CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF TROFIMOV v. RUSSIA

(Application no. 1111/02)

JUDGMENT

STRASBOURG

4 December 2008

FINAL

02/03/2009

This judgment may be subject to editorial revision.

In the case of Trofimov v. Russia,

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

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

Having deliberated in private on 13 November 2008

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

PROCEDURE

1. The case originated in an application (no. 1111/02) 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 Gennadiy Mikhaylovich Trofimov ("the applicant"), on 9 November 2001.

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

3. The applicant alleged, in particular, that his trial had been unfair in violation of Article 6 §§ 1 and 3 (d) of the Convention.

4. By a decision of 12 May 2005, the Court declared the application admissible.

5. The Government, but not the applicant, submitted further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in the town of Apatity in the Murmansk region.

A. First round of the criminal proceedings against the applicant

7. On 6 June 2000 the Apatity Town Court of the Murmansk Region convicted the applicant and his co-defendant, Ms Sk., of concerted drug trafficking under Article 228 § 4 of the Criminal Code. It established that the applicant had repeatedly procured large quantities of drugs from unidentified sources and had handed them over to Sk. with a view to selling them to individual customers. Sk. had packaged the drugs, resold them and returned the proceeds to the applicant. On 1 October 1999 the applicant had come to Sk.'s flat and had collected the usual proceeds in the amount of 2,000 Russian roubles (RUB). He had been arrested shortly after leaving the flat.

8. At the trial Sk. pleaded guilty and submitted that the applicant had suggested that she sell drugs and that she had agreed. The applicant had repeatedly brought heroin and marijuana to her flat, she had sold the drugs to third persons and had returned to the applicant the proceeds in the amount of RUB 2,000 per gramme of heroin. The applicant pleaded not guilty to all charges and claimed that he had lent RUB 2,000 to Sk. and she had finally paid this amount back to him on the day of his arrest. He contended that during the search at his flat he had voluntarily surrendered heroin to the police and that marijuana seized there had been a plant.

9. In convicting the applicant the Town Court relied on the statements made by Sk. at the trial. It found that they were corroborated by the following evidence:

- In a pre-trial statement Mr S., the partner of Sk.. who had previously cohabited with her, confirmed that the applicant had repeatedly handed drugs over to Sk. and that she had subsequently resold them. According to S., on 1 October 1999, before being arrested, the applicant had collected from Sk. the usual proceeds for the sale of heroin and had promised to return later and to hand her over a further amount of drugs for sale. S. was not questioned at the trial; his deposition was read out despite the applicant's and his counsel's objections.

- In a pre-trial statement K. testified that she knew both from the applicant and Sk. that he had systematically provided Sk. with drugs for sale.

- Ya. testified at the trial that the applicant had suggested that she sell drugs but she had refused.

- Five police officers, questioned in court, submitted that prior to the applicant's arrest they had arrested several persons leaving Sk.'s flat in possession of drugs. They also stated that they had seized drugs during the searches of the apartments of both co-accused.

- Five persons testified in court that they had bought drugs from Sk.

- Attesting witness V. confirmed at the trial that narcotic-like substances had been seized at Sk.'s flat.

- Forensic reports established that the substances seized from the co-defendants were heroin and marijuana and whereas it had been impossible to establish any match between the heroin samples seized from the applicant and Sk., the marijuana samples seized from them had not matched.

10. The applicant was sentenced to eleven years and three months' imprisonment. Sk. was sentenced to three years' imprisonment and was relieved from the punishment under the Amnesty Act.

11. The applicant appealed and contended, among other things, that his conviction had been based on circumstantial evidence and that the trial court had failed to summon S. despite the applicant's requests and the fact that S.'s whereabouts had been known to it. Furthermore, he claimed that he had repeatedly requested a confrontation with S. during the preliminary investigation and at the Town Court's preliminary hearings, but all his requests had been either disregarded or turned down without any reasons given. He claimed that, contrary to the statement by Sk. that he had started supplying her with drugs in July 1999, S. had allegedly testified that Sk. had started dealing in drugs in April 1999. The applicant also averred that in her initial statements to the police Sk. had submitted that she had procured drugs from several other sources and not from him. He further complained that the court had convicted him of concerted trafficking in drugs despite the conclusions of the forensic reports that the heroin samples seized from him and his co-defendant were differently coloured and that the expert had been unable to establish whether those samples matched. The marijuana samples seized from him and Sk. had not matched at all. The applicant also alleged that the police had planted marijuana on him during the search of his flat.

