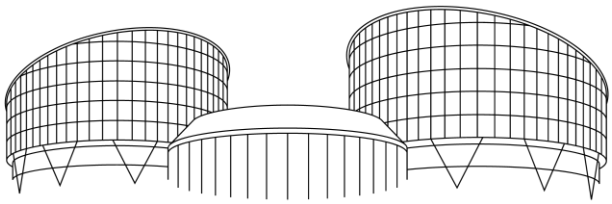

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KONONENKO v. RUSSIA

(Application no. 33780/04)

JUDGMENT

STRASBOURG

17 February 2011

FINAL

17/05/2011

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

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

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

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

Having deliberated in private on 27 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 33780/04) 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 Yuriy Leontyevich Kononenko ("the applicant"), on 4 July 2004.

2. The applicant, who had been granted legal aid, was represented by Mr P. Finogenov, a lawyer with the International Protection Centre, a Moscow-based human-rights NGO. 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, *inter alia*, a violation of his right to cross-examine the key prosecution witness.

4. On 9 October 2008 the President of the First Section decided to communicate the above complaint to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Subsequently, on 6 and 11 May 2010 requests for information under Rule 54 § 2 (a) of the Rules of Court were sent to the Government in relation to the allegations of hindrance of the applicant's right to petition.

5. On 26 February 2010 the President of the Chamber granted priority treatment to the application under Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1970 and is currently serving a term of imprisonment in correctional colony IK-3, Altay Region.

A. Criminal proceedings against the applicant

7. On 14 September 2003 the applicant was arrested on suspicion of murder and taken to the police station.

8. On 15 September 2003 criminal proceedings were instituted against the applicant under Article 105 of the Criminal Code (murder).

9. On the same day a certain Sh. was questioned on the issue of the applicant's involvement in the crime. He submitted, in particular, that

> "... Yuriy [the applicant] grabbed Andrey [the victim] by his foot, stood up sharply and threw him through the broken window ..."

Sh. was then questioned as a witness.

10. On 17 September 2003 the Oktyabrskiy District Court of Barnaul decided to remand the applicant in custody pending investigation. The decision was not appealed against and entered into force on 22 September 2003.

11. On 24 September 2003 charges of murder were brought against the applicant. The applicant was placed in remand prison IZ-22/1, Barnaul.

12. In the meantime, on 6 October 2003 the investigator instructed the head of the Oktyabrskiy District police station to establish the whereabouts of witness Sh., who lived in Barnaul, in order to be able to carry out the investigation with his participation.

13. On 5 November 2003 the Oktyabrskiy District police operative agent produced a certificate to the effect that it had been impossible to discover the whereabouts of Sh.: he did not live at the address in Barnaul indicated by the investigator, and his partner had explained that Sh. had left for an unknown destination.

14. On 13 November 2003 the Oktyabrskiy District Court extended the applicant's detention until 15 December 2003.

15. On 25 November 2003 the Oktyabrskiy District Court set a time-limit of 27 November 2003 for the applicant to study the material of the case file.

16. On 27 November 2003 the Altay Regional Court upheld the decision of 13 November 2003 on appeal.

17. On 27 November 2003 the investigation was completed and the case submitted to Oktyabrskiy District Court for trial.

18. Following the applicant's complaint, on 5 December 2003 the Barnaul City Prosecutor's Office acknowledged the unlawfulness of the applicant's detention at the police station from 10.05 p.m. on 14 September to 6.15 p.m. on 15 September 2003.

19. On 17 December 2003 Oktyabrskiy District Court held a preliminary hearing and ordered that the custodial measure in respect of the applicant should remain unchanged. On 8 January 2004 Altay Regional Court upheld the above decision on appeal.

20. On 5 January 2004 Oktyabrskiy District Court adjourned the hearing until 8 January 2004 because of the failure of several witnesses, including witness Sh., to appear. The court ordered them to be compelled to attend.

21. On 8 January 2004 the bailiff in charge of bringing Sh. to the court submitted that the attendance of Sh. could not be secured since he could not be found at his address in Barnaul, and, according to his partner, he had left to live permanently in Slavgorod. On the same day the court adjourned the hearing until 20 January 2004 and again ordered Sh. to be compelled to attend.

