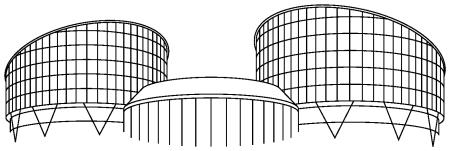

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

# CASE OF VOLKOV AND ADAMSKIY v. RUSSIA

*(Applications nos. 7614/09 and 30863/10)*

JUDGMENT

STRASBOURG

26 March 2015

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

**In the case of Volkov and Adamskiy v. Russia,**

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

Isabelle Berro, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Ksenija Turković,
Dmitry Dedov, *judges*,
and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2015,

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

# PROCEDURE

1. The case originated in two applications (nos. 7614/09 and 30863/10) 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 two Russian nationals, Mr Andrey Viktorovich Volkov and Mr Aleksandr Mikhailovich Adamskiy ("the applicants"), on 25 January 2009 and 12 May 2010, respectively.

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

3. The applicants alleged that they had been convicted of distributing counterfeit software and copyright infringement following entrapment by the police in violation of Article 6 of the Convention.

4. Mr Volkov also complained that he had not been afforded free legal assistance during the appeal proceedings in his case.

5. On 23 November 2010 the applications were communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were each targeted in undercover operations conducted by the police in the form of a test purchase of counterfeit software under sections 7 and 8 of the Operational-Search Activities Act of 12 August 1995

(no. 144-FZ). The operations led to their criminal conviction for distribution of counterfeit software.

## A. Application of Mr Volkov (no. 7614/09)

7. On 6 December 2007 an undercover police officer V called the applicant on the number advertised by him on a job-advertisement site on the Internet and asked him to perform some computer repairs, including the installation of software. The applicant agreed, bought several compact discs with counterfeit software on them and installed the software on V's computer for 3,300 roubles (RUB) (about 45 euros (EUR)). The relevant part of the recording of the applicant's conversation with V in the course of the repairs read as follows:

> "...
>
> V: how much will [the installation] cost approximately?
>
> Mr Volkov: I don't know exactly, [it] depends on the programmes to be installed.
>
> V: [I need] Photoshop, [Windows] XP etc.
>
> Mr Volkov: with Photoshop, it is 200 roubles more.
>
> V: We called other companies; they said it would cost about twenty thousand. Why are the prices so different? ...
>
> Mr Volkov: [other companies] are probably being careful, unlike me, I come instantly. They are probably afraid of getting caught; they may have done it before and run into some inspection.
>
> V: What kind of inspection?
>
> Mr Volkov: [Licensing] inspection, if I installed a licensed programme for you, it would cost a lot.
>
> V: How much does the licensed programme cost?
>
> Mr Volkov: Photoshop is 500 dollars.
>
> V: To install?
>
> Mr Volkov: No, the programme itself. ... if it is done like now, in a semi-legal way, the price is obviously lower ..."

8. Following the above, the applicant was charged with copyright infringement. The applicant retained a lawyer during the pre-trial proceedings but could no longer afford paying for legal representation in court. He was therefore provided with a legal aid lawyer.

9. On 3 July 2008 the Golovinskiy District Court of Moscow (District Court) examined the applicant's case. The applicant testified that he had agreed to help V because he had already performed similar services for his relatives and acquaintances. He also testified that V had asked him to have some programmes installed but did not indicate whether V had specifically asked for unlicensed software. V testified that the police had launched an

undercover operation after they had received information incriminating the applicant in the distribution of counterfeit software. The applicant pleaded not guilty to copyright infringement and claimed that the police had incited him to commit the crime. The court found the applicant guilty of copyright infringement and imposed a suspended sentence of one year and three months' imprisonment with one year's probation.

10. The applicant lodged an appeal (*кассационная жалоба*) asking the appellate court (*кассационный суд*) to examine the case in his presence. In his appeal, he did not request to have a lawyer appointed for the hearing of his case.

