CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF MAKEYEV v. RUSSIA

(Application no. 13769/04)

JUDGMENT

STRASBOURG

5 February 2009

FINAL

05/05/2009

This judgment may be subject to editorial revision.

In the case of Makeyev 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,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 15 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 13769/04) 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 Anatoliy Viktorovich Makeyev ("the applicant"), on 10 February 2004.

2. The applicant, who had been granted legal aid, was represented by Ms O. Preobrazhenskaya and Ms M. Arutyunyan, lawyers with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the criminal proceedings against him had been unfair because he had been unable to examine witnesses against him.

4. On 14 April 2006 the President of the First Section decided to communicate the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1954 and lives in the Moscow Region.

7. On 6 March 2003 the applicant and Mr S. were arrested and charged with the armed robbery of Ms M., an offence under Article 161 § 2 (g) of the Russian Criminal Code, and the robbery of Ms G., an offence under Article 162 § 2 (g) of the Criminal Code.

8. The first charge was based on the investigator's interviews with Ms M., the victim, and Ms K., an eyewitness to the robbery. Ms M. stated that on 30 January 2003 she had been working as a pedlar. The applicant and Mr S. had come up to her and told her to give them merchandise and money. The applicant had threatened her with a knife. She panicked. The men stuffed the merchandise in bags, took her money and left. Ms K. testified that on 30 January 2003 she had seen two men approach Ms M. and heard them ask for money. They had verbally threatened her. Then they had got hold of the merchandise and left. The applicant's flat was searched and the objects taken from Ms M. were found there. An identification parade was held and Ms M. identified the applicant and Mr S. as the persons who had robbed her.

9. The second charge was based on the statements that Ms G. and her brother Mr G. gave to the investigator. Ms G. explained that at some time in February 2003 the applicant and Mr S. had come to her brother Mr G. They had locked themselves in her brother's room. She had heard the visitors say that her brother owed them money and that they would take the TV set and video player for the debt. They had threatened to kill her. She had seen them carrying the TV set and video player out of the flat. Mr G.'s testimony was identical to that of his sister, except that he claimed that he owed nothing to the applicant or Mr S.

10. On 29 April 2003 the applicant and Mr S. were committed for trial on both charges. The Lobnya Town Court of the Moscow Region scheduled the hearing for 27 May 2003 and summoned Ms M., Ms K., Ms G. and Mr G. to appear as prosecution witnesses.

11. On 27 May 2003 Ms M., Ms K. and Mr G. did not appear. The applicant asked the court to obtain their attendance. The court adjourned the hearing until 17 June 2003 and ordered that the police ensure the witnesses' appearance in court.

12. On 17 June 2003 the witnesses did not appear. Ms K. sent a note saying that she could not come as she had to look after her new-born baby. As to Ms M., the police report stated that in the morning of 17 June 2003 she had not been at home and that a neighbour had said that "Ms M. had not lived at that address for some time". Mr G. was in custody and could not be brought to the courtroom on 17 June 2003 as on that day "the prosecutor

was going to extend the authorised period of investigation in the criminal case against Mr G.".

13. The applicant insisted that the court should make further efforts to obtain the attendance of the witnesses and asked the court to adjourn the hearing. However, the court decided to proceed with the hearing in the absence of the witnesses.

14. The court heard the testimony by the applicant and his co-defendant Mr S. On the first count the applicant admitted that on 30 January 2003 he had seen Ms M. in the street. She had been talking to a certain Misha. Misha had given him a bag, which he had brought home. He denied that he had threatened Ms M. with a knife. On the second count he pleaded not guilty. He acknowledged that on 14 February 2003 he had come to see Mr G. to recover a debt but denied having taken anything from him or from his sister. Mr S. pleaded not guilty on both counts.

15. The court then examined Ms G., who confirmed the testimony she had given to the investigator.

16. The prosecutor requested the court's permission to read out the statements made by Ms M., Ms K. and Mr G. during the pre-trial investigation. The applicant did not object. His co-defendant Mr S. made an objection. The court allowed the prosecutor's request and the statements by Ms M., Ms K. and Mr G. were read out.

17. On 19 June 2003 the Lobnya Town Court delivered its judgment. On the first count it considered that the applicant's guilt was sufficiently established in relation to the armed robbery of Ms M. on the basis of the following evidence: written depositions made by Ms M. and Ms K. during the pre-trial investigation; Ms M.'s complaint to the police; the report on the search in the applicant's flat, where the stolen merchandise had been found; and the report on an identification parade during which Ms M. had identified the applicant as one of the robbers.

