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

FIRST SECTION

CASE OF MOISEYEV v. RUSSIA

(Application no. 62936/00)

JUDGMENT

STRASBOURG

9 October 2008

FINAL

06/04/2009

This judgment may be subject to editorial revision.

In the case of Moiseyev v. Russia,

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

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

Having deliberated in private on 18 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 62936/00) 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 Valentin Ivanovich Moiseyev ("the applicant"), on 1 November 2000.

2. The applicant, who had been granted legal aid, was represented before the Court by Ms K. Moskalenko and Ms K. Kostromina of the International Protection Centre, lawyers practising in Moscow, and by Mr W. Peukert, a lawyer practising in Strasbourg. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, of breaches of the guarantee against inhuman and degrading treatment, the excessive length of his pre-trial detention and the impossibility of obtaining judicial review of that detention, unfairness of the trial and lack of independence and impartiality of the trial court, and excessive length of the criminal proceedings against him. He also complained of unforeseeable and retrospective application of the criminal law in his case, and unjustified restrictions on his communication with counsel, access to the file materials and family visits.

4. By a decision of 9 December 2004, the Court declared the application partly admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Court decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1946 and lives in Moscow.

A. Arrest and indictment

7. On 3 July 1998 Mr C., a South Korean diplomatic officer, was apprehended by the Federal Security Service of the Russian Federation ("the FSB") while receiving certain materials from the applicant who was then deputy head of the First Asian Department in the Ministry of Foreign Affairs of the Russian Federation. On the following day Mr C. was declared *persona non grata* and left Russia.

8. On 3 July 1998 at 11.30 p.m. a group of eight armed FSB officers entered and searched the applicant's flat. They apprehended the applicant and escorted him to the Lefortovo remand prison.

9. On 3 August 1998 the Ministry of Foreign Affairs dismissed the applicant for serious breaches of the Russian legislation on the civil service.

10. On 4 July 1998 investigators from the FSB Investigations Department interrogated the applicant as a suspect in a high treason case.

11. On 6 July 1998 a deputy Prosecutor General remanded the applicant in custody. The applicant's detention was subsequently extended on several occasions.

12. On 13 July 1998 the applicant was charged with high treason in the presence of his legal-aid counsel, Mr Konoval. He was accused of having disclosed classified information to a South Korean intelligence agent.

13. On 15 July 1998 the applicant retained Mr Gervis as his defence counsel.

14. On 22 and 23 July, 16 September and 12 November 1998 the investigator ordered seizure of the applicant's car and garage, 5,447 US dollars and a computer from his home, as security in respect of possible forfeiture of the applicant's property following a conviction.

15. On 14 January, 12 March and 20 May 1999 the applicant attempted to challenge the orders authorising his continued detention on remand.

16. On 1 February and 4 June 1999 the Moscow City Court examined the applicant's complaints and rejected them as unsubstantiated. The court found that the investigator had correctly imposed the preventive measure, having regard to the gravity of the charge and the applicant's potential to abscond or interfere with the investigation.

17. On 10 June 1999 the pre-trial investigation was completed and the applicant was granted access to the case file.

18. On 25 August 1999 the bill of indictment was served on the applicant. The applicant was refused permission to take a copy of the indictment to his cell because the document contained classified information. The applicant could examine the indictment at the special department (*спецчасть*) in the remand centre.

B. First conviction and its quashing

19. On 16 December 1999 the Moscow City Court found the applicant guilty as charged, sentenced him to twelve years' imprisonment and ordered confiscation of his property.

20. On 15 June 2000 and other dates the applicant and his lawyers appealed against the conviction.

21. On 25 July 2000 the Supreme Court of the Russian Federation quashed the conviction and remitted the case to the trial court for a fresh examination. It found as follows:

> "In finding [the applicant] guilty of the offence under Article 275 of the Criminal Code, the [first-instance] court noted that... between early 1994 and 3 July 1998 [the applicant] had... communicated information and documents containing State secrets to the South Korean intelligence service. The [first-instance] court gave only a general list of information and documents..., without specifying which information and documents and when [the applicant] had communicated. As the offences imputed to [the applicant] were continuous in time and spanned the period from 1992-1993 to July 1998, during which period Russian legislation evolved, the determination of these issues is of crucial importance for the case.
>
> Pursuant to Article 29 § 4 of the Constitution... the list of information constituting State secrets was to be defined in a federal law. Such a list was first established in the federal law 'On the introduction of changes and amendments to the State Secrets Act' of 6 October 1997. Hence, until that date there was no list of information constituting State secrets that met the requirements of the Constitution. As there is no indication in the judgment about when exactly [the applicant] transmitted information and documents, it is impossible to reach the correct conclusion as to which of the offences imputed to the applicant were committed during the period when the federal law containing a list of State secrets and compatible with the requirements of the Constitution was in force.
>
> The case file shows that... experts from the Ministry of Foreign Affairs prepared their report [on the classified nature of the information transmitted by the applicant] on the basis of the State Secrets Act of 21 July 1993, the President's decree of 30 November 1995 and the Government resolution of 18 September 1992, and the expert from the Main Intelligence Department of the General Headquarters of the Russian Army worked on the basis of the Security Act of 5 March 1992, the State Secrets Act of 21 July 1993 and the President's decree of 30 November 1995.
>
> However, it has to be taken into account that the State Secrets Act of 21 July 1993 on which the above experts relied contained no list of information constituting State secrets. Section 5 of the Act (text of 21 July 1993) referred only to the information

that could be classified as State secrets. The conclusions of these reports... have to be re-assessed with regard to the above considerations.

Taking into account that the *actus reus* of the offence under Article 275 of the Criminal Code only comprises acts involving State secrets, the [first-instance] court should have determined which information and documents listed in the indictment and communicated by [the applicant] could have been considered as State secrets in accordance with the requirements of the laws in force at the material time."

C. Second trial

1. Hearings under Judge Gubanova

22. On 5 September 2000 the Moscow City Court began hearing the applicant's case. Presiding Judge Gubanova and two lay judges sat on the bench.

23. The applicant applied to the court for release pending trial. On the same day the court rejected the application. It held that detention on remand could be imposed on a person charged with high treason on the sole ground of the dangerousness of the offence and that there were therefore no grounds to release the applicant.

24. On 11 September 2000 the applicant requested the court to change the measure of restraint applied to him. On the same day the court dismissed the request, finding that the dangerousness of the offence alone was a sufficient ground to remand him in custody. On 15 September 2000 the applicant appealed against that decision to the Supreme Court. The appeal was not examined. According to the applicant, by a letter of 14 March 2001, Judge Galiullin of the Supreme Court informed Judge Yegorova, President of the Moscow City Court, that "there had been no grounds to lodge an appeal against that decision of the court". A copy of the letter was not made available to the Court, but the Government did not dispute the applicant's rendition of the letter's content.

25. On 12 September 2000 one of the lay judges was replaced by the substitute lay judge.

2. Hearings under Judge Koval

26. On 24 or 29 November 2000 the acting President of the City Court ordered a change in the court's composition, referring to Judge Gubanova's prolonged sick leave. He assigned Judge Koval and two new lay judges to sit in the case.

27. On the same day the applicant challenged the new composition of the bench as unlawful and asked for copies of the decision officialising the change and of documents confirming the lawfulness of the appointment of new lay judges, as no reasons for replacement of the lay judges had been

given. On 1 December 2000 Judge Koval dismissed the complaint, finding that the case had been reassigned by order of the acting President of the City Court and that no procedural decision on that matter was required.

28. The applicant appealed to the Supreme Court. On 14 March 2001 the Supreme Court dismissed the appeal. It found that Judge Gubanova had been on sick leave from 15 November to 13 December 2000 and then from 18 December 2000 to 18 January 2001, and that the decision on her replacement had therefore been lawful and justified. The Supreme Court did not mention the appointment of new lay judges.

29. On 1 December 2000 the applicant again applied for release, claiming his innocence. The City Court dismissed the application, finding that the measure of restraint had been imposed in accordance with the law and there was no reason to change it. The applicant appealed to the Supreme Court. The appeal was not examined.

30. On 10 April 2001 the proceedings were adjourned until 13 June 2001, pending translation of various documents from Korean into Russian. The applicant challenged the decision on the adjournment of the proceedings, which had the effect of extending his detention; the City Court dismissed the challenge. On 6 June 2001 the Supreme Court dismissed the appeal concerning the adjournment of the proceedings as unsubstantiated.

3. Hearing under Judge Medvedev

31. On 10 July 2001 the entire bench was replaced and the case was assigned to Judge Medvedev and two new lay judges. No reasons for the replacement were given.

32. The applicant unsuccessfully challenged the substitution of the bench.

33. On 16 July 2001 the applicant appealed against the rejection of his challenge to the Supreme Court, which dismissed the appeal as unsubstantiated on 26 September 2001.

4. Hearings under Judge Komarova

(a) Replacement of the presiding judge and lay judges

34. On 20 July 2001 the President of the City Court instructed Judge Komarova to accept the case. Judge Medvedev and both lay judges were replaced by Judge Komarova and two new lay judges, A.A. and N.A. No reasons were indicated.

35. The applicant challenged the new bench; his challenge was dismissed on the same day. His request to have the substitute lay judge appointed in accordance with Article 242 of the RSFSR Code of Criminal Procedure was also refused.

36. An appeal to the Supreme Court was examined and rejected in a summary fashion on 26 September 2001.

(b) New replacement of lay judges

37. On 31 July 2001 lay judge A.A. stepped down for family reasons and was replaced by lay judge A.M.

38. The applicant unsuccessfully challenged the replacement. His appeal was dismissed in a summary fashion by the Supreme Court on 26 September 2001.

(c) Further applications for release

39. On 10, 20 and 31 July 2001 the applicant lodged three further applications for release. Those were rejected by the Moscow City Court on the same days. Each time the court determined that the measure of restraint had been imposed lawfully and there were no grounds to change or revoke it.

40. On 16 and 24 July and in early August 2001 the applicant filed appeals against these decisions with the Supreme Court.

41. On 26 September 2001 the Supreme Court examined all three appeals and upheld the decisions of the City Court.

(d) The conviction

42. On 14 August 2001 the Moscow City Court convicted the applicant of high treason committed in the form of espionage, an offence under Article 275 of the Criminal Code of the Russian Federation.

43. As regards the *actus reus* of the offence, the court found that during his long-term diplomatic mission in Seoul in 1992-1994 the applicant had consented to informal co-operation with South Korea's Agency for National Security Planning ("the KCIA") in return for regular payment. In fulfilment of the KCIA's instructions, between early 1994 and 3 July 1998 the applicant had arranged no less than 80 meetings with the KCIA's agent, Mr C., and communicated to the KCIA the following documents collected at the KCIA's request:

> "-secret information constituting State secrets, on Russia's position and approach to the friendly relationship, friendship and co-operation with the Democratic People's Republic of Korea (the DPRK), set out in two draft treaties on the basis of friendly relationships between the two states: in September 1995 – the draft treaty on the basis of a friendly relationship between Russia and DPRK; in September 1996 – the draft treaty on friendship and co-operation between Russia and the DPRK,
>
> - in autumn 1997, secret information constituting State secrets that was contained in the updated report of the Korean Department of the MFA on military co-operation between Russia and DPRK... which he had copied and kept in his office at the MFA until communication;

- secret information constituting State secrets in the field of military co-operation:

> in November 1994 – on the beginning of implementation of the inter-governmental treaty, contained in the letter addressed to the Russian Ambassador in the DPRK, dated 19 September 1994;
>
> in August 1994 – on the Russian proposal to initiate closed negotiations in the field of military co-operation;
>
> in May 1995 – on the position of the Russian Ministry of Defence...
>
> on 18 March 1996 – information in the area of politically sensitive relationships between Russian and DPRK, contained in two documents of 14 March 1996...
>
> on 20 June 1996 – on termination of the Russian-North Korean treaty on military intelligence, received by the MFA from the Russian Embassy to the DPRK on 11 June 1996;

- other information which did not contain State secrets, by communicating copies of internal documents:

> in 1994: copies of documents on negotiations between deputy foreign ministers of Russia and the DPRK... list of diplomats of the DPRK Embassy, report on certain developments in the political life of the DPRK...;
>
> in 1995: copies of... a report by the Russian Embassy in Pyongyang on the political situation in the DPRK in 1994, report on the situation in the DPRK following the death of Kim Il-sung, list of diplomats of the DPRK Embassy in Moscow... list of Russian citizens working in the DPRK;
>
> in 1996: copies of the 1995 directory of the DPRK management cadres... a draft press-release following a visit by a State Duma delegation to Pyongyang and the list of the delegation members...
>
> in 1997: copies of the 1996 directory of the DPRK management cadres... contract between the Russian Industria concern and the foreign relations committee of the DPRK...
>
> in 1998: copies of the 1997 directory of the DPRK management cadres... updated report on the situation in DPRK... report by the Russian Embassy on the situation in the DPRK, information on the members of a delegation accompanying the Vice-Prime Minister of the Russian Federation on a forthcoming visit to the Republic of Korea...

