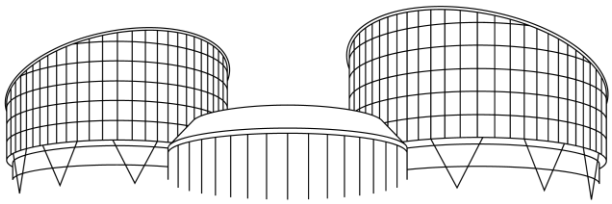

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FIRST SECTION

CASE OF SUTYAGIN v. RUSSIA

(Application no. 30024/02)

JUDGMENT

STRASBOURG

3 May 2011

FINAL

28/11/2011

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

In the case of Sutyagin 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 André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 5 April 2011,

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

PROCEDURE

1. The case originated in an application (no. 30024/02) 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 Igor Vyacheslavovich Sutyagin ("the applicant"), on 11 July 2002, as supplemented on 1 December 2004.

2. The applicant was represented by Ms K. Moskalenko and Ms A. Stavitskaya, lawyers with the International Protection Centre in Moscow. The respondent Government were initially represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representatives Mrs V. Milinchuk and Mr G. Matyushkin.

3. The applicant alleged, in particular, that the length of his detention on remand and the length of the criminal proceedings against him had been excessive, that the court that had tried him had not been independent, impartial and lawful, that he had not had a fair trial and that his conviction had violated Articles 7 and 10 of the Convention.

4. By a decision of 8 July 2008, the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits. The Court 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 1965 and currently lives in London.

7. The applicant worked at the Institute of the USA and Canada at the Russian Academy of Science as the head of the Military-Technical and Military-Economic Policy Department. He resided in Obninsk, Kaluga Region.

A. Preliminary investigation

8. On 26 October 1999 the Kaluga Region Department of the Federal Security Service of the Russian Federation (*Управление Федеральной службы безопасности Российской Федерации по Калужской области*, the "FSB") opened criminal proceedings under Article 283 of the Criminal Code in connection with the publication in 1998 of the book "Strategic Nuclear Weaponry of Russia" which allegedly contained State secrets.

9. On 27 October 1999 the FSB, acting on the basis of a search warrant, searched the applicant's flat in the presence of the applicant and his wife and seized notes, books, press clippings, computers, money in foreign currencies (cash) and other items. They took the applicant to their office in Obninsk. Over the next three days an investigator questioned him as a witness, having warned him about his criminal liability if he refused to testify or made false statements. The applicant had no access to a lawyer, nor did he request that one be appointed.

10. On 29 October 1999 the FSB brought criminal proceedings against the applicant on suspicion of high treason in the form of espionage, punishable under Article 275 of the Criminal Code.

11. On the same day an investigator joined the two cases and ordered the applicant's detention on remand under Article 90 of the Code of Criminal Procedure. The detention order, upheld by the prosecutor of Obninsk on the same day and served on the applicant at 12.30 a.m. on 30 October 1999, stated that the applicant had gathered, systematised and summarised information of a military-technical nature and then passed it on to representatives of a foreign organisation, Alternative Futures, for remuneration, during meetings with them outside Russia. Thus, in September 1998 in Budapest the applicant had allegedly handed over analytical materials containing State secrets on the state of the Russian rocket attack warning system. In July 1999 in Brussels he had allegedly passed on materials concerning the latest Russian aircraft complexes and had been requested to collect information on the Akula submarine and the MIG-29 aircraft. He had prepared that information and obtained an entry

visa for Italy, intending to hand it over in Rome in October 1999. He had failed to do so for reasons beyond his control. The investigator concluded that the applicant's actions contained elements of treason, punishable under Article 275 of the Criminal Code. The order also stated that the preparation of charges against the applicant had not been completed, that he might obstruct the investigation and continue his criminal activities and that he might abscond.

12. On 1 November 1999 the applicant was questioned as a suspect in the presence of his lawyer.

13. On 5 November 1999 the applicant was charged with high treason in the form of espionage under Article 275 of the Criminal Code. The charges were formulated in a one-page document. The applicant was accused of collecting and handing over to the UK-based consultancy firm Alternative Futures information containing State secrets and other information damaging to Russia's national security, in the manner described in the detention order of 29 October 1999.

14. On 24 December 1999 the prosecutor's office extended the term of the preliminary investigation and the applicant's detention on remand to 26 March 2000.

15. On 25 February 2000 the applicant's counsel requested the investigator to replace the applicant's detention with another preventive measure that would not involve deprivation of liberty. He specifically requested that factors other than the gravity of the charge against him be taken into consideration. He pointed out that Obninsk was the place of the applicant's permanent residence, that the applicant was married and had two small children, that his family did not have a source of income other than his salary, that he had a number of diseases which required medical care and that he wished to continue his work at the institute. The request was supported by applications from a Vice-President of the Russian Academy of Science and another scientist, who wished to be the applicant's personal guarantors. On 1 March 2000 the investigator from the Kaluga Region Department of the FSB rejected the request. The applicant appealed against this decision.

16. On 23 March and 13 April 2000 the prosecutor's office extended the term of the preliminary investigation and the applicant's detention on remand to 26 April and 26 July 2000 respectively.

17. On 26 April 2000 the Regional Prosecutor's office dismissed the applicant's appeal against the investigator's decision of 1 March 2000, stating that the investigator had rightly rejected the request because the applicant had been charged with a particularly serious offence. A further appeal to the Deputy General Prosecutor of the Russian Federation was rejected on 28 April 2000 on the same ground.

18. On an unspecified date the applicant filed a court appeal complaining that his detention was unlawful and unjustified and requesting

his release. In particular, he argued that he had been unlawfully detained from 27 to 29 October 1999. He pointed out that there was no evidence that he might flee, and that various other factors, including his family situation, made him eligible for release. On 29 June 2000 the Kaluga District Court of the Kaluga Region rejected the application as unfounded. The court pointed out that the applicant was accused of a crime falling into the category of particularly serious offences. It then observed that the domestic law permitted [the courts] to remand in custody those accused of such offences by a mere reference to the gravity of the offence. The court added that the investigation into the charges against the applicant had not been completed. It did not comment on the applicant's allegations concerning the period from 27 to 29 October 1999. The decision of 29 June 2000 was subject to appeal to the Kaluga Regional Court. There is no indication that the applicant appealed against it.

19. The investigating authority ordered that an expert examination be carried out with a view to determining whether the materials which the applicant had allegedly collected, stored and passed on to Alternative Futures contained State secrets, and whether they could have been obtained from the publications to which the applicant referred as the sources of his information. The applicant asked the investigating authority to give him an opportunity to provide explanations to the experts. His motion was rejected.

20. On 30 June 2000 a commission of experts from the Land Forces Headquarters, which included expert K., reached the conclusion that materials on the topic "The RF Ministry of Defence's failure to implement in full plans to set up permanent readiness units in 1998" could have been derived from open publications and did not contain State secrets.

21. On 12 July 2000 the Deputy General Prosecutor extended the term of the applicant's detention in custody until 26 September 2000. An appeal by the applicant against this decision and an application for release were rejected by the Kaluga District Court on 10 August 2000. In its decision the court again referred to the gravity of the charges against the applicant as the only reason for his continued detention. There is no indication that the applicant appealed to the Kaluga Regional Court against this decision.

22. On 17 August 2000 another group of experts from the General Headquarters of the Russian armed forces, which included expert N., stated that the information on the topic "Options for the structure of the RF's strategic nuclear forces for the period up to 2007" could have been derived from open sources, represented the result of analytical research, was untrue and did not contain State secrets.

23. Information relating to thirty-eight other topics was found by the experts to have contained State military secrets.

24. On 19 September 2000 the finalised charges were brought against the applicant. They consisted of thirty-eight items, set out on eleven pages. The applicant was accused of gathering, by way of analysing and

systematising information published in Russia and other countries, and information from other non-established sources, and of passing on materials concerning Russia's military and defence potential which contained State secrets and other materials of a military and military-technical nature, to two representatives of the US intelligence service, who were working under cover of the consultancy firm Alternative Futures, to be used to damage Russia's national security. According to the charge sheet, the applicant had handed over materials on thirty-eight topics of the above nature, for remuneration, during seven meetings in 1998-1999 in Birmingham, London, Budapest and Brussels.

25. According to the applicant, all of the information used in charging him was obtained by the investigating authority from his statements given on 27-29 October 1999, 1-5 and 24 November 1999, 25 January and 4 September 2000.

26. On 26 September 2000 the preliminary investigation was finalised.

27. On 23 October 2000 the defence finished examining the case file.

28. On 26 October 2000 the Deputy Kaluga Regional Prosecutor transmitted the case to the Kaluga Regional Court for trial.

B. Proceedings before Kaluga Regional Court

29. On 9 December 2000 the Kaluga Regional Court ordered that the case be heard by a bench composed of a judge and two people's assessors, in a closed trial. On the same day the court rejected the applicant's request for release, supported by two non-governmental organisations, on the ground of the gravity of the charges against him.

30. A hearing was originally scheduled for 26 December 2000. It was adjourned until 9 January and then until 26 February 2001, on a request by the applicant's two new counsels, in order to allow time for examination of the case file.

31. On 7 February 2001 the Supreme Court of the Russian Federation ("the Supreme Court") dismissed the applicant's appeal against the decision of 9 December 2000. It stated that, under Article 96 of the Code of Criminal Procedure, detention on remand could be applied on the mere ground of the gravity of the crime. It held: "As follows from the materials of the case, Sutyagin is accused of committing a particularly grave crime. In these circumstances one cannot accept the arguments in the appeal with regard to the unlawfulness and groundlessness of the judge's decision to maintain detention on remand as a measure of restraint."

32. The hearing took place on 27 and 28 February 2001. On 1 March it was adjourned to 5 March 2001, 3 and 4 March being non-working days, because one of the defence counsel would be busy in another trial on the following day.

33. The hearing was held on 5-7 March 2001. Between 14 March and 21 May 2001 no hearing took place because one of the defence counsels was ill.

34. The examination of the case continued on 25, 28-30 May, 4-9, 14-15, and 18-20 June 2001. On the latter date the court granted the prosecutor's request to call witnesses and experts and adjourned the hearing until 17 July 2001.

35. The trial continued on 18-20, 23-27 and 30-31 July, 2-3, 6-10, 13-14 and 16-17 August 2001. On 20 August 2001 the hearing was adjourned to 4 September 2001 on account of the defence counsel's illness. It continued on 5-7, 10-14, 17-18, 20-21 September 2001. On the latter date the court granted the prosecution's request to adjourn the hearing until 29 October 2001 to allow time for preparation of their pleadings.

36. The hearing continued on 29-31 October 2001. The defence asked that the hearing be adjourned to 12 November 2001 to allow the defence time to prepare on the basis of the prosecutor's submissions. The request was granted.

37. On 1 November 2001 the court heard the prosecutor's pleadings. According to the applicant, the First Deputy Prosecutor of the Kaluga Region B., who represented the prosecution, acknowledged that the applicant had been unlawfully detained by the FSB department of the Kaluga Region from 27 to 29 October 1999 and asked the court to issue a "special finding" (*частное определение*) with such an acknowledgment.

38. On 12 November 2001 the court heard pleadings by the defence.

39. On 13 November 2001 the court adjourned the hearing until 25 December 2001, giving no reasons, and then until 27 December 2001 on account of illness among the judges.