18. On the second count the court found the applicant guilty of the robbery of Ms G. on the strength of the following evidence: statements by Ms G. before the court; a deposition made by Mr G. during the pre-trial investigation; Ms G.'s complaint to the police; and the users' manual for the TV set submitted by Ms G.

19. The court convicted the applicant of the armed robbery of Ms M., an offence under Article 162 § 2 of the Russian Criminal Code, and the robbery of Ms G., an offence under Article 161 § 2 of the Criminal Code. It sentenced him to five years and six months' imprisonment.

20. In his grounds of appeal the applicant complained, in particular, that the trial court had not secured the attendance of Ms M., Ms K. and Mr G. He also complained that the legal characterisation of his actions was erroneous as regards the count of robbery of Ms M. He insisted that he had not had a knife and asked the court to amend the charge of armed robbery to that of robbery.

21. On 27 August 2003 the Moscow Regional Court upheld the judgment on appeal. It did not address the applicant's complaint about the failure to obtain the attendance of witnesses.

II. RELEVANT DOMESTIC LAW

22. Robbery – that is, obtaining property by violence or threat of violence – carries a punishment of three to seven years' imprisonment (Article 161 § 2 (g) of the Russian Criminal Code). Armed robbery carries a punishment of seven to twelve years' imprisonment (Article 162 § 2 (g) of the Criminal Code).

23. Forcible assertion of one's rights in disregard of established procedure, causing considerable damage to a person or organisation and accompanied by violence or threat of violence, is punishable by up to three years' restriction of liberty of movement, or up to six months' arrest, or up to five years' imprisonment (Article 330 § 2 of the Criminal Code).

24. The Code of Criminal Procedure of the Russian Federation of 18 December 2001 provides that witnesses are to be examined directly by the trial court (Article 278). Statements given by the victim or a witness during the pre-trial investigation can be read out with the consent of the parties in two cases: (i) if there is a substantial discrepancy between those statements and the testimony before the court; or (ii) if the victim or witness has failed to appear in court (Article 281).

25. If a witness does not obey a summons to appear without a good reason, the court may order that the police or the bailiffs should bring him to the courtroom by force (Article 113).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

26. The applicant complained that the trial court's reliance on statements by witnesses whom he had had no opportunity to question constituted a violation of Article 6 §§ 1 and 3 (d) of the Convention, which provides 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 ...”

A. Admissibility

27. The Court notes that the application 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

28. The Government submitted that the authorities had made a reasonable effort to secure the attendance of Ms M., Ms K. and Mr G. However, they had been unable to attend the trial. According to her neighbours, Ms M. had moved out of her flat, where she had lived on a temporary basis. She was a Ukrainian national permanently living in Ukraine. Ms K. had refused to attend as she was looking after her child. Mr G. had been taking part in the investigation in a criminal case against him and it had been impossible to bring him to the courtroom on the day of the hearing. Moreover, the applicant had not objected to the reading out of their statements.

29. The applicant submitted that Ms M., Ms K. and Mr G. were the key witnesses against him. On the first charge, although the applicant had confessed to having robbed Ms M., he had denied threatening her with a knife. The court’s conclusion that he had committed the offence of armed robbery, rather than the offence of robbery to which he had confessed, had rested solely on the depositions by Ms M. that he had been armed with a knife. It had been also crucial for the applicant to question Ms K., an eyewitness, to clarify whether or not she had seen him brandishing a knife at Ms M. On the second charge, Mr G. had been the only eyewitness to the robbery. Although the court had also relied on the testimony given by his sister Ms G. in court, she had been only a hearsay witness. The conviction had been primarily based on Mr G.’s statements to the investigator. In particular, the court’s conclusion that the applicant had robbed Mr G. rather than taken his belongings for the debt had rested solely on Mr G.’s assertion that he had owed nothing to the applicant or Mr S., which had not been corroborated by any other evidence.

30. The applicant further argued that the authorities’ effort to obtain the attendance of the witnesses had been insufficient. In particular, they had not delivered the summonses to Ms K. until the day of the hearing. Had this been done in advance, she could have made arrangements for babysitting.

Similarly, the police had visited Ms M. only on the day of the hearing. As she had been absent from her flat, they had assumed that she had left Russia. However, they had never verified whether she had indeed moved away. Nor had they attempted to discover her whereabouts. As for Mr G., he had been in custody under the control of the authorities. The summonses had been issued by the court on 27 May 2003, so the authorities had known well in advance that on 17 June 2003 Mr G. had to be present in court. They could therefore have examined the issue of extending the investigation in respect of him on any other day. Moreover, the extension of the authorised period of investigation was a purely formal decision taken in the absence of the accused and without hearing his opinion.