In addition, between 5 January 1994 and 5 November 1996 Mr Moiseyev orally communicated to the South Korean intelligence no fewer than thirty-five pieces of information on various aspects of inter-State relationship that did not contain State secrets.

Having received from Mr C. in 1997 the list of information that was of interest for the KCIA, Mr Moiseyev copied and communicated to the South Korean intelligence

> service certain internal documents, such as protocols and co-operation treaties between Russia and the DPRK in various areas.”

44. The court established that the KCIA had paid the applicant no less than fourteen thousand US dollars in remuneration.

45. The court founded its findings on, in particular, the applicant’s own statements, obtained in the days immediately following his arrest, and statements by several witnesses. Most witnesses were identified in the judgment only by their three initials, i.e. the first letters of their first, father’s (patronymic) and last names. For some witnesses, only the first letter of their last name was given.

46. Witness “K.G.B.” stated in his pre-trial deposition that virtually all documents concerning Russia’s bilateral relationships with other countries and appraisal of the political and economic situation in these countries, which had been prepared within the Ministry of Foreign Affairs, had contained sensitive information and their disclosure or communication to other states had been highly undesirable. The court noted that on 12 September 1990 the applicant, when taking up his duties at the Ministry of Foreign Affairs, had signed an undertaking not to disclose State or work-related secrets. In their pre-trial depositions witnesses “M.A.I” and “I.A.T.” confirmed that the applicant had had access to sensitive documents which had been of interest to the South Koreans and that Mr C.’s affiliation with the intelligence service had been common knowledge among experts in Korean issues. Their depositions were read out in court and witness “T.G.D.” also made oral submissions to the same effect. Both “I.A.T” and “T.G.D.” testified that the South Koreans had had good knowledge of issues which they were not supposed to have been aware of.

47. The court further noted that, according to information from the External Intelligence Service of the Russian Federation (*СВР РФ*) and the Main Investigations Department of the Russian Army Headquarters (*ГРУ ГШ ВС РФ*), during his work in Seoul between June 1992 and February 1994 the applicant had had contacts with employees of the Korean intelligence services and had negligently discussed sensitive matters in unprotected areas. In 1996 it was discovered that the South Korean intelligence service regularly received confidential information to which the applicant had access and that the applicant maintained private contacts with Mr C. in return for remuneration. Witness “M.”, an employee of the Federal Security Service, testified to the court that in January 1996 he had contacted the applicant and advised him of Mr C.’s official mission as a representative of the KCIA in Moscow. The applicant had acknowledged that he had been aware of this fact.

48. Referring to a letter from the Counter-intelligence Operations Department of the Federal Security Service of the Russian Federation (*УКРО ДКР ФСБ РФ*) of 9 July 1998, the court established that in February 1997 the External Intelligence Service had provided the Federal

Security Service with copies of a "draft order on the organisation of the work of KCIA agents, resident in Moscow in 1997" and the applicant's "personal residence file", from which it followed that the applicant had been recruited by the KCIA during his stay in South Korea and enlisted as a functioning agent of that service.

49. The court relied on the experts' findings in establishing that the information communicated by the applicant had contained State secrets. It found as follows:

> "The court agrees with the experts' conclusions because the [study] was performed by competent persons in compliance with the rules of criminal procedure and [has been] scientifically proven. According to the experts, the information [disclosed] reveals the substance of Russia's foreign policy and co-ordination agreements with foreign states in the field of military co-operation and intelligence and also contains politically sensitive data.
>
> The arguments put forward by the defendant and his lawyer about a lack of competence on the part of the experts cannot be considered substantiated, because the expert study was carried out by a panel that included experts designated by [the applicant] and his defence; at their request the experts who had been on the expert panel at the pre-trial investigation stage took part in the court hearing and supplied [the court] with their written conclusions and clarifications..."

50. Finally, the court dismissed in the following terms the applicant's argument that he could not be held liable for disclosure of State secrets because there had been no list of classified information prior to the amendment of the State Secrets Act of 6 October 1997:

> "Pursuant to section 2 of the State Secrets Act of 6 October 1997, the list of information constituting State secrets is the aggregate of categories of information which can be classified as State secrets... This definition was included in the terminology part [of the law] in order to bring its original wording into compliance with the Russian Constitution. Since the information constituting State secrets cannot be explicitly enumerated in the law, the approach chosen was that the list was to be understood as an aggregate of the relatively generic categories of information described in section 5 of the new law [i.e. that of 6 October 1997].
>
> Hence, there is merely an unimportant semantical difference between section 5 of the State Secrets Act in its 1993 wording and that of 1997. By no means does it imply that there were no legal instruments countering encroachments upon the fundamentals of the constitutional structure and the security of the Russian State until 6 October 1997...
>
> Nor are the arguments to the effect that the *actus reus* of the offence under Article 275 of the Criminal Code only comprises acts involving State secrets based on the law. The object of espionage may include information constituting State secrets, as well as other information that is being collected and transmitted at the request of a foreign intelligence service for use detrimental to the external security of the Russian Federation..."

51. Having regard to the applicant's clean criminal record, age, state of health, lengthy detention in custody, positive work references and the

absence of aggravating circumstances, the court invoked the "special-circumstances" clause of Article 64 of the Code of Criminal Procedure and sentenced him to a shorter term than that provided in the relevant sanction, specifically to four years and six months' imprisonment in a strict-security correctional colony, with account for the time served from 4 July 1998, and confiscation of his property.

52. On 26 December 2001 and other dates the applicant and his three lawyers appealed to the Supreme Court against the conviction. They alleged violations of the applicant's rights as guaranteed by the Russian Constitution and various Convention provisions. The points of appeal touched on substantially the same issues as those raised before this Court.

53. On 9 January 2002 the Supreme Court upheld the conviction. The court rejected the arguments by the defence and found that the first-instance court and the investigators had fully complied with both national and international law throughout the proceedings. There had been no violations of law capable of rendering the judgment unfounded or unlawful. The Supreme Court reproduced verbatim the city court's reasoning concerning liability for disclosure of State secrets.

D. Conditions of detention and transport

1. The conditions of detention

54. From 4 July 1998 to 25 January 2002 the applicant was held in the Lefortovo remand prison, run by the Federal Security Service.

55. According to the Government, the applicant was held in a two-person cell measuring 8.2 sq. m. The cell was equipped with heating, mandatory ventilation, a window that could be opened, furniture, a fridge, a TV set, a sink and a lavatory. The applicant had an individual sleeping place and bedding. He received food three times a day in accordance with standard norms. The applicant was given cutlery and personal hygiene items, as well as books and magazines from the library. He could exercise outside for one hour a day.

56. In the applicant's submission, the cell of 8.2 sq. m was designed for three inmates and contained three bunk beds fixed to the concrete floor and walls. He shared the cell with two other detainees in February and March 2000 and then from 19 September 2000 to 15 January 2001. The furniture consisted of two small tables and an open shelf, which the detainees mockingly referred to as "a TV set" because all the items on the shelf were on display. Contrary to the Government's assertion, there was no fridge or TV set.

57. The lavatory in the corner of the cell had no flush system and inmates filled a pail with water from the sink to eliminate waste. The toilet was not separated from the living area; the applicant had to use the toilet

and apply his treatment for haemorrhoids in front of his cellmates and the wardens who observed them through a peephole in the door. Detainees cleaned the cell themselves. No broom, dustbin or detergent was given to them. Once in a while they received 100 g of sodium hydrate to disinfect the lavatory. The applicant had access to the showers once a week and received 50 g of laundry soap for washing.

58. The cell was dimly lit by two 40-60-watt bulbs, fixed in the ceiling and covered with metal bars and opaque glass. The artificial light was never switched off. The window pane also had frosted glass. The exercise courts were located on the roof of the facility and measured about 10 sq. m. The external walls were three metres high and the opening to the sky was protected with metal bars and netting.

59. On 5 December 2001 the applicant lodged a complaint with the Lefortovskiy District Court of Moscow about the general conditions of his detention, inadequate medical assistance, meagre food provisions and lack of privacy in the cell. On the same day the applicant was visited by the head of the remand prison and senior medical officer and asked about the reasons for lodging the above complaint. The head of the prison had a printed copy of the applicant's complaint, originally hand-written, which had never been addressed to the prison administration.

60. On 17 December 2001 the Lefortovskiy District Court invited the applicant to identify the authority against which he was complaining and to pay the court fee by 27 December 2001. The applicant received this decision only on 27 December 2001. On the same day the court disallowed the applicant's complaint because the instructions of 17 December 2001 had not been fulfilled; the copy of that decision was served on the applicant on 8 January 2002 and on the following day his conviction became final.

2. The conditions of transport between the Lefortovo prison and the Moscow City Court

61. The applicant was transported from the remand centre to the courthouse and back more than 150 times.

62. The prison vans in which the applicant was transported had a passenger cabin which was 3.8 m long, 2.35 m wide, and 1.6 m high. The cabin was divided into two multi-occupancy cubicles, designed for twelve inmates each, and one single-occupancy cubicle. The cubicles were equipped with hard benches. In addition to the detainees' cubicles, the cabin contained a 1.5-m wide lobby for two police officers. According to the Government, the applicant was placed in a single-occupancy cubicle on the basis of a written request by the prison administration, in order to prevent him from communicating with other detainees (a copy of that request has not been provided to the Court). The applicant submitted that he was usually placed in a multi-occupancy cubicle with up to eighteen other detainees, who had stood or sat on one another's laps. Even when he was confined to

the tiny solitary cubicle, he had had to share it with another person and they had taken turns sitting on each other's laps. He was never transported alone and he could not be isolated from others because the van was so overcrowded.

63. The Government submitted that the prison-van heaters and interior lights had been powered by the van engine. The vans were naturally ventilated through the emergency hatch and additional hatches with controlled airflow. The passenger cabin was cleaned and disinfected on a daily basis. The applicant insisted that the natural flow of air through the hatches was insufficient and that it was stiflingly hot in summer. Moreover, as the hatches were located in the wardens' lobby, the latter opened and closed the hatches on whim. In winter there was no heating when the engine was not running, and detainees were locked for hours inside the extremely cold van at assembly points. The floor of the cabin was extremely dirty and covered with cigarette butts, food crumbs and packaging, plastic bottles and bags with urine; no access to the toilet was possible during the transport.

64. According to the Government, the travel time from the Lefortovo prison to the Moscow City Court and back did not exceed thirty minutes. The applicant pointed out that for attendance at court hearings he had usually been taken out of the detention centre early in the morning but was never brought back until ten to fifteen hours later. The road from the Moscow City Court to the Lefortovo facility took much longer than thirty minutes because the van called en route at either the Matrosskaya Tishina or Butyrka remand prison, both of which served as assembly points for detainees. As a result, the travel time was as long as three to eight hours. By way of example, the applicant gave the following figures: on 26 December 2000 the travel time from the court to the Lefortovo prison was 3 h 10 min; 11 January 2001 – 4 h 30 min; 17 January 2001 – 4 h 15 min; 5 February 2001 – 3 h 20 min; 27 July 2001 – 3 h 30 min (to the court) and 4 h 20 min (from the court); 30 July 2001 – 4 h 50 min; 3 August 2001 – 5 h 20 min; 9 August 2001 – 5 h 50 min (until 1.10 a.m. on the following day).

