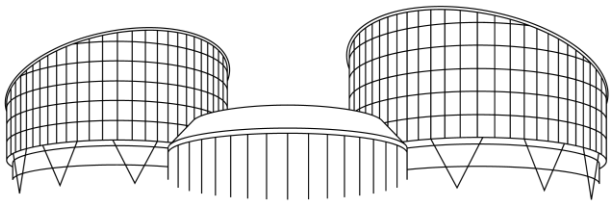

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KRESTOVSKIY v. RUSSIA

(Application no. 14040/03)

JUDGMENT

STRASBOURG

28 October 2010

FINAL

28/01/2011

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

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

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 7 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 14040/03) 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 Vadim Vladimirovich Krestovskiy ("the applicant"), on 19 March 2003.

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

3. The applicant alleged, in particular, that the criminal case against him had not been heard in public.

4. On 7 February 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963 and is serving a prison sentence in Yagul, Udmurtiya Republic.

7. On an unspecified date D., M., Gil. and Gut. were arrested and charged, *inter alia*, with the murders of P. B. and S. When questioned, D. and Gil. testified that the applicant had hired them to kill B.

8. On 23 April 2001 the applicant was arrested on suspicion of aiding and abetting the murder of B. He remained in custody pending trial and was repeatedly questioned by the investigator.

9. On 9 October 2001 the Supreme Court of the Udmurtiya Republic set the trial for 23 October 2001.

10. On 19 October 2001 the head of the organised crime unit of the regional department of the interior informed the Supreme Court as follows:

> "Since December 2000, [the organised crime unit] has been investigating [S.'s murder] ... Defendants [D]., [M]. and [Gil.] ... pleaded guilty and gave truthful statements. On the basis of those statements and the evidence collected it was possible to establish that a leader of the Izhevsk organised criminal gang [V.] had been involved in S.'s murder, committed in April 1998. V. has been put on the federal wanted list.
>
> ... [The organised crime unit] received information that the organised crime leaders had decided to kill D. after he testified against V. ... Furthermore, the police believe that D. knows about other crimes committed by organised crime leaders in Udmurtiya.
>
> Having regard to the above..., we consider it possible that an attempt might be made to assassinate D. We hereby request that the trial be closed to the public and conducted at correctional colony no. 9 ...

11. On 22 October 2001 the Supreme Court of the Udmurtiya Republic decided to dispense with the public hearing of the criminal case against the applicant and D., M., Gil. and Gut. The defendants or their lawyers were not present. In particular, the court noted as follows:

> "The Supreme Court of the Udmurtiya Republic received a letter from the head of the [organised crime unit] concerning the possibility that D. would be assassinated during the trial. D. had earlier testified about V. being involved in the crimes under investigation.
>
> Having regard to the fact that [(1)] the defendants are charged with particularly serious offences, including involvement in organised crime and [(2)] the court is under obligation to ensure the safety of D. and all parties to the proceedings, the employees of the Supreme Court of the Udmurtiya Republic and other persons, [the court] decides to close the trial and to conduct [it] at remand prison no. 1. Another reason to justify the closure of the trial is the fact that D. is accused of murdering [S.] because the latter had raped [D.'s sister]."

12. On 23 October 2001 the Supreme Court opened the trial at remand prison No. 1. The applicant was represented by counsel of his own choice. The court granted his request to hear additional witnesses on his behalf. The applicant pleaded not guilty and testified in court.

13. On 13 December 2001 the Supreme Court of the Udmurtiya Republic found the applicant guilty of murder and sentenced him to thirteen years' imprisonment. The court based its findings on the confessions provided by the applicant's co-defendants D. and G., statements from eight witnesses, the crime scene investigation and forensic reports.

14. The applicant appealed against the conviction. He complained about the lack of a public hearing of the criminal case against him and assessment of evidence by the first-instance court.

15. On 2 October 2002 the Supreme Court of the Russian Federation upheld the judgment of 13 December 2001 on appeal. The hearing was public. After hearing the applicant and his counsel, the court endorsed the lower court's findings as to the points of fact and law. It appears from the text of the decision that the applicant's argument regarding the lack of public hearing at first instance remained unanswered by the court.

II. RELEVANT DOMESTIC LAW

16. The Code of Criminal Procedure in force at the material time provided as follows:

Article 18. Public hearing

> "All matters shall be heard in a public hearing unless it contravenes the interests of protection of state secrets.
>
> The [court] may decide ... to close a trial concerning persons under the age of sixteen, sex crimes and other cases in order to prevent the disclosure of information about the private lives of the parties to the proceedings.
>
> The proceedings in the event of a closed trial, shall comply with all rules of [criminal procedure].
>
> The verdict shall be pronounced in public."