31. Finally, the applicant conceded that he had not objected to the reading out of the witnesses' statements. He argued, however, that such an objection would have been ineffective. Indeed, an objection raised by his co-defendant Mr S. had been dismissed by the court and the witnesses' statement had been read out. Moreover, his failure to object to the reading out of the statements in question had not amounted to a waiver of his right to question the witnesses against him. He had twice asked the court to adjourn the hearing and secure their attendance. He had therefore clearly shown that he had considered it important to have the witnesses questioned.

2. The Court's assessment

32. 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 applicant's complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports of Judgments and Decisions* 1997-III).

33. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and 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 statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports* 1996-II, and *Van Mechelen and Others*, cited above, § 50).

34. 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).

35. As the Court has stated on a number of occasions, it may prove necessary in certain circumstances to refer to depositions made during the investigative 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, with further references).

36. 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).

37. The first question to be decided in the present case is whether by failing to object to the reading out of the witnesses' statements the applicant waived his right to have the witnesses examined. In this regard the Court reiterates that the waiver of a right guaranteed by the Convention, in so far as permissible, must be established in an unequivocal manner (see *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 65, 10 November 2005). In the present case the applicant twice asked the court to adjourn the hearing and obtain the attendance of the witnesses. It is true that he did not object to the reading out of the statements they had made at the pre-trial stage. However, in view of his repeated requests to secure the witnesses' presence in court, the Court cannot find that he may be regarded as having unequivocally waived his right to have them questioned.

38. The Court will further examine whether the use in court of the statements by the absent witnesses amounted to a violation of the applicant's right to a fair trial. In doing so, it will ascertain whether their statements read out at the trial were corroborated by other evidence and whether a reasonable effort was made by the authorities to secure their appearance in court.

(a) The reading out of depositions by Ms M. and Ms K.

39. The Court observes that Ms M. and Ms K. were respectively the victim and the only eyewitness to the armed robbery, the first charge levelled at the applicant. They both testified that the applicant had approached Ms M. in the street and got hold of her money and merchandise. That testimony was corroborated by the applicant's confession and the results of the search of his flat, where the stolen merchandise had been found.

40. However, Ms M. was the only one to testify that the applicant had threatened her with a knife. As the applicant denied this and Ms K. did not mention a knife in her depositions to the investigator, the domestic courts' conclusion that the applicant had brandished a weapon rested solely on Ms M.'s statement. The Court notes in this connection that the question of whether the applicant had been armed was crucial for the legal characterisation of the applicant's actions as robbery or armed robbery, the latter carrying a more severe penalty (see paragraph 22 above). Given that Ms M.'s statements were of decisive importance for the applicant's conviction, in order to receive a fair trial he should have had an opportunity to question her. The Court also accepts the applicant's argument that he should have been afforded an opportunity to question Ms K., the eyewitness to the robbery, who could have confirmed or disputed Ms M.'s testimony.

41. The Court takes note of the Government's argument that Ms M. and Ms K. had been unavailable for questioning during the trial as Ms M. had left Russia and Ms K. had been looking after her child. It observes, however, that, in view of the importance of the witnesses' testimony to the proceedings, the authorities should have made a particular effort to obtain their attendance. The Court accepts that the domestic courts made a certain effort to secure the attendance of Ms M. and Ms K. They sent them summonses to attend the hearing of 27 May 2003, adjourned that hearing when confronted with the witnesses' failure to appear, and ordered that the police bring them to the courtroom on 17 June 2003. However, as was indicated by the applicant and not disputed by the Government, the police remained passive until the very date of the hearing, when for the first time they visited Ms M.'s flat and contacted Ms K. As for Ms M., the police concluded that she had left Russia merely on the basis of her absence from the address provided during the preliminary investigation and a neighbour's unverified supposition that she had moved out. No effort was made to establish her whereabouts. While the Court is not unmindful of the difficulties encountered by the authorities in terms of resources, it does not consider that tracking down Ms M. for the purpose of calling her to attend the trial, in which the applicant stood accused of a very serious offence and risked up to twelve years' imprisonment (see paragraph 22 above), would have constituted an insuperable obstacle (see *Bonev v. Bulgaria*, no. 60018/00, § 44, 8 June 2006). As for Ms K., her belated notification of

the date of the hearing resulted in her unavailability. If she had been apprised of her duty to testify in advance, she could have made arrangements for the care of her child. The responsibility for her failure to appear therefore rests with the domestic authorities.