65. The applicant gave the following account of the conditions of his transport in a complaint of 25 December 2000 addressed to the Prosecutor General's Office (resent on 25 January 2001):

> "On 22 December 2000 [we] left the premises of the Moscow City Court around 5 p.m., and I was brought back to the FSB (Lefortovo) remand prison at 1.15 a.m. on the following morning, that is, 8 hours later. During the entire period I was kept in an unheated van [used] for the transport of detainees, although the outside temperature was approximately -10° C, without anything to eat or drink and without access to a toilet. Each cubicle of the van contained up to 18 persons: they had to stand or to sit on each other's laps. Following this 'trip' I had the symptoms of flu, I had an acute attack of gastroduodenitis, [suffered from] a headache and other symptoms resulting from a lengthy period of sitting on cold benches in the frost. This situation was in no way exceptional: on 19 December [2000], for example, we started from the courthouse of the Moscow City Court at approximately at 9.30 p.m., although the court hearing ended at about 5 p.m. We arrived at the detention centre at about

> 11 p.m.... Similar incidents also occurred thereafter: instead of the 10-15 minutes normally required for a ride, [the journey] to the remand centre takes, as a rule, three to eight hours.”

66. On 28 April 2001 the commander of the police convoy regiment replied to the applicant that an unidentified regiment officer who had violated the applicable regulations had been disciplined.

67. On 13 February 2001 the applicant unsuccessfully attempted to complain about the conditions of transportation to the administration of the remand prison. A similar complaint lodged with the Prosecutor General’s office on 13 August 2001 evoked the following response from the Moscow City Department of the Interior on 23 November 2001:

> “The delays in transportation were due to objective factors. Measures have been undertaken to avoid similar delays in the future”.

68. In August 2001 the applicant complained of degrading and inhuman conditions of transport to the trial judge. His statements were entered in the trial record and the judge promised to get in touch with the relevant authorities to find a way to improve the situation.

69. The applicant also mentioned the appalling conditions of his transport to and from the remand centre in his complaint of 5 December 2001 to the Lefortovskiy District Court (see paragraph 59 above).

3. Conditions of confinement at the Moscow City Court

70. On the days of court hearings the applicant was held in the convoy cells of the Moscow City Court. On more than a dozen occasions – on 7 and 21 September, 1, 15, 20 and 23 November, 5 and 19 December 2000, 11 and 29 January, 1 February, 5 and 21 March 2001 – the applicant was brought to the courthouse but no hearings were held, and he remained in the convoy cell for the entire day.

71. According to the Government, the convoy cells had standard dimensions of 1.95 m (width) by 1 m (depth) by 3.1 m (height) and the applicant was held there alone to prevent him from communicating with other detainees. The applicant submitted that the convoy cell measured one metre square and was nicknamed a “stone tube” (*«каменный стакан»*) because the floor and walls were covered with an abrasive concrete lining and the height was almost twice the width or depth. He was never alone in the convoy cell and occasionally he had to share it with a consumptive inmate.

72. The Government indicated that convoy cells were equipped with a bench fixed to the floor, mandatory ventilation, heating, lighting and a metal door with a peephole. In cold seasons the average internal temperature was 22° C. Cells were cleaned daily and disinfected weekly. The convoy premises had a toilet room, to which detainees had access at their discretion.

The applicant submitted that the bench fixed to the floor could barely accommodate two persons; the third detainee had to remain standing. The cell was lit by a small bulb behind metal bars that provided insufficient light to read by. The floor and the bench were dirty and covered with cigarette butts, food waste and torn paper. The cell had no windows and the only opening was the peephole in the door. Heating and the mandatory ventilation were not available; the air was heavy with cigarette smoke from prisoners smoking in the cell and police officers smoking outside. A visit to the toilet was possible two or three times a day at the warden's order; from within the cell it was impossible to call the warden. The applicant never received any food (hot meal or a dry ration) in the convoy cell.

E. Restrictions on family visits

73. The applicant had no family visits from 3 July 1998 to 9 April 1999.

74. On 25 January 1999 the applicant's wife asked the investigator for permission to see her husband. Her request was refused on 10 February 1999 with reference to the nature of the applicant's case and the gravity of the charge against him. The investigator considered a visit "inopportune".

75. On 22 February 1999 the applicant asked the investigator to allow his wife to visit him. Four days later his request was refused, as the visit was deemed to be "inopportune at that moment".

76. On 10 March 1999 the applicant's wife complained about the investigator's decision to the Prosecutor General's office. By a letter of 30 March 1999, the Chief Military Prosecutor's office responded that by law the investigator had full discretion in the matter of family visits and that he had acted within his competence.

77. On 18 March 1999 the applicant wrote a complaint to the Chief Military Prosecutor's office. He indicated, in particular, that he had not seen his family for more than eight months and that the investigator had offered to permit him a family visit in exchange for withdrawal of a judicial complaint concerning the unlawfulness of his detention. On 2 April 1999 the prosecutor's office responded that the FSB Investigations Department had been asked "to settle the issue" of family visits.

78. On 5 April 1999 the applicant applied for permission for his wife and daughter to visit him. Permission was granted to his daughter only and on 9 April 1999 she paid him a visit.

79. On 11 May 1999 the applicant asked for permission to see his wife. On 24 May 1999 his wife was allowed to see him.

80. In the subsequent period the applicant's family was allowed to visit him no more often than twice a month, each visit lasting up to one hour. During the visits the applicant was separated from his relatives by a glass partition and talked to them through an interphone. A warden was present.

81. The applicant had no family visits from 3 March to 5 September 2000.

82. On 25 July 2001 the applicant's daughter asked to see her father. She was refused because on 9 June 2001 she had already come to see him with her mother, which counted as two visits, whilst the law only provided for two visits by relatives a month.

83. On 26 July 2001 the applicant's wife complained about the refusal to the Moscow City Court and the Prosecutor General's office alleging, *inter alia*, a violation of Article 8 of the Convention. A week later she was granted permission to visit the applicant.

84. Between 7 December 2001 and 10 January 2002 no permits for family visits were issued.

F. Communication with lawyers and preparation of the defence

1. Restrictions on communication with lawyers

85. Throughout the proceedings the applicant's lawyers were permitted to visit him on the basis of permits that were valid for one visit only. Such permits were issued by investigators from the Federal Security Service at the pre-trial investigation stage or by a judge during the trial.

86. On 26 April and 4 May 2000 Ms Moskalenko, one of the applicant's lawyers, applied to the Supreme Court of the Russian Federation for an unrestricted permit to visit the applicant. In both cases the registry clerk gave her a printed permit valid for "[one] visit". However, yielding to Ms Moskalenko's demands, on both occasions the clerk made handwritten corrections, changing the singular to the plural.

87. On 26 April 2000 the staff of the Lefortovo remand centre treated the Supreme Court's document as a single-use permit because it had been corrected by hand, whereas it originally referred to a single visit.

88. On 5 May 2000 Ms Moskalenko attempted to file a written request to the director of the Lefortovo prison for an unrestricted permit to visit the applicant. The facility staff refused to accept the request and told her that she could not see the director.

89. Subsequently a deputy director of the Lefortovo prison visited the acting director of legal services office no. 10, where Ms Moskalenko worked, and told her that Ms Moskalenko had forged the permit to visit the applicant; he threatened Ms Moskalenko with criminal prosecution. Ms Moskalenko denied all those allegations.

90. On 1 June 2000 the Supreme Court issued Ms Moskalenko with a printed permit valid for "[several] visits" to the applicant. According to the Government, on 23 May 2001 Ms Moskalenko was refused permission to visit the applicant as she did not provide a mandate by her legal services office for the defence of his interests.

91. On 21 August, 12 September and 17 October 2001 Ms Kostromina, one of the applicant's lawyers, unsuccessfully applied to the trial court for a multiple-use permit to visit the applicant.

92. On 25 October 2001 the Constitutional Court held that section 16 § 15 of the Custody Act, which allowed the authorities to require that a visit of a detainee by his advocate be authorised by the investigator or trial court, was incompatible with the constitutional right to legal assistance in criminal cases, in that it made the exercise of the right to defence conditional on a discretionary decision by the authority in charge of the case (Ruling no. 14-P).

93. On 10 January 2002, after the conviction had become final, Ms Kostromina received an unrestricted permit to visit the applicant.

2. Restrictions on access to the case-file and notes

94. During the pre-trial investigation the bill of indictment was kept in the special department of the remand centre. The applicant could access it with the written consent of the administration. His lawyers obtained access to the bill of indictment after the beginning of the trial, at the special registry of the Moscow City Court.

95. Any exchange of documents between the applicant and his lawyers was only possible through the remand centre administration and with its written consent. The administration perused the documents before passing them on.

96. During the trial the applicant could make notes only in special notebooks that were deposited with the indictment at the special registry of the City Court. The same requirements applied to the applicant's lawyers, who were directed to keep all case-related files, notes and copies of complaints at the special registry.

97. According to the applicant, he was chained by his hand to a table or chair when studying the case file on the premises of the Moscow City Court after the court session on a given day was over. He had to assume an uncomfortable posture and after a while his chained hand went numb. Moreover, when he was chained by his right hand, he could not use a pen and make notes. The time afforded for studying the case file was granted at the discretion of wardens. The Government submitted that the applicant had only been handcuffed on his way to and from the hearing.

98. On 29 October 2001 the applicant lodged a complaint about the inadequate conditions for preparation of the defence with the Moscow City Court. The complaint remained unanswered.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant criminal law

99. The Criminal Code of the Russian Soviet Federalist Socialist Republic of 27 October 1960 (in force until 31 December 1996) provided as follows:

Article 64 Betrayal of the Motherland

> “(a) Treason, being an intentional act of a USSR citizen undermining the sovereignty, territorial integrity, national security or defence of the USSR, in particular, desertion to the enemy, espionage, communication of a State or military secret to a foreign state,... shall be punishable by ten to fifteen years’ imprisonment and confiscation of property or by the death penalty and confiscation of property...”

Article 65 Espionage

> “Communication of State or military secrets, as well as their collection or storage with a view to communicating them to a foreign state, a foreign organisation or their agents, and also communication or collection of other information at the request of a foreign intelligence service for the purpose of using them to harm the interests of the USSR, committed by a foreign national or a stateless person, shall be punishable by seven to fifteen years’ imprisonment and confiscation of property or by the death penalty and confiscation of property.”

100. The Criminal Code of the Russian Federation of 13 June 1996 (in force from 1 January 1997) provides as follows:

Article 275 High treason

> “High treason, that is, espionage, disclosure of State secrets or assistance otherwise provided to a foreign state, a foreign organisation or their representatives for ... subversive activities undermining the external security of the Russian Federation, committed by a Russian national, shall be punishable by twelve to twenty years’ imprisonment and confiscation of property...”

Article 276 Espionage

> “Communication of State secrets, as well as their collection, theft or storage with a view to communicating them to a foreign state, a foreign organisation or their representatives, and also communication or collection of other information at the request of a foreign intelligence service for the purpose of using them to harm the external security of the Russian Federation, committed by a foreign national or a stateless person, shall be punishable by ten to twenty years’ imprisonment.”

B. State secrets

101. The Constitution of 12 December 1993 provides:

Article 15

"3. Laws must be officially published. Unpublished laws are not to be applied. No legal acts interfering with the rights, freedoms and obligations of a man and citizen may be applied unless they are officially published and publicly available".

Article 29

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

102. On 21 September 1993 the State Secrets Act (Law no. 5485-1) was enacted. Section 5 provided as follows:

"The following information may be classified as a State secret:

...

(2) information in the field of the economy, science and engineering...

(3) information concerning foreign policy and trade:

[information] about the foreign policy... of the Russian Federation in respect of which its premature disclosure may harm [the State's] interests;..."

103. Section 9 described the procedure for classification of information as State secrets. Authority to classify information was delegated to the heads of State agencies. The Act did not contain a list of such officials, which was to be approved by the President. The President was also to approve a List of information classified as State secrets, which was to be officially published.

104. On 16 March, 26 and 27 October 1995 the State Duma, noting that the absence of a list of classified information "deprived the law-enforcement agencies of a legal basis for the performance of their duty to protect the security of the State, community and individuals", repeatedly petitioned the Government to prepare for the President's approval a draft decree containing the list of classified information.