40. On 27 December 2001 the court heard the applicant's final statement. The applicant stated that he had gathered information for Alternative Futures using open sources and denied the charges against him.

41. On the same day, after deliberations, the Kaluga Regional Court remitted the case for additional investigation.

1. Kaluga Regional Court's decision of 27 December 2001

42. In its decision the Kaluga Regional Court stated that the investigating authority had significantly breached the rules of criminal procedure in the course of the preliminary investigation, thus prejudicing the applicant's right to defend himself. The charges against the applicant in the statement of charges of 19 September 2000 and in the bill of indictment, notably the content of the materials which the applicant had allegedly gathered, stored and transmitted to a foreign intelligence service, were excessively vague. Those documents contained the titles and general description of the topics about which the applicant had allegedly transmitted information, but did not indicate the content of that information. With

regard to some accusations there was a significant discrepancy between their formulation in the statement of charges and the bill of indictment, which fact, in line with the practice directions of the Supreme Court, was a ground for remitting the case for additional investigation. With regard to certain other charges, the court noted that the investigating authority had contradicted itself in the statement of charges and the bill of indictment by referring to the same information as classified and non-classified.

43. A general criticism about the charges on twenty-nine topics was that it remained unclear exactly what information the applicant had allegedly gathered, stored and transmitted. This made it impossible for the court to assess the arguments put forward by the prosecution and the defence; to establish factual questions concerning the sources and circumstances in which the information was collected; to assess whether the information was truthful and comprised State secrets, and to assess the possibility that it was damaging to Russia's external security. The vague formulation of the charges, which made it impossible for the applicant to know exactly what he was accused of, also violated his right to defend himself.

44. The investigating authority had established the applicant's guilt based, *inter alia*, on the applicant's own statements. At the same time they had failed to set out and analyse in the bill of indictment the applicant's statements concerning the circumstances in which the information was collected and stored and the content of that information.

45. According to the investigating authority, the applicant's guilt was corroborated by the applicant's four notebooks. There was nothing in the bill of indictment about the content of those notebooks or its analysis.

46. The bill of indictment referred to mutually exclusive evidence which had not been analysed and was not assessed by the investigating authority. Thus, the applicant was accused of gathering, storing and transmitting secret information concerning "options for the structure of the RF's strategic nuclear forces for the period up to 2007". The bill of indictment referred to three expert reports as evidence: (i) report of 29 February 2000 by the commission of experts from the Armed Forces General Headquarters, according to which this information was "top secret"; (ii) statements by a certain expert to the effect that this information was partially untrue but did however contain State secrets; and (iii) report of 17 August 2000 by the commission of experts from the Armed Forces General Headquarters, according to which the information was untrue and did not contain State secrets.

47. The bill of indictment did not set out the applicant's arguments and any results of their examination by the investigating authority. Thus, after the charges had been served on him Mr Sutyagin contended that he had taken certain information, allegedly secret, from various published interviews with Russian military commanders. He asked whether such information had been declassified. Neither the applicant's arguments nor the

results of their examination were set out in the bill of indictment. The applicant had argued that he obtained some information from the foreign press in English. However, the experts submitted to the trial court that they had never examined these publications. The applicant had contended that he had received all of his information, including that which, according to the experts, had comprised State secrets, from open sources. These arguments by the applicant had not been properly examined in the course of the preliminary investigation. The results of the examination had not been set out in the bill of indictment.

48. During the preliminary investigation, expert examinations had been conducted into the secrecy of the information allegedly gathered, stored and transmitted by the applicant. Four expert commissions had concluded that part of the information contained State secrets of different levels. The experts' conclusions had been included in the formulation of charges. In their examination the experts had been governed by order no. 055 of the Ministry of Defence of 10 August 1996, containing a list of information subject to classification in the RF Armed Forces, to which the applicant had never had access. By failing to provide the applicant with access to that document the investigating authority had violated his right to defend himself. Furthermore, that list was a secret document and had never received State registration; it should not therefore have been relied on by the experts (the Supreme Court in its decision of 12 September 2001 held that this order was a document touching upon human rights which should be registered; normative acts void of registration were invalid).

49. The trial court agreed with the defence that the expert examinations (reports of 29 February, 25 July, 2 and 17 August 2000) had been ordered and carried out in violation of the law on criminal procedure.

50. In view of the above violations the trial court remitted the case to the Kaluga regional prosecutor for additional investigation, as required by Articles 232 § 1 (2) and 308 of the Code of Criminal Procedure, and ordered, without giving any reasons, that the applicant should remain in detention.

51. The court held that should the evidence gathered as a result of the new investigation be sufficient to bring charges against the applicant, those charges were to be formulated in detail in a statement of charges, in accordance with the requirements of Article 144 of the Code. A bill of indictment had to comply with Article 205 of the Code and contain, in particular, the detailed formulation of a charge, which was not to differ significantly from the formulation in the statement of charges to the detriment of the accused. The bill of indictment had further to describe and examine evidence produced by the investigating authority and the accused's arguments in his defence. Expert examination of the information included in the charges should, if necessary, be carried out so that the accused's rights would be duly respected.

2. Appeal against the decision of 27 December 2001

52. The applicant and his counsel appealed against this decision. They did not dispute the trial court's findings with regard to the procedural violations by the investigating authority. They argued, however, that the vague formulation of the charges, as well as the violations in preparing the bill of indictment and in ordering and carrying out expert examinations, showed the irreparable incompleteness of the investigation, which warranted the applicant's acquittal. The trial court should not have remitted the case for additional investigation on its own initiative without relevant requests to that effect by the parties. The flawed preliminary investigation should have resulted in the applicant's acquittal.

53. The defence also appealed against the decision upholding the applicant's detention. They submitted that there was no evidence that he would flee. The applicant and his family and relations – his wife, two minor children, parents and brother – resided permanently in Obninsk. His wife and children were in a difficult financial situation. The applicant had a number of diseases which could not be treated properly in his detention facility. There was no evidence that the applicant could obstruct the investigation or would engage in criminal activities. The counsel complained about violations of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms in particular, given that the gravity of the offence was the sole ground for the applicant's continued detention.

54. On 20 March 2002 the Supreme Court dismissed the appeal and upheld the decision. It maintained that the charges against the applicant had been too vague, and stated that the Kaluga Regional Court had rightly decided to remit the case for additional investigation and remand the applicant in custody, and that it found no ground to quash or amend that decision.

C. Additional investigation

55. On 8 April 2002 the investigation department of the FSB of the Kaluga Region commenced the additional investigation.

56. On 6 June 2002 they ordered a new comprehensive expert report on whether the information which the applicant had allegedly transmitted to Alternative Futures contained State secrets. The defence objected to that decision, arguing that the experts were supposed to compare the statutory list of classified information and the transmitted information, which was in fact legal assessment. The applicant requested that he be allowed to be present at the expert examination and to provide explanations to the experts. He also noted that for unknown reasons the investigating authority had not forwarded to the experts a number of publications used by him. He

requested that those publications be sent to the experts for their examination.

57. In his decision of 17 June 2002 the head of the investigation department rejected the applicant's requests. He stated, in particular, that all open sources had been forwarded for expert examination, except for those to which the applicant had referred without any ground, as they were mismatched chronologically (published after the events incriminated to the applicant) or textually with the information transmitted by the applicant. He stated that the applicant's presence at the expert examination was not necessary since the materials submitted to the experts, including the applicant's statements, were sufficient to answer the questions put to them.

58. On 18 June 2002 the case was transferred to the FSB central investigation department in Moscow on the Deputy Prosecutor General's instruction.

59. On 18 July 2002 a commission of experts from the Headquarters of the Ministry of Defence of the Russian Federation carried out an assessment of the materials given to them by the investigating authority (records of the applicant's interrogations and the publications to which the applicant referred as the sources of his information) and reached the conclusion that the materials on the following five topics constituted State secrets, were true and could not have been obtained from the publications examined by them:

– the structure and state of the missile [early-]warning system;

– the RF Ministry of Defence's failure to implement in full plans to set up permanent readiness units in 1998;

– options for the structure of the RF's strategic nuclear forces for the period up to 2007;

– specific features of the construction and military potential of the MiG-29 SMT aircraft and the military potential of the modernised MiG-29;

– possible directions in the development of Russian air-to-air missiles.

60. In their assessment the experts were governed by the Official Secrets Act, as amended on 6 October 1997, Presidential decree no. 1203 of 30 November 1995, the Code of Criminal Procedure and unpublished decrees of the Ministry of Defence nos. 055 and 015 issued on 10 August 1996 and 25 March 2002 respectively.

61. On 29 July 2002 the applicant was re-charged with five counts of treason by way of espionage under Article 275 of the Criminal Code. He was accused of gathering, using the opportunities provided by his job at the Institute of the USA and Canada, information on five topics containing State secrets from various sources, including closed sources, and transmitting it, on five occasions in 1998-1999, to representatives of a foreign state with a view to damaging the national security of Russia. The charges in respect of the remaining items were withdrawn.

62. On 7 August 2002 the additional investigation was finalised.

63. On the same day the applicant and his counsel began examination of the case file. The case file was composed of more than 8,120 pages, computer files, audio and video records.

64. On 9 August 2002 the Moscow City Court extended the applicant's detention on remand to 8 October 2002 at the investigator's request. The applicant appealed. On 2 October 2002 the Supreme Court quashed the decision as unlawful and ordered a fresh examination. It stated in its decision that pre-trial detention could only be extended if legitimate grounds were supported by the relevant factual circumstances.

65. Following this decision, an investigator from the prosecutor's office submitted to the Moscow City Court a copy of a document from which it followed that the applicant had received an entry visa for Italy which had expired in November 1999.

66. On 3 October 2002 the City Court gave a new decision extending the applicant's detention until 8 October 2002, on the grounds that, in view of his open visa for a trip abroad, he could abscond or otherwise obstruct the investigation and that he was accused of committing a particularly serious offence.

67. On 4 October 2002 the Moscow City Court extended the applicant's detention on the same grounds until such time as the applicant had completed examination of the case file.

68. The defence appealed against the two decisions, pointing out, *inter alia*, that, according to the applicant's passport, his Italian visa had been issued for the period from 28 October 1999 to 18 November 1999.

69. On 25 December 2002 the Supreme Court rejected the appeals, holding that there were no grounds for the applicant's release and referring to the gravity of the charges.

70. On 15 August 2003 the defence finished its examination of the case file. The applicant requested that N. and K., who had carried out the expert assessment in the case in 2000, be examined by a trial court. The investigating authority included these individuals in the list of witnesses to be examined by a trial court, which was enclosed with the bill of indictment. Three prosecution witnesses, the Obninsk Navy training unit officers T., V. and G., were also added to that list.

D. Jury trial

71. In August 2003 the applicant lodged a request for his case to be heard by a jury. The case was transferred to the Moscow City Court for trial.

72. On 8 September 2003 a judge of the Moscow City Court listed a preliminary hearing for 15 September 2003. The hearing started on the latter date but was adjourned to 25 September 2003 at the prosecutor's request to allow time for preparation.

73. On 23 September 2003 the President of the Moscow City Court assigned the case to judge Sh., who held a preliminary hearing on 25 September and scheduled a hearing on the merits by a jury for 3 November 2003.