11. On 6 August 2008 the Golovinskiy District Court of Moscow informed by post and telephone Ms D., the applicant's lawyer in the proceedings before the District Court, that the hearing of the applicant's appeal had been scheduled for 20 August 2008. The court's call log indicated that the applicant had no retainer agreement with Ms D. for representation in the appeal proceedings.

12. On 20 August 2008 the Moscow City Court dismissed the applicant's arguments on appeal and upheld his conviction. The applicant was present at the hearing. However, Ms D. did not appear and the applicant did not have any other lawyer to represent him during the appeal hearing. It is not clear whether the applicant requested to have the hearing adjourned or to have replacement counsel appointed.

### B. Application of Mr Adamskiy (no. 30863/10)

13. On 10 December 2008 an undercover police officer M called the number advertised by the applicant in the computer-repairs section of a newspaper and asked him to install several computer programmes. The applicant, who was in financial need at the time, downloaded several unlicensed programmes from the Internet and installed them on M's computer the next day for RUB 3,000 (about EUR 40). The relevant part of the recording of the applicant's conversation with M in the course of the repairs read as follows:

> "...
>
> M: how much does [this programme] cost?
>
> Mr Adamskiy: I did not buy it.
>
> M: You did not?
>
> Mr Adamskiy: To buy means to go bankrupt.
>
> M: [did you get it] from the Internet? Or some other way?
>
> Mr Adamskiy: Got it through my peers, [it was] cracked ...
>
> M: I don't really understand this stuff ... If I install it at work, will I get arrested?

Mr Adamskiy: I think it is obvious. I would not let any inspections in while the data is downloading.

M: ...why? What can happen?

Mr Adamskiy: just warning, I personally would not [let anyone inspect].

M: what would happen? ... Do they inspect more often?

Mr Adamskiy: yes ...

M: will we get jailed?

Mr: Adamskiy: No, if it is kept quiet ..."

14. Following the above, the applicant was charged with copyright infringement. On 28 September 2009 the Timiryazevskiy District Court of Moscow examined the applicant's case. At the trial, the applicant did not claim that M had asked him to have unlicensed software installed. He also confirmed that he had informed M in the course of the installation that the software had been counterfeit. M testified that the police had received information implicating the applicant in the distribution of counterfeit software and had decided to verify that information. The applicant pleaded guilty to copyright infringement but claimed that the police had incited him to commit the crime. The court convicted the applicant and imposed a suspended sentence of one year and six months' imprisonment with one year's probation.

15. On 16 November 2009 the Moscow City Court upheld the applicant's conviction and sentence on appeal.

## II. RELEVANT DOMESTIC LAW

### A. Criminal liability for copyright infringement/distribution of counterfeit software

16. Article 146 (Copyright Infringement) of the Criminal Code of the Russian Federation as in force at the material time provided that the unlawful use of copyright and derivative works or the wilful purchase, storage or transfer of counterfeit copies or phonorecords thereof for commercial distribution carried a fine of up to RUB 200,000 (about EUR 2700) or eighteen months' salary or other income of the convicted person, or compulsory community service of between 100 and 240 hours, or correctional work of up to two years, or a term of imprisonment of up to two years.

### B. Investigative techniques and evidence in criminal proceedings

17. For a summary of the relevant provisions on undercover operations and evidence in criminal proceedings in Russia, see *Lagutin and Others*

*v. Russia* (nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, §§ 62-66, 24 April 2014).

## C. Appellate review

18. Article 373 of the Code of Criminal Procedure of the Russian Federation (CCP, as in force at the material time) provided that the appellate court examined appeals with a view to verifying the lawfulness, validity and fairness of judgments.

19. Article 379 read as follows:

> "1. A judgment may be quashed on appeal on the following grounds:
>
> (1) a discrepancy between the findings made in the judgment and the factual circumstances of the case established by the first-instance ... court;
>
> (2) a breach of criminal procedural law;
>
> (3) incorrect application of the criminal law;
>
> (4) injustice of the judgment."