22. According to the report of the investigator of the Oktyabrskiy District Prosecutor's Office of 20 January 2004, Sh.'s sister confirmed that in the second half of September 2003 Sh. had been in Slavgorod. He had told her that he had witnessed a crime in Barnaul and given a statement to the investigator. Fearing revenge from the applicant, Sh. had left for the Tyumen Region. The hearing was adjourned until 4 February 2004.

23. On 22 January 2004 the Tyumen Region Prosecutor's Office was commissioned to establish the whereabouts of Sh.

24. On 4 February 2004 the Oktyabrskiy District Court adjourned the hearing until 19 February 2004.

25. On 17 February 2004 the investigator of the Slavgorod Interdistrict Prosecutor's Office reported that Sh. had not been found on the territory of the Slavgorod District of the Altay Region.

26. At the hearing of 19 February 2004 the prosecutor requested the court, under Article 281 § 2 of the Code of Criminal Procedure, to read out the statement made by Sh. at the pre-trial investigation stage. The applicant and his counsel objected to the reading out of Sh.'s previous statements and insisted that further searches for him be conducted and that he be made to attend the hearing.

27. Having heard the participants of the trial, the court granted the prosecutor's request, declared Sh.'s failure to attend an emergency case in accordance with Article 281 § 2 (4) of the Code of Criminal Procedure, due to the impossibility of establishing his whereabouts after all available measures had been taken, and proceeded with the reading out of depositions made by Sh. on 15 September 2003.

28. On 19 February 2004 the Oktyabrskiy District Court of Barnaul convicted the applicant of murder and sentenced him to nine years'

imprisonment. In convicting the applicant the District Court relied on the pre-trial statement by witness Sh. on 15 September 2003, which read as follows:

> "On 14 September 2003 in flat no. 59 situated at [the address] the [applicant], the [victim] and myself were in the kitchen. The [applicant] had an argument with the [victim] because his money was missing. They started fighting and moved towards the window. During the fight one of them broke the window. Afterwards the [applicant] grabbed a knife and started brandishing it in front of the [victim]. The latter was pushing the [applicant] away and was leaning against the broken window. Then I saw the [applicant] grab the [victim] by his foot and throw him through the window."

The District Court found that the above statements of Sh. were corroborated by the following evidence:

- The testimony by witness P., who submitted as follows:

> "On 13-14 September 2003 I was with G., the [victim], Z., the [applicant] and Sh. in the above flat; we were drinking alcohol. ... On 14 September 2003 around 6 p.m. G. and I went to the bedroom to sleep. Sh., the victim and the [applicant] remained in the kitchen. While I was in the bedroom I heard the sound of breaking glass, but I did not do anything. I was woken a couple of hours later by Sh. and [the applicant]. The [applicant] was holding a knife and demanding that G. return his money. [The applicant] threw himself at G. and cut his face; then G. knocked the knife out of his hand. Afterwards I went to the kitchen, saw the blood, saw the money under the chair and told the [applicant] about it. The [victim] was not in the kitchen; the window was broken; I asked about the [victim], and the [applicant] replied that the latter had his nose broken. Scared, I left the flat. ..."

- The testimony by witness Ye. G. similar to the above statement of P.;
- The testimony by witness L. G., who submitted that she had learned from Sh. that the applicant and the victim had had a quarrel over the lost money and that Sh. had seen the applicant throw the victim through the window.
- The results of the forensic medical examination of the victim's body;
- The record of the crime scene examination;
- The record of the seizure of the applicant's shoes, sweatshirt and sports trousers; and
- The results of biological expert examination of the blood samples discovered on the floor of the kitchen, on a fragment of the broken window, two knives and the applicant's shoes and sports trousers, the bloodstains on the applicant's trousers possibly linking the applicant to the victim.

29. The applicant appealed against his conviction. In his appeal he complained, *inter alia*, that at no stage of the proceedings had he been given an opportunity to examine Sh., whose statements were determinative for the court's finding of guilt.