THE LAW

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

17. The applicant complained that he had not had a public hearing in the criminal proceedings against him, contrary to Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing by [a] tribunal ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

A. Admissibility

18. The Government considered that the applicant had introduced his complaint out of time and it should be rejected in accordance with Article 35 §§ 1 of the Convention. In particular, they noted that the Court's stamp on the application form did not indicate the date of its receipt by the Court.

19. The applicant contested the Government's allegations. He submitted that his initial application form had been dispatched on his behalf by the International Protection Centre on 19 March 2003, as indicated by the postmark.

20. The Court observes that is not disputed by the parties that the final decision in respect of the applicant's complaint within the meaning of Article 35 § 1 of the Convention was taken by the Supreme Court of Russia on 2 October 2002. The Court further observes that, pursuant to the legible post mark on the envelope containing the applicant's application form, it was dispatched on 19 March 2003, that is five and a half months after the final decision on the matter.

21. Having regard to the above, the Court concludes that, by introducing the complaint about the lack of a public hearing on 19 March 2003, the applicant had complied with the six-month rule, and the complaint cannot be rejected pursuant to Article 35 § 4 of the Convention. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

22. The Government considered that the trial court's decision to close the hearing of the applicant's case had been justified and in accordance with the applicable domestic rules of criminal procedure. It had been necessary in order to ensure the safety of all parties to the proceedings and to prevent disclosure of information concerning the private life of an alleged rape victim and the relatives of the alleged rapist murdered by the applicant's co-accused. The applicant had had access to all materials in the case file. All the guarantees of a fair trial had been respected. The applicant had been represented. He had had an opportunity to call witnesses on his behalf. The proceedings had been adversarial. It was not disputed by the applicant that the trial court had been independent and impartial. The verdict was pronounced publicly. In their additional observations they submitted that, by deciding to hold the trial at the remand prison, the trial court had removed the risk an assassination attempt might pose to the people of the residential area in the close proximity to the court-house. It had also excluded the possibility of the assassination of the accused while being transported to and from the court-house.

23. The applicant considered that the trial court's decision to dispense with a public hearing of his case had been in contravention of domestic laws. He further reasoned that the domestic judicial authorities had failed to strike a balance between his right to a public trial and the protection of other interests at stake, namely security of the courtroom and prevention of disclosure of information concerning private life. He believed that the trial court could have employed alternative measures to ensure security and to ensure that there were no weapons in the courtroom. He further noted that the law expressly provided that the court bailiffs were under an obligation to carry out weapon screening to prevent anyone from secretly bringing a weapon into the courtroom. The applicant further submitted that the circumstances of the alleged rape had not been subject to the examination by the trial court and that the alleged rape victim had not been questioned on the issue. He concluded that the authorities' failure to employ alternative measures to ensure security of the courtroom had resulted in the violation of his right to a public and fair trial.

2. The Court's assessment

24. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. This protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. Administration of justice, including trials, derives legitimacy

from being conducted in public. By rendering the administration of justice transparent, publicity contributes to fulfilling the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see *Gautrin and Others v. France*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, § 42, and *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, § 21). There is a high expectation of publicity in ordinary criminal proceedings, which may well concern dangerous individuals, notwithstanding the attendant security problems (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 87).

25. The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the provision that "the press and public may be excluded from all or part of the trial in the interests of ... national security in a democratic society, ... or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Thus, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses, or to promote the free exchange of information and opinion in the pursuit of justice (see *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 37, ECHR 2001-III, with further references).

26. Turning to the circumstances of the present case, the Court observes that the trial against the applicant and four other defendants was closed to the public. When deciding on that issue, the trial court referred to the need "to ensure the safety of ... all parties to the proceedings, the employees of the Supreme Court ... and other persons" and protection of privacy. Accordingly, the question before the Court in the present case is whether the trial court's decision to dispense with the public hearing of the applicant's case was justified.

27. Having regard to the material in its possession and to the parties' submissions before it, the Court answers this question in the negative. In the Court's view, the trial court failed to strike a proper balance between the applicant's right to a public hearing of the criminal case against him, on the one hand, and other important interests at stake, on the other.

28. Firstly, the Court notes that it cannot subscribe to the trial court's opinion that the gravity of the charges against the defendants called for the closure of the trial. To find otherwise would be contrary to the letter and spirit of Article 6 of the Convention.