20. Under Article 377 §§ 4 and 5 of the CCP an appellate court could directly examine evidence, including additional material submitted by the parties

## D. Legal representation in appeal proceedings

### *1. Constitution of the Russian Federation*

21. The Constitution of the Russian Federation guarantees a defendant in criminal proceedings the right to qualified legal assistance (Article 48) and to a determination of the criminal charge against him in accordance with the principles of adversarial proceedings and equality of arms (Article 123).

### *2. Code of Criminal Procedure*

22. Article 51 § 1 of the CCP provides for mandatory legal representation if, *inter alia*, the defendant has not waived his right to legal representation in accordance with Article 52 of the CCP. Unless counsel is retained by the defendant, it is the responsibility of the investigator, prosecutor or the court to appoint a lawyer to represent him.

23. As provided for in Article 52 of the CCP, the defendant may refuse legal assistance at any stage of criminal proceedings. Such a waiver can only be accepted if made on the defendant's own initiative. The waiver must be filed in writing and recorded in the official record of the relevant procedural act. The investigator, prosecutor or the court may decide not to accept the waiver. The defendant does not forfeit the right to subsequently

ask for the appointment of a lawyer to represent him in the criminal proceedings.

*3. Case-law of the Constitutional Court of the Russian Federation*

24. Examining the compatibility of Article 51 of the CCP with the Constitution, the Constitutional Court ruled as follows (decision no. 497-O of 18 December 2003):

> "Article 51 § 1 of the Code of Criminal Procedure, which sets out the circumstances in which the participation of defence counsel is mandatory, does not contain any indication that its requirements are not applicable in appeal proceedings or that the convicted person's right to legal assistance in such proceedings may be restricted."

That position was subsequently confirmed and developed in seven decisions delivered by the Constitutional Court on 8 February 2007. It found that free legal assistance for the purpose of appeal proceedings should be provided on the same conditions as during the earlier stages in the proceedings and was mandatory in the situations listed in Article 51. It further underlined the obligation of courts to secure the participation of defence counsel in appeal proceedings.

*4. Case-law of the Supreme Court*

25. In a number of cases (decisions of 13 October 2004 and 26 January, 6 April, 15 June and 21 December 2005) the Presidium of the Supreme Court of the Russian Federation quashed judgments of appeal courts and remitted the cases for fresh consideration on the ground that the courts had failed to secure the presence of defence counsel in the appeal proceedings despite it being obligatory for the accused to be legally represented.

### E. Reopening of criminal cases on account of new or newly discovered circumstances

26. Article 413 of the Code of Criminal Procedure provides for the possibility of reopening criminal proceedings as a result of the finding by the European Court of Human Rights of a violation of the Convention.

## THE LAW

### I. JOINDER OF APPLICATIONS

27. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar factual and legal background.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (AGENT PROVOCATEUR)

28. The applicants complained that the police had incited them to commit the crime of copyright infringement and that as a result their conviction had been in breach of their right to a fair trial as provided for in Article 6 of the Convention, which reads as follows:

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

29. The Government claimed that Mr Volkov had not raised the complaint of entrapment before the domestic courts. They also alleged that neither applicant had challenged the alleged entrapment before the prosecutor's office.

30. Having examined the case file of Mr Volkov, the Court finds that the court records and the points of appeal contain sufficiently clear and specific allegations that the offences in issue were the result of police incitement. Moreover, it is clear from these documents and the respective judgments that these complaints were understood by the domestic courts as such, but were dismissed. Consequently, the Court concludes that Mr Volkov's complaint was brought to the attention of the domestic courts competent to deal with them.