30. On 20 February 2004 the applicant went on hunger strike until 5 March 2004.

31. On 29 April 2004 the Altay Regional Court upheld the conviction on appeal. As regards the applicant's specific grievances, it found as follows:

"[The applicant's] guilt in the [crime] is proved by statements by witness Sh., the eyewitness to the crime, from which it follows that [the applicant] had an argument with [the victim] because of the lost money. During the fight one of them broke the window. [The applicant] grabbed a knife and started brandishing it in front of the victim. The latter was pushing [the applicant] away and leaning against the window. Next [the applicant] grabbed [the victim] by the foot and pushed him out of the window. The victim fell out of the window and on to the ground.

The [trial] court had with reason made this statement the basis of the conviction. No grounds were established for a false accusation of the applicant by witness Sh.. [The applicant] submitted in the trial hearing that he and Sh. had been good acquaintances, that he trusted the latter. The [trial] court established that there had been no conflict between the witness and the victim. The statements from witness Sh. had been received in accordance with the requirements of the criminal procedural law and they are in conformity with other evidence in the case.

...

The appeal court detects no violations of the criminal procedural law leading to the quashing of the conviction. As regards the [applicant's] argument about the failure of the investigator to carry out a confrontation between him and Sh., it cannot be taken into consideration, since pursuant to Article 162 of the Code of Criminal Procedure the investigator was entitled, but not obliged, to carry out such an investigative measure. The statements by witness Sh. had been read out during the trial at the request of the prosecutor as it was impossible to locate him in person, after the prosecution and the court had taken sufficient measures to compel him to appear in court. In view of the above the [trial] court had with reason declared [his] failure to attend an exceptional circumstance. Furthermore, besides the statements by Sh., the [applicant's] guilt had been established by cumulative evidence set out in the judgment.

..."

On the same day the applicant renewed his hunger strike until 18 June 2004.

32. On 17 June 2004 the applicant was transferred to Rubtsovsk prison UB-14/10 in the Altay Region to serve his sentence.

B. Proceedings for compensation for non-pecuniary damage caused by the applicant's unlawful detention

33. The applicant brought proceedings against the Oktyabrskiy District Department of the Interior and the Ministry of Finance for compensation for non-pecuniary damage caused by his unlawful detention from 10.05 p.m. on 14 September to 6.15 p.m. on 15 September 2003.

34. On 5 November 2008 the Altay Regional Court, as the court of final instance, granted the applicant's claim in part and awarded him 500 Russian roubles (RUB) in non-pecuniary damage.

C. Alleged hindrance of the applicant's right to individual petition

1. The applicant's correspondence with the representative and the Court

35. On 13 October 2008 the Court dispatched a letter to the applicant informing him that his application was being communicated to the respondent Government and setting a time-limit of 24 November 2008 for a representative to be assigned. According to the stamp of the LIU-8 correctional facility, where the applicant had been serving his sentence at the material time, the letter in question reached that facility on 21 November 2008. However, it was not handed to the applicant until forty-two days later, on 2 January 2009.

36. On 21 March 2009 the applicant's representative dispatched a letter to the applicant. The letter reached the LIU-8 facility on 1 April 2009 and was handed to the applicant three weeks later, on 24 April 2009.

37. On 1 June 2009 the applicant's representative dispatched another letter to the applicant. The letter reached the LIU-8 facility on 9 June 2009 and was handed to the applicant over a week later, on 18 June 2009.

38. On 18 June 2009 the applicant's representative dispatched a telegram to the applicant. The telegram reached the LIU-8 facility the following day. On 24 June 2009 it still had not been handed to the applicant.

39. On 18 June 2009 the applicant raised with the Prosecutor's Office the issue of undue delays in handing out of correspondence by the administration of the LIU-8 facility. In its reply of 31 July 2009 the Barnaul City Prosecutor's Office informed the applicant that the matters complained of had been confirmed to have occurred and that a formal warning *(представление)* had been issued to the head of the facility in question.

40. On 7 April 2010 the applicant's representative sent a parcel to the applicant enclosing a letter and human rights booklets. On 17 April 2010 it was returned to the representative, giving as the reason that the applicant had left the facility, whereas in accordance with the domestic law it should have been forwarded to the applicant's new address (Section 51 of the Internal Prison Rules approved by the Ministry of Justice on 3 November 2005, Decree no. 205).