105. On 30 November 1995 the President approved Decree no. 1203 "On the list of information classified as State secrets". Paragraphs 23-30 of the list provided for classification of information concerning foreign policy and trade and designated the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry for Foreign Economic Relations, the External Intelligence Service and other agencies as bodies authorised to classify such information.

106. On 20 December 1995 the Constitutional Court examined the compatibility of the State Secrets Act with the Constitution and found as follows:

> "4... The State may classify as State secrets information in the field of defence, economic and other activities, disclosure of which may undermine national defence and the security of the State. In this connection Article 29 § 4 of the Constitution provides that the list of information constituting State secrets is to be adopted in the form of a federal law. The State may also determine forms and measures for the protection of State secrets, including by way of establishing criminal liability for its disclosure and communication to a foreign State.
>
> However, by virtue of the above-mentioned constitutional provision, criminal liability for disclosure of State secrets to a foreign state is only justified on condition that the list of information constituting State secrets is established in an officially published and universally accessible federal law. Pursuant to Article 15 § 3 of the Constitution, no law-enforcement decision, including a conviction by a court, may be grounded on an unpublished legal act.
>
> The requirements of Article 29 § 4 of the Constitution are fulfilled by the State Secrets Act of 21 July 1993 which defines the concept of State secrets and indicates the information classifiable as State secrets.
>
> Accordingly, establishing criminal liability for disclosure of State or military secret to a foreign State is not incompatible with Articles 15 § 3, 29 § 4 and 55 § 3 of the Constitution."

107. On 6 October 1997 a federal law (no. 131-FZ) amending the State Secrets Act was enacted. Section 5 of the State Secrets Act was changed to read as follows:

> "State secrets shall include: ...
>
> (3) information in the field of foreign policy and trade..."

The amended section 5 listed categories of information constituting State secret.

108. On 17 April 2000 the Supreme Court, having considered the prosecutor's appeal against the acquittal of Mr Nikitin on charges under Articles 275 and 283 § 1 of the Criminal Code (case no. 78-000-29), upheld the acquittal in the following terms:

> "Having acquitted Mr Nikitin for the lack of constituting elements of a criminal offence in his acts, the [first-instance] court proceeded from the premise that between 12 December 1993 and 30 November 1995 there had been no legal definition of information constituting State secrets...
>
> Pursuant to Article 29 § 4 of the Russian Constitution... the list of information constituting State secrets was to be defined in a federal law. Such a list was first determined in the federal law 'On the introduction of changes and amendments to the State Secrets Act' of 6 October 1997. Taking into account that during the period when Mr Nikitin committed his acts [in 1995], there was no list of information constituting State secrets that met the requirements of the Constitution, the information that he had

collected... and disclosed... cannot be said to have contained State secrets... As the *actus reus* of offences under Articles 275 and 283 of the Criminal Code only refers to acts involving State secrets, the same acts involving other information cannot be held to be high treason and disclosure of State secrets...

The State Secrets Act [in its 1993 version] could not have been applied to Mr Nikitin as it did not contain a list of information constituting State secrets, since section 5 of that Act only referred to information that could be classified as State secrets. However, Article 29 § 4 of the Constitution required that the said list be established in a federal law. As section 5 of the State Secrets Act and Article 29 § 4 of the Constitution refer to different subjects, the court cannot agree with the argument of the appeal to the effect that the difference between these provisions is merely semantic..."

C. Appointment of judges and changes in composition

109. Section 21 of the State Secrets Act and section 2 of the Law "On additional safeguards for the social protection of judges and administrative staff of the courts of the Russian Federation" stipulate that judges with security clearance are eligible for additional financial benefits. The scale and amount of these benefits depend on the level of security clearance. Authority to set the specific amounts of such benefits is delegated to the Government and other executive bodies, such as the Ministry of Justice.

110. The RSFSR Code of Criminal Procedure provided:

Article 241 Immutability of court composition

"Every case must be examined by one and the same composition. If one of the judges is no longer able (*лишен возможности*) to take part in the proceedings he must be replaced by another judge, and the court proceedings must restart from the beginning, expect in cases described in Article 242."

Article 242 Substitute lay judge

"If a case requires a long time for its examination, a substitute lay judge may be appointed. The substitute lay judge is present in the courtroom from the beginning of the proceedings and may step in in case of withdrawal of a lay judge. If the substitute lay judge who has stepped in does not ask for the proceedings to start anew, the proceedings may continue."

111. The Courts Organisation Act (RSFSR Law of 8 July 1981) establishes that a court President may appoint judges as the presiding judges and distribute duties between judges (sections 26 (1) and 37 (4) and (11)). The Act stipulates that lay judges have the same rights as professional judges in the administration of justice (section 11).

112. The Status of Judges Act (Law no. 3132-I of 26 June 1992) provides:

Section 6.2
Powers of court Presidents and deputy court Presidents

"1. The court President, at the same time as exercising judicial powers in the respective court and the procedural powers conferred on court presidents by federal constitutional laws and federal laws, carries out the following functions:

(1) organises the court's work;

...

(3) distributes duties between the President's deputies and, in accordance with the procedure provided for by federal law, between the judges."

D. Detention and time-limits for trial

113. The Constitution establishes that a judicial decision is required before a defendant can be detained or his or her detention extended (Article 22). At the material time, a decision ordering pre-trial detention could be taken by a prosecutor or a court (Articles 11, 89 and 96 of the RSFSR Code of Criminal Procedure, the "CCrP").

114. Before 14 March 2001, pre-trial detention was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment (Article 96 of the CCrP). The amendments of 14 March 2001 repealed the provision that permitted defendants to be remanded in custody on the sole ground of the dangerous nature of the criminal offence they had committed.

115. After arrest a suspect could be placed in custody "pending investigation" for an initial two-month period (Article 97 of the CCrP). Further extensions could be granted by prosecutors at ascending levels of jurisdiction.

116. Once the investigation had been completed and the defendant had received the charge sheet and finished reading the case file, the file was submitted to a trial court. From that day the defendant's detention was "before the court" (or "pending trial"). Until 14 March 2001 the Code of Criminal Procedure set no time-limit for detention "pending trial". On 14 March 2001 a new Article 239-1 was inserted which established that the period of detention "during trial" could not normally exceed six months from the date the court received the file.

E. Visits and correspondence

117. The Custody Act (Federal Law on the Detention of Suspects and Defendants, no. 103-FZ of 15 July 1995) provides as follows:

Section 16. Internal order in remand centres

“The Ministry of Justice, the Ministry of the Interior, the Federal Security Service, the Ministry of Defence shall adopt, upon approval of the Prosecutor General, the Internal Rules for Remand Centres, for the purpose of ensuring order in remand centres.

The Internal Rules establish the procedure for:

...

(7) receiving and dispatching telegrams, letters and money transfers by suspects and defendants;

...

(15) organising meetings between suspects and defendants and the persons listed in section 18 of the present Act...”

Section 17. Rights of suspects and defendants

“Suspects and defendants have the right:

...

(5) to meet with relatives and other persons listed in section 18;

(6) to keep documents and records relating to the criminal case or to exercise of their rights and lawful interests...

...

(8) to maintain correspondence and to use writing utensils.”

Section 18. Meetings with counsel, relatives and other persons

“From the moment of arrest, suspects and defendants may be visited by their legal representative in privacy. Visits are not limited in frequency or duration. Visits may be granted: if the legal representative is an advocate – upon presentation of a mandate issued by the legal services office (*ордер юридической консультации*)... and an identity document.

...

Subject to written consent from the official or authority in charge of the criminal case, a suspect or defendant may have up to two meetings per month with relatives and other persons, each visit to last for up to three hours...”

Section 20. Correspondence

> "Suspects and defendants may correspond with relatives and other persons, without any limitation on the number of incoming and outgoing letters or telegrams...
>
> Correspondence by suspects and defendants is to be carried out through the administration of the remand prison and is subject to censorship. Censorship is carried out by the administration of the remand prison and, if necessary, by the official or authority in charge of the criminal case ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF CONDITIONS OF THE APPLICANT'S DETENTION

118. The applicant complained that the conditions of his detention in the Lefortovo facility had been incompatible with Article 3 of the Convention, which provides:

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

A. Submissions by the parties

119. The applicant submitted that the floor surface per detainee had been insufficient, that the toilet had offered no privacy, that the lighting had been dull, and that he had to obtain food and personal hygiene items from the facility shop or from his wife. He complained that the subordination of the Lefortovo remand prison to the Federal Security Service was contrary to the rule of law and to the principle of separation of the penitentiary system from investigative authorities, as the head of the Lefortovo detention centre had been also the head of the FSB Investigations Department.

120. The Government submitted that an inquiry by the Prosecutor General's office had not established any violations of the applicant's rights under Article 3 of the Convention as regards the conditions of detention in Lefortovo. They refrained from commenting on the material conditions of the applicant's detention.

B. The Court's assessment

121. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. The Convention

prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see *Balogh v. Hungary*, no. 47940/99, § 44, 20 July 2004, and *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Although measures depriving a person of his liberty may often involve such an element, in accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

122. The applicant spent three years and six months in a Moscow remand prison. Although there was no allegation of overcrowding beyond the design capacity or of a shortage of sleeping places (see, by contrast, *Grishin v. Russia*, no. 30983/02, § 89, 15 November 2007, and *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002-VI), the conditions in the prison were nevertheless extremely cramped. The applicant shared the eight-square-metre cell with one or two other detainees. It follows that the living area per inmate varied from 2.6 to 4 sq.m.

123. The Court reiterates that in certain cases the lack of personal space afforded to detainees in Russian remand prisons was so extreme as to justify, in its own right, a finding of a violation of Article 3 of the Convention. In those cases applicants usually disposed of less than three sq.m 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; *Mayzit v. Russia*, no. 63378/00, § 40, 20 January 2005; and *Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005). By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. Thus, even in cases where a larger prison cell was at issue – measuring in the range of three to four sq.m per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting (see, for example, *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; *Trepashkin v. Russia*, no. 36898/03, § 94, 19 July 2007, and *Peers v. Greece*, no. 28524/95, §§ 70-72, ECHR 2001-III).

124. The tiny cell in which the applicant was held contained three bunks beds, two small tables, a sink and a lavatory. These fittings further reduced the floor surface available to detainees. It is of particular concern for the Court that there existed no partition or separation between the living area and the lavatory which was not equipped with any kind of flush. Such a close proximity was not only objectionable from a sanitary perspective but also deprived the detainees using the toilet of any privacy. This situation must have taken a particularly heavy toll on the applicant, who was undergoing treatment for haemorrhoids and had to apply his medicine in full view of his cellmates and the wardens who watched through the peephole.

125. The Court observes that during the entire period of detention the applicant's access to natural light and air was significantly restricted, to the point of being virtually non-existent. The window in his cell had frosted glass which greatly reduced the amount of natural light penetrating to the inside and required the artificial lighting to be kept on at all times. It appears that the window did not open and that the air only circulated through the mandatory ventilation system. The possibility for outdoor exercise was limited to one hour a day. It follows that for three and a half years the applicant was practically confined to his cell with no transparent window or access to natural air (compare *Peers*, cited above, § 75). Moreover, the exercise yards could hardly afford any real possibility for exercise, being just two square metres larger than the cells. They were surrounded by three-metre-high walls with the opening to the sky protected with metal bars and a thick net. Obviously the restricted space coupled with the lack of openings undermined the facilities available for recreation and recuperation. In addition, on the days of court hearings, the applicant forfeited the opportunity to go to the exercise yard.

126. Having regard to the cumulative effect of those factors, the Court finds that the fact that the applicant was obliged to live, sleep and use the toilet in poorly lit and ventilated cells for almost four years, without any possibility for adequate outdoor exercise, must have caused him distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. It follows that the conditions of his detention amounted to inhuman and degrading treatment.

127. There has therefore been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention in the Lefortovo remand centre.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF CONDITIONS OF THE APPLICANT'S TRANSPORTATION TO AND FROM THE COURTHOUSE

128. The applicant complained that he had been transported in a prison van to and from the Moscow City Court in inhuman and degrading conditions incompatible with Article 3 of the Convention.

