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

FIFTH SECTION

CASE OF RADCHIKOV v. RUSSIA

(Application no. 65582/01)

JUDGMENT

STRASBOURG

24 May 2007

FINAL

12/11/2007

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

In the case of Radchikov v. Russia,

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

Mr P. LORENZEN, *President,*
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr R. MARUSTE,
Mr A. KOVLER,
Mr M. VILLIGER, *judges,*

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 4 October 2005 and on 2 May 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 65582/01) 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 Valeriy Grigoriyevich Radchikov, on 23 January 2001. The applicant died on 31 January 2001 and his daughters, Mrs Natalia Blinova and Mrs Maria Radchikova, have decided to pursue the application. The applicant was represented before the Court by Mrs. K. Moskalenko and Mrs G. Orozaliyeva, lawyers practising in Moscow.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that the quashing of his acquittal was contrary to Article 6 of the Convention and Article 4 of Protocol No. 7.

4. By a decision of 4 October 2005, the Court declared the application partly admissible.

5. The Government, but not the applicant's representatives, filed further written observations (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956 and lived in Moscow.

A. The background of the case

7. The applicant engaged in commerce and at some point in the early 1990s became the president of the Russian Afghan War Veterans Fund.

8. In April 1997 the authorities brought criminal proceedings against the applicant and a few other persons on suspicion of several crimes, including masterminding the murder of the applicant's business rivals.

B. First-instance judgment

9. On 21 January 2000 the Military Court of the Moscow District (*Московский окружной военный суд*), sitting as a bench composed of one professional judge and two lay assessors, examined the case presented by the prosecution and acquitted the applicant and his co-accused on all charges for lack of evidence of his involvement in the alleged crimes (*за недоказанностью участия в совершении преступлений*).

C. Appeal proceedings

10. On 26 January 2000 the prosecution lodged an appeal against the judgment of 21 January 2000, arguing that the first-instance court had wrongly assessed the evidence in the case and "failed to adopt measures aimed at achieving a comprehensive, full and objective investigation of all the circumstances of the case, to eliminate the inconsistencies in the prosecution case file and to have regard to all possible versions of events, but had pinpointed nonexistent inconsistencies for which the investigative authority allegedly failed to account".

11. The prosecution suggested that the first instance court ought to have eliminated the inconsistencies in the prosecution case file of its own motion and requested the appeal court to remit the case for re-trial.

12. On an unspecified date the parties, including the applicant and alleged victims, filed their own arguments.

13. By decision of 25 July 2000 the Military Division of the Supreme Court of Russia (*Военная коллегия Верховного Суда Российской Федерации*), sitting as a bench of three professional judges, examined and

rejected the arguments of the prosecution and the alleged victims and upheld the judgment of 21 January 2000 in full. The court noted that:

> "... Despite the arguments in the prosecution's appeal about the incomplete and one-sided nature of examination of the case by the court, the judicial investigation was sufficiently thorough and comprehensive.
>
> All pieces of evidence presented by the prosecution and the defence were examined at the court hearing.
>
> The court ruled on all applications by the parties concerning the examination of the evidence, took all necessary measures to remedy the shortcomings of the investigation and eliminate the inconsistencies in the oral statements of the questioned persons, and as regards the questions requiring specialist knowledge decided to carry out and then carried out appropriate expert examinations.
>
> At the same time, having evaluated the evidence examined in its entirety, the court came to a reasoned conclusion that the evidence was insufficient to convict and that every means of collecting evidence in the court proceedings had been exhausted. In fact, this was confirmed by the prosecutor (*государственный обвинитель*), who did not make any application for a fresh investigation in court (*судебное следствие*) with a view to eliminating of the existing or newly discovered inconsistencies, and the prosecutor who took part in the appeal hearing ...
>
> The constitutional principle of adversarial proceedings and equality of arms in the administration of justice presupposes the separation of the function of consideration of cases from the functions of the prosecution and the defence submitting argument before the court. Thus, the task of prosecution before the court pertains to the prosecution bodies, whilst the court has an obligation to formulate conclusions about the established facts, regard being had to the evidence examined in the court hearing, to evaluate objectively the lawfulness and validity of the charges, to decide on the issue of acquittal or conviction, have due regard to the evidence collected by the investigation bodies and the arguments of the defence, thus securing the just and impartial resolution of the case and granting the parties equal opportunities to defend their positions. Hence, the court is empowered to determine the guilt of a person only on condition that it has been proven by the prosecuting bodies and officials. The lower court in the present case has fully complied with this requirement of the Constitution of the RF ...
>
> Having considered the evidence of guilt and innocence presented in court by the parties, the court came to the conclusion that it was insufficient to convict and that [the court] has exhausted all statutory means of collecting additional evidence, which is why it took a well-grounded decision to acquit [the applicant and two co-accused] for lack of evidence of their involvement in the criminal actions in respect of which they had been accused by the investigative bodies, having interpreted, in accordance with the requirements of the legislation and the Constitution of the RF, all doubts about the guilt in their favour."