12. On 1 November 2000 the Murmansk Regional Court quashed the trial judgment and ordered a retrial. The Regional Court found that some of the trial court's findings had lacked a proper evidentiary basis, that the trial court had found the applicant guilty of trafficking in bigger amounts of heroin than initially imputed to him by the prosecution, and that it should have questioned the attesting witnesses present when the seizure was carried out at the applicant's flat. It also held that the trial court had breached Article 286 of the Code of Criminal Procedure by failing to take any measures to secure the attendance of witness S., whose testimony had had major importance for the determination of the charge against the applicant and whose whereabouts had been known to it.

B. Retrial

13. During a new trial, the applicant pleaded guilty to unlawful purchase of drugs (Article 228 § 1 of the Criminal Code), but not to the concerted sale of drugs. He maintained that Sk. had slandered him under the influence of drugs and had yielded to pressure from the police officers. Sk. confirmed at the court hearings her statements made during the initial trial.

14. Having re-examined the case, on 22 January 2001 the Town Court delivered a new judgment. It found both defendants guilty of unlawful procurement, storage and concerted trafficking in drugs, repeatedly and on a large and particularly large scale under Article 228 § 4 of the Criminal Code. It sentenced the applicant to eleven years and three months' imprisonment and Sk. to three years' imprisonment, referring, among other things, to the fact that she had "unmasked her accomplice". By the same judgment it relieved Sk. from punishment by virtue of the Amnesty Act and ordered that she be treated for drug addiction.

15. The court based the applicant's conviction on the statements made at the retrial by Sk. It dismissed the applicant's allegations that Sk. had slandered him as unfounded and held that her statements were corroborated by other evidence:

- It referred to the pre-trial deposition from S., noting that "his statements were read out pursuant to Article 286 of the Code of Criminal Procedure".

- It questioned K. who had previously asserted that she had learnt from the co-defendants that they had been dealing in drugs. K. retracted, but the trial court preferred to rely on her earlier pre-trial statement.

- It also read out the statement from Ya. made at the initial trial in which she submitted that the applicant had been trafficking in drugs, in particular heroin, after his release from prison and that he had suggested that she sell drugs but she had refused.

- It further had regard to the fact that RUB 2,000 (according to Sk., the usual proceeds for the sale of one gramme of heroin) had been seized from the applicant during his arrest, and referred to handwritten notes seized at his flat. Those notes contained columns, arithmetical operations, and figures, including "2,000", "1,150", "500" and so forth.

- Attesting witness Kh. submitted to the court that during the search he had seen the applicant surrender to the police what was supposed to be heroin and the police discover what was supposed to be marijuana.

- The police officers and the drug buyers confirmed to the court their statements made at the first trial.

- The court also referred to the forensic reports and other pieces of evidence used in the previous trial. The expert was not summoned to be heard as a witness.

16. On 8 February and 22 March 2001 the applicant submitted his grounds of appeal to the Murmansk Regional Court. He complained, among other things, that the Town Court had failed to question S., although his testimony had contradicted Sk.'s and his own accounts of the events; that he had twice requested the court to question S.; that the trial court had known that S. had been held in a detention facility in the Murmansk Region and thus had had a real opportunity to obtain his attendance and, finally, that the first conviction had been quashed precisely because S. had not been questioned in open court. The applicant pointed out that the trial court had

not referred to any circumstances which would justify the reading out of S.'s statement. He also complained that the trial court had incorrectly assessed the forensic reports on the seized substances and that it had refused to summon the expert who could have given his opinion as to the difference in colour of the heroin seized from him, Sk. and the drug buyers.

17. On 15 May 2001 the Murmansk Regional Court upheld the applicant's conviction. It held that Sk.'s statements had been coherent and consistent throughout the proceedings and that the applicant's conviction was based on her testimony, corroborated by other evidence. As to the failure to secure the attendance of S., the court of appeal ruled as follows:

> "The fact that witness ... S. was not directly questioned at a court hearing is not a significant breach of the law on criminal procedure.. By the time of the retrial, S. was already serving a prison sentence. Transferring him to the town of Apatity would have entailed a lengthy adjournment of the trial. Therefore, in the present case the court, in the [appeal court's] opinion, lawfully read out ... the statements of witness S. and subsequently assessed them together with other pieces of evidence..."

