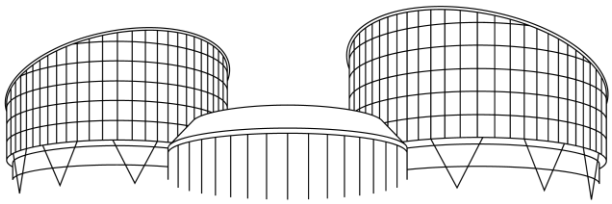

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MELNIKOV v. RUSSIA

(Application no. 23610/03)

JUDGMENT

STRASBOURG

14 January 2010

FINAL

14/04/2010

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 Melnikov v. Russia**,**

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

Christos Rozakis, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 15 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 23610/03) 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 Sergey Anatolyevich Melnikov ("the applicant"), on 3 July 2003.

2. The applicant, who had been granted legal aid, was represented by Ms V. Bokareva, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, the then Representative of the Russian Federation at the European Court of Human Rights.

3. On 12 December 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

4. On 21 September 2006 the Chamber decided, under Rule 54 § 2 (c) of the Rules of Court, that the Government should submit further observations on the admissibility and merits of the application.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1968 and is currently detained in prison no. 72/1 in the Ulyanovsk Region.

A. Criminal proceedings against the applicant

1. First and second offences

7. On 15 May 2000 the applicant, together with Mr S. and another unidentified person, broke into the premises of a private company and stole several items of property.

8. On 19 September 2000 the applicant, together with Mr S. and Mr I., committed another theft.

9. Mr S. was arrested on an unspecified date and was questioned by the investigating authority. At the interview, in the presence of counsel, he admitted to the thefts. He gave a detailed account of the events, stating that the applicant had forced the window frames in order to enter into the buildings, and described how they had then shared the proceeds from the sale of the stolen items.

10. On 6 December 2001 the investigator set up a face-to-face confrontation between S. and the applicant (see paragraph 38 below for "Relevant domestic law and practice"). According to the record, the investigator asked them if they knew each other and whether they had committed the offences. The applicant replied that he was acquainted with S. but had not committed any criminal offence with him; S. insisted that they had committed the above offences together. The record contained a note saying that they had been apprised of their right to put questions to each other; that they had waived this right and that they had no comments to add to the record. The copy of the record submitted by the Government bears S.'s and the applicant's signatures. According to the applicant, he did not sign the record.

2. Third offence

11. On 28 September 2001 the applicant, together with Mr A. and two other unidentified accomplices, robbed a warehouse belonging to a private company. During the preliminary investigation A. confessed to the robbery and named the applicant and another person as his accomplices. Allegedly, no counsel was present at this interview.

3. Trial

12. The applicant and A. were detained pending trial. S. and I. were not detained but were ordered not to leave the town.

13. In April 2002 the prosecutor signed the bill of indictment. The criminal case against the above persons was scheduled to be tried before the Vyshniy Volochek Town Court of the Tver Region. At the trial the applicant denied his involvement in the offences with which he was charged. He also argued that S. and A. had wrongly accused him, alleging that A. had admitted to the charges against him during the preliminary investigation following ill-treatment by the police.

14. On an unspecified date, S. went into hiding from justice. On 18 June 2002 the judge issued an arrest warrant in respect of S. On 19 June 2002 this order was sent to the Vyshniy Volochek police department. As is clear from an undated letter submitted by the Government, the trial judge asked the police department to speed up the enforcement of her earlier order. On 5 September 2002 the Town Court resumed the trial proceedings. On 6 September 2002 the trial court suspended the proceedings noting that S. had previously named the applicant and I. as his accomplices and that an arrest warrant had been issued against S., who went into hiding. The trial court also extended the applicant's detention. The applicant appealed against the preventive measure. On 24 October 2002 the Regional Court upheld the preventive measure but decided that the suspension of the proceedings was not justified.

15. The trial proceedings resumed. At the hearing on 3 December 2002 A. retracted the statement he had given to the investigator in relation to the third offence and argued that he had confessed and implicated the applicant under duress. At the prosecutor's request the trial court heard evidence from two officers of the Vyshniy Volochek district investigation department, who had arrested the applicant and A. Having also examined the video recordings in which A. showed the scene of the crime and pointed to the applicant as his accomplice, the trial court rejected as unfounded the allegation of confession under duress.

16. The applicant contended that he had not been afforded an opportunity to examine S., who had evaded prosecution and was in hiding. At the hearing on 4 December 2002 the prosecutor asked the trial court to allow the reading-out of S.'s pre-trial deposition. The applicant and I. objected to this request. The judge granted the request in the interests of the "objective examination of the case".

17. On 10 December 2002 the Town Court convicted the applicant of robbery and two counts of theft. The court sentenced him to eight years and six months' imprisonment. In finding the applicant guilty of two thefts, the court relied on S.'s pre-trial statement accusing the applicant, and referred to various statements by the employees of the private companies from which the thefts had been committed. Those statements only concerned the

assessment of the pecuniary damage caused by the thefts. The court also listed several items of "other physical evidence" including the record of the crime scene description and the articles stolen.

18. On 20 March 2003 the Tver Regional Court upheld the judgment in substance, while reducing the applicant's prison term to eight years. The appeal court stated that the trial court had rejected the allegation of duress after a proper inquiry. Regarding S., the appeal court pointed out that the applicant had had an opportunity to confront him and challenge the credibility of his statements during the face-to-face confrontation at the pre-trial stage of the proceedings.

