible as it was unclear which authority, when and on what grounds had ordered to interrogate these witnesses. Furthermore, their oral evidence was neither properly legalised nor translated by competent translators. As regards P., A. and M., according to the applicant, at the pre-trial stage of proceedings these witnesses gave evidence against him, whilst at the trial they retracted their previous statements and witnessed in his favour. The applicant submitted that, in breach of Article 6, the court had preferred the former evidence and had failed to take account of the latter. Finally, the applicant submitted that the court ought to have rejected that evidence as inadmissible.

2. The Government's submissions

123. As to the complaint that the applicant was unable to question witnesses whose statements were read out in court, the Government recalled that the trial court had repeatedly summoned the witnesses of Norwegian nationality R., B., a witness of German nationality P. and the witnesses of Russian nationality M. and A. The authorities did their best to secure their presence at the trial but their attempts proved futile as the Norwegian nationals resided in Norway, refused to appear voluntarily and could not be compelled to come to Russia. The court furthermore gave a motivated and justified decision to admit the oral evidence given by these witnesses. As regards German national P., he was away in Germany and could not be

summoned, whilst witnesses M. and A. were repeatedly searched for by the authorities, but their whereabouts could not be established. Furthermore, these three witnesses were present during the first round of proceedings and the applicant and his defence team were fully able to cross-examine them in person. Overall, in the Government's view, Article 6 was respected.

3. The Court's assessment

124. At the outset the Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that, as a rule, it is for the national courts to assess the evidence before them, the task of the Court being to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see the references in paragraph 108). The Court further recalls that, according to its case-law, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. Thus, the use of statements obtained at earlier stages of proceedings is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (see *Asch*, cited above, § 27).

125. In the present case the Court notes as regards the statements of witnesses P., M. and A. that the applicant and his defence team were given a reasonable opportunity to cross-examine these witnesses during the first round of criminal proceedings and to comment on the evidence that they had given at the pre-trial stage of the proceedings (see, by contrast, *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, §§ 39-45; *Windisch v. Austria*, judgment of 27 September 1990, Series A no. 186, §§ 25-31). Furthermore, from the case-file and documents presented by the Government (see paragraph 30 in the summary of facts) it transpires that reasonable measures were taken by the court aimed at summoning these witnesses and it cannot be said that their failure to attend was imputable to the lack of diligence by the authorities in this respect (see, by contrast, *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, §§ 34-37). This being so and having regard to the fact that the applicant's conviction was firmly corroborated by various other pieces of evidence such as the statements of a number of other witnesses, documentary evidence and expert examinations (see e.g. *Trivedi v. UK*, no. 31700/96, Commission decision of 27 May 1997), the Court concludes that the admission of statements made by witnesses P., M., and A. did not fail to respect the rights of the defence.

126. As to the admission of statements of witnesses R. and B., the Court observes that the witnesses were foreign residents who could not have been compelled to come to the courtroom and who, in response to the summons, refused to appear. Furthermore, the trial court carried out a detailed analysis of the evidence in the case-file and found the statements of these witnesses to be corroborated by a series of other items of evidence (see in a somewhat similar context *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, §§ 52-53). Thus, the Court takes the view that there has been no violation of Article 6 on account of admission of statements of witnesses R. and B.

127. Having regard to the foregoing, the Court reaches the overall conclusion that there has been no violation of Article 6 in respect of the questioning of the witnesses R., B., P., M. and A. before the trial court.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 16 November 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President