74. On 29 September 2003 judge Sh. examined an application for release lodged by the defence. He observed that the applicant had been detained in connection with the accusation of a particularly grave offence, on well-founded grounds which were still valid. He held that the applicant's detention as a preventive measure should therefore remain in place. The defence appealed, arguing that the decision contained no reasons for the applicant's continued detention.

75. The jury was formed and the trial commenced on 3 November 2003.

76. On 5 November the prosecution asked that the hearing be adjourned to 11 November 2003 in order to produce evidence. The request was granted.

77. On 11 November the hearing was postponed to 18 November 2003 as the prosecution witnesses had failed to appear.

78. On 12 November 2003 the Supreme Court rejected the applicant's appeal against the decision of 29 September 2003 and upheld that decision. It noted the seriousness of the charges against the applicant and stated that the reasons for the initial decision to remand the applicant in custody as a preventive measure were still valid and that there had been no violations of the rules of criminal procedure.

79. On 18 November 2003 the examination of the case was adjourned to 25 November 2003 as the applicant had not been transported to court on account of quarantine in his detention facility.

80. On 25 November 2003 the court adjourned the hearing until the end of the quarantine period and the applicant's recovery.

81. On 26 November 2003, as the defence later learned from the materials of the case file, the President of the Moscow City Court assigned the case to judge K. The materials of the case file contain the following resolution by the President: "To M.A. K., [I] [a]sk [you] to take the case over for examination".

82. The list of jurors of the Moscow City Court for 2004 was approved by the Mayor of Moscow on 4 December 2003 and later sent to the court.

83. According to the applicant, the quarantine ended on 5 December 2003. The defence filed numerous requests with the presiding judge, the President of the court and various authorities, seeking to have hearings in the case resumed.

84. On 16 February 2004 the defence was notified that the hearing would take place on 15 March 2004 and that the case had been assigned to judge K. The defence lodged a number of requests, seeking information on the grounds and reasons for the replacement of the presiding judge,

including a request of 15 March 2004 addressed to the President of the Moscow City Court. They were all left unanswered.

85. On 24 February 2004 judge K. examined a request by the prosecution for extension of the term of the applicant's detention. She also examined an application for the applicant's release, supported by an application from representatives of various non-governmental organisations, the State Duma and the Academy of Science. The judge noted that the six-month period of the applicant's detention in custody, from the moment of the receipt of the case by the court, would expire on 25 February 2004. Under Article 255 § 3 of the Code of Criminal Procedure, in cases concerning grave and particularly grave offences a court could prolong the terms of detention in custody for not more than three months each time. In the circumstances, the judge concluded that the period of the applicant's detention should be extended until 25 May 2004. The defence appealed against this decision, arguing that it contained no reasons to justify the extension of the applicant's detention.

86. The new presiding judge K. held a hearing on 15 March 2004 at which she carried out the selection of a new jury from thirty-one candidate jurors.

87. The request by the defence to have the case examined by the initial composition of the jury, which, they alleged, had been unlawfully dismissed, was rejected. So too was a motion challenging the presiding judge who, according to the defence, was conducting the trial in a way favourable to the prosecution.

88. One of the questions put to the candidate jurors by the presiding judge was whether there were among them heads or deputy heads of bodies of the representative or executive authorities, deputies, servicemen, clergymen, judges, prosecutors, investigators, advocates, notaries and persons serving in the Ministry of Interior or the FSB. Four persons responded that they had served in the FSB. They were dismissed at the request of the defence. The defence asked the candidate jurors fourteen questions, some of which were addressed to all of them, for example, questions about their place of work, knowledge of foreign languages and Internet use. The defence challenged some of the candidate jurors twice without giving reasons. A candidate juror, Mr Y., answered that he worked as a deputy head of a foreign company representative office and spoke Polish.

89. On the same day the individuals who were selected to serve on the jury took the oath.

90. The hearing was adjourned until 17 March 2004 in order for the applicant to have additional time to examine the case file, as requested by him. On the latter date the defence unsuccessfully challenged the presiding judge.

91. On 22 March 2004 the prosecution witnesses, notably T., V., G. and L., were examined before the jury.

92. At a hearing on 29 March 2004 the presiding judge granted the motion by the defence to have those publications, which, according to the applicant, had been the only source for the information transmitted to Alternative Futures, presented to the jury. The publications were presented.

93. The expert reports of 18 July 2002 and 17 August 2000 were then read out before the jury on a motion by the defence.

94. It follows from the records of the hearing that the defence then requested the examination of N. as one of the experts who had prepared the report of 17 August 2000. The representatives of the prosecution objected, stating that it was impossible to understand from the report which part of the examination had been carried out by a particular expert; that in 2000 and 2002 the experts had examined different materials; and that the 2000 report had lacked the "research part", as a result of which a new expert examination – conducted in compliance with the legal requirements – had been commissioned at the stage of the additional investigation in 2002. The prosecution requested that the report of 17 August 2000, which had been conducted in breach of the law on criminal procedure, be declared inadmissible evidence. The presiding judge granted the motion by the defence to examine N. as an expert. Since his examination was connected with the issue of admissibility of evidence the judge ordered N.'s examination in the jury's absence and adjourned the decision on the admissibility of evidence until after N.'s examination. After hearing N. the judge declared the expert report of 17 August 2000 inadmissible evidence on the ground that the expert examination had been carried out with breaches of the law on criminal procedure, notably Article 191 of the RSFSR Code of Criminal Procedure, in force at the material time. Thus, the report did not state what examination had been carried out by a particular expert, what facts a particular expert had established and what conclusions he or she had reached. The judge rejected the motion by the defence to have N. examined before the jury since "the expert's examination [was] connected with the issue of admissibility of evidence". Upon the jury's return to the court room they were told that the expert report of 17 August 2000 had been declared inadmissible evidence and that the parties could not therefore refer to it.

95. On 30 March 2004 more publications, from which, the applicant alleged, he had obtained information for Alternative Futures, were presented to the jury. The defence asked to examine the expert report of 30 June 2000 before the jury. The presiding judge declared the report inadmissible evidence for the same reasons as the report of 17 August 2000. It follows from the records of the hearing that the defence asked to examine as a witness K., one of the experts who had prepared the report of 30 June 2000 and who came to the court at the request of the defence. The defence asked

to examine him on issues unrelated to the expert examination in question. The prosecution objected, arguing that at the preliminary investigation K. had carried out the expert examination and had later been examined as an expert in the trial before Kaluga Regional Court. This prevented him from being examined as a witness in the case. K. had erroneously been put on the list of witnesses in the bill of indictment. The prosecution requested that the motion by the defence be rejected. The presiding judge rejected the motion to examine K. on the ground that K.'s procedural status as an expert who had carried out the examination and given statements at the earlier hearing excluded the possibility of examining him as a witness.

96. The applicant asked that the expert assessment report of 18 July 2002 be declared inadmissible evidence since, he claimed, it had the same procedural defects as the above two expert reports, given that it also lacked a "research" section. The judge rejected the motion. The applicant argued before the jury that not all publications from which he had obtained the information transmitted to Alternative Futures had been examined by the experts who prepared the report of 18 July 2002.

97. The judge rejected a request by the defence to examine before the jury an opinion obtained by the defence from the Russian aircraft construction corporation MiG, which allegedly could help the defence to prove that the materials concerning the MiG-29 aircraft (specific features of the construction and military potential of the MiG-29 SMT aircraft and the military potential of the modernised MiG-29) did not contain State secrets.

98. The applicant consistently claimed that in preparing the materials for Alternative Futures he had only used information from publicly available sources – Russian and foreign publications – which were listed in his statements to the investigating authority and the court. According to the Director of the Institute of the USA and Canada, who was examined at the trial, the applicant did not have admission or access to information containing State secrets during his work at the Institute. As a researcher at the institute, the applicant had to be aware of all publicly available information concerning the armament policies of the USA and Russia. The institute did not have at its disposal information containing State secrets. According to the applicant, the prosecution did not establish any closed source from which he had allegedly obtained classified information.

99. On 30 and 31 March 2004 the defence again challenged presiding judge K., since they considered that she had violated the principle of equality of arms. She dismissed the requests.

100. On 1 April 2004 the Supreme Court dismissed the applicant's appeal against the decision of 24 February 2004 extending his pre-trial detention, stating that he could not be released because the trial was underway.

101. The following four questions were put to the jury by the presiding judge:

Question 1. Has it been shown that, from 19 February to June 1998, meetings occurred in Birmingham and London (Great Britain) at which a cooperation agreement was concluded with S. Kidd, a representative of US military intelligence, on gathering information about the Russian Federation, for subsequent transfer to the above-mentioned individual; in accordance with instructions from S. Kidd, the following information was collected in the Institute for the USA and Canada in Moscow and Obninsk (Kaluga oblast), stored and handed over on various dates:

(a) from 24 June to 15 September 1998 information on the topic "the structure and state of the domestic missile early warning system", specifically ... was collected and stored, and subsequently handed over to S. Kidd, representative of US military intelligence, at hotel A in Budapest (Hungary) from 15 to 17 September 1998;

(b) from 22 October 1998 to 15 January 1999 information on the topic "the RF Ministry of Defence's failure to implement in full plans to set up permanent readiness units in 1998", specifically ... was collected and stored, and subsequently handed over to Locke and Kidd, representatives of US military intelligence, at hotel B in Budapest (Hungary) from 15 to 18 January 1999;

(c) from 18 January to 27 March 1999 information on the topic "options for the structure of the RF's strategic nuclear forces for the period up to 2007", specifically ... was collected and stored, and subsequently handed over to S. Kidd, representative of US military intelligence, at hotel C in London (Great Britain) from 27 to 31 March 1999;

(d) from 31 March to 20 May 1999 information on the topic "specific features of the construction and military potential of the MiG-29 SMT aircraft and the military potential of the modernised MiG-29", specifically ... was collected and stored, and subsequently handed over to N. Locke, representative of US military intelligence, at hotel D in Birmingham (Great Britain) from 20 to 23 May 1999;

(e) from 23 May to 14 July 1999 information on the topic "possible directions in the development of domestic air-to-air directed missiles", specifically ...was collected and stored, and was handed over to N. Locke, representative of US military intelligence, at hotel E in Brussels (Belgium) from 14 to 18 July 1999 ;

Question 2. If an affirmative answer has been given to the first question, then has it been shown that the actions set out in it were committed by Sutyagin and that he received financial compensation for them?

Question 3. If affirmative answers have been given to Questions 1 and 2, then is Sutyagin guilty of having committed the above-mentioned actions?

Question 4. If an affirmative answer has been given to Question 3, then does Sutyagin deserve leniency?

102. The applicant's lawyers sought to have other questions put to the jury, in particular a question as to whether the collected and transmitted

information contained State secrets and had been obtained from closed sources. Their motion was refused by the presiding judge.

103. On 5 April 2004 the jury unanimously found the applicant guilty, having answered the first three questions put to them in the affirmative and the fourth question in the negative.