B. Conditions of detention in the remand centre

19. From October 2001 to April 2003 (in relation to the above proceedings) and from 24 November 2003 to 8 December 2004 (in relation to new proceedings) the applicant was kept in remand centre no. 69/1 in the town of Tver. Between April and November 2003 the applicant served his sentence in Tver colony no. 10 in relation to the above criminal case.

1. The applicant's account

20. In his letter of 1 May 2004 the applicant described his conditions of detention in the remand centre since 24 November 2003 as follows.

On his arrival the applicant was put in cell no. 19. The cell measured approximately thirty square metres and was designed to accommodate twelve inmates. However, at that time the applicant shared the cell with more than thirty inmates. In 2004 the number of inmates in his cell exceeded the limit, varying between twenty and forty. In these circumstances the applicant had to share a bed with another inmate.

The applicant was confined in one cell with a HIV-positive inmate and others suffering from tuberculosis and hepatitis B and C.

The concrete floor in the cell was always wet because the water tap was broken. Besides the fact that water ran freely on the floor, the accumulation of humidity was conducive to the spread of infectious diseases among the cell inmates. The cell was infested with bugs, cockroaches and lice and was poorly ventilated.

From 23 December 2003 until 6 January 2004 the applicant was not allowed to shower.

No radio receiver, TV set or light reading such as crossword puzzles for entertainment were allowed by the authorities of the detention facility.

In late 2003 and 2004 the applicant was allowed to have meetings with his family, during which he could talk to them through a glass partition with the aid of a telephone.

2. The Government's account

21. From 24 November 2003 to 22 October 2004 the applicant was kept in cell no. 19 together with up to twenty-one detainees, the average cell population being fourteen detainees. From 22 October to 15 November 2004 the applicant was in cell no. 20, which housed up to eighteen persons, the average cell population being thirteen detainees. Both cells measured twenty-four square metres and had twelve beds. No information was submitted regarding the period from 15 November to 8 December 2004.

22. Each cell was equipped with a table, two benches and a toilet. Each cell had both natural and mandatory artificial ventilation, as well as ventilator windows. The necessary disinfection or sanitary measures were taken on a regular basis.

23. The applicant was provided with an individual bed and bedding, including a mattress, a pillow, a pillowslip, a cover, two bed sheets and a towel. Once a week he was allowed to have a fifteen-minute shower.

3. The applicant's complaints about his conditions of detention

24. According to the applicant, in January 2004 he complained to the Moskovskiy District Court of Tver about the conditions of his detention in remand centre no. 69/1. On an unspecified date the President of the District Court sent a letter to the applicant stating that no complaint from him had been received by that court. As he was unsatisfied with the reply of the District Court, the applicant wrote to the Tver Regional Court. No reply was received.

25. The applicant complained about the conditions of his detention in the remand centre to the Office of the Russian President. In reply to this complaint he received a letter dated 27 August 2004 from the prosecutor's office of the Tver Region, which confirmed that the population of the remand centre had exceeded the limit (twenty-one inmates compared with a limit of twelve persons) at the relevant time. In the same letter the prosecutor's office rejected the applicant's complaint concerning the allegedly unlawful limitations on visits from his family members, including extended visits from his wife.

C. Detention in Tver colony no. 1

26. Before July 2005 the applicant was detained in Tver colony no. 10. In July 2005 he was transferred to Tver colony no. 1. In both facilities he was reprimanded on several occasions for breaching the prison discipline rules. He was put into a punishment cell for five and later for fifteen days.

27. On 28 November 2005 the disciplinary committee decided that his prison regime should be changed to a strict regime with effect from 7 December 2005 on account of his repeated breaches of prison discipline.

Hence, from late October 2005 until September 2006 he was placed in a punishment cell at least twenty-five times for periods of between six days and two months (on one occasion in 2006). In the meantime, other disciplinary measures (such as reprimands or an "educational talk") were imposed on him for similar breaches.

D. The applicant's correspondence with the Court

28. At the applicant's request, on 2 May 2006 the Court decided under Rule 36 § 4 (a) of the Rules of Court to give Ms Bokareva, then a legal consultant at the International Protection Centre in Moscow, leave to represent the applicant in the proceedings before the Court. She was invited to submit by 6 July 2006 at the latest any written observations on behalf of the applicant in reply to the Government's observations, together with any claims for just satisfaction. She was also invited to indicate by the same date the applicant's position regarding a friendly settlement of the case, and any proposals he might wish to make. The above time-limit was extended to 6 August 2006.

29. In addition, in response to a request for legal aid by Ms Bokareva on behalf of the applicant, the latter was invited to complete, by 15 June 2006, the form for the declaration of means provided for in Rule 93 § 1 of the Rules of Court. This time-limit was extended to 15 July 2006.

30. According to the applicant, on 31 May 2006 in the presence of three other prisoners the applicant gave guard N. of Tver colony no. 1 a package of documents (fifty-seven single or double-spaced pages) containing his observations in reply to the Government's observations on his application before the Court. He asked that it be dispatched to his representative, Ms Bokareva. N. then informed him that he had transmitted the package to officer K. Later, the applicant learned from unit officer Sh. that the latter had seen the package. The applicant contended that he had handed over his letter to guard N. in the presence of three cellmates. According to the applicant, it was never dispatched.