29. As regards the security concerns proffered by the trial court as a ground for closure of the trial, the Court reiterates that security problems are a common feature of many criminal proceedings, but cases in which security concerns alone justify excluding the public from a trial are nevertheless rare (see *Riepan v. Austria*, no. 35115/97, § 34, ECHR

2000-XII). Admittedly, it was incumbent on the domestic judicial authorities to protect the safety and security of the persons present in the courtroom and to respond to the threat of D.'s assassination. However, in the Court's view, the security measures should be narrowly tailored and comply with the principle of necessity. The judicial authorities should thoroughly consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose. The Court notes that it is regrettable that in the present case no such effort was made by the trial court. It did not explain why such measures as, for instance, installation of metal detectors or screening of the public entering the courtroom were insufficient in the circumstances of the case. Nor did it find that the state security system in place at the courthouse was inadequate to such an extent that an assassination attempt could not be prevented other than by completely closing the trial to the public.

30. Furthermore, the Court finds without merit the Government's argument that it was necessary to hold the trial at the remand prison to prevent any risk D.'s assassination might pose to the residents of the areas close to the courthouse and to exclude the possibility of assassination during the defendants' transport. There is nothing in the trial court's decision to suggest that those considerations were of any concern to the trial court.

31. Similarly, the Court is unconvinced that the protection of the interests of an alleged rape victim or relatives of the alleged rapist required the exclusion of the public from the entire trial. The Court concedes that the sensitive content of the testimony to be provided by the witnesses in question might call for certain limitations of the applicant's right to a public hearing. Nevertheless, it was the duty of the court to restrict the rights of the accused as little as possible. In the present case the Court discerns nothing in the materials in its possession to suggest that closing only part of the hearing, during which the witnesses would testify, would have jeopardised or impacted negatively on the clarity and accuracy of their testimony or infringed their privacy.

32. The Court also notes that, unlike the case of *Volkov v. Russia* where it accepted that the interests of justice required the exclusion of the public from the trial and where the trial court took the relevant decision after the prosecution and the defence had had an opportunity to submit their arguments on the point (see *Volkov v. Russia*, no. 64056/00, § 32, 4 December 2007), in the present case the trial court made the relevant decision in the absence of the parties to the proceedings.

33. In sum, the Court concludes that the trial court has failed to give due consideration to the applicant's right to a public hearing.

34. Finally, the Court does not lose sight of the fact that the appeal hearing was public. However, as it has previously ruled on many occasions, the lack of a public hearing could not in any event be remedied by anything

other than a complete re-hearing before the appellate court (see *Riepan*, cited above, § 40).

35. An examination of the facts of the present case reveals that the review carried out by the Supreme Court of Russia did not have the requisite scope. It is true that the appellate court was able to review the case as regards questions of law and fact and to reassess the sentence. However, apart from questioning the applicant, the court did not take any evidence, and in particular it did not hear the witnesses again. Similarly to its finding in *Riepan*, the Court considers it of little importance that the applicant did not request that the witnesses be heard again. It was for the domestic judicial authorities to secure the defendant's right to have evidence adduced at a public hearing (see *Riepan*, cited above, § 41).

36. Having regard to the above, the Court finds no justification for the lack of a public hearing at first instance in the present case. Nor does it find that such lack of a public hearing was remedied by the appeal court hearing the case in public. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. The applicant further made a number of complaints under Articles 3, 5, 6, 8, 13 and 14 of the Convention relating to his arrest, pre-trial detention and fairness of the trial. However, having regard to all the material in its possession, the Court finds that there is no appearance of a violation of the provisions invoked. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

40. The Government considered the applicant's claim excessive and unsubstantiated. They further proposed that the finding of a violation would constitute sufficient just satisfaction.

41. The Court considers that the non-pecuniary damage sustained by the applicant cannot be sufficiently compensated for by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,800 in respect of non-pecuniary damage. The Court further notes that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention.

B. Costs and expenses

42. The applicant also claimed compensation, leaving its amount to the Court's discretion, for the costs and expenses incurred before the Court.

43. The Government considered that the applicant's claim should be rejected.

44. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the amount of EUR 850 has already been paid to the applicant by way of legal aid. In such circumstances, the Court does not consider it necessary to make an award under this head.

C. Default interest

45. 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 a public hearing admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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) in respect of non-pecuniary damage, plus any tax that may be chargeable, 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;

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

Done in English, and notified in writing on 28 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President