31. In so far as the Government may be understood as suggesting that, before or in addition to having raised the issue of incitement in court, Mr Volkov and Mr Adamskiy were required to file the same complaints with the prosecutor's office, the Court considers that this was not necessary in order to comply with the rule of exhaustion of domestic remedies. It reiterates that an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). When a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009). In the circumstances of the present case, the Court considers that the applicants have complied with the exhaustion requirement and that it has not been shown that a complaint to the prosecutor would have offered better prospects of success.

32. Accordingly, the Court dismisses the Government's objection as to non-exhaustion of domestic remedies.

33. The Government alleged, in the alternative, that the criminal proceedings against the applicants had been fair and that the covert operations had been lawful and had not involved entrapment. In particular, they claimed that the applicants had had pre-existing criminal intent and that the undercover police officers had exerted no pressure on the applicants when they had asked them to install software.

34. The applicants maintained that they had been unfairly convicted of crimes incited by the police. They claimed that they had never been implicated in the distribution of counterfeit software prior to the undercover operations and that the undercover police officers had pressured them into installing unlicensed software despite their reluctance to do so.

35. The Court reiterates that in several cases against Russia it has found that the applicable domestic law did not provide for sufficient safeguards in covert operations, particularly in relation to test purchases of drugs, and has stated the need for such operations to be subject to judicial or other independent authorisation and supervision (see *Vanyan v. Russia*, no. 53203/99, §§ 46-49, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); *Bannikova v. Russia*, no. 18757/06, §§ 48-50, 4 November 2010; *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, §§ 126-28, 2 October 2012; *Lagutin and Others*, cited above, § 134, 24 April 2014; and *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, 30 October 2014).

36. That being said, the Court also observes, however, that the present situation distinctly contrasts with previous Russian cases on entrapment and does not fall, even *prima facie*, within the same category. In particular, having carefully examined the circumstances and context of the present case, the Court considers that unlike in other "entrapment cases" and notwithstanding the defects identified in Russian law on undercover operations, the conduct of the applicants in this case was the determinative factor for their conviction and excluded entrapment on the part of the police.

37. The Court has held that when faced with a plea of entrapment it will attempt, as a first step, to establish whether the offence would have been committed without the authorities' intervention (see *Bannikova*, cited above, § 37). The Court has also emphasised the obligation of the police to verify criminal complaints and held that where the determinative factor was the conduct of the applicant, on balance the police may be said to have "joined" the criminal activity rather than to have initiated it (see *Milinienė v. Lithuania*, no. 74355/01, § 38, 24 June 2008, and *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII (extracts)).

38. In this regard, the Court has distinguished between situations in which the police acted in an impermissible manner and situations where their actions were lawful. In *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008, with the references cited therein, the Court held as follows:

> "The Court has condemned certain police acts of incitement in the past when the whole context was illegal, for example police involvement in drug dealing ... or the forgery of official documents ..., where, but for their authorised undercover roles, the police officers involved would have been guilty of criminal offences themselves. However, in the present case, [the undercover police officer] lawfully purchased a drink at the applicant's bar, as any ordinary citizen might have done. It was the applicant who, according to the findings of the domestic courts, then behaved illegally by serving him a smaller quantity than that ordered. Such a police role does not strike

> the Court as an abusive or arbitrary technique in the investigation of suspected criminal behaviour...
>
> Moreover, the Court finds the present case distinguishable from other applications involving test purchases conducted by third parties acting at the behest of the police in illegal drug dealing ... Again, the Court places emphasis on the fact that, in the present case, the police officer's test purchase was a lawful, banal act to which the applicant apparently responded in an illegal manner."

39. The Court observes that in the case of *Kuzmickaja* the police came to the applicant's place of business to follow up on an anonymous tip that the applicant was serving inaccurate, reduced measures of alcohol in her bar. The Court further notes that by merely placing a customer order with the applicant, the police were found to have acted lawfully and to have carried out their investigation in an essentially passive manner which involved no risk of the applicant's being manipulated into criminal behaviour. The Court therefore declared the entrapment complaint in *Kuzmickaja* case inadmissible.