31. The Government produced a copy of Mr N.'s report stating that no documents had been handed over to him while he was on duty from 30 to 31 May 2006. Similarly, Mr K. and Mr Sh. also testified that Mr N. had not been in possession of any documents from the applicant on 31 May 2006. The prison administrative officer reported that all correspondence from the applicant to various authorities and the International Protection Centre had been properly dispatched in 2006. The censorship unit officer reported that a letter from the applicant dated 30 May 2006 (eight pages) had been dispatched to Ms Bokareva without undue delay.

32. According to the applicant, in June 2006 another letter pertaining to the proceedings before the Court was belatedly dispatched to his representative. According to the report produced by the Government, the

censorship unit officer confirmed that a two-page letter from the applicant dated 5 June 2006 had been dispatched to Ms Bokareva without undue delay.

33. On 4 July 2006 the applicant's representative informed the prison authorities that any hindrance of the applicant's correspondence would violate Article 34 of the Convention.

34. On 2 August 2006 Ms Bokareva arrived from Moscow at Tver colony no. 1. She was accompanied by Mr R., a lawyer practising in Moscow. It appears that the purpose of this visit was the drafting of the applicant's observations in reply to those of the Government.

35. According to the applicant's representative, the deputy prison governor, Mr V., refused to allow a meeting with the applicant. Ms Bokareva made a written request to see the prison governor. Having waited for more than two hours, she saw the prison governor leave the colony premises. His deputy, Mr Sm., undertook to deal with their request but after two more hours they had still not managed to see the applicant.

36. According to the Government, on 2 August 2006 Mr V. spoke to Ms Bokareva and another person, who indicated that they were the applicant's lawyers. Mr V. informed them that a visit could be granted in compliance with the applicable procedure only at a prisoner's request (see paragraph 47 below). The visitors left his office and did not return. According to a report dated 2 October 2006 and signed by Mr Sm., on 2 August 2006 he received two persons, one of whom was Mr R. The latter produced documents certifying that he was a lawyer and the applicant's counsel. The visitors asked Mr Sm. to contact the applicant so that he could make a written statement asking for an appointment with the lawyers. In the meantime, they were asked to wait outside the colony administrative building. The applicant, who was in a punishment cell, signed the statement and handed it over to Mr Sm. However, when Sm. returned the lawyers had already left the area.

37. The applicant's representative submitted observations in reply and claims for just satisfaction on 4 August 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Examination of witnesses

1. RSFSR Code of Criminal Procedure

38. Criminal proceedings were regulated by the RSFSR Code of Criminal Procedure until 1 July 2002, when the 2001 Code of Criminal Procedure (CCrP) entered into force. Under Article 162 of the Code, an

investigator was authorised to set up a face-to-face confrontation between two persons who had been previously interviewed and whose testimonies contained significant discrepancies.

39. Article 163 of the Code read as follows:

> "...The investigator starts the confrontation procedure by asking the participants whether they know each other and what their relationship is. Thereafter, each participant in turn is invited to give evidence on the relevant issues. After they have given evidence, the investigator can ask questions. The participants can ask questions to each other, if allowed by the investigator..."

2. Code of Criminal Procedure 2001 (CCrP)

40. Article 240 of the Code provides as follows:

> "1. All the evidence should normally be presented at a court hearing...The court should hear statements from the defendant, the victim, witnesses...and examine physical evidence...
>
> 2. The reading of pre-trial depositions is only permitted under Articles 276 and 281 of the Code..."

41. Article 276 § 1 of the Code read in 2002 as follows:

> "The reading out of a pre-trial deposition made by the defendant...may be allowed if requested by the parties and if (1) there are substantial discrepancies between the pre-trial statement and the statement before the court..."

42. Article 281 § 1 of the Code read as follows in 2002:

> "The reading-out of earlier statements made by the victim or witness...is permitted if the parties give their consent to it and if (1) there are substantial discrepancies between the earlier statement and the later statement before the court, (2) the victim or witness has not appeared before the court."

3. Jurisprudence of the Supreme Court of Russia

43. Sitting as a court of appeal in a criminal case, the Supreme Court held that before the legislative amendment in July 2003 the requirement of consent to the reading-out of depositions under Article 281 of the CCrP made it possible for one of the parties to the criminal proceedings to act in breach of the adversarial nature of those proceedings (appeal decision no. 3-74/03 of 19 February 2004). Thus, with reference to Article 15 of the Constitution, the Supreme Court considered that the first-instance court was empowered not to apply Article 281 of the Code and to rely directly on the Constitution. That approach allowed the trial court to proceed with the reading-out of the pre-trial deposition despite the absence of consent from one of the parties. The Supreme Court interpreted Article 281 as requiring consent from both parties only when the trial court decided to read out a

pre-trial statement of its own motion rather than in response to a request from one of the parties.

4. Jurisprudence of the Constitutional Court of Russia

44. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading-out of pre-trial depositions should be considered as an exception to the court's own assessment of the evidence and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insisted on calling a witness whose testimony might be important to the case, the court had to take all available measures to ensure that witness's presence in court. Where that witness was available for questioning, the reading-out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, where the witness was not available for questioning, the defence was still to be provided with appropriate procedural safeguards such as a challenge to the deposition in question, a motion to challenge it by way of examining further evidence or a pre-trial face-to-face confrontation between that witness and the defendant, at which the latter was given an opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

B. Re-opening of criminal proceedings

45. Article 413 of the 2001 Code of Criminal Procedure provides that criminal proceedings may be reopened if the European Court of Human Rights has found a violation of the Convention.