104. On 7 April 2004 the judgment was delivered. It stated as follows:

"The court ..., having examined in a closed hearing a criminal case on the charges against Sutyagin Igor Vyacheslavovich of having committed an offence provided for by Article 275 of RF CC [Criminal Code]

ESTABLISHED:

By the jury verdict of 5 April 2004 that Sutyagin is found guilty in that from 19 February to June 1998 in the cities of Birmingham and London (Great Britain) [he] met with Sh. Kidd, representative of US military intelligence, and gave his consent for co-operation for collection of data about the Russian Federation with its subsequent transfer to the said person. On Sh. Kidd's instructions Sutyagin collected, stored and transferred, at different times, at the RAN [Russian Academy of Science] Institute for the USA and Canada in Moscow and Obninsk, Kaluga Region, the following data:

(a) from 24 June to 15 September 1998, information on the topic "the structure and state of the domestic missile early warning system", specifically ... , was collected and stored, and subsequently handed over to Sh. Kidd, representative of US military intelligence, at ... [hotel A] in Budapest (Hungary) from 15 to 17 September 1998;

(b) from 22 October 1998 to 15 January 1999, information on the topic "the RF Ministry of Defence's failure to implement in full plans to set up permanent readiness units in 1998", specifically ..., was collected and stored, and subsequently handed over to Sh. Locke and N. Kidd, representatives of US military intelligence, at ... [hotel B], room ..., Budapest (Hungary), from 15 to 18 January 1999;

(c) from 18 January to 27 March 1999, information on the topic "options for the structure of the RF's strategic nuclear forces for the period up to 2007", specifically ..., was collected and stored, and subsequently handed over to Sh. Kidd, representative of US military intelligence, at ... [hotel C], London (Great Britain) from 27 to 31 March 1999;

(d) from 31 March to 20 May 1999, information on the topic "specific features of the construction and military potential of the MiG-29 SMT aircraft and the military potential of the modernised MiG-29", specifically ..., was collected and stored, and subsequently handed over to N. Locke, representative of US military intelligence, at ... [hotel D] in Birmingham (Great Britain) from 20 to 23 May 1999;

(e) from 23 May to 14 July 1999, information on the topic "possible directions in the development of domestic air-to-air directed missiles", specifically ..., was collected and stored, and was handed over to N. Locke, representative of USA military intelligence, at ... [hotel E], Brussels (Belgium) from 14 to 18 July 1999.

On the basis of circumstances as established by the guilty verdict the court determines that the accused Sutyagin's acts were high treason in the form of espionage under Article 275 of the RF CC, specifically transmission, collection and

storage with a view to transmission to foreign state representatives, of information constituting State secrets, to be used to damage the RF's national security committed by a RF citizen.

It has been established that the aforementioned information, which Sutyagin collected and stored with a view to transmission, and transmitted to US military intelligence representatives, constitutes State secrets.

Furthermore, the mechanism of the espionage activities committed by him is characterised by a mercenary motive ... [Sutyagin] transmitted to foreign state representatives information about the Russian Federation of a military and military-political nature constituting State secrets to damage the RF's national security in exchange for a cash award in an attempt to derive gains of a pecuniary nature.

...

In deciding on the culprit's punishment in accordance with Article 60 of the RF CC the court takes into account the nature and the degree of social danger of the committed acts, information on his personality, and the impact of the punishment imposed on his reformation and on the conditions of his family's life.

The court takes into account Sutyagin's positive references from his place of work and residence, his having two dependant minor children, born in 1990 and 1991, and his state of health.

Under the jury's verdict the culprit does not deserve leniency. The court found no circumstances extenuating or aggravating Sutyagin's punishment.

Taking into consideration the specific circumstances of the case, and the fact that the RF's defence and security was damaged as a result of the transmission by Sutyagin of information about Russia constituting State secrets to foreign state representatives, the court concludes that the culprit's correction and reformation are only possible in the conditions of his isolation from society by serving his sentence in a strict-regime correctional colony.

On the basis of the aforesaid and being governed by Articles 343, 348, 350 paragraph 3 and 351 of the RF CCP, the court

SENTENCED:

Sutyagin Igor Vyacheslavovich to be convicted of an offence provided for by Article 275 of the RF CC and to be punished by way of deprivation of liberty for 15 years, to be served in a strict-regime correctional colony.

I.V. Sutyagin's sentence is to be calculated from 29 October 1999.

..."

105. The applicant appealed against the judgment. In particular, he complained that the replacement of Judge Sh. and the original jury composition by assigning judge K. to the case had been unlawful; that juror Y. should not have sat in his trial as he had been included in the list of

jurors of the Moscow Circuit Military Court; and that the list of jurors of the Moscow City Court had not been published. The applicant further complained that the questions to the jury had been formulated in breach of the domestic law. The presiding judge had dismissed his request to put to the jury questions as to whether the information collected, stored and transmitted by him had constituted State secrets and had been received from closed sources. No questions had been put to the jury as to whether he had had intent to damage national security, whether the representatives of Alternative Futures had belonged to foreign intelligence or whether he had transmitted information which had previously been published in open sources. Nor was the latter question examined in the judgment. The applicant further argued that the trial court had had no grounds to declare the exculpatory expert reports of 30 June and August 2000 inadmissible evidence, to reject his request for examination of N. and K. as witnesses and simultaneously to refuse to declare the inculpatory expert report of 18 July 2002, which had the same procedural flaw as the former two reports, inadmissible evidence. In his appeal the applicant relied on Articles 6, 7 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

106. In May 2004 the general list of jurors for the Moscow Circuit Military Court was published with Y.'s name on it.

107. On 17 August 2004 the Supreme Court delivered a final decision in the case. It rejected the appeal and upheld the judgment, having succinctly stated that there had been no violations of the RF Code of Criminal Procedure on the part of the trial court, in particular in its reasoned refusal to examine experts as witnesses and to admit their reports in evidence, as well as in its formulation of questions to the jury. The Supreme Court stated that the principle of immutability of a court composition had not been violated in the case, which had been examined in compliance with the requirements of Article 242 of the Code of Criminal Procedure. It noted that Y. had been included in the approved list of jurors of Moscow. It held that the court's finding of the applicant's guilt had been based on the jury's lawful verdict and that the applicant's acts had been legally characterised in accordance with the factual circumstances established by the jury's verdict. The applicant's arguments concerning the failure to prove his guilt could not be taken into consideration as the judgment delivered as a result of the jury trial could not be appealed against and quashed on those grounds, of which the applicant had been aware.

108. The general list of jurors of the Moscow City Court (for the North administrative circuit of Moscow) was published on 18 August 2004. It included Mr Y. According to the applicant, thereafter the defence obtained information that juror Mr Y. had allegedly worked for the FSB.

109. In July 2010, after signing a clemency petition to the President of the Russian Federation in which the applicant acknowledged his guilt in the

crime of which he was convicted, he was released as part of an exchange of prisoners between Russia and the United States. He was taken to Britain, where he currently resides. The applicant claims that he was coerced into acknowledging his guilt by the circumstances surrounding the exchange and that he in fact denies his guilt.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention during criminal proceedings

110. For the domestic law regulating detention during criminal proceedings see *Bykov v. Russia* [GC], no. 4378/02, §§ 49-55, ECHR 2009-... in respect of the period until 1 July 2002, and *Veliyev v. Russia*, no. 24202/05, §§ 107-113, 24 June 2010 in respect of the period since 1 July 2002.

B. Composition of courts and assignment of cases to judges

111. The Constitution of the Russian Federation guarantees the right to have one's case examined in a court and by a judge whose jurisdiction to examine the case is established by law (Article 47). According to the Constitutional Court's judgment of 16 March 1998, such a law (laws) must contain criteria which would predetermine in which court this or that civil or criminal case falls to be examined. This would allow the court (judge), parties and other participants in the proceedings to avoid uncertainty in this question. Such uncertainty would have otherwise to be obviated by way of an enforcement decision, that is, the discretionary power of an enforcement body or official. In the latter case jurisdiction would not be determined on the basis of law.

112. The Constitution provides that judges are independent and that they are subordinate only to the Constitution and the federal law (Article 120).

113. The Code of Criminal Procedure of the Russian Federation in force since 1 July 2002 (Law no. 174-FZ of 18 December 2001, the "CCrP"), provides as follows:

Article 242
Immutability of court composition

"1. The case must be examined by one and the same judge or by a court bench in one and the same composition.

2. If one of the judges is no longer able to take part in the hearing he must be replaced by another judge, and the court hearing must restart from the beginning."

114. Law no. 3132-I of 26 June 1992 "On the Status of Judges in the Russian Federation" provides:

Section 6.2
Powers of court Presidents and deputy court Presidents

1. The Court President, at the same time as exercising judicial powers in the respective court and the procedural powers conferred on court presidents by Federal Constitutional Laws and Federal Laws, carries out the following functions:

(1) organises the court's work;

...

(3) distributes duties between the President's deputies and, in accordance with the procedure provided for by Federal Law, between the judges; ...

115. The instruction on courts' internal document management, in force at the material time, provided that the court President was responsible for the court's clerical and office management (Instruction no. 169 of the Courts Administration Office at the Supreme Court of the Russian Federation of 28 December 1999).

116. As a matter of common practice, a court President distributed cases lodged with a court between the judges of that court.

117. Under paragraph 19 of Resolution no. 23 of the Supreme Court Plenum of 22 November 2005, setting out practice directions on the application of the Code, the replacement of a presiding judge in jury trials invalidates the trial which has taken place up to that moment and calls for the replacement of a jury because, under Article 328 of the Code, the obligation to form a jury is imposed on the presiding judge.

C. Jury trial

118. Article 30 of the CCrP reads as follows:

"...

2. In courts of first instance, criminal cases shall be examined by the following compositions:

...

(2) At the defendant's request, the judge of a federal court and a jury of twelve persons shall examine cases concerning the crimes set out in Article 31 § 3 of this Code...."

Article 31 § 3 of the Code includes, *inter alia*, a crime punishable under Article 275 of the Criminal Code.

119. A secretary or a judge assistant selects candidate jurors from the court's annual list of jurors by drawing them at random (Article 326 of the Code).

120. The procedure for drawing up the list of jurors of Moscow for 2004 was regulated by the RSFSR Law on the Judicial System of 8 July 1981, as amended on 16 July 2003, and the Moscow Mayor's instruction of 31 October 2003. The initial lists of jurors were drawn up by the Moscow district councils, informing the public and providing the public with access to the lists with a view to enabling them to request their inclusion or exclusion from the lists. After necessary corrections the lists were then amalgamated by the prefectures of the Moscow administrative circuits and further served as the basis for drawing up separate lists of jurors for the Moscow City Court and the Moscow Circuit Military Court by the Moscow Administration's Territorial Organs Department. The lists were to be approved by the Moscow mayor and forwarded to those courts. 30 November 2003 was fixed as a time-limit for submitting the 2004 jurors' lists, approved by the Mayor, to the Moscow City Court and the Moscow Circuit Military Court. The lists were to be published. Under paragraph 14 of Recommendations of the RF Minister of Justice of 30 September 1993 concerning the procedure for drawing up lists of jurors, it was desirable to publish general and reserve lists of jurors in the regional press not later than two weeks before sending them to the relevant court. The publication had to explain to citizens their rights to request regional councils to include or exclude them from those lists.

121. One and the same person cannot sit as a juror more than once a year (Article 326 of the CCrP and section 85 of the Judicial System Act).

122. Parties to proceedings can challenge candidate jurors with or without reasons, twice in the latter case (Article 327 of the CCrP). The parties can ask them questions for the purpose of uncovering circumstances which would prevent them from sitting in a case. The presiding judge explains to candidate jurors their duty to answer questions put to them truthfully (Article 328 of the Code).

123. Under Article 330 of the Code, before the jurors take the oath it is open to the parties to proceedings to plead that the jury as a whole might be unable to deliver an objective verdict in view of the specific features of a case. After hearing the parties the presiding judge delivers a decision. If the request is found to be justified the jury will be dismissed.