40. Turning to the facts of the present case, the Court observes that similarly to the applicant in the case of *Kuzmickaja* Mr Volkov and Mr Adamskiy were engaged in lawful business activity. They publicly advertised their computer-repair services, providing their respective telephone numbers. They thereby solicited customers in need of computer repairs and offered their technical expertise to the general public.

41. Meanwhile, the police received incriminating information against the applicants and, as such, came under an obligation to verify a criminal complaint. They called the applicants on their respective numbers and asked them to install some computer programmes. The applicants did not complain to the domestic courts that the police officers had specifically asked for unlicensed software or that they had exerted any pressure on the applicants at the time of the call or tried to pressure them into committing illegal acts. Moreover, from the records of the conversation between the applicants and the police officers in the course of the computer repairs it is clear that the applicants brought unlicensed software for installation on their own initiative, without unlawful incitement by the undercover agents (see paragraphs 7 and 13 above).

42. The Court therefore considers that the undercover police officers' requests appeared to be regular orders of the kind usually placed by customers in response to online or newspaper advertisements for services. The actions of the police did not go beyond the ordinary conduct which is normally expected of clients in the course of lawful commercial activity. It was up to the applicants to respond to such requests in a lawful manner and to install licensed software.

43. However, Mr Volkov admitted in court that after the order had been placed he had bought compact discs with counterfeit software on them for installation. Mr Adamskiy acknowledged that soon after the call he had

downloaded counterfeit copies of the required programmes from the Internet. The applicants both promptly found unlicensed software and installed it on V's and M's computers the next day. Neither of the applicants indicated in the domestic proceedings that V and M had specifically asked them to install unlicensed software. Mr Adamskiy also claimed that he had acted unlawfully because he had been in need of money at the time. However, nothing in the case materials suggests that the police were aware of Mr Adamskiy's financial situation and that they used it to incite him to commit a crime. Moreover, in the course of the computer repairs both applicants openly informed the undercover agents that the software had been counterfeit and that it would have been much more expensive to install licensed software (see paragraphs 7 and 13 above).

44. Accordingly, it follows that the present case is distinguishable from other Russian cases on entrapment because it was the applicants' own deliberate conduct and not the actions of the police that became the determinative factor in the commission of their offences. Mr Volkov and Mr Adamskiy appear to have shown pre-existing criminal intent and have committed the criminal offences without active intervention on the part of police.

45. Therefore, under these circumstances, the Court sees no reason to depart from the finding on an *agent provocateur* complaint which it made in the case of *Kuzmickaja* (cited above). The police's conduct in the present case does not appear to have been unlawful or arbitrary given their obligation to verify criminal complaints, whereas the applicants chose of their own free will to act illegally.

46. It follows that the applicants' *agent provocateur* complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

47. Mr Volkov complained that he had not been provided with a legal aid lawyer during the appeal hearing of 20 August 2008. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... (c) to defend himself in person or through legal assistance of his own choosing ..."

## A. Admissibility

48. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. Submissions by the parties*

49. The applicant claimed that his appeal hearing was not fair because he had not been provided with a legal aid lawyer. He also complained that the court had not informed him that no lawyer would be present at the appeal hearing and that it had not adjourned the hearing of his case.

50. The Government submitted that the applicant's counsel, Ms D., had been informed of the date of the appeal hearing but had failed to appear. They further noted that, under Russian law, if the individuals concerned were duly notified of the date, time and location of the appeal hearing, their failure to appear did not preclude examination of the case on appeal.

### *2. The Court's assessment*

#### (a) General principles

51. The Court notes at the outset that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under Article 6 §§ 1 and 3 should be examined together (see *Vacher v. France*, 17 December 1996, § 22, *Reports of Judgments and Decisions* 1996-VI).