C. Conditions of detention

46. Order no. 7 issued on 31 January 2005 by the Federal Service for the Execution of Sentences deals with implementation of the "Remand centre 2006" programme. The programme is aimed at improving the functioning of remand centres so as to ensure their compliance with the requirements of Russian legislation. It expressly acknowledges the issue of overcrowding in pre-trial detention centres and seeks to reduce and stabilise the number of detainees in order to resolve the problem. The programme mentions Tver remand centre no. 69/1 as one of the detention centres affected. As of 1 July 2004, its design capacity was 1,160 detainees but it actually housed 1,587 inmates.

47. Pursuant to Article 89 § 4 of the Code of Execution of Sentences, in force at the material time, for the purpose of receiving legal advice prisoners could have visits from advocates or other persons entitled to provide legal advice. Such visits were not subject to limitation as to their number and

could not exceed four hours. At prisoners' request meetings with advocates could be held in private, without being heard by others.

48. The Internal Regulations for Penitentiary Facilities adopted by the Ministry of Justice on 3 November 2005 provided that if they so requested, detainees were allowed to have visits from advocates or other persons authorised to provide legal advice (§ 83). If so requested, such visits could be held in private out of the hearing of others and without the use of listening devices. There was no restriction on the number of such visits. By its decision of 26 June 2007, upheld on 11 September 2007, the Supreme Court ruled that paragraph 83 of the Regulations was unlawful as it made consultation with a lawyer subject to a request from the prisoner concerned. The Supreme Court concluded that this provision of the Regulations contradicted Article 89 § 4 of the Code of Execution of Sentences.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

49. The applicant complained that the conditions of his detention in Tver remand centre no. 69/1 from 24 November 2003 to 8 December 2004 had been in breach of Article 3 of the Convention. In his submissions in August 2006 he also complained that the conditions of his detention in the remand centre from October 2001 to April 2003 were in breach of Article 3 of the Convention. This provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

50. The Court observes that the complaint concerning the conditions of detention from October 2001 to April 2003 was introduced by the applicant in August 2006. The Court finds, therefore, that this complaint was introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

51. As regards the complaint concerning the conditions of the applicant's detention in the remand centre from 24 November 2003 to 8 December 2004 (see paragraphs 19 - 25 above), the Court considers that it 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

52. The Government submitted that at the time the authorities had been unable to provide four square metres of cell space per detainee in this remand facility, as required under Russian law (see also paragraph 46 above). The problem of overpopulation had been widespread at the relevant time and could not be resolved in view of the high level of crime and a lack of funding. However, the mere fact of non-compliance with the national requirements concerning cell space per detainee, in the Government's view, did not suffice to find a violation of Article 3 of the Convention. The remaining conditions of the applicant's detention (the fact that he had an individual bed and bedding, the light and temperature conditions in the cells, the presence of a toilet and table) had been acceptable.

53. The applicant maintained his initial allegations and submitted that he could not have been provided with an individual bed since the number of detainees exceeded the number of beds in the cells.

54. The Court observes that the parties' accounts differ in various respects. However, it is clear that the applicant was afforded less than two square metres of cell space, while at some times this figure went below one square metre per detainee (see paragraph 21 above). In particular, the Government made no submissions regarding the cell population between 15 November and 8 December 2004, which prompts the Court to give credence to the applicant's allegation that the cell population might have approached forty persons instead of the twelve detainees for which cells nos. 19 and 20 were designed. Moreover, the Court cannot accept the Government's submission that the applicant was provided with an individual bed in a situation where the cells housed more than twelve detainees and had a constant number of beds (twelve).

55. The Court also notes that the applicant's grievances at the national level gave rise to an enquiry, which confirmed in substance the above findings concerning the overpopulation problem and the related insufficiency of individual beds for all detainees (see paragraph 25 above).

56. The Court reiterates that in a number of cases the lack of personal space afforded to detainees in Russian remand centres was so extreme as to justify, in itself, a finding of a violation of Article 3 of the Convention. In those cases applicants were usually afforded less than three square metres of personal space (see, for example, *Lind v. Russia*, no. 25664/05, § 59,

6 December 2007; *Kantyrev v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Andrey Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005; and *Mayzit v. Russia*, no. 63378/00, § 40, 20 January 2005).

57. As regards the Government's submission that the overcrowding was due to objective reasons and that the facility officials could not be held liable for it, the Court reiterates that even if there had been no fault on the part of the facility officials, the Contracting Parties are answerable under the Convention for the acts of any State agency, since what is in issue in all cases before the Court is the international responsibility of the State (see *Lukanov v. Bulgaria*, 20 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). Whether overpopulation was due to maintenance works or to other causes is immaterial for the Court's analysis, it being incumbent on the respondent State to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties (see *Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006).

58. The foregoing considerations are sufficient to enable the Court to conclude that the conditions of the applicant's detention from 24 November 2003 to 8 December 2004 were inhuman and degrading.

59. In view of the above findings, the Court does not consider it necessary to establish the truthfulness of the remaining allegations made by the applicant.

60. There has accordingly been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

61. The applicant complained that he had not been afforded an effective opportunity to examine S. in relation to two theft charges. He also contended that the reading-out of S.'s pre-trial incriminating statement and its admission in evidence had been unlawful. He relied on Article 6 of the Convention, which, in its relevant parts, reads as follows:

> "1. In the determination of...any criminal charge against him, everyone is entitled to a fair ... hearing...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. Admissibility

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

B. Merits

1. The parties' submissions

63. The applicant alleged the face-to-face confrontation could not be considered as an effective opportunity to examine S. since the applicant's lawyer had not been given notice to attend. The applicant affirmed that he had refused to sign the record. Furthermore, the authorities had not taken reasonable steps to secure S.'s presence at the trial. The Government had provided no evidence to prove that any summons had been issued or measures taken. According to the applicant, S. had incriminated the applicant in exchange for release from custody. Moreover, S.'s testimony was unreliable since he had changed his deposition several times before the trial, in particular regarding the identity and number of persons involved in the thefts. In view of the above, the trial court's reliance on S.'s pre-trial statement in finding the applicant guilty on two counts of theft had been unlawful and in breach of the presumption of innocence.