124. Each juror takes an oath prior to the examination of a case. The oath reads as follows (Article 332 of the Code):

> "In assuming the responsible duties of a juror, I solemnly swear to fulfil them honestly and impartially, to take into consideration all the evidence examined in court, both which incriminates the defendant and which exonerates him or her, to decide the criminal case on the basis of my inner conviction and conscience, not acquitting the guilty and not convicting the innocent, as befits a free citizen and fair person."

The presiding judge reads the text of the oath, after which each juror replies when called by the judge: "I swear."

125. Under Articles 334 § 1 and 339 of the CCrP, jurors take decisions on the following questions which are put to them after examining the evidence and hearing the parties:

– has it been proven that the acts of which the culprit is accused were committed;

– has it been proven that those acts were committed by the culprit;

– is the culprit guilty of committing those acts?

Jurors can also be asked particular questions about, *inter alia*, circumstances which may have an impact on the issues of guilt or may entail the culprit's exemption from liability. No questions requiring legal assessment can be put to jurors.

If the culprit is found guilty the jurors also state whether the culprit deserves leniency.

The questions to the jury are formulated in writing by the presiding judge. The parties can make their observations on the questions and propose new questions (Article 338 of the CCrP).

126. Questions other than those to be decided by jurors, as stated above, are decided by the presiding judge alone without jurors' participation (Article 334 § 2 of the CCrP).

127. Issues of inadmissibility of evidence are examined without jurors' participation. After hearing the parties the presiding judge takes a decision to exclude evidence which he or she found inadmissible (Article 335 §§ 5 and 6 of the CCrP).

128. Before the jury retires to the deliberation room the presiding judge gives directions (Article 340 of the CCrP). The presiding judge sums up the charges; informs them about the applicable criminal law provisions; sums up the evidence examined at the trial and the positions of the prosecution and the defence; and explains the rules of assessment of evidence in their entirety, the principle of presumption of innocence, the rule of interpreting insoluble doubts in favour of the accused, the rule that their verdict must only be based on evidence examined at the trial and that no evidence has predetermined force for them. The presiding judge further brings jurors' attention to the fact that the culprit's refusal to give statements at the trial should not be interpreted as evidence of guilt. The presiding judge explains the rules of deliberations and voting. The jurors are reminded of the oath taken by them.

129. No one except the jurors may be present in the deliberation room (Article 341 of the CCrP). The questions put to the jurors are answered by way of affirmation or negation, to be supplemented by a word or a phrase to make the meaning of the answer precise (Article 343 § 7 of the CCrP).

130. If the jury delivers a guilty verdict the trial continues without the jurors to examine, *inter alia*, circumstances relevant to the legal

characterisation of the acts committed by the culprit, sentencing and determination of a civil claim. The parties' submissions may concern any legal issues to be resolved in a judgment (Articles 346-347 of the CCrP) which will be delivered by the presiding judge on the basis of the jury's verdict. The presiding judge may deviate from the guilty verdict and acquit the culprit if he or she finds that the acts committed by the culprit do not contain the elements of a crime. The presiding judge may dissolve the jury and order a fresh examination of the case by a new composition of the court if he or she finds that the event of a crime or the culprit's participation in a crime have not been established and that the guilty verdict has therefore been delivered in respect of an innocent person and there are sufficient grounds for his or her acquittal (Article 348 of the CCrP). The jury's opinion that the culprit deserves leniency is binding on the presiding judge (Article 349 of the CCrP).

131. A higher court which examines the case on appeal may not quash or change a judgment delivered as a result of a jury trial on the ground of inconsistency between the conclusions reached by the trial court in its judgment and the facts established by that court. Permissible grounds for quashing or changing a judgment in such a case are violation of the procedural law, misapplication of criminal law, and unfairness of the sentence imposed (Article 379 of the CCrP).

D. Criminal liability for disclosure of State secrets

132. Article 29 § 4 of the Constitution provides:

> "Everyone has the right to freely search, obtain, impart, generate and disseminate information by all lawful means. The list of information constituting State secrets shall be defined by a federal law."

The Constitutional Court of the Russian Federation held that this provision was motivated by the need to defend the sovereignty of Russia and to ensure its defence and security, and is in accord with Article 55 § 3 of the Constitution, which permits restrictions of human rights and freedoms and, therefore, the right to information for the above-mentioned purposes. It follows that the legislature may establish a list of information which can be classified as State secrets and regulate its declassification and protection, as well as admission and access to such information. Under section 1 of the State Secrets Act, its provisions are binding within and outside the territory of the Russian Federation for, *inter alia*, nationals of the Russian Federation who have accepted obligations or are obliged in view of their status to enforce the requirements of the Russian legislation on State secrets. The duty to observe the legislation on State secrets flows from the general legal duty to observe the Constitution and the laws (Article 15 § 2 of the

Constitution). Thus, section 1 of the State Secrets Act is in conformity with the Constitution (the Constitutional Court's judgment of 27 March 1996).

133. The Criminal Code of the Russian Federation of 1996 provides:

Article 275. High Treason

"High treason, i.e. espionage, disclosure of state secrets or assistance otherwise provided to a foreign state, a foreign organisation or their representatives for their subversive activities undermining the external security of the Russian Federation, committed by a Russian national, shall be punishable by 12 to 20 years' imprisonment with or without confiscation of property."

134. Section 5 of the "Official Secrets Act" (RF Law no. 5485-1) of 21 July 1993, as amended on 6 October 1997, provided:

"The following information shall be classified as State secrets:

(1) information in the military sphere:

On the content of strategic and operational plans, documents of the combat department on the preparation and conduct of operations, and on the strategic, operational and mobilisation deployment of the Armed Forces of the Russian Federation, and of other troops, military formations and units as envisaged in the Federal "Defence Act", on their combat and mobilisation readiness, on the creation and use of mobilisation resources;

On plans to develop the Armed Forces of the Russian Federation, other troops of the Russian Federation, on guidelines on the development of armaments and military hardware, on the content and results of special programmes, research and experimental design projects on the creation and modernisation of models of armaments and military hardware;

On the development, technology, production, output volume, storage and recycling of nuclear munitions, their components, fissionable materials used in nuclear munitions, on the technical systems and (or) methods for protecting nuclear munitions from unauthorised use, and also on nuclear power units and special physical installations for defence purposes;

On the tactical-technical specifications and potential for combat use of models of armaments and military hardware, on the properties, formulae or production technology of new forms of rocket fuel or explosives for military use;

On the disposition, names, degree of readiness, defence capabilities of operational and especially important facilities, their designs, construction and exploitation, and also on the assignment of land, underground areas and bodies of water for these facilities;

On the disposition, actual names, organisational structure, weapons, and numerical strength of troops and the status of their combat support systems, and also on military-political and (or) operational conditions;

..."

135. Under section 4 of the Official Secrets Act, the RF President approves, upon the Government's submission, the list of information constituting State secrets. Presidential Decree no. 1203 of 30 November 1995 defined the list of military information classified as State secrets as follows:

> 1. Information revealing strategic plans for the use of troops, operational plans, battle management documents, documents on bringing troops to various levels of combat readiness.
>
> 2. Information on the strategic and operational deployment of troops.
>
> 3. Information on construction plans, development, numerical strength, effective combat strength or quantity of troops, their combat readiness, and also on military-political and (or) operational conditions.
>
> 4. Information revealing the status of operational (combat) training of troops, support services for their activities, and the composition and (or) status of command and control systems.
>
> 5. Information on the mobilisation deployment of troops, their readiness for mobilisation, the creation and use of mobilised resources, the control and command system for mobilisation deployment and (or) on the potential for augmentation of troop strength with personnel, armaments, military hardware and other material and financial resources, and also military transport movements.
>
> 6. Information revealing the guidelines, long-term forecasts or plans for the development of armaments and military hardware, the content or results of special programmes and research and experimental design projects for the creation or modernisation of models of armaments or military hardware, and their tactical and technical specifications.
>
> 7. Information revealing the design and construction guidelines, production technology, isotope composition, combat, physical, chemical or nuclear characteristics, and procedure for use or operation of armaments and military hardware.
>
> 8. Information revealing the production capacity and actual or projected data on the production and (or) shipment (in physical terms) of bacteriological agents or medical protective means.
>
> 9. Information on the development, technology, production, output volume, storage and (or) recycling of nuclear munitions and (or) their components, fissionable materials, nuclear power units, special physical installations for defence purposes, and technical systems and (or) methods for the protection of nuclear munitions from unauthorised use.
>
> Information revealing the content of previously completed projects concerning weapons of mass destruction, the results of such projects, and also information on the composition of the model and (or) receptor, production technology or equipment of products.

10. Information on the design, installation, operation or security support of nuclear installations.

11. Information revealing the achievements of nuclear science and engineering with important defence and economic implications or determining a qualitatively new level of potential for the creation of armaments and military hardware and (or) fundamentally new articles and technologies.

12. Information revealing the properties, formulae or production technology of rocket fuels, and also ballistic propellants, explosives or military demolition explosives, and also new alloys, special liquids, new fuels for armaments and military hardware.

13. Information revealing the disposition, actual names, organisational structure, weapons and numerical strength of troops where publication of such information is not foreseen by the international obligations of the Russian Federation.

14. Information on the use of the infrastructure of the Russian Federation to safeguard the State's defensive capabilities and security.

15. Information on the disposition, names, level of readiness or protection of operations facilities not covered by the Russian Federation's commitments under international treaties, on the selection, assignment of parcels of land, underground areas or bodies of water for the construction of these facilities, and also on planned or current exploratory, design or other projects for the establishment of such facilities. The same information in relation to the special facilities of government agencies.

16. Information on the use or developmental prospects of the coordinated communications network of the Russian Federation to safeguard the State's defensive capabilities and security.

17. Information revealing the distribution or use of radio frequency bands of military or special electronic equipment.

18. Information revealing the organisation or functioning of all forms of communication and of radar or wireless troop support services.

19. Information revealing the content, organisation or results of the main types of activity of the Russian Federation border troops (FPS) and the organisation of the defence of the state borders, exclusive economic zone and continental shelf of the Russian Federation or those of the Member States of the CIS.

20. Information revealing the guidelines for the development of dual-purpose equipment and technology, the content and results of special programmes, research and (or) experimental design projects on the development or modernisation of such equipment or technology. Information on the use of dual-purpose resources and technology for military purposes.

21. Information on the prospects for the development and (or) use of the Russian Federation's space infrastructure to safeguard the State's defensive capabilities and security.

22. Information revealing the status and (or) guidelines of hydronautic projects to safeguard State defence and security."

III. INTERNATIONAL TEXTS AND DOCUMENTS

136. The UN Human Rights Council Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, in his report on his mission to the Russian Federation (19 to 29 May 2008), published on 23 March 2009, stated:

"61. The distribution of cases among the judges is left to the discretion of the court chairperson. It appears that there is no system for ensuring that cases are allocated according to objective criteria. Instances have been reported in which more sensitive cases are allocated to 'certain' judges or where a criminal case was transferred to another judge during the ongoing trial because the judge in question refused to be influenced.

...

96. In order to assist the Russian Federation in pursuing and renewing efforts in the judicial reform process, the Special Rapporteur recommends that:

...

99. To enhance the independent role of judges:

...