18. By a decision of 22 October 2001, the President of the Murmansk Regional Court dismissed the applicant's request for supervisory review of his conviction.

19. By a decision of 18 March 2004, a judge of the Murmansk Regional Court dismissed an application by the prosecutor of the Murmansk Region for supervisory review of the applicant's conviction. The decision stated, among other things, that the fact that the expert had been unable to confirm the match of the heroin samples seized from the applicant and Sk. and had concluded that the marijuana samples seized from them had not matched at all did not undermine the court's finding that the co-defendants had been trafficking in drugs in concert. This was because it had been established that the applicant had procured drugs from different sources on several occasions and had repeatedly supplied Sk. with small quantities of drugs for further sale. It was also noted that, according to the trial court verbatim record, the applicant had not submitted any requests for the expert to be summoned or any further examinations to be carried out.

20. On 18 January 2005 the Kolskiy District Court of the Murmansk Region ordered the applicant's release on parole. It found that the applicant had already served half of his prison sentence and that he had proved by his conduct that he did not need to serve it in full.

21. On 2 November 2006 the President of the Murmansk Regional Court dismissed the application by the Deputy Prosecutor General for supervisory review of the applicant's conviction, finding that it did not contain any arguments which would not have been examined in the decision of 18 March 2004.

II. RELEVANT DOMESTIC LAW

22. Article 228 § 1 of the Criminal Code (as in force at the material time) provided that unlawful purchase or possession of a large quantity of drugs without the intention to sell was punishable by up to three years' imprisonment. Unlawful purchase or possession of a large or especially large quantity of drugs with the intention to sell, or the selling of drugs in the above quantities, committed by a group of persons and repetitively, carried a sentence of from seven to fifteen years' imprisonment (Article 228 §§ 2, 3 and 4).

23. Article 240 of the Code of Criminal Procedure of 1960 (as in force at the material time) provided that the trial court was to examine the evidence in the case directly: it had to question defendants, victims, witnesses and experts, and examine material evidence, read out records and other documents. Article 286 provided that statements made by a witness during the inquiry or pre-trial investigation could be read out in two circumstances: (i) if there was a substantial discrepancy between those statements and the testimony given at the trial; or (ii) if the witness was absent from the court hearing for reasons that made it impossible to secure his or her attendance.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complained about the unfairness of the trial under Article 6 §§ 1, 2 and 3 (d) of the Convention. He alleged that the domestic courts had made an incorrect assessment of the evidence and had failed to secure the attendance of S. and of the expert who had examined the seized substances. Article 6, in the relevant parts, provides as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. Failure to secure the attendance of witness S.

1. Submissions by the parties

25. The Government conceded that the trial court had failed to comply with the directions of the appeal court given in the judgment of 1 November 2000. In particular, it had not questioned the expert who had explicitly stated that the samples of marijuana found at the applicant's and Sk.'s apartments had not matched. Furthermore, the trial court had not taken any measures to obtain the attendance of S., although his testimony had been significant for the establishment of the applicant's guilt and the court had had precise information about his whereabouts, S. having been detained during the applicant's retrial in the town of Apatity. The trial court had read out his deposition in breach of Articles 240 and 286 of the RSFSR Code of Criminal Procedure. Moreover, it had not secured the attendance of witness Ya. and had read out her deposition in breach of the same provisions. The Government concluded that the above failures had resulted in a restriction of the applicant's right to examine witnesses against him. They stressed, however, that on 18 January 2005 the applicant had been released on parole and that on 2 August 2005 the Prosecutor General's Office had lodged an application for supervisory review of his conviction on the above-mentioned grounds. In their view, those measures should have made up for the violation of the applicant's Convention rights.

26. The applicant did not submit any observations after the Court had declared the application admissible on 12 May 2005. In his observations before the admissibility stage he maintained his complaints and indicated that he had unsuccessfully requested the trial court to obtain the attendance of the expert. He also submitted that all applications for supervisory review of his conviction had been unsuccessful.