64. The Government submitted that during the preliminary investigation S. and the applicant had had a face-to-face confrontation at which the applicant had waived his right to ask S. questions. Moreover, all reasonable efforts had been made to secure S.'s presence at the trial. A subsequent suspension of the trial proceedings would have impinged upon the accused's rights, in particular their right to a trial within a reasonable time. Accordingly, the trial court had been justified in allowing the reading-out of S.'s pre-trial statement. The reading-out had been lawful.

2. The Court's assessment

(a) General principles

65. The Court reiterates that 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 statements or at a later stage (see *Van Mechelen and Others v. the*

Netherlands, 23 April 1997, § 51, *Reports* 1997-III, *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238). Indeed, as the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d) of the Convention (see, for instance, *Belevitskiy v. Russia*, no. 72967/01, § 117, 1 March 2007). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined at some stage of the proceedings, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, 24 November 1986, §§ 31-33, Series A no. 110; *Saïdi v. France* 20 September 1993, §§ 43-44, Series A no. 261-C; *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

66. The Court also reiterates that where a deposition may serve to a material degree as the basis for a conviction then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà*, cited above, § 41). In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are absent or otherwise missing, the authorities must make a reasonable effort to secure their presence (see *Bonev v. Bulgaria*, no. 60018/00, § 43, 8 June 2006). The Court also considers that while the appearance of a witness is a prerequisite for the defence's opportunities to confront this witness, there must also be an adequate opportunity to question him or her (see *Kaste and Mathisen v. Norway*, nos. 18885/04 and 21166/04, § 47, ECHR 2006-...).

67. The Court considered in *Isgrò v. Italy* (19 February 1991, § 35, Series A no. 194-A) that the confrontation procedure in that case had enabled the applicant to put questions directly to a key witness and to discuss his statements, thus providing the investigating judge with all the information which was capable of casting doubt on the witness's credibility. Mr Isgrò had also been able to repeat in person his claims before the first-instance and appeal courts. Despite the fact that Mr Isgrò had not been represented during the confrontation in question, the Court noted that the public prosecutor had likewise been absent, and that the purpose of the confrontation did not render the presence of the applicant's lawyer indispensable. The Court also noted that the national authorities had made efforts to take evidence from the witness in person; having been unable to do so, they had based their decision solely on the witness's pre-trial

statements; those statements had been made by him to an investigating judge, whose impartiality had not been contested; the courts had regard to other testimony and to the observations submitted by the applicant during the investigation and at the trial. Since it had been open to the applicant to put questions and to make comments himself, the Court concluded that the applicant enjoyed the guarantees secured under Article 6 § 3 (d) to a sufficient extent.

68. In *Doorson v. the Netherlands* (26 March 1996, §§ 24-25 and §§ 66 et seq., *Reports* 1996-II), which concerned anonymous witnesses, the Court found no violation of Article 6 when two of six such witnesses against the applicant had been questioned by an investigating judge on the direction of the appeal court and the defence lawyer had had an opportunity to examine the witnesses, albeit in the absence of the applicant.

69. The Court considered in a recent case against Russia that the confrontations carried out by an investigator between several witnesses and the applicant in the presence of his lawyer satisfied the requirements of Article 6 §§ 1 and 3 (d) in so far as questions had been put to those witnesses and their answers had been recorded (see the partial admissibility decision in *Slyusarev v. Russia* (dec.), no. 60333/00, 9 November 2006). The Court noted that the applicant had not explained in what other respect the confrontations had been procedurally deficient and why further questioning of the above witnesses before the trial court had been necessary. The Court was not provided with any evidence that the defence had somehow been placed in a disadvantageous position vis-à-vis the prosecution during the face-to-face confrontations. Lastly, noting that the applicant's conviction on the relevant charges had not been based solely on the testimonies of the above witnesses, the Court held that although the latter had been absent at the trial, the applicant's right under Article 6 § 3 (d) had been properly secured at the pre-trial investigation stage (see also, for similar reasoning, *Vozhigov v. Russia*, no. 5953/02, §§ 52-58, 26 April 2007).

(b) Application of those principles in the present case

70. Turning to the circumstances of the present case, the Court considers that, although S. did not testify at a court hearing he should, for the purposes of Article 6 § 3 (d) of the Convention, be regarded as a witness because his statement, as taken down by the investigative authorities, was used in evidence by the domestic courts. It is noted that he was not an anonymous witness and that his absence at the trial was due to his having absconded.

71. First of all, as regards the alleged unlawfulness of the reading-out of S.'s pre-trial statement, 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, *Van Mechelen*, cited above, § 50, and *Doorson*, cited above, § 67; see also *Babkin v. Russia* (dec.), no. 14899/04, 8 January 2009). The Court thus considers that it was up to the national courts to determine what provision of the Code of Criminal Procedure applied to the co-defendant's statement (see paragraph 40 above).