A. Submissions by the parties

129. The applicant challenged the Government's description of the conditions of transport as factually inaccurate: in his view, the Government described the conditions as they should have been in accordance with all applicable regulations rather than as they actually were. In reality, the prison vans had been filled beyond their design capacity and he had never been transported alone. No food had been given and no access to the toilet had been possible during the transport. Both the ventilation and heating systems had been deficient and it had been stiflingly hot in summer and extremely cold in winter.

130. The Government submitted that the applicant had always been transported alone and that he had provided with a dry ration for the entire duration of transport. In their assessment, the conditions of the applicant's transport were compatible with Article 3 of the Convention.

B. The Court's assessment

131. On the facts, the Court observes that the applicant was transported to the court hearings in standard-issue prison vans on more than one hundred and fifty days. The passenger cabins of those vans were designed for the transportation of twenty-five detainees on a floor space measuring less than nine square metres, which left an area of approximately fifty by fifty centimetres for each detainee. The height of the cabin (1.6 m) was not sufficient for a man of normal stature to enter or stand up without hunching, which required the detainees to remain in a seated position at all times while inside the van. The Court is not convinced by the Government's claim that the applicant was always transported alone further to a special request by the prison administration, because a copy of that request was not produced. The Government did not comment on the total number of detainees transported by prison vans. However, it appears that overcrowding of prison vans transporting prisoners in Moscow was one of the problems reported by the authority in charge of remand centres as a result of an inquiry carried out in 2003 (see the letter of 26 November 2003 from the head of the Moscow Directorate for the Execution of Punishments, cited in *Starokadomskiy v. Russia* (dec.), no. 42239/02, 12 January 2006). The Court therefore lends

credence to the applicant's submission that prison vans were occasionally occupied by a total number of detainees exceeding the design capacity, which further reduced the floor space available to them.

132. Furthermore, the Court sees little evidence that prison vans, as described by the parties, were sufficiently lit, ventilated and heated. The Government admitted that the heating and lighting systems were only operational when the engine was running. Given that there were no windows or other openings giving access to natural light, the detainees remained in darkness – and, occasionally, in the cold – once the engine was stopped. Natural ventilation through the emergency hatches was obviously inadequate on hot days, given the cramped conditions inside the van, and was, moreover, not directly accessible to detainees from within the cubicles.

133. The Court observes that the applicant remained in these conditions for extended periods of time on each journey. Admittedly, the Lefortovo prison is located not far from the Moscow City Court and the direct route would have hardly required more than thirty minutes. However, the Government did not refute, or comment upon, the applicant's submission that prison vans called on their way into other remand centres, namely Matrosskaya Tishina or Butyrka, located much farther from the City Court. The detainees remained locked inside the vans during the detours and loading and unloading of other prisoners. The detailed information produced by the applicant in respect of travelling time on specific dates was likewise unrebutted by any relevant documents which the Government must have had in their possession. In fact, a response by the Moscow police department to the applicant's complaint contained an acknowledgment of delays in transportation of detainees (see paragraph 67 above). Thus, whereas it is impossible to establish with absolute certainty the duration of a journey on every occasion, what is important for the Court's assessment is that the time spent by the applicant inside the van was far from negligible and amounted on average to five or six hours per day, and was occasionally as long as ten hours.

134. The Court reiterates that the assessment of the minimum level of severity which a given form of treatment must attain if it is to fall within the scope of Article 3 depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162, and *Kudła*, cited above, § 91). The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Kudła*, cited above, § 92). Thus, the Court has found a violation of Article 3 in a case where an

applicant was transported together with one other detainee in a single-occupancy cubicle which measured one square metre. Although the travel time did not exceed one hour, the Court considered such transport arrangements inhuman and degrading, irrespective of the duration (see *Khudoyorov v. Russia*, no. 6847/02, §§ 118-120, ECHR 2005-... (extracts)).

135. In the present case the applicant was transported more than one hundred and fifty times in standard-issue prison vans which were sometimes filled beyond their design capacity. Given that he had to stay inside that confined space for several hours, these cramped conditions must have caused him intense physical suffering. His suffering must have been further aggravated by the absence of adequate ventilation and lighting, and unreliable heating. Having regard to the cumulative effect which these conditions of transport must have had on the applicant, the Court finds that the conditions of transport from the remand centre to the courthouse and back amounted to "inhuman" treatment within the meaning of Article 3 of the Convention. It is also relevant to the Court's assessment that the applicant was subjected to such treatment during his trial or at the hearings with regard to applications for an extension of his detention, that is, when he most needed his powers of concentration and mental alertness (compare *Khudoyorov*, cited above, § 120).

136. There has therefore been a violation of Article 3 of the Convention on account of the conditions in which the applicant was transported.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF THE APPLICANT'S DETENTION AT THE COURTHOUSE

137. The applicant complained that the conditions of his confinement to the convoy premises at the Moscow City Court had been in breach of Article 3 of the Convention.

A. Submissions by the parties

138. The applicant challenged the Government's description of the confinement conditions as factually inaccurate. He confirmed that the convoy cells – described as "stone tubes" in the vernacular – had been overcrowded, dirty, poorly lit, excessively hot and unventilated. When locked inside, he had not received any food and had been unable to answer the calls of nature. On many occasions he had spent up to 15 hours in the cells without ever being summoned to a hearing.

139. The Government submitted that the applicant had been held alone in a standard convoy cell of the Moscow City Court. Apart from the standard convoy cells, there were no other cells or "stone tubes" on the

court's premises. In the Government's view, there had been no violation of Article 3 as regards the conditions of the applicant's confinement.

B. The Court's assessment

140. The Court observes that on more than one hundred and fifty days the applicant was detained in the convoy cells located on the premises of the Moscow City Court. Whereas his detention in these cells was normally limited to several hours before, after and between court hearings, on a dozen occasions he was not summoned to a hearing and spent the entire working day inside the cell.

141. The parties disagreed on the measurements of the convoy cells and the number of detainees who were held there with the applicant. The Court does not consider it necessary to resolve this controversy. It notes that the convoy cells were destined for detention of a very limited duration. Accordingly, not only were they tiny in surface area – by any account no more than two square metres – but also, by their design, they lacked the amenities indispensable for longer detention. The cell did not have a window and offered no access to natural light or air. Its equipment was limited to a bench, there being no chair, table or any other furniture. It is of a particular concern for the Court that the cell did not have a toilet and that detainees could only relieve themselves on the wardens' orders. Furthermore, there is no evidence of any catering arrangements which would have enabled the detainees to receive sufficient and wholesome food and drink on a regular basis. The Court considers it unacceptable for a person to be detained in conditions in which no provision has been made for meeting his or her basic needs (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 106, 24 January 2008).

142. The applicant remained in these cramped conditions for several hours a day and occasionally for as long as eight to ten hours. Although his detention in the convoy premises was not continuous, the Court cannot overlook the fact that it alternated with his detention in the remand prison and transport in conditions which it has already found above to have been inhuman and degrading. In these circumstances, the cumulative effect of the applicant's detention in the extremely small cells of the convoy premises at the Moscow City Court without ventilation, food, drink or free access to toilet must have been of such intensity as to induce physical suffering and mental weariness.

143. There has accordingly been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention on the convoy premises of the Moscow City Court.

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

144. The applicant alleged that he had been denied the right to trial within a reasonable time or to release pending trial, in breach of Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Submissions by the parties

145. The applicant submitted that, in extending his pre-trial detention, the domestic authorities had generically referred to the gravity of the offence he had been charged with and his potential to abscond or interfere with the establishment of the truth, without pointing to any factors capable of showing that the risks relied upon had actually existed. It had not been taken into account that he had strong social links, a permanent place of residence in Moscow, a stable family relationship and no criminal record, and that his internal and diplomatic passports and all his savings had been seized. The applicant considered that the grounds invoked had not been sufficient to justify holding him in custody for more than three years. What is more, the domestic authorities had failed to display "special diligence" in the conduct of the proceedings.

146. The Government maintained that the length of the applicant's pre-trial detention had been compatible with the requirements of the RSFSR Code of Criminal Procedure.

B. The Court's assessment

147. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among other authorities, *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30, and *Kudła*, cited above, § 110).

148. The presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his

conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (see, for instance, *Castravet v. Moldova*, no. 23393/05, § 30, 13 March 2007; *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...; *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000; and *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, § 4).

149. The Court notes that the applicant was placed in custody on 3 July 1998 and his conviction was pronounced by the Moscow City Court on 14 August 2001. In view of the essential link between Article 5 § 3 of the Convention and paragraph 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence", as specified in the latter provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty "after conviction by a competent court" (see *Kudła*, cited above, § 104, and *Barfuss v. the Czech Republic* (dec.), no. 35848/97, 7 September 1999). Accordingly, the applicant's detention from 16 December 1999, the date of his first conviction, to 25 July 2000, the date on which that conviction was quashed and his case remitted, cannot be taken into account for the purposes of Article 5 § 3. The Court consequently finds that the period to be taken into consideration consisted of two separate terms, the first lasting from 3 July 1998 to 16 December 1999 and the second from 25 July 2000 to 14 August 2001, and amounted to two years and slightly more than six months in total.

150. Such a length of pre-trial detention – over two years and six months – is a matter of concern for the Court. It observes that at no point in the proceedings did the domestic authorities consider whether the length of his detention had already lasted beyond a "reasonable time". The fact that the maximum time-limits permitted by the domestic law were not exceeded may not be a decisive element in the Court's assessment. As the Court has previously found in other Russian cases, the calculation of the domestic time-limits depended solely on the gravity of the charges, which was decided upon by the prosecution and was not subject to judicial review (see *Shcheglyuk v. Russia*, no. 7649/02, § 43, 14 December 2006, and *Khudoyorov*, cited above, § 180).

151. The Court observes that Russian criminal-procedure law, as it was worded before the legislative amendments of 14 March 2001, allowed the suspect to be held in detention on the sole ground of the dangerous nature of the crime with which he was charged (see paragraph 114 above). Acting in accordance with these provisions, the domestic courts extended the applicant's detention and rejected his petitions for release, relying on the gravity of the charges against him as the only relevant and sufficient ground (see, in particular, the decisions of 5 and 11 September 2000). They also

occasionally mentioned other grounds, such as the risk of absconding or interference with justice (see the decisions of 1 February and 4 June 1999). Finally, in other instances the judicial review of the grounds for application of the custodial measure was confined to a verification of the formal lawfulness of the decision (see the decisions of 10, 20 and 31 July 2001).

152. According to the Court's constant case-law, although the severity of the sentence faced by the applicant is a relevant element in the assessment of the risk of absconding, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence (see *Belevitskiy v. Russia*, no. 72967/01, § 101, 1 March 2007; *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001; and *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 51). This is particularly relevant in the Russian legal system, where the characterisation in law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence that has so far been obtained supports a reasonable suspicion that the applicant has committed the alleged offence (see *Khudoyorov*, *loc. cit.*).

153. As regards the grounds for detention other than the gravity of the charges, the Court observes that the domestic courts did not mention any specific facts supporting their finding that there existed a risk of absconding or interference with justice. On the other hand, it is a matter of serious concern for the Court that the courts gave no heed to the applicant's arguments that he had a permanent place of residence in Moscow, a stable family relationship and strong social links, that he had been dispossessed of his identity and travel documents and savings, or to other relevant facts which mitigated the risk of his absconding.

154. The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, warrants a departure from the rule of respect for individual liberty. Any system of mandatory detention pending trial is incompatible *per se* with Article 5 § 3 of the Convention, it being incumbent on the domestic authorities to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005). Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is permissible only in exhaustively enumerated and strictly defined cases (see *Ilijkov*, cited above, §§ 84-85, with further references).

155. The Court finds that by failing to address concrete relevant facts and by relying mainly on the gravity of the charges, the authorities extended the applicant's detention on grounds which cannot be regarded as

"sufficient". The authorities thus failed to justify the applicant's continued detention pending trial (see *Rokhlina*, cited above, § 69).

156. There has therefore been a violation of Article 5 § 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

157. The applicant complained under Article 5 § 4 of the Convention that his appeals against the City Court's decisions refusing his requests for release had been considered after a substantial delay if at all. Article 5 § 4 provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful..."