D. Supervisory review proceedings

14. On 25 August 2000 the Deputy Prosecutor General applied for supervisory review of the judgments in the case, arguing that the lower courts ought to have reacted to the breaches of the domestic law and various deficiencies in the prosecution case file by remitting the case for an additional investigation instead of acquitting the accused. He referred to, among other things, paragraph 2 of Article 232(1) of the RSFSR Code of Criminal Procedure in this connection.

15. On 13 December 2000, the Presidium of the Supreme Court, sitting as a bench of nine professional judges, heard the parties, including the applicant and his counsel, and accepted the prosecution's arguments.

16. The court stated that:

> "... the Presidium finds that the prosecution appeal is well-founded and that it should be granted, as the preliminary investigation and the trial, despite the requirements of Article 20 of the RSFSR Code of Criminal Procedure, were conducted in an incomplete and one-sided manner, without proper inquiry into incriminating and exculpatory circumstances. ..."

17. The court pointed out several breaches of the domestic procedure by the investigating authorities and various inconsistencies in the prosecution case file and gave a number of detailed instructions as to how these deficiencies should be eliminated. The court quashed the judgment of 21 January 2000 and the appeal decision of 25 July 2000 and remitted the case for a fresh investigation

E. Subsequent developments

18. On 31 January 2001 the applicant died in a car accident.

19. On 2 April 2001 the prosecution discontinued the case in respect of the applicant on account of his death, and pursued the investigation against S., one of the persons who had stood trial and been acquitted together with the applicant.

20. On 28 May 2003 co-accused S. was found guilty and sentenced to fourteen years' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Applicable legislation

21. Section VI, Chapter 30, of the 1960 Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*), as in force at the material time, allowed certain officials to challenge a judgment which had become effective and to have the case reviewed on points of law and procedure. The

supervisory review procedure (Articles 371-83 of the Code) is distinct from proceedings in which a case is reviewed in the light of newly established facts (Articles 384-90). However, similar rules apply to both procedures (Article 388).

1. Date on which a judgment becomes effective

22. Under the terms of Article 356 of the Code of Criminal Procedure, a judgment takes effect and is enforceable from the date on which the appeal court renders its decision or, if no appeal has been lodged, once the time-limit for appeal has expired.

2. Grounds for supervisory review and reopening of a case

Article 379
Grounds for setting aside judgments which have become effective

"The grounds for quashing or varying a judgment [on supervisory review] are the same as [those for setting aside judgments (which have not taken effect) on appeal] ..."

Article 342
Grounds for quashing or varying judgments [on appeal]

"The grounds for quashing or varying a judgment on appeal are as follows:

(i) prejudicial or incomplete investigation or pre-trial or court examination;

(ii) inconsistency between the facts of the case and the conclusions reached by the court;

(iii) a grave violation of procedural law;

(iv) misapplication of [substantive] law;

(v) discrepancy between the sentence and the seriousness of the offence or the convicted person's personality."

Article 384
Grounds for reopening cases due to new circumstances

"Judgments, decisions and rulings which have become effective may be set aside on account of newly discovered circumstances.