72. The Court further notes that the main thrust of the applicant's complaint was the alleged lack of an adequate opportunity to examine S. or have him examined, in particular on account of the alleged lack of any reasonable effort on the part of the national authorities to ensure S.'s presence at the trial.

73. It is uncontested between the parties that the applicant pleaded not guilty throughout the proceedings and that his conviction on two counts of theft was based, to a decisive extent, on S.'s pre-trial deposition. In finding the applicant guilty of two thefts, the trial court relied on this deposition and referred to various statements by the employees of the private companies from which the thefts had been committed. Those statements, however, only concerned the assessment of the pecuniary damage caused by the thefts. The court also listed several items of "other physical evidence" including the record of the crime scene description and the articles stolen, without any further discussion of their probative weight.

74. The Court's case-law under Article 6 § 3 (d) of the Convention requires that a defendant be given an adequate opportunity to examine, or have examined, a witness at some stage of the proceedings, and it is preferable for such examination to take place in the course of adversarial proceedings before an independent and impartial tribunal.

75. The Court notes in that connection that S. not only admitted the charges but named the applicant as his accomplice and gave a detailed account of the applicant's and his own role in the commission of the thefts. In the Court's opinion, there is a considerable risk that a co-accused's statement may be unreliable, given his or her obvious interest in diverting blame from himself to another person. Thus, a higher degree of scrutiny may be required for assessing such a statement, because the position in which accomplices find themselves while testifying is different from that of ordinary witnesses. They testify without being under oath, that is, without any affirmation of the truth of their statements which could render them punishable for perjury for wilfully making untrue statements (see *Vladimir Romanov v. Russia*, no. 41461/02, § 102, 24 July 2008).

76. The Court further notes that S. made his initial statement to an investigating authority (an inquirer or an investigator). Neither the applicant nor his counsel was present during that interview. Nothing in the case file suggests that S.'s statement was recorded on video so that the applicant and

the trial court could observe his demeanour under questioning and thus form its own impression of his reliability (see, by contrast, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-...).

77. At the same time, the Court found no factual basis in support of the applicant's allegation that S. had concluded any agreement with the prosecution, for instance in the form of a plea bargain (see *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999).

78. Bearing the above factors in mind, the Court considers that before admitting S.'s statement in evidence it was incumbent on the national court to assess what impact the absence of the co-accused, who was also the putative key witness against the applicant, might have on the fairness of the trial. The national courts' analysis in the present case was limited to stating that S.'s absence at the trial was counterbalanced by the fact that the applicant had had a previous opportunity to question him during the pre-trial face-to-face confrontation (see paragraph 38 above).

79. Having regard to its previous jurisprudence on the matter (see paragraphs 67 - 69 above), the Court observes that the applicant was not assisted by counsel during the confrontation, apparently, because counsel had not been summoned to it. The Court has previously underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (*Can v. Austria*, no. 9300/81, Commission report of 12 July 1984, § 50, Series A no. 96, and, more recently, *Salduz v. Turkey* [GC], no. 36391/02, § 54, 27 November 2008). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer (see *Salduz*, cited above, § 54). Thus, it is unlikely that in the absence of legal advice the applicant was in a position to understand the confrontation procedure and effectively exercise his right to examine a "witness" with a view to casting doubt on the authenticity and credibility of S.'s incriminating statement. The Court is not prepared to consider that the applicant validly waived his right to examine S.

80. Moreover, the Court notes that the confrontation was conducted by an investigator who did not meet the requirements of independence and impartiality, and had a large discretionary power to block questions during the confrontation.

81. In view of the above, the pre-trial confrontation procedure in the present case was not an appropriate substitute for the examination of the co-accused in open court (see, *mutatis mutandis*, *Windisch v. Austria*, 27 September 1990, § 28, Series A no. 186). S.'s presence was of crucial

importance to enable the court to make an effective assessment of his demeanour and of the reliability of his deposition (see *Hulki Güneş v. Turkey*, no. 28490/95, § 92, ECHR 2003-VII (extracts); *Vladimir Romanov*, cited above, § 105; and *Makeyev v. Russia*, no. 13769/04, §§ 41-42 and 45, 5 February 2009).

82. Lastly, the Court notes that the respondent Government failed to show that every reasonable effort had been made in order to bring S. before the trial court. In particular, it does not appear that any measures were taken after an arrest warrant had been issued against S. Nor does it appear that when instructing the trial judge to resume the trial the court of appeal enquired whether the requisite measures had indeed been taken. While the Court is mindful of the difficulties encountered by the authorities in terms of resources, it has no reason to consider that tracking down S. for the purpose of calling him at the trial, in which the applicant stood accused of a serious offence and faced a custodial sentence, would have constituted an insuperable obstacle (see *Bonev*, cited above, § 44, with further references).

83. Although the Court does not doubt that the domestic courts undertook a careful examination of S.'s pre-trial deposition, it finds that the defence rights were in the circumstances restricted to an extent that was incompatible with the guarantees provided by Article 6.

84. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

85. The applicant complained that the prison authorities had acted in breach of his right of individual petition under Article 34 of the Convention which, in its relevant parts, reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A. Submissions by the parties

86. The applicant raised three separate grievances:

(i) he alleged that on 31 May 2006 the prison authorities had failed to dispatch to his representative his comments on the Government's observations in the present application and had delayed dispatching another letter in June 2006;

(ii) he contended that his representative had been refused permission to have a meeting with him in the prison; and

(iii) he maintained that he had been detained in a punishment cell on numerous occasions since October 2005 because of his application to the Court.