41. On 3 July 2010 the applicant submitted to the administration of IK-3 of the Altay Region a letter to be sent to his representative, which included the Court's request for information about the allegations of hindrance of the applicant's right to petition. On 10 August 2010 the letter was dispatched with twenty-three pages of enclosures missing, including written statements by the applicant's fellow prisoners.

2. The applicant's telephone communication with the representative

42. According to the applicant, on a number of occasions he could not make telephone calls to his representative, notwithstanding the approval of his written requests to this effect, due to the large numbers of inmates wishing to make phone calls and the limited time for telephone communication in the facility (from 3 p.m. to 5 p.m. and from 6 p.m. to 8 p.m.).

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

43. Article 240 of the CCrP provides as follows:

"1. In a court hearing all evidence in a criminal case should be examined directly ... The court shall hear statements from the defendant, the victim, witnesses, the conclusions from the expert, examine physical evidence, read out records and other documents, carry out other court actions connected with examination of the evidence.

2. The reading of depositions made at the pre-trial investigation should be allowable only in the circumstances set out in Articles 276 and 281 of the present Code.

3. The court's sentence can be based only on evidence which has been examined at a court hearing."

44. Article 281 of the CCrP, in so far as relevant, provides as follows:

"1. Testimony previously given by a victim or witness during the preliminary investigation or at the trial may be read out... if the victim or witness fails to attend, subject to the parties' consent, save in cases listed in the second part of the present Article.

2. If a victim or witness fails to appear in court, the court may, at a party's request or on its own initiative, read out statements previously given by them in the following cases:

1) the death of the victim or witness;

2) serious illness precluding attendance at a court hearing;

3) refusal by a victim or witness who is a national of a foreign State to attend a hearing when summoned by the court;

4) natural disaster or any other emergency case precluding attendance at a court hearing.

3. ..."

45. Article 413 of the CCrP, in so far as relevant, provides as follows:

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

...

4. New circumstances are:

...

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

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

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

(c) other new circumstances."

B. Constitutional Court of Russia

46. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading out of pre-trial depositions should be considered an exception to the court's own assessment of evidence, and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insists on calling a witness whose testimony may be important to the case, the court should take all available measures to ensure this witness's presence in court. When that witness is available for questioning, the reading out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, when the witness is not available for questioning, the defence should still be provided with appropriate procedural safeguards such as a challenge to the deposition which has been read out, a request for challenge by way of examining further evidence, and pre-trial face-to-face confrontation between that witness and the defendant, in which the latter is given the opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

47. The applicant complained under Article 6 § 3 (d) of the Convention that he had not had a fair trial. In particular, he complained that at no stage of the criminal proceedings against him had he been afforded an opportunity to examine Mr Sh., the key prosecution witness. As 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, the Court will examine the applicants' complaints under those two provisions taken together (see, among many other authorities, *Samoshenkov and Strokov v. Russia*, nos. 21731/03 and 1886/04, § 72, 22 July 2010). Article 6 in the relevant part reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

A. Admissibility

48. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The Government

49. The Government submitted that the domestic court had taken comprehensive measures to secure the attendance of witness Sh. at the trial; on several occasions the trial court dismissed prosecution requests for the depositions by Sh. made at the stage of the pre-trial investigation to be read out, due to objections voiced by the applicant and his counsel. On four occasions the hearing was adjourned because the court ordered the witness's enforced appearance.

50. Despite the fact that witness Sh. was the key prosecution witness, the applicant's guilt was corroborated by other evidence set out in detail in the court's judgment. All versions advanced by the applicant in his defence were given due consideration by the court and rejected as unsubstantiated, in reasoned fashion. The depositions by witness Sh. made at the pre-trial investigation stage were obtained in accordance with the requirements of domestic law on criminal procedure. No grounds were established for a contention that the applicant had been falsely accused by witness Sh.

51. The Government further submitted that the reading out of depositions by witness Sh. in the absence of a party's consent also complied with the requirements of the domestic law on criminal procedure, the absence of witness Sh. from the trial having been declared an extraordinary and exceptional circumstance.