The grounds for reopening a criminal case are as follows:

(i) with regard to a judgment which has become effective, the establishment of false witness testimony or false expert opinion; forgery of evidence, investigation records,

court records or other documents; or an indisputably erroneous translation which has entailed the pronouncement of an unfounded or unlawful judgment;

(ii) with regard to a judgment which has become effective, the establishment of criminal abuse of their powers by judges when examining the case;

(iii) with regard to a judgment which has become effective, the establishment of criminal abuse of their powers by investigation officers dealing with the case, where this has entailed the pronouncement of an unfounded or unlawful judgment or a decision to terminate the prosecution;

(iv) other circumstances, unknown to the court at the time when the case was examined, which, alone or combined with other previously established facts, prove a convicted person's innocence or the commission by him or her of an offence which is more or less serious than that of which he or she was convicted, or which prove the guilt of a person who was acquitted or whose prosecution was terminated."

By ruling no. 4-P of 2 February 1996 the Constitutional Court of the Russian Federation considered the fact that the applicable provisions of the Code of Criminal Procedure did not provide for the supervisory review of decisions of the Presidium of the Supreme Court and ruled that Article 384 of the Code, which limited the possibilities of contesting the merits of such decisions in the light of newly established facts to "other circumstances, unknown to the court at the time when the case was examined" was too restrictive since it prevented the correction of judicial mistakes breaching personal rights and freedoms. It therefore quashed part (iv) of paragraph 2 of that Article as unconstitutional.

3. Authorised officials

23. Article 371 of the Code of Criminal Procedure provided that the power to lodge a request for a supervisory review could be exercised by the Prosecutor-General, the President of the Supreme Court of the Russian Federation or their respective deputies in relation to any judgment other than those of the Presidium of the Supreme Court, and by the presidents of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of those officials for a review.

4. Limitation period

24. Article 373 of the Code of Criminal Procedure set a limitation period of one year during which a request calling for the supervisory review of an acquittal could be brought by an authorised official. The period ran from the date on which the acquittal took effect.

5. The effect of a supervisory review on acquittals

25. Under Articles 374, 378 and 380 of the Code of Criminal Procedure, a request for supervisory review was to be considered by the judicial board (the Presidium) of the competent court. The court could examine the case on the merits and was not bound by the scope and grounds of the request for supervisory review.

26. The Presidium could dismiss or grant the request. If it dismissed the request, the earlier judgment remained in force. If it granted the request, the Presidium could decide to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, to order a fresh court examination at any instance, to uphold a first-instance judgment reversed on appeal, or to vary or uphold any of the earlier judgments.

27. Article 380 §§ 2 and 3 provided that the Presidium could, in the same proceedings, reduce a sentence or amend the legal classification of a conviction or sentence to the defendant's advantage. If it found a sentence or legal classification to be too lenient, it was obliged to remit the case for a new examination.

28. On 17 July 2002 the Constitutional Court of the Russian Federation examined the challenge to the laws which allowed supervisory review of a final acquittal. In its ruling no. 13-P of the same date, the Constitutional Court declared incompatible with the Constitution the legislative provisions permitting the re-examination and quashing of an acquittal on the grounds of a prejudicial or incomplete investigation or court hearing or on the ground of inaccurate assessment of the facts of the case, save in cases where new evidence had emerged or there had been a fundamental defect in the previous proceedings.

29. The Constitutional Court's ruling stated, in particular:

> "... Article 4 of Protocol No. 7 to the Convention provides that the right not to be tried or punished twice does not prevent the reopening of the case in accordance with the law and criminal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> It follows ... that, subject to the above requirements, the national legislation may provide for a system by which a case may be reopened and a final judgment quashed, and may specify where, depending on the case, a procedure for reopening on the grounds of new or newly discovered evidence or a supervisory review should apply.
>
> Any exemption from the general prohibition on reopening proceedings to the detriment of the acquitted or convicted person may be justified only in exceptional circumstances, where a failure to rectify a miscarriage of justice would undermine the very essence of justice and the purpose of a verdict as a judicial act and would upset the required balance between the constitutionally protected values involved, including the rights and legitimate interests of convicted persons and those of the victims of crime. In the absence of any possibility of reversing a final judgment resulting from proceedings tainted by a fundamental defect that was crucial for the outcome of the

case, an erroneous judgment of this type would continue to have effect notwithstanding the principle of general fairness ... and the principle of judicial protection of fundamental rights and freedoms.