A. Submissions by the parties

158. The applicant submitted that his appeals against the City Court's decisions of 15 September and 1 December 2000 and that of 16 April 2001 had not been considered by the Supreme Court, and that his appeals against the City Court's decisions of July 2001 had only been examined by the Supreme Court on 26 September 2001, that is, more than six weeks after his conviction had been pronounced.

159. The Government indicated that the applications for release had been considered within the time-limits established by domestic law.

B. The Court's assessment

160. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. Although it does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, § 28; *Toth v. Austria*, judgment of 12 December 1991, Series A no. 224, § 84). The requirement that a decision be given "speedily" is undeniably one such guarantee; while one year per instance may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79,

ECHR 2003-IV). In that context, the Court also observes that there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending because the defendant should benefit fully from the principle of the presumption of innocence (see *Iłowiecki v. Poland*, no. 27504/95, § 76, 4 October 2001).

1. Failure to examine the appeals

161. It was submitted by the applicant and uncontested by the Government that on 15 September 2000 he had lodged an appeal against the City Court's decision of 11 September 2000, by which his application for release had been rejected, and that this appeal had not been examined (see paragraph 24 above). It was likewise undisputed that his appeal against the City Court's decision of 1 December 2000 had not been heard by the Supreme Court (see paragraph 29 above).

162. In the absence of any indication to the contrary, the Court assumes that the appeals were introduced within the time-limits and in accordance with the procedure stipulated in the Russian law. The Government did not offer any justification for the Supreme Court's failure to examine the appeals.

163. There has therefore been a violation of Article 5 § 4 on account of the Supreme Court's failure to examine the appeals against the decisions of 15 September and 1 December 2000.

2. Belated examination of the appeals

164. On 16 and 24 July and in early August 2001 the applicant filed appeals against the City Court's decisions of 10, 20 and 31 July 2001, by which his applications for release had been rejected. The appeals were examined by the Supreme Court on 26 September 2001, that is, respectively, seventy-one, sixty-three and approximately fifty days later.

165. Nothing suggests that the applicant, having lodged the appeals, caused any delays in their examination. The Court considers that these three periods were excessively long and fell short of the "speediness" requirement of Article 5 § 4, especially taking into account that their entire duration appears to have been attributable to the authorities (compare, as a recent example, *Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006, where review proceedings which lasted from twenty-nine to thirty-six days were not considered "speedy").

166. There has therefore been a violation of Article 5 § 4 on account of the Supreme Court's belated examination of the appeals against the decisions of 10, 20 and 31 July 2001.

VI. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF A LACK OF INDEPENDENCE AND IMPARTIALITY OF THE TRIAL COURT

167. The applicant complained under Article 6 § 1 of the Convention that the trial court lacked independence and impartiality because of arbitrary changes in its composition, special security requirements on the judges sitting in the formation, and the affiliation of the prosecutor and lay judges with the Federal Security Service. The relevant part of Article 6 § 1 provides:

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

A. Submissions by the parties

168. The applicant pointed out that that during the second trial the bench had been changed on six occasions, including four replacements of the presiding judges and two replacements of lay judges (under presiding Judges Gubanova and Komarova). He submitted that immutability of the composition of courts, as set out in Article 242 of the RSFSR Code of Criminal Procedure, was an important principle of criminal procedure. The possibility of replacing a judge who could "no longer take part in the proceedings" should normally be used only in exceptional circumstances such as the judge's death, serious illness, retirement, and suspension or termination of his judicial function by the judges' qualifications panel. However, Russian law lacked clear rules governing the distribution of cases among judges, which left the matter of selection and replacement of judges to the discretion of the court President. A court President had no legal obligation to give grounds for substitutions and replacements. The applicant emphasised that judges were fully dependent on the court President with regard to their career advancement and fringe benefits, which made them reluctant to contradict his or her wishes. In his case, the changes in the composition of the bench had always come unannounced and no reasons had been given. In the applicant's view, the arbitrary changes had been motivated by the authorities' aspiration to obtain a conviction from an "obedient" bench, and the trial court therefore lacked impartiality and independence.

169. The applicant further submitted that access to "top secret" information, such as that contained in his case file, was granted by the Federal Security Service, which was the prosecuting authority in his case. According to the regulations in force, the head of an organisation, such as a court President, was personally responsible for designating the persons who should be granted access to classified information. This resulted in the

formation of a special category of "authorised judges", who had obtained security clearance and were assigned to sit in cases involving sensitive information. The absence from the case file of undertakings not to disclose classified information, which were mentioned by the Government, was indicative of the fact that Judges Gubanova, Koval, Medvedev and Komarova had permanent security clearance. The applicant pointed out that judges with permanent security clearance were eligible for financial benefits such as a salary increase of ten to twenty-five percent, depending on the degree of security clearance. The applicant maintained that the bench in his case had not been formed "in accordance with the ordinary procedure" but rather included "authorised judges", hand-picked by the court President.

170. The Government submitted that distribution of cases among judges was the responsibility of the court President, his or her deputy or any other persons designated by them. A case could be reassigned to another judge if the presiding judge suffered from a prolonged illness, was involved in other proceedings, recused himself or was challenged. According to the Government, immutability of the bench was a fundamental requirement of Russian criminal procedure. The Government explained that in the applicant's case Judge Gubanova had fallen ill and had been replaced by Judge Koval. Sick leave certificates were evidence of Judge Gubanova's indisposition, although she had subsequently come to the City Court to sign documents and trial records for the cases she had previously heard. In their submissions on the admissibility and merits, the Government claimed that they were not in a position to make comments about subsequent changes in the composition of the bench because the trial record did not indicate grounds for the changes. At the post-admissibility stage the Government submitted that Judge Koval had been replaced by Judge Komarova because of the former judge's heavy involvement in other ongoing criminal proceedings.

171. The Government submitted that the domestic law did not impose any special requirements on the composition of the bench in criminal cases involving classified information. Pursuant to section 21 of the State Secrets Act, all judges had access to classified information without special clearance. Nevertheless, they were required to sign an undertaking not to disclose classified information and were informed of their potential liability in case of disclosure. The same undertaking had to be signed by lay judges who sat in such cases. The Government asserted that the trial court in the applicant's case had been formed in accordance with the ordinary procedure and that it should therefore be presumed impartial and objective.

B. The Court's assessment

172. The first limb of the applicant's complaint was that the changes in the composition of the trial court had been arbitrary and incompatible with the requirements of "independence" and "impartiality" of a tribunal.

173. As regards the issue of "independence", the Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

174. As to the requirement of "impartiality", two aspects must be taken into account. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, meaning it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings (see *Academy Trading Ltd and Others v. Greece*, no. 30342/96, §§ 43-45, 4 April 2000, and *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, § 29).

175. Since no evidence has been produced in the present case which might suggest personal bias on the part of the trial court judges, the Court will focus its examination on the concepts of independence and objective impartiality which are closely linked and must be considered together (see *Findlay*, cited above, § 73, and *Bochan v. Ukraine*, no. 7577/02, § 68, 3 May 2007).

176. The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties etc., which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, the Court must be satisfied that such (re)assignment was compatible with

Article 6 § 1, and, in particular, with its requirements of objective independence and impartiality (see *Bochan*, cited above, § 72).

177. The Russian legislation does not contain any provisions governing the distribution of cases among the judges of the court with appropriate jurisdiction. Section 6.2 of the Status of Judges Act implies that control over the distribution of cases is to be exercised by the court President, in a manner to be regulated by a federal law (see paragraph 112 above). However, since no such law has been enacted to date, as a matter of common practice cases lodged with courts are distributed by the court Presidents at their own discretion.

178. After the case has been assigned and the proceedings begun, the law requires that the case remains with the same court composition until the final decision is taken. This principle, known as the rule of immutability of the court composition, was set out at the material time in Article 241 of the RSFSR Code of Criminal Procedure (see paragraph 110 above, now Article 242). The rule of immutability provided for the possibility of replacing a judge who was no longer able to take part in the proceedings with another judge. It was applicable to professional and lay judges alike, the status of the latter being identical to the status of the former in the administration of justice (see paragraph 111 above).

179. During the second trial in the applicant's case there were eleven replacements of the judges on the bench. Four presiding judges dealt successively with the case. Each replacement of the presiding judge was followed by the replacement of both lay judges. In addition, on one occasion the substitute lay judge was called upon to step into the proceedings, and on another a new lay judge had to be designated to replace one who had withdrawn from the case. The proceedings had to be started anew each time a new member joined the formation.

180. The Government did not explain how this inordinate number of changes in the bench – which is striking in comparison to other Russian criminal cases that have come before the Court – could be reconciled with the rule of immutability of the court composition, the fundamental importance of which they themselves emphasised. It is a matter of utmost concern for the Court that not only were replacements particularly frequent in the applicant's case but that the reasons for such replacements were only made known on two occasions. Firstly, the case was reassigned from Judge Gubanova to Judge Koval on account of the former judge's indisposition, the reality and intensity of which is disputed by the applicant. Secondly, lay judge A.A., sitting with Judge Komarova, withdrew for family reasons and was replaced by lay judge A.M. As the Government acknowledged at the pre-admissibility stage, there was no mention in the trial record of the reasons for the other replacements. In the post-admissibility submission they claimed that Judge Koval had been replaced by Judge Komarova because of the former judge's continued involvement in other criminal

proceedings. However, this assertion is both at variance with their pre-admissibility position and belied by the fact that Judge Koval was succeeded by Judge Medvedev rather than by Judge Komarova, who entered the proceedings at a later stage.

181. The Court notes that Article 241 of the RSFSR Code of Criminal Procedure only mentioned the possibility of replacing a judge who was "no longer able to take part in the proceedings", without setting out the circumstances in which such a replacement was possible or indeed required. Despite the Court's explicit request to that effect, the Government omitted to cite any examples of judicial interpretation of the provision in question. Although Article 241 may be presumed to encompass such situations as voluntary withdrawal of a judge, recusation by a party or external events that would preclude him or her from continuing to sit – for example, discontinuation of his or her judicial status by the qualifications board, there was no indication that any such circumstances occurred during the applicant's trial. None of the replaced judges expressed a wish to resign from sitting in the case, was successfully challenged or had their judicial status suspended or terminated. Although the adequacy of the grounds for reassignment of the case from Judge Gubanova to Judge Koval was a matter of controversy between the parties, eight replacements of the judges sitting in the applicant's trial took place for reasons that remained unknown to the applicant and could not be ascertained in the Strasbourg proceedings. In the Court's assessment, the replacement of a sitting judge for which no reason was given can only be described as arbitrary.

182. The Court further observes that, as with the distribution of incoming cases among judges, the power to reassign a pending criminal case to another presiding judge was habitually exercised by the President of a court. It transpires in the instant case that two reassignments were explicitly ordered by the President or acting President of the City Court (from Judge Gubanova to Judge Koval, and later from Judge Medvedev to Judge Komarova). As the Court has found above, the law did not determine with any degree of precision the circumstances in which such reassignment could occur. The lack of foreseeability in the application of Article 241 had the effect of giving the President of the Moscow City Court unfettered discretion in the matter of replacement and reassignment of judges in the applicant's criminal case. In this connection the Court emphasises that no procedural safeguards against the arbitrary exercise of the discretion were incorporated in Article 241. Thus, it did not require that the parties be informed of the reasons for the reassignment of the case or given an opportunity to comment on the matter (compare *Bochan*, cited above, § 72). Furthermore, the replacement of a member of the bench was not set out in any procedural decision amenable to judicial review by a higher court. The Court considers that the absence of any procedural safeguards in the text of the law rendered the members of the bench vulnerable to outside pressure.

183. Finally, the Court reiterates that the possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, § 33). In the present case it may be assumed that the Supreme Court, sitting as a court of appeal, should have had the power to quash the conviction on the ground of a serious violation of criminal procedure, such as a breach of the rule of immutability of court composition (Article 342 (4) of the RSFSR Code of Criminal Procedure). Although the applicant referred to this breach in his statement of appeal, the Supreme Court upheld the conviction and sentence in their entirety. As a consequence, it did not cure the failing in question (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-...; *De Haan v. the Netherlands*, judgment of 26 August 1997, *Reports* 1997-IV, §§ 52-55; and *Findlay*, cited above, §§ 78-79).