52. Relying on domestic law and practice (see paragraphs 43-45 above) the Government further argued that the applicant had not been deprived of the opportunity to defend himself by all means provided by domestic law. In particular, the applicant had an opportunity to request the court to exclude the depositions by witness Sh. from the evidence or to challenge the depositions in question by way of submitting further evidence, however the applicant had not availed himself of this opportunity.

53. Finally, the Government submitted that in any event the procedural balance between the interests of the prosecution and those of the defence had not been upset, since the prosecutor had also not had the opportunity to examine witness Sh.

54. In sum, the Government maintained that there had been no breach of the applicant's right to a fair trial.

(b) The applicant

55. The applicant pointed out at the outset that the Government did not deny that he had not been given the opportunity to examine the prosecution witness Sh. in the proceedings leading up to his conviction. He submitted further that, regard being had to the fact that witness Sh. had been the only eyewitness to the crime and the weight that the domestic court had consequently attached to his depositions (see paragraphs 28 and 31 above), the denial of the opportunity to examine him breached the applicant's right under Article 6 § 3 (d) of the Convention.

56. The domestic court did not give due consideration to the applicant's version of events, according to which the disappearance of witness Sh. had been prompted by his own guilt, as he had committed the crime and wanted to escape criminal liability.

57. Contrary to the Government's assertion (see paragraph 52 above), the applicant had on several occasions lodged requests to the effect that the depositions by witness Sh. be excluded from the evidence, both at the pre-trial investigation and at the trial, but to no avail.

58. The only opportunity for the applicant to rebut the depositions made by the single eyewitness to the crime was by confronting the latter and examining him during the trial. The difficulties encountered by the domestic authorities when searching for witness Sh. cannot justify a breach of the applicant's rights under the Convention.

59. The Government failed to provide any documentary evidence regarding the measures taken by the domestic authorities to search for witness Sh. in the Tyumen Region.

60. No balance had been struck between the interests of the prosecution and the defence, since while the statements by witness Sh. underlay both the indictment and the conviction, the applicant did not have a single opportunity to examine the witness in question.

2. The Court's assessment

61. The Court reiterates its constant case-law that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether witness statements have been properly admitted in evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports of Judgments and Decisions* 1996-II, and *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III).

62. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238).

63. As the Court has stated on a number of occasions, it may prove necessary in certain circumstances to refer to depositions made during the investigation stage. If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II; *Makeyev v. Russia*, no. 13769/04, § 35, 5 February 2009; and *Samoshenkov and Strokov*, cited above, § 75).

64. The Court further reiterates that the authorities should make "every reasonable effort" to secure the appearance of a witness for direct examination before the trial court. With respect to statements of witnesses who have proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court would emphasise that "paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner" (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII; *Trofimov v. Russia*, no. 1111/02, § 33, 4 December 2008; and *Makeyev*, cited above, § 36).

65. Turning to the facts of the present case, the Court has therefore to determine whether the applicant had the opportunity to examine witness Sh. at any stage of the proceedings, whether the statements by witness Sh. were corroborated by other evidence, and whether a reasonable effort was made by the authorities to secure the appearance of witness Sh. in court.

66. The Court notes, first of all, and it has not been disputed by the parties, that the applicant had no opportunity to examine witness Sh. either during the investigation or at the trial. The Court further notes that the Government has not disputed that the applicant objected to the reading out of the pre-trial statement of witness Sh., and finds no evidence to conclude that he waived his right to confront that witness (see *Trofimov*, cited above, § 34, and, by contrast, *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007, and *Ozerov v. Russia* (dec.), no. 64962/01, 3 November 2005).

67. The Court observes subsequently that the statements made by witness Sh. were the only direct evidence, as he was the only eyewitness to the crime with which the applicant had been charged. This was acknowledged by the Government, which had agreed that witness Sh. had been the key prosecution witness (see paragraph 50 above). Other witnesses who were heard by the court - witnesses P., Ye. G. and L. G. - had not seen the acts the applicant was alleged to have committed (see paragraph 28 above). The remaining evidence – the results of the forensic medical examination of the victim's body, the records of the crime scene examination and of the seizure of the applicant's clothes, and the results of biological expert examinations – had also been of a circumstantial nature. Having regard to the foregoing, the Court considers that the domestic courts based their finding of the applicant's guilt to a decisive extent on the statements by witness Sh., whom the applicant should have had an opportunity to question in order to receive a fair trial (compare and contrast *Andandonskiy v. Russia*, no. 24015/02, § 52, 28 September 2006, and *Samoshenkov and Strokov*, cited above, § 76).