A mechanism be established to allocate court cases in an objective manner."

137. In its Resolution 1685 (2009) entitled *Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states* adopted on 30 September 2009, the Parliamentary Assembly of the Council of Europe stressed the fundamental importance, for the rule of law and the protection of individual freedom, of shielding criminal justice systems throughout Europe from politically motivated interference. It held as follows:

"3.1 ...True independence of judges also requires a number of legal and practical safeguards, including:

...

3.1.4. the independence of judges vis-à-vis court chairpersons ... shall be protected, *inter alia*, by the allocation of cases on the basis of predetermined, objective systems, by strict rules protecting judges from being taken off individual cases without reasons specifically defined by law..."

The Assembly noted, *inter alia*, that in the Russian Federation court chairpersons have disproportionate power over other judges, in particular

because of their power to decide on the distribution of cases (paragraph 4.3.6.). The Assembly called on the Russian Federation to:

> "5.5.3. strengthen the system of allocation of cases among the courts and to individual judges or sections within the courts, in such a way as to prevent any "forum shopping" by the prosecutor's office and the exercise of any discretion in this respect by the court chairpersons;
>
> 5.5.4. promote the development of a spirit of independence and critical analysis in legal education in general and in initial and continued training of judges and prosecutors in particular, and to robustly sanction any local, regional or federal officials that continue to try to give instructions to judges, as well as any judges who seek to obtain such instructions; ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

138. The applicant complained that the length of his pre-trial detention was unreasonable, in breach of Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

139. The Government submitted that during the preliminary investigation and the trial the applicant had been detained on remand in accordance with the law, in particular, Articles 89 and 96 of the old Code of Criminal Procedure. In deciding to detain the applicant on remand it had been taken into account that he could obstruct the establishment of truth in the case, continue his criminal activities and flee from justice. The probability of him fleeing had existed in view of his "open" Italian visa or other possibilities at his disposal. All those circumstances had triggered further decisions to extend the applicant's detention.

140. The applicant argued that even when Article 96 of the old Code had been in force, detention on remand could not be applied only on the basis of the gravity of an offence, as had been explained in decision no. 3 of the Plenum of the Supreme Court of the Russian Federation of 27 April 1993. He pointed out that the Kaluga Regional Court's decision of 27 December 2001 had given no reasons for his continued detention, nor had the Supreme Court's decision of 20 March 2002. His Italian visa had been valid from 28 October 1999 to 18 November 1999. There had been no other evidence that he might abscond.

141. The Court reiterates that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continuing detention. The domestic courts must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty and must set them out in their decisions on the applications for release (see, among other authorities, *Kalashnikov v. Russia*, no. 47095/99, § 114, ECHR 2002-VI, and *Bykov*, cited above, §§ 61-64).

142. The Court reiterates that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among other authorities, *Wemhoff v. Germany*, 27 June 1968, § 9, Series A no. 7, and *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV). It notes that the date on which the applicant in the present case was taken into custody was in dispute between the parties, falling in the period between 27 and 30 October 1999, and that the applicant's relevant complaint under Article 5 § 1 (c) was declared inadmissible (see *Sutyagin v. Russia* (dec.), no. 30024/02, 8 July 2008). The Court cannot therefore resolve this discrepancy. In the circumstances of the present case it can, however, examine the complaint under Article 5 § 3 without establishing the exact date in question. The applicant's detention pending trial ended on 7 April 2004, when the trial court delivered a judgment in his case. It thus lasted more than four years and five months.

143. The Court observes that in refusing the applicant's release throughout the whole period of his detention the domestic courts consistently relied on the gravity of the charges against him as the sole or decisive factor justifying his remand in custody. Where they relied on other reasons – the risk of absconding, obstructing investigation and reoffending – or stated that such reasons underlying the original detention order remained valid four years later, they made no reference in their decisions to any factual circumstances to explain the existence of such risks at the particular time of their review (the Moscow City Court's decisions of 3 and 4 October 2002 as upheld by the Supreme Court on 25 December 2002, and the Moscow City Court's decision of 29 September 2003 as upheld by the Supreme Court on 12 November 2003). The applicant's argument that his visa for a trip abroad, to which Moscow City Court referred in its decisions of 3 and 4 October 2002, had expired in November 1999 was ignored by Supreme Court on appeal. So were other arguments, such as his family ties and his permanent place of residence, put forward by the defence in their applications for release, some of which were supported by non-governmental and other organisations and persons as the applicant's

potential guarantors. In two decisions no reasons whatsoever were cited for the applicant's continued detention (the Kaluga Regional Court's decision of 27 December 2001 as upheld by the Supreme Court's decision of 20 March 2002). At no point did the domestic courts consider having recourse to alternative measures to ensure the applicant's appearance at the trial.

144. According to the Court's well-established case-law, such a situation is incompatible with Article 5 § 3 (see, among many other authorities, *Sarban v. Moldova*, no. 3456/05, §§ 100-101 and 103-104, 4 October 2005; *Shcheglyuk v. Russia*, no. 7649/02, §§ 11-14 and 16, 14 December 2006; *Pshevecherskiy v. Russia*, no. 28957/02, §§ 19-25, 24 May 2007; *Bykov*, cited above, §§ 65 and 67, and *Logvinenko v. Russia*, no. 44511/04, §§ 45-49, 17 June 2010).

145. There has, accordingly, been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE LENGTH OF THE PROCEEDINGS

146. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which provides:

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

147. The Government contested that argument. In particular, they pointed out that for more than half of the twelve-month period of the proceedings before the Kaluga Regional Court the case had not been examined for reasons attributable to the conduct of the applicant and his lawyers, who had further delayed the examination of the case file after the additional investigation.

148. According to the applicant, the authorities had been responsible for major delays which could be explained neither by the complexity of the case, which had been examined by the Moscow City Court in fifteen working days, nor by his conduct or that of his lawyers, which had delayed the proceedings only for three months and thirteen days for valid reasons. Familiarisation with the case file after the additional investigation had been organised in such a way that he had had an average of two and a half hours per day for that purpose. For five weeks no access was given, during five weeks access was given on one day per week, and for fifteen weeks access was given on two days per week.

149. The Court notes that the period to be taken into consideration began between 27 and 30 October 1999, the exact date being disputed between the parties (see paragraph 142 above), when the applicant was taken into

custody, and ended on 17 August 2004 when the Supreme Court upheld the judgment on appeal. It thus lasted more than four years and nine months for the pre-trial proceedings and the court proceedings at two levels of jurisdiction.

150. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

151. The Court notes that the first round of the pre-trial investigation lasted one year, the first round of the court proceedings before Kaluga Regional Court one year and two months and the proceedings before the Supreme Court less than three months, the additional investigation almost one year and five months and the final round of the court proceedings before Moscow City Court seven months and before Supreme Court over four months.

152. The case which involved expert examinations concerning the secrecy of information had a certain complexity. However, the last such examination, which resulted in the only expert opinion examined by the trial court, was carried out within one month. Furthermore, it took Moscow City Court in its final composition less than two months to examine the case and deliver its judgment.

153. The Kaluga Regional Court's findings in its decision of 27 December 2001 to remit the case for additional investigation suggest that this was the fault of the investigating authorities, which had failed to prepare the charges properly. It thus took the authorities about two years and five months to bring the final charges against the applicant on 29 July 2002, which reveals little diligence on their part. The Government did not offer any justification for this delay.

154. As regards one year for the defence's acquaintance with the materials of the case file after the additional investigation, the Court considers that the authorities should have afforded the defence more time to be able to read the case file within a shorter period, especially after the substantial delay during the investigation stage.

155. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to that in the present case (see *Pélissier and Sassi*, cited above).

156. Given what was at stake for the applicant, who had spent most of the time in question – more than four years and five months – in detention pending investigation and trial, the Court, having examined all the material submitted to it, considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court

considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

157. There has accordingly been a breach of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE INDEPENDENCE, IMPARTIALITY AND LAWFULNESS OF THE TRIAL COURT

158. The applicant complained that his trial court had not been "an independent and impartial tribunal established by law" in view of the change in the composition of the court by way of reassigning the case from Judge Sh. to Judge K., the selection of the candidate jurors from an unpublished list of jurors and in a way that allegedly impeded verification of its lawfulness, and in view of Y.'s participation in the trial as a juror.

The applicant relied on Article 6 § 1 of the Convention which, in so far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Submissions by the parties

1. The trial court's composition

(a) The Government

159. The Government submitted that the President of the Moscow City Court had decided to transfer the applicant's case to judge K. in view of judge Sh.'s high workload, as he had had several other complex criminal cases, and his annual leave from 15 December 2003 to 14 January 2004. The law did not require any special decision to be issued if a case was transferred from one judge to another.

160. They further submitted, with reference to paragraph 19 of resolution no. 23 of the Plenum of the Supreme Court of 22 November 2005, that Ms K. had formed a new jury in accordance with Article 328 of the Code of Criminal Procedure, which conferred the task of jury formation on a presiding judge, and had recommenced the trial in compliance with the principle of immutability of court composition set out in Article 242 of the Code.

161. According to the Government, the applicant's challenge to Ms K. had been based only on his disagreement with her decisions to dismiss various motions by the defence.

(b) The applicant

162. The applicant argued that the only exception to the principle of immutability of court composition was where it was impossible for a judge to continue sitting in a case (Article 242 of the Code of Criminal Procedure), which was in line with the principle of independence of the judiciary, prohibiting any interference with judges' administration of justice (Article 120 of the Constitution and sections 9 and 10 of the Status of Judges Act). Therefore, where a judge had begun examination of a case any interference with his or her activity, in particular by a presiding judge, was impermissible. The presiding judge could only replace a judge who had begun examining a case if there were objective reasons which made it impossible for that judge to complete the examination of the case. Replacement of a judge was not to be at an individual's discretion; otherwise it could give rise to abuses aimed at securing a certain outcome of proceedings.

163. The applicant contended that the reasons cited by the Government to demonstrate that judge Sh. had no longer been able to sit in the case, namely his high workload and annual leave, were not convincing. High workload was typical for all judges in Russia. When assigning the case to judge Sh. the presiding judge had been aware of that judge's workload, the complexity of the case and the fact that it had to be heard by a jury. Assessment of those factors had apparently shown that Mr Sh. was genuinely able to examine the applicant's case and had had time to do so. Furthermore, the applicant could have appeared at the court as early as 5 December 2003, since the quarantine in his cell had been lifted by that date. Mr Sh. could therefore have continued the hearing in the case before his annual leave.

164. The applicant concluded that there had been no objective factors, such as withdrawal, challenge, lengthy illness or mission, which could have indicated that Mr Sh. was no longer able to sit in the case.

165. The applicant claimed that the replacement of the presiding judge in his case had been carried out in order to change the composition of the jury, which had apparently not satisfied the prosecution. Ms K. had been unable to deal with the case until three and a half months after her assignment. Numerous requests to resume the proceedings and to explain the reasons for the replacement, submitted by the defence to the President of the Moscow City Court and other authorities, had been left unanswered.

2. Selection of jurors and Mr Y.

(a) The Government

166. The fact that the jurors' list had not been published prior to the applicant's trial had, in the Government's view, no impact on its validity

under domestic law and, hence, on the authority of the jurors selected to sit in the applicant's case. The lawfulness of the jury was not therefore open to doubt. The Government stressed that the applicant made unsubstantiated statements about the court officials' good faith and their compliance with the procedure for selecting the candidate jurors for his trial.