3.2. Under the [Constitution and the Convention] any possibility provided for at national level of quashing a final judgment and reviewing a criminal case must be subject to strict conditions and criteria clearly defining the grounds for such review, given that the judgment concerned is already binding and determinative of the individual's guilt and sentence.

However, the grounds for review of final judgments provided for in the Code of Criminal Procedure [of 1960] go beyond these limits. When establishing a procedure for the review of final convictions and, especially, acquittals ... definite grounds should have been formulated to ensure that such a procedure would be implemented with sufficient distinctness, precision and clarity to exclude its arbitrary application by the courts. In failing to do so, [the legislature] misapplied the criteria which derive from [the Constitution] and Article 4 of Protocol No. 7 to the Convention for the quashing of final judgments in criminal cases ...

Furthermore, [the power] of a supervisory instance to remit a case for fresh investigation where it concludes, through its own assessment of evidence, that the previous investigation has been prejudicial or incomplete, is incompatible with the constitutional principles of criminal procedure and with the Constitutional Court's jurisprudence, in that it gives the prosecution an unfair advantage by providing it with additional opportunities to establish guilt even after the relevant judgment has become operative. It follows that a court of supervisory instance cannot quash a final acquittal only on the ground of its being unfounded ... Accordingly, the prosecutor is not entitled to request the supervisory review of such a judgment on the ground that it is unfounded ..."

6. The provisions of the new Code of Criminal Procedure in respect of supervisory review proceedings

30. On 1 July 2002 the new Code of Criminal Procedure came into force. Under Article 405 of the Code, the application of supervisory review was limited to those cases where it did not involve changes that would be detrimental to the convicted person. Acquittals and decisions to discontinue the proceedings cannot be the subject of a supervisory review.

31. By ruling no. 5-P of 11 May 2005 the Constitutional Court of the Russian Federation quashed Article 405 of the Code in so far as this provision limited the judicial review of decisions, including judgments which became effective, to those cases where it did not involve changes that would be detrimental to the convicted person and thus excluded the possibility of correcting fundamental defects in the previous proceedings, which could affect the outcome of the case. The court declared that the provision was in breach of both the Constitution of the Russian Federation, Article 6 of the Convention and Article 4 of Protocol No. 7, and struck it down. It further ruled that, pending the introduction of amendments in the relevant legislation, the supervisory review of court decisions, including

judgments which had become effective, was not limited to cases which did not involve changes that would be detrimental to the convicted person. The time-limit for an application for supervisory review was set at one year.

7. The remittal of cases for an additional investigation under the old and new Code of Criminal Procedure

32. The old Code of Criminal Procedure empowered the courts of various levels to remit criminal cases for an additional investigation at any stage of court proceedings, including first instance (Articles 221 and 232), appeal (Article 339) and supervisory review (Articles 378 and 380).

33. Article 232(1) of the 1960 Code of Criminal Procedure listed the situations in which the trial court should remit the case to the investigative authorities for an additional investigation. In particular, the court should do so in cases of incompleteness of the investigation which could not be remedied in court (paragraph 1); serious violations of the statutory criminal procedure by the investigative authorities (paragraph 2); the existence of grounds for indicting the accused on a new charge which is different but related to the existing charge, or for replacing the charge with more serious or factually different charges from the ones indicated in the bill of indictment (paragraph 3); the existence of grounds for bringing criminal proceedings in the case in respect of persons other than the accused if it is impossible to sever the case (paragraph 4); an erroneous decision to join or sever cases (paragraph 5). When remitting the case for an additional investigation, the court should indicate the grounds for its decision and list the circumstances which ought to be clarified by the investigative authorities during the fresh proceedings.