2. The Court's assessment

(a) The applicant's victim status

27. The Court will first examine the Government's submission concerning the applicant's release on parole and the Deputy Prosecutor General's application for supervisory review of his conviction. In so far as the Government may be understood to imply that the applicant ceased to be a victim of the alleged violation of his Convention rights, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" of a violation of a Convention right unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Amuur v. France*, judgment of 25 June 1996, *Reports of*

Judgments and Decisions 1996-III, p. 846, § 36; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

28. Having regard to the decision of 18 January 2005, the Court observes that the Kolskiy District Court ordered the applicant's release on parole solely on the ground of his positive behaviour and the fact that he had served half of his imprisonment term. The Court discerns nothing in that decision which could be interpreted as an acknowledgement of or redress for the alleged violation of the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention.

29. As regards the Deputy Prosecutor General's application for supervisory review, the Court has found on several occasions that reopening of criminal proceedings by way of supervisory review with a view to remedying the defect complained of by the applicant may deprive him of victim status (see *Popov and Vorobyev v. Russia* (dec.), no. 1606/02, 2 March 2006, and *Zaytsev v. Russia*, no. 22644/02, §§ 18-24, 16 November 2006). However, this situation did not obtain in the case at hand because the President of the Murmansk Regional Court dismissed the Deputy Prosecutor's General application for supervisory review of the applicant's conviction (see paragraph 21 above).

30. Having regard to the foregoing, the Court considers that the applicant may still claim to be a victim of the alleged violation of his rights under Article 6 §§ 1 and 3 (d) of the Convention.

(b) Failure to secure the attendance of witness S.

31. The Court observes that the applicant's complaint about the domestic courts' failure to secure the attendance of witness S. relates solely to the charge of drug trafficking in concert with Sk. Thus, it will examine the complaint only in so far as it concerns the applicant's inability to obtain the attendance of and confront that person in relation to that charge. Since the requirements of paragraph 3 (d) of Article 6 represent specific aspects of the right to a fair trial set forth in paragraph 1, it will examine the applicant's complaint under the two provisions taken together (see, among many other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 203, § 25).

32. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50).

33. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). The same paragraphs, taken together, require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him, such measures being part of the diligence the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). If there has been no negligence on the part of the authorities, the impossibility of securing the appearance of a witness at the trial does not in itself make it necessary to halt the prosecution (see *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, § 21). The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or to a decisive extent, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, p. 16, § 37; *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 13, § 35). Finally, Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court and it is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among many other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

34. Turning to the facts of the present case, the Court is satisfied that for the purposes of Article 6 § 3 (d) S. should be regarded as a "witness" within the autonomous meaning of this term given by the Convention because his written statement made during the pre-trial questioning was used for the applicant's conviction (see *Asch*, cited above, § 25). It also notes that the Government did not dispute that the applicant had objected to the reading out of the pre-trial statement of S., and finds no evidence to conclude that he had waived his right to confront that witness (see, by contrast, *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007, and *Ozerov v. Russia* (dec.), no. 64962/01, 3 November 2005).

35. The Court further observes that the trial court's failure to secure the attendance of S. was one of the reasons for the Regional Court to quash the judgment of 6 June 2000: being aware of S.'s whereabouts and of the major importance of his testimony, the trial court had failed to take any measures to obtain his attendance (see paragraph 12 above). During the retrial, despite the clear indication of the court of appeal, the trial court again failed to summon S. to its hearings and was satisfied with the reading out of his statements. It did not give any reasons as to why his attendance was not or could not have been secured (see paragraph 15 above). The appellate court upheld that judgment referring to the fact that S. had been serving his prison sentence in another town (see paragraph 17 above).

36. However, the Court cannot accept that reasoning, particularly in the light of the Government's admission that S. was detained in the town of Apatity, where the retrial was being held, and that the trial court was aware of his whereabouts (see paragraph 25 above). In these circumstances, the Court cannot but conclude that the domestic courts displayed manifest negligence as regards their obligation to provide the applicant with an effective opportunity to challenge and question a witness against him. Indeed, the Government conceded that no effort whatsoever had been made in that respect (see ibid., and compare *Pello v. Estonia*, no. 11423/03, § 34, 12 April 2007).