52. The Court reiterates that the manner in which § 1, as well as § 3 (c), of Article 6 is to be applied in relation to appellate or cassation courts depends upon the particular features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and the role of the appellate or cassation court therein (see *Twalib v. Greece*, 9 June 1998, § 46, *Reports of Judgments and Decisions* 1998-IV and *Granger v. the United Kingdom*, 28 March 1990, § 44, Series A no. 174).

53. The Court observes that in Russia the jurisdiction of appellate courts extends to both the legal and factual issues and they can fully review cases on appeal (see *Kononov v. Russia*, no. 41938/04, § 35, 27 January 2011, and *Shulepov v. Russia*, no. 15435/03, § 34, 26 June 2008). In earlier Russian cases on the right to free legal assistance during appeal proceedings in a criminal case, the Court has held that given the wide powers of Russian appellate courts, the seriousness of the charges against the applicants and the severity of the sentence which they faced, the interests of justice

demanded that the applicants should have had legal representation at the appeal hearing (see *Shekhov v. Russia*, no. 12440/04, § 44, 19 June 2014, with references cited therein). The Court has also held that the applicant's representation on appeal was mandatory under domestic law when the applicant did not waive, explicitly or implicitly and in accordance with Article 51 of the Code of Criminal Procedure, his right to be assisted by counsel on appeal (see *Eduard Rozhkov v. Russia*, no. 11469/05, §§ 23-24, 31 October 2013).

54. The Court considered that a person may waive, of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial as neither the letter nor the spirit of Article 6 of the Convention prevents a person from doing so (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007). Such a waiver must be established unequivocally, however, and must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; *Aleksandr Dementyev v. Russia*, no. 43095/05, §§ 41, 49-50, 28 November 2013). As regards requests by the unrepresented applicant for adjournment of the hearing or replacement counsel, the Court has considered that the applicant's conduct cannot of itself relieve the authorities of their obligation to take steps to guarantee him an effective defence (see *Shekhov*, cited above, § 42).

55. Lastly, the Court has held that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or is sufficiently brought to their attention in some other way (see, among many other authorities, *Daud v. Portugal*, *Reports of Judgments and Decisions* 1998-II, § 38, and *Sejdovic v. Italy* [GC], no. 56581/00, § 95, ECHR 2006-II).

**(b) Application of the above principles to the present case**

56. The Court notes at the outset that it is not in dispute that the applicant did not have sufficient means to retain a lawyer of his own choosing for the trial and appeal proceedings.

57. The Court further observes that, as an appellate court, the Moscow City Court had broad powers to review the applicant's case in full (see paragraphs 18 - 20 and 53 above). It could examine evidence and additional materials submitted by the parties directly. It was empowered to dismiss an appeal and uphold a trial court's judgment, quash a judgment and terminate criminal proceedings, quash a judgment and remit a case for a fresh trial, or amend a judgment (see *Kononov*, cited above, § 35). The Court further notes that the charges against the applicant in the present case carried a maximum punishment of two years' imprisonment whereas the actual punishment imposed on him was a suspended sentence of one year and three

months' imprisonment with one year's probation (see, respectively, paragraphs 16 and 9 above). However, it also considers that given the broad review powers of the appellate court, there remained a possibility that the applicant could have substantially benefited from his lawyer's specialist expertise and assistance. Moreover, under Russian law as interpreted by the Constitutional Court of Russia and the Supreme Court of Russia, the right to legal representation extends to appeal proceedings if, *inter alia*, the defendant has not waived in writing his right to legal aid counsel; and it is incumbent on the authorities to appoint him one (see paragraphs 22-25 above; *Orlov v. Russia*, no. 29652/04, § 52, 21 June 2011, and *Eduard Rozhkov*, cited above, §§ 23-24). In the light of the foregoing, the Court concludes that, unless the applicant waived his right to legal assistance, the interests of justice demanded that he should have a lawyer to represent him in the appeal hearing of his case, irrespective of the gravity of the charges against him and the length of his sentence.