34. By ruling no. 7-P of 20 April 1999 the Constitutional Court of the Russian Federation quashed paragraphs 1 and 3 of Article 232(1) as unconstitutional in that they breached the principle of the separation of powers and were incompatible with the role of the court as an administrator of justice.

35. By ruling no. 1-P of 14 January 2000 the Constitutional Court had regard to similar considerations and also quashed paragraph 4 as unconstitutional.

36. Article 20 of the Code provided that a court, a prosecutor and investigative officials were under an obligation to undertake all measures provided for by law to ensure a comprehensive, complete and objective investigation of the circumstances of the case and establish both the circumstances incriminating and exculpating the accused and mitigating and aggravating circumstances.

37. Under the new Code of Criminal Procedure, the appeal (Article 378 of the Code) and supervisory review courts (Article 410) have the power to remit the case to the lower instance courts for a fresh examination but no power to remit the case to the prosecutor for an additional investigation.

B. Relevant materials

38. On 19 January 2000, at the 694th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights. The recommendation encouraged the Contracting Parties to examine their national legal systems with a view to ensuring that there existed adequate possibilities to re-examine the case, including the reopening of proceedings, in instances where the Court had found a violation of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

39. The applicant complained under Article 6 § 1 of the Convention that the supervisory review court had quashed his acquittal. This provision, in so far as relevant, reads as follows:

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

A. The parties' submissions

40. The Government submitted, first, that the supervisory review of the applicant's acquittal had been lawful because the domestic procedure had been respected. Secondly, they argued that the supervisory review in the case had been justified by the need to correct the apparent judicial error and therefore had not breached the applicant's Article 6 rights. Thirdly, according to the Government, a supervisory review did not prejudge subsequent judgments by merely remitting the case for a further investigation. Fourthly, the Government referred to the Court's ruling in the case of *Nikitin v. Russia* (no. 50178/99, ECHR 2004-VIII) that the principle of legal certainty was not absolute and argued that the reopening of the case at issue was justified by the need to correct a "fundamental defect in the previous proceedings which might affect the outcome of the case" within the meaning of Article 4 of Protocol No. 7.

41. The applicant's lawyers argued that the applicant's acquittal had not been quashed because of a fundamental defect in the proceedings or because of new facts. In their view, the decision to quash had been unlawful even under the domestic law because the Constitutional Court permitted it only if

there was a fundamental defect in the proceedings or new facts had come to light. According to the applicant's lawyers, the supervisory review body had failed to address this point. In response to the Government's reference to *Nikitin*, cited above, the applicant's counsel described it as erroneous because the present case was factually different. Lastly, they compared the present case to *Ryabykh v. Russia* (no. 52854/99, ECHR 2003-IX), where the Court had found a violation of Article 6. Overall, they concluded that the supervisory review of the applicant's acquittal had been in breach of that Convention provision.

B. The Court's assessment

1. General principles

42. The Court reiterates the importance of one of the fundamental aspects of the rule of law, namely, the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see, as leading authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Ryabykh*, cited above, § 51). In the specific context of supervisory review in criminal cases, the Court has previously held that this requirement is not absolute and that any decision deviating from the principle must be assessed in the light of Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings which was capable of affecting the outcome of the case (see, for example, *Nikitin*, cited above, §§ 54-57, and *Savinskiy v. Ukraine*, no. 6965/02, § 23, 28 February 2006).

43. Thus, the mere possibility of reopening a final judgment in a criminal case is not as such incompatible with Article 6 of the Convention, provided that the actual manner in which the reopening took place did not impair the very essence of the applicant's right to a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct a supervisory review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of criminal justice. In other words, a review of a final and binding judgment should not be granted merely for the purpose of obtaining a rehearing and a fresh determination of the case, but rather to correct judicial errors and miscarriages of justice.