The applicant contended that his situation had worsened after notice of his application had been given to the respondent Government. He had spent most of the time between late October 2005 and November 2006 in a punishment cell, purportedly for minor breaches of prison discipline such as non-compliance with the rule on making one's bed. The applicant contended that he had handed over his letter to guard N. in the presence of cellmates B., Y. and M.

87. The Government submitted that the applicant had not handed over any letter on 31 May 2006. However, his letters of 30 May and 5 June 2006 had been dispatched to his representative before the Court. With regard to the second grievance, the Government submitted that the applicant's representative and Mr R. had left the prison before they were given permission to see the applicant. Lastly, the Government contended that the applicant had been placed in a punishment cell on account of numerous breaches of prison discipline and not in connection with his application pending before the Court.

B. The Court's assessment

1. General principles

88. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 102, ECHR 2005-I). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. The fact that the individual actually managed to pursue his application does not prevent an issue arising under Article 34: should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 105 and 254, *Reports* 1996-IV). The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34 (see *Paladi v. Moldova* [GC], no. 39806/05, § 87, 10 March 2009).

89. Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case (see *Akdivar and Others* cited above, § 105). In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities.

2. Application in the present case

(a) Dispatch of correspondence

90. Having examined the parties' submissions, the Court considers that the applicant's allegations concerning the failure to dispatch one letter in May 2006 (see paragraphs 30 and 31 above) and the delayed dispatch of another one in June 2006 (see paragraph 32 above) have not been substantiated.

91. It is not necessary for the Court to determine the facts, which are in dispute between the parties, since in any event the Court does not find that there has been any act of hindrance, which would entail a violation of the respondent State's obligation under Article 34 of the Convention in the circumstances of the case.

(b) Meeting with the representative

92. The issue before the Court is whether the impediments to communication allegedly placed in the applicant's way by the prison staff amounted to a violation of the respondent State's obligation not to hinder the effective exercise of the right of petition under Article 34 of the Convention.

93. In a Moldovan case the Court found a violation of Article 34 on account of the impossibility for the applicant to discuss with his lawyer issues concerning the application before the Court without their being separated by a glass partition (see *Cebotari v. Moldova*, no. 35615/06, §§ 58-68, 13 November 2007).

94. The applicant's inability during his treatment in hospital for several months to communicate in any way with his representative before the Court was found to amount to a violation of Article 34 of the Convention in *Shtukaturov v. Russia* (no. 44009/05, § 140, 27 March 2008). The Court concluded that the restrictions had made it almost impossible for the applicant to pursue his case before the Court; as a result, the application form had been completed by the applicant only after his discharge from the hospital.

95. In *Lebedev v. Russia* (no. 4493/04, §§ 116-119, 25 October 2007) the applicant complained that one of his lawyers had had to obtain certain additional authorisations in order to be able to meet him. The Court noted that in principle, excessive formalities in such matters could *de facto*

prevent a prospective applicant from effectively enjoying his right of individual petition. However, no violation was found in that case since the limitation complained of had had no negative effect, either theoretical or practical, on the proceedings before the Court; the domestic formalities had not been excessive and, in any event, the applicant had had meetings with his other lawyers during the period under consideration.

96. Turning to the circumstances of the present case, the Court accepts that compliance with certain formal requirements may be necessary before obtaining access to a detainee, for instance for security reasons or in order to prevent collusion or action to pervert the course of the investigation or justice. It is uncontested in the present case that the applicant's representative before the Court was in possession of a valid authority form and that the only reason for refusing her permission to see the applicant was the absence of a formal request from the latter. The Court observes that although the Code of Execution of Sentences did not require a prisoner to make a formal request in order to have a meeting with his or her lawyer, the prison authorities relied on the secondary legislation, which apparently contradicted the Code (see paragraphs 47 and 48 above). Be that as it may, there is no doubt that the prison staff took steps to obtain such a request from the applicant on 2 August 2006. As is clear from Mr Sm.'s report, the representative was required to wait outside the prison administrative building in the meantime. Apparently, she was not given any indicative time when she would be able to see the applicant. However, there is insufficient factual evidence before the Court to enable it to consider that the prison staff subsequently acted in a way which would amount to unjustified interference with the applicant's right of individual petition.

97. Accordingly, the Court concludes that the respondent State complied with its obligation under Article 34 of the Convention.

(c) Disciplinary measures against the applicant

98. The Court observes that, according to the information submitted by the Government, the applicant was placed in a punishment cell on at least twenty-five occasions between October 2005 and September 2006. The periods of detention lasted from six days to two months (on one occasion in 2006).

99. The Court does not exclude that recourse to disciplinary penalties or criminal proceedings against an applicant can be aimed at intimidating or punishing him for his application to the Court (see *Oferta Plus SRL v. Moldova*, no. 14385/04, § 143, 19 December 2006). The threat of criminal or disciplinary proceedings against an applicant's lawyer concerning the contents of a statement submitted to the Court has previously been found to interfere with the applicant's right of petition (see *Kurt v. Turkey*, 25 May 1998, §§ 160 and 164, *Reports* 1998-III, and *McShane v. the United Kingdom*, no. 43290/98, § 151, 28 May 2002), as has the

institution of criminal proceedings against a lawyer involved in the preparation of an application to the Commission (see *Şarli v. Turkey*, no. 24490/94, §§ 85-86, 22 May 2001). The Russian Government were found to be in breach of their obligation under Article 34 of the Convention in a case where the applicant's representative and translator had been summoned by the local police for an interview in connection with the applicant's claims for just satisfaction (see *Fedotova v. Russia*, no. 73225/01, §§ 49-52, 13 April 2006; see also *Ryabov v. Russia*, no. 3896/04, §§ 58-65, 31 January 2008).