68. The Court further considers that, in view of the importance to the proceedings of witness Sh.'s testimony, the authorities should have made a particular effort to obtain his attendance. The Court is willing to accept that the domestic authorities made a certain effort to secure the attendance of witness Sh. Indeed, the domestic court ordered the police to compel witness Sh. to appear in court. Further, between 5 January and 19 February 2004 the hearing was adjourned on four occasions for failure to secure the attendance of that witness. Comprehensive information has been provided by the Government as to the failure of the domestic authorities to discover the whereabouts of witness Sh. in Barnaul and Slavgorod District, Altay Region (see paragraphs 21, 22 and 25 above). However, as was indicated by the applicant and not disputed by the Government, no information was provided to show the results of any reasonable effort to search for witness Sh. in the Tyumen Region, where he had supposedly moved. The Court notes with concern that the trial court proceeded with the reading out of the testimony by witness Sh. less than a month after the Tyumen Region Prosecutor's Office had been commissioned to establish the whereabouts of witness Sh. and without obtaining the results of the search in the Tyumen Region. In such circumstances the domestic authorities cannot be considered to have made every "reasonable effort" to track down witness Sh. and to ensure that the applicant had a proper and adequate opportunity to question him.

69. Having regard to the fact that the applicant had no opportunity to cross-examine the witness whose statements were of decisive importance for his conviction and the fact that the domestic authorities had not made every reasonable effort to secure the appearance of that witness in court, the Court concludes that the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention. Accordingly, there has been a violation of these provisions.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

70. The applicant complained under Article 34 of the Convention that the domestic authorities had impeded his correspondence with the representative and the Court. He also contended that he had had only restricted access to the telephone to make calls to his representative. Article 34 of the Convention reads, in so far as relevant, as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A. Submissions by the parties

71. The Government submitted that no delays in dispatching the applicant's correspondence had been occasioned by the management of the IK-10, KTB-12, LIU-8 and IK-3 facilities where he had been detained between June 2004 and the present, and that the applicant had not been in any way impeded in the effective implementation of his right to individual petition. The Government further denied having restricted the applicant's telephone communication with his representative. Specifically, they submitted that while being held in facility KTB-12 in 2009-2010 the applicant had had seven telephone conversations, six of which were with his representative, and fourteen telephone conversations while being held in facility LIU-8, nine of which were with his representative.

72. The applicant maintained his complaint. He submitted that the correspondence from the Court and from his representative had been handed out to him with regular and substantial delays. The applicant did not dispute that he had telephoned his representative over a dozen times and admitted that telephone communication had been the most effective means of maintaining contact with the latter. At the same time, he noted that such communication had not always been available (see paragraph 42 above).

B. The Court's assessment

73. The Court reiterates at the outset that a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see *Ryabov v. Russia*, no. 3896/04, § 56, 31 January 2008, with further references).

74. The Court further reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 102, ECHR 2005-I). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. The fact that the individual actually managed to pursue his application does not prevent an issue arising under Article 34: should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 105 and 254, *Reports* 1996-IV). The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with; what matters is whether

the situation created as a result of the authorities' act or omission complies with Article 34 (see *Paladi v. Moldova* [GC], no. 39806/05, § 87, 10 March 2009).

75. Turning to the circumstances of the present case, the Court observes that its letter of 13 October 2008 informing the applicant about communication of his application to the respondent Government was handed to him by the LIU-8 facility authorities forty-two days after its receipt and when the procedural time-limit set out by the Court for the applicant to assign an advocate to represent him in the proceedings before it had already expired. Regard being had to the nature of the above correspondence and its importance for the subsequent procedure before the Court, the significance of the delay in handing it to the applicant and the findings of the domestic authorities in this respect and in respect of other similar instances (see paragraphs 35-39 above), the Court considers that the actions of the domestic authorities had affected the effective exercise by the applicant of his right to individual petition, which is incompatible with the respondent State's obligations under Article 34 of the Convention.