58. In this regard, it is necessary to examine whether or not the applicant waived his right to legal assistance in the appeal proceedings. A waiver of legal assistance in Russia must be filed in writing and recorded in the official record of the relevant procedural act (see paragraph 23 above). The Court observes that the case materials do not contain any such document written by the applicant and record thereof. Therefore, the Court concludes that the applicant did not unequivocally waive his right to a lawyer for the appeal hearing (see, *a contrario, Aleksandr Dementyev*, cited above, § 50). The Court also notes that the applicant did not request in his appeal to have a legal aid lawyer appointed (see paragraph 10 above). It also remains unclear whether or not the applicant asked for the appeal hearing to be adjourned or for replacement counsel to be appointed by the appellate court. However, as the Court has previously held, it does not need to establish whether the applicant made such requests because the applicant's conduct could not of itself relieve the authorities of their obligation to provide him with an effective defence (see *Shekhov*, cited above, § 42).

59. The Court further notes that in the absence of a written waiver from the applicant, domestic law required the authorities to appoint a legal aid counsel for him (see paragraph 22 above). Moreover, it was brought to their attention that the applicant had no retainer agreement with his trial lawyer, Ms D., when the representative of the Golovinskiy District Court of Moscow called to inform her of the upcoming appeal hearing (see paragraph 11 above). Thus, in such circumstances it was up to the domestic authorities to intervene and appoint a legal aid counsel for the appeal hearing or to adjourn the hearing until such time as the applicant could be adequately represented (see *Eduard Rozhkov*, cited above, § 25). However, they failed to do so.

60. To sum up, given the wide powers of the appellate court, the requirements of domestic law and the apparent failure of legal aid counsel to

continue the applicant's representation on appeal, the authorities should have ensured the applicant's legal representation on appeal but did not comply with their obligation.

61. The Court therefore finds that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

## IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

62. The applicants raised certain additional complaints with reference to Article 6 and Article 7 of the Convention. However, having regard to all the material in its possession, and in so far as it has jurisdiction to examine the allegations, the Court has not found any appearance of a breach of the rights and freedoms guaranteed by the Convention or its Protocols regarding that part of their applications. It follows that that part must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

64. Mr Volkov claimed 500,000 roubles (RUB) (about 6,748 euros (EUR)) in respect of non-pecuniary damage, plus RUB 201,766 (about EUR 2,723) in respect of pecuniary damage.

65. The Government submitted that the claims were excessive and unsubstantiated.

66. The Court considers that the applicant sustained non-pecuniary damage as a result of the violation of his right to legal assistance. However, the amount claimed by the applicant appears to be excessive. Making its assessment on an equitable basis, it awards him EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

67. As regards the compensation for pecuniary damage claimed by Mr Volkov, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

68. The Court further reiterates that when an applicant has been convicted despite a potential infringement of his rights guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of

redress would, in principle, be the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010). The Court notes in that connection that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 25 above).

### B. Costs and expenses

69. Mr Volkov claimed RUB 72,500 (about EUR 978) for the costs and expenses incurred in the pre-trial proceedings and RUB 1,890 (about EUR 25) in postal expenses for urgent transmission of his complaint to the Court. He submitted receipts substantiating these payments.

70. The Government submitted that the sum claimed by the applicant was excessive and unsubstantiated.

71. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, taking into account the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads for which the applicant submitted legible documentary proof.

### C. Default interest

72. The Court considers it appropriate that the default interest rate 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. *Decides* to join the applications;

2. *Declares* Mr Volkov's complaint concerning the absence of legal assistance in the appeal proceedings admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention on account of the absence of legal assistance in the appeal proceedings in the case of Mr Volkov;

4. *Holds*

(a) that the respondent State is to pay Mr Volkov, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to Mr Volkov, in respect of costs and expenses;

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

5. *Dismisses* the remainder of Mr Volkov's claim for just satisfaction.

Done in English, and notified in writing on 26 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro
President