37. Moreover, having examined the decisions of the domestic courts, the Court considers that they convicted the applicant of drug trafficking in concert with Sk. mainly with reference to the latter's statements made in the course of two trials. Being a "witness" for the purposes of the Convention (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II), Sk. at the same time remained the applicant's co-defendant, who could have plausibly had her own interest in the outcome of the case (see, by contrast, *Andandonskiy v. Russia*, no. 24015/02, § 52, 28 September 2006) and who, by virtue of her procedural status as a co-defendant, would be shielded from eventual prosecution for perjury if she made untrue statements.

38. Having regard to the evidentiary basis of the applicant's conviction on the charge of concerted drug trafficking, the Court considers that, apart from Sk., her partner S. was the only direct witness to the exchange of drugs and the distribution of proceeds between the co-defendants, including on the day of the applicant's arrest, the other evidence being of a circumstantial nature (see paragraph 15 above). Indeed, the Regional Court emphasised that his questioning had been crucial for the establishment of the applicant's guilt (see paragraph 12 above). In these circumstances, it would appear that his pre-trial statement played a decisive role in the applicant's conviction on the charge of concerted sale of drugs. However, the authorities did not afford the applicant an opportunity to confront S. at any stage of the proceedings (see, by contrast, *Klimentyev v. Russia*, no. 46503/99, § 125, 16 November 2006), this failure being the result of their manifest

negligence (see paragraph 36 above). Having regard to the foregoing and also to the fact that the Government admitted that the authorities' failure to summon witness S. had breached the applicant's rights (see paragraph 25 above), the Court concludes that this failure restricted the rights of the defence to an extent that is incompatible with the guarantees provided by Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention.

39. There has accordingly been a violation of those provisions.

B. Other complaints

40. The applicant also complained about the domestic courts' failure to secure the attendance of the expert and the courts' assessment of evidence in his case.

41. Having regard to its findings in paragraphs 34-39 above, the Court does not consider it necessary to examine the remainder of the applicant's complaints (see *Komanický v. Slovakia*, no. 32106/96, § 56, 4 June 2002).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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."

43. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that there is no need to examine the remainder of the applicant's complaints under Article 6 § 1 of the Convention;

3. *Decides* to make no award under Article 41 of the Convention.

Done in English, and notified in writing on 4 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring separate opinion of Judge Spielmann is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN

1. In the present case the Court has found a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention.

2. The Court concludes that the applicant's defence rights have been restricted to an extent that is incompatible with the guarantees provided for by those provisions (paragraph 38).

3. My separate opinion concerns the conclusions the Court should have drawn under Article 41 of the Convention, notwithstanding the fact that no claim had been submitted by the applicant in this respect.

4. On 6 June 2000 the Apatity Town Court of the Murmansk Region convicted the applicant but on 1 November 2000 the Murmansk Regional Court, finding that the trial had been flawed, quashed the judgment and ordered a retrial. The Murmansk Court held that the trial court had breached Article 286 of the Code of Criminal Procedure by failing to take any measures to secure the attendance of witness S., whose testimony had had major importance for the determination of the charge against the applicant and whose whereabouts had been known to the court.

5. Even the Government conceded that the trial court had failed to comply with the directions of the appeal court given in the judgment of 1 November 2000 (see paragraph 25). The Court rightly observes in paragraph 35 of the judgment that the trial court's failure to secure the attendance of S. was one of the reasons why the Regional Court quashed the judgment of 6 June 2000. Despite the clear indication of the appeal court, the trial court again failed to summon S. to its hearings. The Court concludes that the domestic courts displayed manifest negligence (see paragraph 36).

6. In these circumstances, the Court should have reiterated – as it has done in other cases – that when an applicant has been convicted despite an infringement of his rights under Article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in had the requirements of the provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006; *Vladimir Romanov v. Russia*, no. 41461/02, § 118, 24 July 2008; and *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 219, 25 September 2008).

7. On account of its importance, such reasoning should then have been included in the operative provisions as well, for reasons which I have already explained to a certain extent in other separate opinions (see for example, the joint concurring opinion I appended with Judge Malinverni to the *Vladimir Romanov v. Russia* judgment (no. 41461/02, 24 July 2008) as well as my concurring opinion in *Polufakin and Chernyshev v. Russia* (no. 30997/02, 25 September 2008).