100. The Court has to determine whether the imposition of relatively harsh consecutive penalties on the applicant in the present case was intended to impinge or actually had the effect of impinging upon his right of petition under Article 34 of the Convention. The Court observes in that connection that none of the substantive claims raised by the applicant before the Court concerned the detention facility in question. More importantly, the applicant did not contest the fact that he had disregarded certain prison rules which he considered unreasonable.

101. The Court notes from the parties' submissions that throughout his detention in various detention facilities the applicant was subjected to disciplinary penalties for breaches of the prison rules. Those penalties gave grounds to take additional disciplinary measures against him. Having examined the record presented by the Government, the Court considers that neither the penalties nor the consequent change in the applicant's detention regime revealed any arbitrariness which could in itself amount to a form of pressure contrary to Article 34 of the Convention (see *Poleshchuk v. Russia*, no. 60776/00, § 32, 7 October 2004, and *Bakhmutskiy v. Russia*, no. 36932/02, § 167, 25 June 2009). The applicant's allegation that there was a connection between his application to the Court and the imposition of the penalties at issue is unsubstantiated. The Court thus finds that it has not been convincingly established that the authorities of the respondent State interfered with the exercise of the applicant's right of individual petition.

102. Accordingly, the respondent State cannot be said to have failed to comply with its obligation under Article 34 of the Convention on this account.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

103. Lastly, the applicant complained under Article 6 of the Convention that the trial court had erred in admitting as evidence A.'s incriminating statements made at the pre-trial stage, allegedly under duress. He also complained under Article 8 of the Convention of the limitation of his contacts with his family during an unspecified period or periods of his detention in the remand centre.

104. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant claimed 2,000,000 euros (EUR) in respect of non-pecuniary damage and health damage, in particular on account of the conditions of his detention and his unlawful conviction.

107. The Government contested this claim.

108. The Court considers that the claim concerning the alleged health damage is unsubstantiated. At the same time, having regard to the nature of the violations found and making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant.

109. As regards the findings under Article 6 §§ 1 and 3 (d) of the Convention, the Court also reiterates that when an applicant has been convicted despite a potential infringement of his rights as 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 relevant proceedings if requested (see *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV, and *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 82, 10 November 2005). The Court notes in this connection that Article 413 of the Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court has found a violation of the Convention.

B. Costs and expenses

110. The applicant made no claim in respect of costs and expenses. There is therefore no call to make an award under this head.

C. Default interest

111. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the conditions of detention from November 2003 to December 2004 and the alleged lack of an opportunity to examine a co-accused admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

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

4. *Holds* that the respondent State has not been in breach of its obligations under Article 34 of the Convention;

5. *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 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 14 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President

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

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN

I.

I must admit that it was not without hesitation that I agreed that there had been no violation of Article 34 of the Convention in so far as the meetings with the applicant's representative are concerned.

Admittedly, compliance with certain formal requirements may be necessary before obtaining access to a detainee, for instance for security reasons or in order to prevent collusion or action that might pervert the course of the investigation or justice (see paragraph 96 of the judgment).

In the instant case, however, the only reason for refusing the applicant's representative permission to see the applicant was the absence of a formal request from the latter. In my view such a requirement is clearly disproportionate. It may lead to the absurd result that a lawyer who wants to prepare a case pending before the Court must contact the applicant to request a formal invitation to visit the latter in prison.

Nevertheless I voted against finding a violation of Article 34 because I agree with my colleagues that there is no evidence that the right to individual petition has been undermined.

II.

In paragraph 109, the Court rightly reiterates its case-law as regards the findings under Article 6 §§ 1 and 3 (d) of the Convention, namely that when an applicant has been convicted despite a potential infringement of his rights as 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 relevant proceedings if requested.

Given its importance, however, I would have preferred the reasoning set out in paragraph 109 of the judgment to have been included also in the operative provisions, for the following reasons.

Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention. It is therefore a matter of some significance, from a legal standpoint, that part of the Court's reasoning appears also in the operative provisions.

Indeed, what the Court states in paragraph 109 of the judgment is, in my view, of the utmost importance. It reiterates that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*). In the present case, the best means of achieving this is the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option and it is available in the domestic law of the respondent State.

The reason why I wish to stress this point is that it must not be overlooked that the amounts which the Court orders to be paid to victims of a violation of the Convention are, in accordance with the terms and the spirit of Article 41, of a subsidiary nature. Wherever possible, the Court should therefore seek to restore the *status quo ante* for the victim. It should even, in cases such as the present one, reserve its decision on just satisfaction and examine this issue, where necessary, only at a later stage, should the parties fail to settle their dispute satisfactorily.

Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters. We believe that where, as in the present case, the respondent State has equipped itself with such a procedure (Article 413 of the Russian Code of Criminal Procedure), it is the Court's duty not only to note the existence of the procedure, as paragraph 109 does, but also to urge the authorities to make use of it, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

Moreover, the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment that "*unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay, within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused*", sums in respect of non-pecuniary damage and costs and expenses. Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment that "*the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the proceedings are reopened if the*

applicant so desires, and at the same time is to pay her EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement".

By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures intended to facilitate the Committee of Ministers' task in discharging these functions.

To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers the most appropriate to redress the violation.