184. Having regard to the above considerations, the Court finds that in the applicant's case the Russian criminal law failed to provide the guarantees that would have been sufficient to exclude any objective doubt as to the absence of inappropriate pressure on judges in the performance of their judicial duties (compare *Daktaras v. Lithuania*, no. 42095/98, § 36, ECHR 2000-X, and, by contrast, *Sacilor-Lormines v. France*, no. 65411/01, § 67, ECHR 2006-...). In these circumstances, the applicant's doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in his criminal case, which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards.

185. There has therefore been a violation of Article 6 § 1 on account of the lack of independence and impartiality of the trial court. This finding makes it unnecessary to examine the second prong of the applicant's complaint concerning the alleged selection of the presiding judges from a special category of "authorised judges".

VII. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF EXCESSIVE LENGTH OF THE CRIMINAL PROCEEDINGS

186. The applicant complained about a violation of the "reasonable time" guarantee of Article 6 § 1 on account of an excessive length of the criminal proceedings against him.

A. Submissions by the parties

187. The applicant pointed out that the case was not complex, given that the final bench had issued its judgment after only nine hearings, held over a

period of two weeks. Delays in the proceedings had been mainly attributable to the domestic authorities. The pre-trial investigation had lasted more than one year and the first hearing had been postponed for almost two months because the judge had been on leave. It had taken the Supreme Court almost seven months to examine the first appeal; in the second appeal proceedings, the file had been sent from the City Court to the Supreme Court almost four months after the conviction, and its subsequent examination had lasted five months. Furthermore, arbitrary changes of the bench had been, to a significant extent, responsible for delays because every replacement of the presiding judge or lay judge required an examination *de novo*. Relying on the Court's findings in *Ilijkov v. Bulgaria* (no. 33977/96, § 116, 26 July 2001), the applicant noted that the delay caused by the substitution of a lay judge on 31 July 2001 could have been avoided, had the court appointed a substitute lay judge on 20 July 2001 as his defence had proposed.

188. The Government submitted that there had been no periods of inactivity attributable to the judicial authorities. The City Court had taken measures to ensure a thorough and comprehensive examination of the case and all adjournments had been "objectively justified". The applicant had often lodged identical requests, such as challenges to the presiding judge and the entire bench, challenges to the prosecutor, requests for the appointment of lay defenders, admission of additional evidence, etc. The examination of his requests and motions had been time-consuming. A certain period of time had also been necessary to examine the applicant's comments on the trial record and to exchange the statements of appeal between the parties. The Government asserted that there had been no intentional procrastination on the part of the trial court in the applicant's case.

B. The Court's assessment

189. The Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Nakhmanovich v. Russia*, no. 55669/00, § 95, 2 March 2006).

190. The Court takes the date of the applicant's arrest on 3 July 1998 as the starting point of the criminal proceedings. The final judgment in the case was given on 9 January 2002, that is, three years and six months later.

191. The Court notes that the case was heard twice at two levels of jurisdiction. Notwithstanding the sensitive nature of the case, it does not appear that the issues before the trial court were complex because it took the City Court four months on the first occasion and less than a month on the second occasion to issue judgment. On both occasions the appeal issues

were decided in a single hearing. The remaining period of approximately two and a half years – the one-year pre-trial investigation having been deduced from the overall duration – was occasioned by delays of various kinds attributable to the Russian authorities. In this connection the Court specifically notes the delays caused by several unwarranted replacements of the bench – which required the trial to start anew – and excessively long transmittal of the case file between the City Court and the Supreme Court.

192. On the other hand, the Court does not discern any appreciable delay caused by the applicant's conduct. As regards his challenges to judicial officers and procedural requests, the Court reiterates that the applicant cannot be blamed for taking full advantage of the resources afforded by national law in the defence of his or her interest (see *Skorobogatova v. Russia*, no. 33914/02, § 47, 1 December 2005). Furthermore, the fact that the applicant was held in custody required particular diligence on the part of the courts dealing with the case to administer justice expeditiously (see *Panchenko v. Russia*, no. 45100/98, § 133, 8 February 2005, and *Kalashnikov v. Russia*, no. 47095/99, § 132, ECHR 2002-VI). Having regard to the above circumstances, the Court considers that the length of the proceedings exceeded a "reasonable time".

193. There has therefore been a violation of Article 6 § 1 on account of an excessive length of the criminal proceedings against the applicant.

VIII. ALLEGED VIOLATION OF ARTICLE 6 § 3 OF THE CONVENTION

194. The applicant complained under Article 6 § 3 (b) and (c) that he had lacked adequate facilities for the preparation of his defence, on account of restricted access to the indictment, the case materials and his own notes, strictly regulated communication with the defence team and the appalling conditions of his transport and confinement at the courthouse. The relevant parts of Article 6 § 3 provide:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing..."

A. Submissions by the parties

195. The applicant considered that the rights of the defence had been seriously impaired. He claimed that he had had no adequate legal assistance in the first days following his arrest because the legal-aid counsel who had

been appointed to represent him had been a classmate of the investigator and had induced the applicant into self-incrimination. His subsequent counsel had been required to apply for permission to visit him to the Federal Security Service, that is, to the authority conducting the prosecution. The administration of the remand centre, which had also been managed by the Federal Security Service, had refused to recognise the validity of the "multiple-use" permits obtained by Ms Moskalenko. The trial judges had also issued permits valid for one visit only. Ms Kostromina had obtained an unrestricted permit only after the conviction had become final. Any exchange of documents between him and his lawyers had only been possible in the remand centre with the written consent of the administration, which perused documents to be handed over.

196. The applicant pointed out measures which restricted his ability to consult the documents contained in the criminal case file. He and his lawyers had been able to access the bill of indictment and other case-file materials only in the special department of the remand centre or at the special registry of the City Court. They had also been required to keep in these premises any notes taken during the trial and copies of complaints.

197. Finally, the applicant claimed that the conditions of his transport to the courthouse and his confinement at the convoy premises had adversely affected his physical and mental faculties. The constant strain, accumulating fatigue, malnutrition and lack of sleep had considerably diminished his ability to defend himself in an efficient manner. After the hearing he had been able only to read the file in a contorted posture because he had been shackled to a table or chair by his hand. He had not been able to write with his right hand attached by handcuffs.

198. The Government submitted that the applicant's defence had been entrusted to four advocates of his own choosing. They had been able to visit the applicant in the remand centre without any restrictions on the frequency or duration of their visits. The Moscow City Court had not prevented the applicant from communicating with his lawyers; it had not imposed any restrictions on the number of visits and granted permission to visit every time it was requested, except on one occasion (see paragraph 90 above). Although the applicant's complaints to prosecutors, courts and other State bodies had not been subject to censorship, his correspondence with counsel was monitored by the remand centre administration in accordance with section 20 of the Custody Act.

199. The Government indicated that the applicant had had access to the indictment during the court sessions and at the remand centre. His request that he be given a copy of the bill to take with him to his cell had been refused because the indictment contained classified information.

200. The Government claimed that the applicant had only been handcuffed when he had been taken from the convoy premises of the

Moscow City Court to the hearing. In the courtroom the handcuffs had been removed.

B. The Court's assessment

201. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaints under both provisions taken together (see, among other authorities, *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 29). The Court considers that in order to determine whether the rights of the defence were respected in the criminal proceedings against the applicant, it is necessary firstly to examine the issues of the legal assistance available to him, secondly the access he and his lawyers were given to the case file, and finally the effect which the conditions of the applicant's transport and confinement at the courthouse had on his ability to prepare his defence.

1. Restrictions on legal assistance

202. The Court notes that the contacts between the applicant and his lawyers were only possible on the basis of permits issued by the authority in charge of the case.

203. The Court reiterates that the principle of equality of arms, as one of the features of the wider concept of a fair trial under Article 6 § 1, requires that each party be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (see *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, § 47, and *Borgers v. Belgium*, judgment of 30 October 1991, Series A no. 214-B, § 24).

204. On the facts, the Court notes that counsel for the applicant were required to seek special permits to visit and confer with him. Permits were valid for one visit only and the lawyers' attempts to have extended their period of validity proved to be unsuccessful. Permits were issued by the authority in charge of the case. After the Constitutional Court declared unconstitutional the provisions of the Custody Act which granted the authority in charge of the criminal case discretion in the matter of meetings with counsel (see paragraph 92 above), counsel for the applicant obtained an unrestricted permit; however, by that time the conviction had already been upheld in the final instance. It follows that for the entire duration of the criminal proceedings against the applicant visits by the applicant's counsel were conditional on authorisation by the authorities.

205. The prosecution in the applicant's case was instituted and conducted by the Federal Security Service. The Lefortovo remand centre, in which the applicant was held, was also under the jurisdiction of the Federal

Security Service. Under these circumstances the prosecuting authority enjoyed unrestricted access to the applicant for its own purposes but exercised full and effective control over his contacts with the defence counsel, who were required to apply for a permit from the investigator – an officer of the Federal Security Service – each time they wished to visit him in the remand centre. The Court takes note of the Government's assertion that at no point in the proceedings was permission for a visit by counsel unreasonably withheld. Nevertheless, it has no doubt that the need to apply for an individual permit for every visit created considerable practical difficulties in the exercise of the rights of the defence because it detracted time and effort from pursuing the defence team's substantive mission. What causes the Court still greater concern is that this arrangement put the defence in a position of dependence on, and subordination to, the discretion of the prosecution and therefore destroyed the appearance of the equality of arms. On several occasions the Federal Security Service abused the dominant position it had in the matter by refusing to accept Mrs Moskalenko's request for an unrestricted permit or threatening criminal prosecution against her in the absence of any evidence that the permit had been forged (see paragraphs 88 and 89 above).

206. The Court further notes that the Government omitted to make any comments on the legal basis which would have allowed the domestic authorities to require special permits for visits by counsel in the first place. Nothing in the text of section 18 of the Custody Act suggests that a mandate from the legal services office and an identity document were not sufficient for allowing visits to the applicant by professional advocates, which all of the applicant's legal representatives were. Whereas section 18 explicitly requires consent by the competent authority for a family visit, it does not mention that visits by counsel may be subordinate to any such consent. It follows that the requirement on the applicant's counsel to seek permission to visit him was not only excessively onerous for the defence team but also devoid of legal basis and therefore arbitrary.

207. In the light of the above, the Court finds that the control exercised by the prosecution over access to the applicant by his counsel undermined the appearances of a fair trial and the principle of equality of arms.

2. *Perusal of documents exchanged with the applicant*

208. In addition to seeking permission for visits, counsel for the applicant and the applicant himself were required to obtain special permission from the remand centre administration for any documents they wished to pass to each other. The documents were read by the administration before being exchanged.

209. The Court reiterates that an accused's right to communicate with his legal representative under conditions which favour full and uninhibited discussion is part of the basic requirements of a fair trial in a democratic

society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, § 33). The importance to the rights of the defence of ensuring confidentiality in the relations between the accused and his lawyers has been affirmed in various international instruments and the Court's case-law (see *Öcalan v. Turkey* [GC], no. 46221/99, § 133, ECHR 2005-IV; *Brennan v. the United Kingdom*, no. 39846/98, §§ 38-40, ECHR 2001-X, and *Campbell v. the United Kingdom*, judgment of 25 March 1992, Series A no. 233, § 47).

210. The Court observes that section 20 of the Custody Act – which apparently was the legal basis for perusing the documents passed between the applicant and his lawyers – provided for censorship of all correspondence by detainees in general terms, without exception for privileged correspondence, such as that with legal counsel. The Court reiterates in this connection that correspondence with lawyers, whatever its purpose, is always privileged and that the reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, when the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature (see *Campbell*, cited above, § 48).

211. As noted above, the Lefortovo remand centre was managed by the same authority that prosecuted the case against the applicant. Thus, the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent. This flagrant breach of confidentiality of the client-attorney relationship could not but adversely affect the applicant's right to defence and deprive the legal assistance he received of much of its usefulness. It has not been claimed that the application of such a sweeping measure throughout the entire duration of the criminal proceedings was justified by any exceptional circumstances or previous abuses of the privilege. The Court considers that perusal of the documents passed between the applicant and his counsel encroached on the rights of the defence in an excessive and arbitrary fashion.

212. Accordingly, the Court finds that the routine reading of the defence materials by the prosecuting authority was in breach of the principle of equality of arms and eroded the rights of the defence to a significant degree.