44. The relevant considerations to be taken into account in this connection include, in particular, the effect of the reopening and any subsequent proceedings on the applicant's individual situation and whether the reopening resulted from the applicant's own request; the grounds on

which the domestic authorities revoked the finality of the judgment in the applicant's case; the compliance of the procedure at issue with the requirements of the domestic law; the existence and operation of procedural safeguards in the domestic legal system capable of preventing abuses of this procedure by the domestic authorities; and other pertinent circumstances of the case (see *Nikitin*, cited above, § 60; *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006; *Fadin v. Russia*, no. 58079/00, § 34, 27 July 2006; and *Savinskiy*, cited above, §§ 24-26). Furthermore, proceedings before the supervisory review court should afford all the procedural safeguards of Article 6 § 1 and must ensure the overall fairness of the entire proceedings (see *Vanyan v. Russia*, no. 53203/99, §§ 63-68, 15 December 2005).

2. Application of the above principles to the instant case

45. The Court observes, and it seems undisputed between the parties, that in the present case a final judgment acquitting the applicant on all charges was re-examined and quashed by way of supervisory review at the prosecution's request (see, by contrast, *Fadin*, cited above, § 34). Having reviewed the case, the supervisory court did not simply order the resumption of the judicial proceedings, but remitted the case to the investigative authorities for an additional investigation. Even despite the applicant's death after the supervisory review proceedings, there is no doubt that this decision adversely affected the applicant's individual situation (see, by contrast, *Nikitin*, cited above, §§ 18 and 60). The issue arises as to whether on the facts of the case, and regard being had to the supervisory review proceedings and subsequent events, the authorities struck, to the maximum extent possible, a fair balance between the interests of the applicant and the need to ensure the effectiveness of the system of criminal justice and thus complied with Article 6.

46. Having examined the case file and the parties' submissions, the Court is not persuaded that the authorities respected this requirement in the present case. Whilst the Court accepts that the supervisory review procedure was conducted in compliance with the requirements of the domestic law and procedure, that there existed a one-year time-limit for bringing supervisory review proceedings against the applicant's acquittal which was indeed complied with and that the applicant and his counsel were present at the supervisory review hearing and had ample opportunities to state their case (see, by contrast, *Vanyan*, cited above, §§ 63-68), these factors taken alone are relevant but not sufficient to justify the quashing of the final acquittal in the applicant's case.

47. At the outset the Court finds it difficult to accept the Government's argument that the supervisory review was aimed at the correction of "fundamental defects in the previous proceedings which might affect the

outcome of the case" within the meaning of Article 4 of Protocol No. 7. In this respect the Court notes that the reviewing court stated as follows:

> "... the Presidium finds that the prosecution appeal is well-founded and that it should be granted, as the preliminary investigation and the trial, despite the requirements of Article 20 of the RSFSR Code of Criminal Procedure, were conducted in an incomplete and one-sided manner, without proper inquiry into incriminating and exculpatory circumstances. ..."

48. In the Court's view, the mere consideration that the investigation in the applicant's case was "incomplete and one-sided" or led to an "erroneous" acquittal cannot in itself, in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice (such as in the above-cited *Bratyakin* case), indicate the presence of a fundamental defect in the previous proceedings. Otherwise, the burden of the consequences of the investigative authorities' lack of diligence during the pre-trial investigation would be shifted entirely onto the applicant and, more importantly, the mere allegation of a shortcoming or failure in the investigation, however minor and insignificant it might be, would create an unrestrained possibility for the prosecution to abuse process by requesting the reopening of finalised proceedings. The fear of an abuse of process is even more serious in situations where, such as in the case at issue, the prosecution authorities, having been fully aware of the alleged deficiencies in the investigation (see paragraphs 10 and 11 above) and free to request the first-instance and appeal courts to remit the case for an additional investigation at earlier stages of proceedings prior to the adoption of a final judgment in the case (see paragraphs 32 and 33 above), choose not to avail themselves of this opportunity and have recourse to an extraordinary remedy instead.

49. The Court further notes that the grounds for supervisory review were identical to the grounds for an appeal under the domestic law (see paragraph 22 above). Such arrangement was in itself slightly conducive to the protection of legal certainty and, in the present case, lead to a situation where the supervisory review court simply failed to consider the implications of its decision for legal certainty by dealing with the prosecutor's arguments as if in ordinary appeal proceedings and reopening finalised proceedings on vaguely formulated and evanescent grounds.