76. The Court therefore concludes that the respondent State has failed to comply with its obligations under Article 34 of the Convention by holding back the applicant's correspondence with the Court. It therefore finds it unnecessary to examine separately the applicant's remaining allegations under this head.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

77. Finally, the applicant submitted a number of additional complaints under Articles 3, 5 and 6 of the Convention relating to his arrest, detention and trial.

78. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no 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 manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed 10,000,000 Russian roubles in respect of non-pecuniary damage.

81. The Government considered that the applicant's claim had been unreasonable and unsubstantiated. In any event, the finding of a violation would constitute sufficient just satisfaction.

82. The Court accepts that the applicant suffered distress and frustration resulting from the unfair criminal proceedings against him. The non-pecuniary damage sustained is not sufficiently compensated for by the finding of a violation of the Convention. However, the Court finds the amount claimed by the applicant excessive. Making its assessment on an equitable basis, it awards the applicant 1,800 euros (EUR) under this head, plus any tax that may be chargeable on that amount.

83. The Court further reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Vladimir Romanov v. Russia*, no. 41461/02, § 118, 24 July 2008; and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes in this connection that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 45 above).

B. Costs and expenses

84. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

85. 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. *Declares* the complaint concerning the lack of an opportunity to examine the key prosecution witness admissible and the remainder of the application inadmissible;

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

3. Holds that the State has failed to comply with its obligation not to hinder the right of individual petition under Article 34 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable on 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 17 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
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) Concurring opinion of Judge Kovler;
(b) Concurring opinion of Judges Spielmann and Malinverni.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE KOVLER

I adhered, albeit with serious doubts, to the conclusions of the Chamber concerning the Article 6 violation. The main issue of the case is the absence of the only eyewitness, Mr Sh., at the trial hearing leading to the applicant's conviction. Added to this is the fact that at no stage of the criminal proceedings against him – even at the investigation stage – was the applicant afforded an opportunity to examine this key prosecution witness.

It is not the first time that the Court has dealt with this kind of situation. In some similar cases it has not found a violation of Article 6 § 3 (1) of the Convention (see *Andandonskiy v. Russia*, no. 24015/02, 28 September 2006). But the particularity of the present case is the gravity of the offence (suspicion of murder) and of the penalty (nine years' imprisonment) that predetermines the need for particularly strict observance of the procedural guaranties afforded to an accused person.

It is a positive fact that the Tyumen Region Prosecutor's Office had been commissioned to establish the whereabouts of witness Sh. in a region whose territory covers half of Europe, the objective difficulty of the task explaining particularly why these efforts did not permit successful search results in the region. For this reason the national court was facing a serious dilemma: whether to continue or to postpone the trial. I noted that on four occasions the hearing was adjourned because the court ordered the witness' enforced appearance. But what is regrettable is the fact that the trial court proceeded with the reading out of Sh.'s testimony less than a month after the beginning of a search operation.

In the light of this “haste”, the arguments of the appeal court about “sufficient measures” and “exceptional circumstances” do not seem convincing to me.

More convincing are the arguments about “cumulative evidence” from other testimony and the results of the forensic medical and biological experts' examinations. But these arguments are eclipsed by the absence of the opportunity to cross-examine the key witness at any stage of the criminal proceedings.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN AND MALINVERNI

For reasons we have explained on many occasions,[1] we would very much have liked the principle enunciated in § 83 of the judgment, on account of its importance, to have been reflected in the operative part of the judgment.

[1] See our joint concurring opinions appended to the following judgments: *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008); *Ilatovskiy v. Russia* (no. 6945/04, 9 July 2009); *Fakiridou and Schina v. Greece* (no. 6789/06, 14 November 2008); *Lesjak v. Croatia* (no. 25904/06, 18 February 2010); and *Prežec v. Croatia* (no. 48185/07, 15 October 2009). See also G. Malinverni's concurring opinion joined by Judges Casadevall, Cabral Barreto, Zagrebelsky and Popović in the case of *Cudak v. Lithuania* ([GC], no. 15869/02, 23 March 2010), as well as the concurring opinon of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska in *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008-...).