167. The defence had had ample opportunities to participate in the selection of jurors, by putting questions to the candidates and challenging any of them with or without reasons.

168. Furthermore, it had been open to the applicant, by virtue of Article 330 of the Code of Criminal Procedure, to challenge the jury as a whole if he considered that it might be unable to deliver an objective verdict in the case. The applicant had not availed himself of that opportunity.

169. The Government submitted that the law did not prohibit one and the same individual from being included in the list of jurors for different courts.

170. Under resolution no. 23 of the Plenum of the Supreme Court, the concealment of information by candidate jurors who were subsequently included in a jury was a ground for quashing the judgment, if that information could have influenced the outcome of the case and had deprived the parties of a right to challenge candidate juror in question.

171. There was no information that Mr Y. sat as a juror in the Moscow City Court and the Moscow Circuit Military Court at the same time. Nor was there any information that he had worked for the FSB. The Government produced a certificate issued by the FSB stating that Mr Y. had not been and was not an employee of the FSB.

(b) The applicant

172. The applicant submitted that the list of jurors should have been published two weeks prior to 30 November 2003, in line with the Recommendations of the Minister of Justice of 30 September 1993. He noted that the requirement of publication had been aimed at affording citizens the possibility to request exclusion from or inclusion in the lists of jurors and at providing parties to proceedings with access to an official list in order to verify whether a certain person had indeed been included in it. It was possible to make use of such rights only if the list of jurors was published prior to the examination of a certain case by a court. The applicant argued that one and the same individual should not have been included in two jurors' lists for the Moscow City Court and the Moscow Circuit Military Court, as those lists should have been separate and citizens could only be called to sit as jurors once a year. The list of jurors for the Moscow Circuit Military Court, with Mr Y.'s name on it, was published prior to publication of the list of jurors of the Moscow City Court which also included Mr Y., and was thus more credible. According to the applicant, Mr Y. should not have therefore sat as a juror in his case.

173. The applicant further alleged that the procedure for selection of candidate jurors, as established by the Code of Criminal Procedure, had offered no transparency and no possibility for the defence to verify whether the candidate jurors' names for his trial had been drawn at random, as required by law, and to prevent an attempt to involve specific individuals in his trial through selection of those who might have been considered more suitable by the authorities.

174. The applicant claimed that Mr Y. had concealed his connection with the FSB when the relevant question had been put to the candidate jurors. The applicant referred to official records of questioning of witnesses, who had previously been warned by an investigator of their criminal liability for giving false statements, in various criminal proceedings concerning allegations of unlawful registration of immovable property belonging to a company whose general manager was a certain Mr Y. According to those records, a Mr G. stated in the course of his examination on 19 February 2004 by Moscow police investigator Mr Zh. that he had had personal and business relations with Mr Y. and had known that Mr Y. had served in the FSB. According to Mr G., Mr Y. had believed that he deserved a promotion in his service at the FSB and that his supervisors had underestimated him. According to another witness, Mr K., a police officer who had questioned Mr Y. in 2000, Mr Y. stated that he had been a KGB officer and had had 'connections'. The applicant also referred to a book published in Poland in 1996. According to that book, Mr Y. had served in the Russian intelligence service under diplomatic cover and had been accused in Poland of recruiting the Polish prime-minister Mr Józef Oleksy. He had allegedly occupied the posts of first secretary and then press-secretary at the Russian Embassy in Poland, graduated from intelligence school in 1984, served at the Press Agency Novosti office in Gdansk, and been a lieutenant colonel of the Russian External Intelligence Service ("the SVR").

175. According to the applicant, Mr Y.'s knowledge of Polish, as acknowledged by him in the court, indirectly confirmed the information given in the book. The FSB had investigated the applicant's case and the SVR and the Armed Forces Chief Investigation Department had been involved in the proceedings in the case. Anyone who had some connections with the intelligence services would therefore have been challenged by the defence, as were four candidate jurors who had acknowledged that they had once served at the FSB and who had been dismissed on a motion by the defence. Had Mr Y. admitted his connection with the FSB he too would have been dismissed.

176. The applicant complained that the change of the jury formation in his case had been unlawful. He explained that the Code of Criminal Procedure provided for two grounds for a jury's dismissal. First, where the number of jurors who withdrew exceeded the number of substitute jurors;

second, if a party so requested (Article 330), where the jury formation was not capable of delivering an objective verdict in a case. No such grounds existed in his case. No formal decision had been given by the court when dismissing the jury, which had deprived the defence of a possibility to appeal against it to a higher court. The applicant further claimed that the original jury, formed on 3 November 2003, had been dismissed because their mood about the case, somehow known to the authorities, had not met the latter's expectations. He referred to an investigation carried out by journalist Z. Svetova, who had met with and interviewed some of the jurors of the original formation (her article had been published in the newspaper *Russkiy Kurier*). According to the journalist, had the original formation not been dismissed the applicant would have been acquitted.

177. In reply to the Government's submission concerning the applicant's failure to challenge the final jury as a whole under Article 330 of the Code of Criminal Procedure, the applicant stated that "in selecting the jury the defence had proceeded from the principle of trust in the candidate jurors".

B. The Court's assessment

1. Replacement of judge Sh. by judge K.

Independent and impartial tribunal

178. The Court will first examine the applicant's complaint that the replacement of Judge Sh. by Judge K. had been incompatible with the requirements of "independence" and "impartiality" of a tribunal.

179. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I).

180. The existence of "impartiality" for the purposes of Article 6 § 1 must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Fey v. Austria*, 24 February 1993, § 28, Series A no. 255-A).

181. As to the subjective test, the applicant has not alleged, in so far as the replacement of judge Sh. by judge K. was concerned, that judge K. acted with personal bias. In any event, the personal impartiality of a judge must be

presumed until there is proof to the contrary and in the present case there is no such proof. There thus remains the application of the objective test.

182. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified (see *Hauschildt v. Denmark*, 24 May 1989, § 48, Series A no. 154, and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII).

183. Since the requirement of independence and the objective aspect of the requirement of impartiality are closely linked, they are considered together (see *Findlay*, cited above, ibid.).

184. The Court observes that in September 2003 the applicant's case was assigned to judge Sh. of Moscow City Court, who started the proceedings immediately, formed the jury and commenced the examination of the case on 3 November 2003. On 26 November 2003 the President of Moscow City Court reassigned the case to judge K., who recommenced the proceedings in the case in February 2004, conducted the selection of a new composition of jury and started the trial anew in March 2004. The defence unsuccessfully challenged judge K. on several occasions. They did not exercise their right to challenge the jury. The complaint about the replacement of Judge Sh. was one of the points of their appeal against the judgment. The Supreme Court stated, *inter alia*, without further elaboration, that the principle of immutability of court composition provided for by Article 242 of the Code of Criminal Procedure had been complied with and upheld the judgment.

185. The Court observes further that the defence received no explanation, despite their inquiries, as to the grounds and reasons for the replacement of judge Sh. by judge K. No procedural decision was issued in this respect. Nor had the law required that one was issued, as the Government confirmed in their submissions. The proceedings in the applicant's case were governed by the new 2001 Code of Criminal Procedure.

186. Repeated replacements of members of a trial bench composed of a presiding judge and two lay judges which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards have led the Court to find a violation of the guarantee of independent and impartial tribunal in an earlier case against Russia, in which the trial proceedings were governed by the former 1960 Code of

Criminal Procedure (see *Moiseyev v. Russia*, no. 62936/00, §§ 167-185, 9 October 2008).

187. The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties etc., which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, the Court must be satisfied that such (re)assignment was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality (see *Bochan v. Ukraine*, no. 7577/02, § 71, 3 May 2007, and *Moiseyev*, cited above, § 176).

188. Under section 6.2 of the Status of Judges Act, the court President distributed duties between the judges in accordance with the procedure provided for by Federal Law (see paragraph 114 above). As a matter of common practice, cases lodged with a court were distributed between the judges of that court by the court President at his or her own discretion.

189. After the case has been assigned and the proceedings begun, the law required that the case remain with the same court composition until the final decision was reached. This principle, known as the rule of immutability of the court composition, was set out in Article 242 of the new 2001 Code of Criminal Procedure of the Russian Federation (see paragraph 113 above). It provided for the possibility of replacing a judge who was no longer able to take part in the hearing with another judge. Neither the Code of Criminal Procedure nor any other law set out the circumstances in which such a replacement could occur and the procedure to be followed. In particular, there was no requirement that a court procedural decision, setting out grounds and reasons for the replacement and amenable to appeal to a higher court, be issued.

190. It is conceivable that Article 242 could encompass such situations as self-withdrawal by a judge, recusation of a judge by a party or external events which would preclude him or her from continuing to sit – for example, discontinuation of his or her judicial status. However, no such circumstances occurred during the applicant's trial. The Government argued before the Court that the reasons for the replacement of the presiding judge were Judge Sh.'s involvement in several other criminal proceedings in complex cases and his annual leave scheduled from 15 December 2003 to 14 January 2004. The Court considers that workload and annual leave, akin to those cited by the Government, may be inherent in any judge's professional reality and cannot plausibly explain that Judge Sh. could "no

longer take part" in the proceedings. If the intention behind the transfer had been to avoid the delay in examining the case, such counterarguments as the need to carry out the selection of a new composition of the jury and start the trial from zero should have been taken into account too. Moreover, the new presiding judge was not able to start the trial until March 2004, three and a half months after her assignment. It appears that since the jury had been formed and the trial started, the reasons cited by the Government could not in the circumstances plausibly explain that the need to change the entire composition of the court and to re-commence the trial outweighed the interest of justice in the continued examination of the case by its original composition (see, with necessary changes made, *Mellors v. the United Kingdom* (dec.), no. 57836/00, 30 January 2003). In any event, it is not for the Court to establish the circumstances which called for the replacement of the judge. They should have been made known to the defence in the domestic trial proceedings. However, no procedural decision stating the grounds and reasons for the replacement had been issued and the defence had been kept in uncertainty until the end of the trial despite their inquiries. They did not, therefore, have the possibility of challenging the decision to replace the judge.

191. The Supreme Court upheld the judgment. In similar circumstances the Court concluded that defects that took place in the first-instance proceedings had not been cured by a higher court which upheld conviction and sentence (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86; *Findlay*, cited above, § 79, and *Kyprianou*, cited above, § 134). Nor did the Supreme Court in the present case cure the failing in question.

192. In the light of the foregoing the Court finds that the applicant's doubts as to the independence and impartiality of the trial court in his criminal case may be said to have been objectively justified in view of the replacement of the presiding judge, which occurred for unascertainable reasons and were not circumscribed by any procedural safeguards.

193. There has therefore been a violation of Article 6 § 1 on account of the lack of the trial court's independence and impartiality under the objective test.

2. The remaining complaints

194. This finding makes it unnecessary to examine separately the applicant's other misgivings about the independence and impartiality of Moscow City Court on account of the selection and composition of the jury. It also renders unnecessary the separate examination of the applicant's allegation, on account of the same facts, that his trial court was not "established by law" which, although made in a different legal context, coincides in substance with the complaint concerning independence and impartiality (see *Findlay*, cited above, § 80, and *Piersack v. Belgium*, 1 October 1982, § 33, Series A no. 53).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND 3 (d) OF THE CONVENTION AS REGARDS THE TAKING OF EVIDENCE AND, IN PARTICULAR, EXAMINATION OF WITNESSES

195. The applicant complained that the presiding judge had acted arbitrarily in deciding on the issues of admissibility of evidence and examination of witnesses, in breach of the principle of equality of arms, the guarantee to examine defence witnesses under the same conditions as prosecution witnesses, and, more generally, the right to a fair hearing guaranteed by Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, provides:

> "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;
>
> ..."