42. The Court concludes that the authorities failed to make every reasonable effort to secure the attendance of Ms M. and Ms K. As a result, they never appeared to testify before a court in the presence of the applicant. It does not appear from the materials in the case file – nor has it been argued by the Government – that the applicant had the opportunity to cross-examine them at another time. The applicant was not provided with an opportunity to scrutinise the manner in which Ms M. and Ms K. were questioned by the investigator, nor was he then or later provided with an opportunity to have questions put to them. Furthermore, as Ms M.'s and Ms K.'s statements to the investigator were not recorded on video, neither the applicant nor the judges were able to observe their demeanour under questioning and thus form their own impression of their reliability (see, by contrast, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-II). The Court does not doubt that the domestic courts undertook a careful examination of Ms M.'s and Ms K.'s statements and gave the applicant an opportunity to contest them at the trial, but this can scarcely be regarded as a proper substitute for personal observation of the leading witnesses giving oral evidence (see *Bocos-Cuesta*, cited above, § 71).

43. Having regard to the fact that the applicant was not afforded an opportunity to question Ms M. and Ms K., whose testimony was of decisive importance for the legal characterisation of the offence he was convicted of, and that the authorities failed to make a reasonable effort to secure their presence in court, the Court finds 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.

(b) The reading out of depositions by Mr G.

44. The Court observes that Mr G. was the eyewitness to the robbery of his sister Ms G., the second charge against the applicant. His depositions were identical in many respects to those of Ms G., who testified in court and was questioned by the applicant. Mr G. and Ms G. both stated that the applicant and his accomplice had come to their flat, threatened them and taken their belongings away. The only added value of Mr G.'s testimony was his assertion that he owed nothing to the applicant, while the applicant had claimed that Mr G. was indebted to him and Ms G. had asserted that the belongings had been taken by the applicant for the debt that Mr G. had refused to pay. The Court notes that the existence of a debt was an essential element for the characterisation of the applicant's actions either as robbery of Mr G. and Ms G. or as a forcible assertion of his right to recover the debt. Therefore Mr G.'s depositions had a bearing on the legal characterisation of

the applicant's actions under Article 161 § 2 (robbery) or Article 330 § 2 (forcible assertion of one's right) of the Criminal Code and, consequently, on the penalty imposed on him (see paragraphs 22 and 23 above). The Court considers that Mr G.'s statements, although not the sole evidence against the applicant, were nevertheless of decisive importance for his conviction.

45. The Court will next examine whether the authorities made a reasonable effort to obtain Mr G.'s attendance. It notes that Mr G. was in custody at the disposal of the domestic authorities. The Government did not explain why Mr G. had not been brought to the courtroom on 27 May 2003. Their explanation for the failure to bring him to the courtroom on 17 June 2003 appears unconvincing. The investigator in charge of the criminal case against Mr G. had been informed in advance that on that day Mr G. had to be present in court. He could have organised the investigation schedule to allow Mr G. to testify, but apparently did not make any effort to do so.

46. In view of the above, the Court finds that the domestic authorities did not make a reasonable effort to ensure that the applicant had a proper and adequate opportunity to question Mr G., a key witness against him. In these circumstances, the applicant cannot be said to have received a fair trial.

(c) Conclusion

47. Having regard to the fact that the applicant had no opportunity to cross-examine three witnesses whose statements were of decisive importance for his conviction, the Court concludes that his 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage incurred through the unfair criminal proceedings and his allegedly unlawful detention after conviction.

50. The Government submitted that the applicant's claim for compensation for unlawful detention had been irrelevant to the subject matter of his application.

51. 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 EUR 1,500 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

52. Relying on the lawyers' timesheets, the applicant claimed EUR 2,800 for his representation.

53. The Government submitted that the applicant's lawyers had acted *pro bono*. The applicant had not produced any documents showing that the expenses had been actually and necessarily incurred by him.

54. 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 were reasonable as to quantum. The Court considers excessive the number of hours of work for which the applicant claimed reimbursement. Having regard to the criteria described above and to the amount received by the applicant in legal aid, the Court dismisses the claim for costs and expenses.

C. Default interest

55. 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 application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five 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 at the date of settlement;

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

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

Done in English, and notified in writing on 5 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President