50. The Court does not share the reasoning of the Presidium, namely that the preliminary investigation and the trial "were conducted in an incomplete and one-sided manner, without proper inquiry into incriminating and exculpatory circumstances". The Court considers that the mistakes or errors of the state authorities should serve to the benefit of the defendant. In other words, the risk of any mistake made by the prosecuting authority, or indeed a court, must be borne by the state and the errors must not be remedied at the expense of the individual concerned.

51. Finally, the Court observes that the arguments used by the prosecution to justify the reopening of the proceedings and fresh investigation of the applicant's case were exactly the same as those used by the prosecution in ordinary appeal proceedings to justify the remittal of the case for re-trial. Since these arguments were examined and rejected by the Supreme Court sitting as the bench of three professional judges on appeal, the supervisory review proceedings were, in essence, an attempt by the prosecution to re-argue the case on the same points which failed on appeal.

52. In view of the above considerations, the Court finds that the quashing of the applicant's acquittal in the present case was not intended to correct a fundamental judicial error or a miscarriage of justice but was used merely for the purpose of obtaining a rehearing and a fresh determination of the case.

53. Accordingly, the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

54. The applicant also contended that the supervisory review proceedings had constituted a violation of his right not to be tried again in criminal proceedings for an offence of which he had been finally acquitted. He relied on Article 4 of Protocol No. 7 to the Convention, the relevant parts of which provide:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> ..."

55. The Court observes that in the present case a final judicial decision was quashed and the case remitted to the investigative authorities for a fresh investigation. Having regard to its findings under Article 6 (see paragraph 51 above), the Court finds that the applicant's complaints raise no separate issue under Article 4 of Protocol No. 7 (see *Bratyakin*, cited above, and *Savinskiy v. Ukraine* (dec.), no. 6965/02, 31 May 2005).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant's daughters each claimed 15,000 euros (EUR) for non-pecuniary damage. They alleged that the quashing of the applicant's acquittal resulted in severe stress and frustration both for the applicant and them.

58. The Government were of the view that the alleged pecuniary damage was closely linked to the applicant's "personality and his emotional sphere" and that the applicant's daughters could not claim compensation in this respect on his behalf. They further submitted that the applicant's claims were in any event excessive and unsubstantiated.

59. The Court notes, in response to the Government's argument, that it has repeatedly granted claims for compensation in respect of non-pecuniary damage lodged by the next-of-kin on behalf of their deceased relatives (see, for example, *Vocaturo v. Italy*, judgment of 24 May 1991, Series A no. 206-C, pp. 29 and 30, §§ 2 and 19, or *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, pp. 8 and 10, §§ 2 and 49) and that there is nothing in the circumstances of the present case or in the Government's submissions to justify a departure from that practice. The Court observes that the applicant must have suffered a certain degree of stress and frustration as a result of the quashing of his acquittal. The actual amount claimed is, however, excessive. Making its assessment on an equitable basis, it awards the applicant's daughters jointly the overall sum of EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

60. The applicant's daughters also claimed 928.05 United States dollars (USD) for the costs and expenses incurred before the Court (USD 390.19 in respect of legal fees and USD 537.86 in respect of "other" fees). They submitted contracts concluded between the applicant and his lawyers with indications of the fee paid.

61. The Government did not agree with the amounts claimed, stating that the alleged representation expenses had not been proved. The Government also contested the amount claimed in respect of "other fees".

62. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

63. In the present case, regard being had to the documents submitted by the applicant's daughters, the above criteria and the complexity of the case, the Court awards EUR 300 for costs and expenses.

C. Default interest

64. 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. *Holds* that there has been a violation of Article 6 of the Convention;

2. *Holds* that no separate issue arises under Article 4 of Protocol No. 7 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant's daughters, Mrs Natalia Blinova and Mrs Maria Radchikova, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 2,000 (two thousand euros) jointly in respect of non-pecuniary damage;
      (ii) EUR 300 (three hundred euros) jointly in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 24 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President