196. The applicant disagreed with the trial court's decision to declare the expert reports of 30 June and 17 August 2000 inadmissible evidence. He argued that those reports might have helped him prove that the information transmitted to Alternative Futures on two out of five topics (The RF Ministry of Defence's failure to implement in full plans to set up permanent readiness units in 1998, and Options for the structure of the RF's strategic nuclear forces for the period up to 2007) had not constituted State secrets. He alleged that the expert report of 18 July 2002, which had been examined before the jury, had the same procedural flaws as the above two reports of 2000, in that it lacked a "research" section. Nevertheless, his motion to have it declared inadmissible evidence had been rejected by the presiding judge without giving reasons. The report of 18 July 2002, according to which the information transmitted to Alternative Futures had constituted State secrets and could not have been obtained from open sources, had been the only prosecution evidence of the secret nature of the information at issue. The applicant further alleged that the experts had not examined all publications to which he had referred; that they had in essence carried out legal assessment which should have been done by the judges and that their impartiality was open to doubt, given their status as servicemen.

197. The applicant further submitted that experts N. and K., who were among those who prepared the above reports of 30 June and 17 August

2000, should have been examined before the jury in accordance with Articles 217 § 4, 220 § 4 and 271 of the Code of Criminal Procedure. Both experts had been included in the list of persons to be summoned to the trial, which was enclosed with the bill of indictment. The prosecution witnesses T., V. and G., also included on that list, had been examined before the jury.

198. The applicant further claimed that the judge had arbitrarily rejected his motion for examination before the jury of an opinion from the Russian aircraft construction corporation MiG, prepared at his lawyer's request. That opinion could have helped him prove that the materials prepared by him on the topic concerning the MiG aircraft had not contained State secrets.

199. The Government submitted that the presiding judge's decisions on the taking of evidence had been lawful. Thus, the decision to declare the expert report of August 2000 inadmissible evidence was lawful and duly reasoned, as the expert assessment had been carried out in violation of Article 191 of the RSFSR Code of Criminal Procedure. The expert assessment of 2002, the results of which had been read out before the jury at the request by the defence, had only been one item of evidence supporting the applicant's guilt, which was assessed as part of the totality of evidence and had had no preference over other evidence. All the publications to which the applicant had referred as the sources of his information had been made available to the experts. Furthermore, the defence had examined those publications before the jury with a view to challenging the experts' conclusions.

200. The Government submitted that the applicant and his counsel had been afforded rights to examine witnesses and experts equal to those of the prosecution. The request by the defence to examine expert N. had been dismissed because his report had been declared inadmissible evidence. The defence had requested the examination of K. as a witness and not as an expert. Their request had been lawfully rejected because K.'s participation in the proceedings as an expert in the course of the preliminary investigation and the trial before the Kaluga Regional Court had excluded the possibility of questioning him as a witness about the circumstances of the preliminary investigation, under Article 57 of the RF Code of Criminal Procedure. The defence had not objected to the examination of the prosecution witnesses T., V. and G.

201. In view of the grounds on which it has found a violation of Article 6 § 1 of the Convention (see paragraphs 189-193 above), the Court considers that no separate issue arises under this head (see *Kyprianou*, cited above, § 141, and, with necessary changes made, *Findlay*, cited above, § 80, and *Taxquet v. Belgium* [GC], no. 926/05, § 102, 16 November 2010).

V. ALLEGED VIOLATION OF ARTICLES 7 AND 10 OF THE CONVENTION

202. The applicant complained, invoking Article 7 of the Convention, that he had been convicted in the absence of criminal intent, as one of the constituent elements of the offence of espionage, and that he should instead have been acquitted. Thus, he had not realised that he was dealing with information containing State secrets, since he had received that information from open publications. Questions had not been put to the jury as to whether he transmitted information containing State secrets and whether he collected it from closed or open sources; the jury therefore found that he had transferred non-classified information to foreign intelligence – acts which were not embraced by the *corpus delicti* of espionage. Furthermore, it had not been established by the jury verdict that he had had criminal intent to damage the national security of the Russian Federation by abetting foreign intelligence services. Hence, the presiding judge should have acquitted him on the basis of such a verdict by the jury. The applicant concluded that the presiding judge had manipulated the questions to the jury, having disregarded the request by the defence to change their formulation, and had changed the constituent elements of the offence of espionage to his detriment. The applicant further disagreed with the application of domestic law in his case. He argued that the Official Secrets Act defining the list of classified information, which had in any event been rather vague, had not been applicable to him since he had never had admission or access to State secrets by virtue of his office; that the list of classified information had also been defined by presidential decree no. 1203 of 30 November 1995, although under Article 29 of the Constitution such a list was to be defined in a federal law; and that the expert assessment of the secrecy of the transmitted information of 18 July 2002 had been carried out on the basis of unpublished Ministry of Defence decrees nos. 055 and 015 of 10 August 1996 and 25 March 2002 respectively, to which he had not had access. The applicant considered that this situation had contributed to his arbitrary conviction by the presiding judge. The applicant further complained that all of the above had also led to a violation of Article 10 of the Convention. Articles 7 and 10 of the Convention provide:

Article 7

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

203. The Government submitted that the exercise of the right to freedom of expression carried with it duties and responsibilities and could be subject to formalities, conditions, restrictions or penalties in the interests of national security, territorial integrity or public safety. According to the Court's case-law, the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, were capable of causing considerable damage to national security (they referred to *Hadjianastassiou v. Greece*, 16 December 1992, § 45, Series A no. 252). The conviction of an individual for such a disclosure could not be seen as a violation of Article 10 of the Convention. The State had not violated Article 10 by holding the applicant criminally liable for disclosure of State secrets of a military nature to a foreign intelligence service. The circumstances of the case, as established by the domestic courts, showed that the applicant had used his research skills to damage Russia's external security for the purpose of obtaining financial compensation. The fact that he had not had access to State secrets did not relieve him of criminal liability for divulging classified data to a foreign state. The classified information could have been received by any means. Through his education and the post he occupied at the Institute of the USA and Canada, the applicant had professional contacts with a number of officials in the Ministry of Defence, who had had access to State secrets. He had been purposefully eliciting classified information from them. In his videoed statements to FSB officials, which were used as evidence at the trial, the applicant had repeatedly affirmed that he had realised that his interlocutors were agents of foreign intelligence services; however, he had continued to transmit information to them because of his difficult financial situation. As an educated person and a scientist, the applicant could and should have known of the restrictions on his right to impart information. His argument that the relevant information had been publicly available was untenable. It had been established at the trial that the

information could not have been received from open sources and its divulgence had damaged Russia's security and defence.

204. The Government stated that the applicant's attempts to challenge the judgment in proceedings before the European Court of Human Rights and to put to discussion the issues of guilt, elements of crime and evidence contained in the confidential criminal case did not conform to international and European law, in particular Article 32 of the Convention concerning the jurisdiction of the Court. Furthermore, in a jury trial, as regulated by Russian law, evidence and a defendant's guilt were the exclusive competence of a jury. The jury in the applicant's trial had considered the evidence submitted by the prosecution sufficient to find the applicant guilty of the charges brought against him. They had unanimously found him guilty. According to the law, the jury verdict could not be called into question. Furthermore, the applicant's conviction had been based on Article 275 of the Criminal Code. The decrees by the Ministry of Defence had merely been specific documents which were used for the expert assessment. The main documents defining the list of classified information had been the Official Secrets Act and Presidential decree no. 1203, which had complied with the requirements of accessibility and foreseeability.

205. The Government noted that, since the case file was classified, they could not submit to the Court a number of documents, such as documents describing information which the applicant had handed over to Alternative Futures, the expert reports which analysed that information with a view to determining whether it contained State secrets, full records of the trial hearings or the presiding judge's procedural decisions on the admissibility and examination of evidence.

206. It is a common rule in the Court's practice that the Court is master of the characterisation to be given in law to the facts of the case, and is not bound by the characterisation given by the applicant or the Government. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, ECHR 2010-...). Having regard to this observation, the Court considers that the essence of the applicant's complaints is that he did not receive a fair trial, a matter which primarily falls within the ambit of Article 6 § 1 of the Convention. Having found a violation of Article 6 § 1 of the Convention on the ground of the lack of independence and impartiality of the trial court (see paragraphs 189-193 above), the Court does not consider it necessary to examine whether such a court afforded the applicant a fair trial (see *Kyprianou*, cited above, § 141, and, with necessary changes made, *Findlay*, cited above, § 80, and *Taxquet*, cited above, § 102).

207. The Court further notes, having regard to the material of the case file, that it does not have sufficient information which would enable it to adjudicate on the complaint under Article 10 of the Convention and that it is not called upon, in the circumstances of the present case, to do so.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

208. 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."

209. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage. He argued that the fact that he had been imprisoned for such a long time while innocent had caused him severe mental suffering, equivalent to cruel torture, and physical suffering. He asserted that the authorities had taken every step to obtain his conviction, in particular by ensuring that the case had been heard by the "right" jury composition, and subsequently to make him serve his sentence in harsher conditions, namely by placing him in prisons in remote regions in breach of the relevant legislation, which had inevitably hindered his contacts with his family and affected his emotional state, and by artificially creating circumstances – in bringing disciplinary proceedings against him for keeping a mobile phone – which had ultimately prevented the applicant's pardon by the President of the Russian Federation in 2007. The applicant also referred to his deteriorated health and his hospitalisation in February 2008.

210. The Government submitted that, if the Court were to find a violation of the Convention, that conclusion would in itself constitute sufficient just satisfaction. They noted that in applying for the applicant's pardon in 2007 the applicant and his supporters had not questioned the finding of his guilt. As regards the claim for compensation for an alleged deterioration in the applicant's health while serving his sentence, they noted that that issue was not a subject of the case and no causal link had existed between the applicant's state of health and his punishment, or at least no evidence to that effect had been submitted by the applicant.

211. The Court notes that the conditions of the applicant's detention following his conviction and the dismissal of the applications for pardon have not been part of the present case. The Court notes that it has found violations of Article 5 § 3 on account of the length of the applicant's detention on remand and of Article 6 § 1 on account of the length of the criminal proceedings against the applicant and the lack of independence and impartiality of the trial court.

212. It considers that those violations must have induced feelings of frustration, uncertainty and anxiety in the applicant, which cannot be compensated solely by the finding of a violation. The Court accordingly awards the sum of EUR 20,000 under this head.

213. The applicant made no claim in respect of costs and expenses and no award will therefore be made under this head.

Default interest

214. 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 5 § 3 of the Convention on account of the length of the applicant's detention pending investigation and trial;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings against the applicant;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in that the trial court was not independent and impartial;

4. *Holds* that it is not necessary to examine the complaint of a violation of Article 6 § 1 and 3 (d) of the Convention concerning the taking of evidence and, in particular, examination of witnesses;

5. *Holds* that it is not called upon, in the circumstances of the present case, to examine the complaints submitted under Articles 7 and 10 of the Convention.

6. *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 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 3 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President