3. Restrictions on consultation of the case materials and notes

213. It was not in dispute between the parties that the bill of indictment, other case documents, and the notes compiled by the applicant and his defence team had only been accessible at the special department of the remand centre or special registry of the City Court.

214. The Court reiterates that Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. The concept of "effective participation" in a criminal trial includes the right to compile notes in order to facilitate the conduct of the defence, irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence (see *Matyjek v. Poland*, no. 38184/03, § 59, ECHR 2007-..., and *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000).

215. The Government acknowledged that the applicant's request for a copy of the bill of indictment had been refused on the ground that it had contained sensitive information. Throughout the proceedings the bill of indictment had been kept either at the special department of the remand prison or special registry of the City Court, from where it could not be removed. The Government did not contest the applicant's submission that all other case materials and the notes taken during the hearings, whether by the applicant or his representatives, had to be handed in to the special registry after the hearings.

216. The Court accepts that national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights, such as the right to a fair trial, should have a lawful basis and should be appropriate to achieve their protective function. In the present case the Government did not invoke any act or regulation or other provision of domestic law governing the functioning of special departments in remand prisons or special registries in the courts. Nor did they put forward any justification for the sweeping nature of the restrictions on the applicant's access to the case materials. They did not explain why the domestic authorities had not been able to present the bill of indictment in such a way that the classified information be contained in a separate annex, which would have then been the only part with restricted access. Likewise, it does not appear that the Russian authorities considered separating the case materials constituting State secrets from all the other materials, such as for instance, the courts' procedural decisions, to which access should in principle be unrestricted. Finally, the Court considers that the fact that the applicant and his defence team could not remove their own notes in order to show them to an expert

or use them for any other purpose effectively prevented them from using the information contained in them, since they had then to rely solely on their recollections (see *Matyjek*, cited above, § 59, and *Luboch v. Poland*, no. 37469/05, § 64, 15 January 2008).

217. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, were important guarantees of a fair trial in the context of lustration proceedings. The failure to afford such access weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached (see *Matyjek*, §§ 59 and 63, and *Luboch*, §§ 64 and 68, both cited above). This finding applies *a fortiori* in the circumstances of the present case, where the applicant stood trial and could forfeit not just his good name or possibility to hold public office (as in lustration proceedings) but his liberty. Moreover, as the Court found above, the restrictions on the applicant's access to the case materials and notes had no basis in domestic law and were excessively broad in their scope.

218. The Court therefore holds that the fact that the applicant and his defence team were not given appropriate access to the documents in the case file and were also restricted in the use of their notes, served to compound the difficulties encountered in the preparation of his defence.

4. Effect of the conditions of transport and confinement on preparation of the defence

219. Finally, the applicant argued that he had been unable to prepare properly for the hearings because of the appalling conditions in which he had been transported to the courthouse and confined there.

220. The Court further reiterates that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Mayzit v. Russia*, no. 63378/00, § 78, 20 January 2005; *Connolly v. the United Kingdom* (dec.), no. 27245/95, 26 June 1996, and *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, Series A no. 96, § 53).

221. As regards the "facilities", the Court does not rule out that where a person is detained pending trial, this word may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration (see *Mayzit*, cited above, § 81). In a case where applicants had to face a vitally important trial in a state of lowered physical and mental resistance following an exhausting overnight transfer by prison van, the Court noted this circumstance as one of the factors undermining the

requirements of a fair trial. It went on to state that “despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened [the applicants’] position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel” (see *Barberà, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, §§ 71 and 89). In the same vein, the Court found a violation of Article 6 §§ 1 and 3 in the case where the hearing in a criminal case lasted more than seventeen hours, with the result that not only the accused and his defence but also the judges had been in a state of extreme exhaustion (see *Makhfi v. France*, no. 59335/00, §§ 40-41, 19 October 2004).

222. In the instant case the Court takes note of its above findings under Article 3 of the Convention that the applicant had been detained, transported and confined at the courthouse in extremely cramped conditions, without adequate access to natural light and air or appropriate catering arrangements. The applicant could not read or write, since he was confined to such a tiny space with so many other detainees. The suffering and frustration which the applicant must have felt on account of the inhuman conditions of transport and confinement undoubtedly impaired his faculty for concentration and intense mental application in the hours immediately preceding the court hearings. Admittedly, he was assisted by a team of professional attorneys who could make submissions on his behalf. Nevertheless, taking into account the nature of the issues raised in the proceedings and their close connection to the applicant’s field of competence, the Court considers that his ability to instruct his counsel effectively and to consult with them was of primordial importance. The cumulative effect of the above-mentioned conditions and inadequacy of the available facilities excluded any possibility for the advance preparation of the defence by the applicant, especially taking into account that he could not consult the case file or his notes in his cell.

223. The Court therefore holds that the applicant was not afforded adequate facilities for the preparation of his defence, which undermined the requirements of a fair trial and equality of arms.

5. The Court’s conclusion

224. In sum, the Court finds that the applicant’s trial was unfair for the following reasons: the prosecuting authority had unrestricted discretion in the matter of visits by counsel and exchanges of documents, access by the applicant and his defence team to the case file and their own notes was severely limited, and, lastly, the applicant did not enjoy adequate conditions for the preparation of his defence. The overall effect of these difficulties, taken as a whole, so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened.

225. There has therefore been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b) and (c).

IX. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

226. The applicant complained under Article 7 of the Convention that his conviction had been based on unforeseeable and retrospective application of the law because at the time when he committed the imputed offences there had been no statutory list of State secrets. Article 7 provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Submissions by the parties

227. The applicant claimed firstly that Article 275 of the Russian Federation Criminal Code had been applied in his case with retrospective effect, in that that Code had entered into force only on 1 January 1997. Furthermore, the punishment under Article 275 was more severe than that under Article 64 of the RSFSR Criminal Code, because the terms of imprisonment were longer.

228. Secondly, the applicant pointed out that he had been convicted for communication of State secrets committed in the period until the autumn of 1997. However, he emphasised that, under Article 29 § 4 of the Constitution, the list of information constituting State secret was to be enacted in the form of a federal law. Until the amendments of 6 October 1997 the State Secrets Act had only listed the information that *could* be classified as a State secret, rather than an actual list of State secrets. Neither the Government resolution of 18 September 1992 nor the Presidential decree of 30 November 1995 had the quality of "law" in the domestic legal system. The existence of a legal lacuna in the regulation of State secrets had been acknowledged by members of Parliament during the deliberations on the amendments to the State Secrets Act and also by the Supreme Court's decisions of 17 April 2000 in the case of naval officer Mr Nikitin and of 25 July 2000 in the applicant's own case. The applicant maintained that, in the absence of a clear regulation on the information constituting State secrets in the period before 6 October 1997, he had not reasonably been able to foresee that communication of certain information would expose him to criminal liability. He also claimed that his conviction had represented an

unforeseeable change in the Supreme Court's position as expressed in the above-mentioned decisions of 17 April and 25 July 2000.

229. Finally, the applicant submitted that the nature of his diplomatic work presupposed an exchange of information with his foreign colleagues. He had authored many publications and delivered presentations on Korean issues. He had therefore been unable to foresee that he would incur criminal liability for communication of information which did not constitute State secret, such as copies of treaties between Russia and the DPRK or official directories published by the Ministry of Foreign Affairs.

230. The Government submitted that the charges against the applicant had been correctly prosecuted under Article 275 of the Russian Federation Criminal Code. Although the applicant had committed some of the offences before its entry into force, it was applicable because it provided for a more lenient punishment for high treason: a term of imprisonment rather than capital punishment.

231. The Government pointed out that the applicant had given an undertaking not to disclose State secrets and internal information upon his recruitment to the USSR Ministry of Foreign Affairs on 12 September 1990. Experts had established that the documents he had transmitted to Mr C. had contained information constituting a State secret and also bore the "secret" or "top secret" classification. By a ruling of 20 December 1995, the Constitutional Court had confirmed that the establishment of criminal sanctions for communication of State or military secret to a foreign State was compatible with the Constitution. The terminological difference between the initial wording of section 5 of the State Secrets Act and its text as amended on 6 October 1997 could not justify the conclusion that, prior to the enactment of the amendments, a person could not be held criminally liable for encroachments on the constitutional foundations and security of Russia. As regards the Supreme Court's decisions of 17 April and 25 July 2000, the Government asserted that they could not create rules governing future court decisions because the Russian legal system does not operate by application of precedent.

232. The Government further emphasised that the offence of "espionage", as defined in Article 275 and 276 of the Russian Federation Criminal Code, includes gathering of both classified and non-classified information for the purpose of communicating it to a foreign agent. The investigation had collected evidence showing that the applicant had been aware of the classified nature of the information he had collected and had deliberately transmitted the information to Mr C., whom he had known to be a foreign intelligence agent. The applicant's conviction of espionage had been founded on the established fact that he had collected, stored and communicated information – not necessarily constituting a State secret – at the request of a foreign intelligence service for the purpose of harming the security of the Russian Federation.

B. The Court's assessment

1. General principles

233. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. It is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among other authorities, *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A no. 335-C, §§ 34-35 and §§ 32-33; and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97, 44801/98, § 50, ECHR 2001-II).

234. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, among others, *S.W.*, cited above, § 36; *Streletz, Kessler and Krenz*, cited above, § 50; and *K.-H. W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II).

2. Application of the principles in the present case

235. In the light of the above principles concerning the scope of its supervision, the Court observes that it is not its task to rule on the applicant's individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's acts, at the time when they were committed, constituted criminal offences

defined with sufficient accessibility and foreseeability by Russian or international law.

236. The applicant argued firstly that, since the acts were committed before the enactment of the Russian Federation Criminal Code, the application of that Code with retroactive effect was in breach of Article 7.

237. The Court observes that the Russian Federation Criminal Code provides explicitly for its retrospective application to acts committed prior to its entry into force if the relevant offence carries a milder penalty than it did under the old criminal law (Article 10). High treason was punishable until 1 January 1997 under Article 64 of the RSFSR Criminal Code and thereafter under Article 275 of the Russian Federation Criminal Code, which defined the offence in a substantially similar way. The sanctions, however, were different: whereas Article 64 laid down that high treason was punishable by a term of imprisonment or the death penalty, Article 275 envisages a term of imprisonment as the main sanction for the same offence. Under both Codes a confiscation order could be imposed as an accessory penalty.

238. As the offence of high treason under the Russian Federation Criminal Code is more lenient than a similar offence under the RSFSR Criminal Code (*lex mitius*), by virtue of the above-mentioned provisions it was the former that applied to the acts committed before or after its entry into force. It follows that the applicant's complaint about the retroactive application of criminal law to his disadvantage is without merit (compare *Streletz, Kessler and Krenz*, cited above, §§ 53-55).

239. The Court observes that the domestic courts found the applicant guilty of high treason in the form of espionage. "Espionage" is one of the forms of high treason listed in Article 275 of the Russian Federation Criminal Code and described in further detail in Article 276 of the Code. According to Article 276, the offence of "espionage" is not limited to the communication of State secrets to foreign agents but also includes the collection and communication of "other", that is, non-classified, information at the request of a foreign intelligence service.

240. The Government pointed out that the domestic courts had found all the constituent elements of the offence of "espionage" in the applicant's acts. Thus, it had been established that the applicant had frequent contacts with Mr C., who had been a representative of the South Korean intelligence service. The documents obtained from the KCIA had listed the applicant as a Moscow resident of that organisation. The applicant had copied certain work documents, as per the list prepared by Mr C., and had transmitted those documents to him. The domestic courts deemed those elements sufficient to find the applicant guilty of the offence of high treason in the form of espionage, having regard in particular to the fact that this offence did not necessarily involve communication of information constituting a

State secret. The Court considers that such an interpretation was consistent with the essence of the offence of espionage as defined in Russian law.

241. In deciding, secondly, whether the domestic courts' interpretation of the crime of espionage could reasonably be foreseen by the applicant at the material time, the Court notes that both the RSFSR Criminal Code (Articles 64 and 65) and the Criminal Code of the Russian Federation defined the concept of "espionage" in similar terms. These provisions explicitly referred to the collection of "other information" (that is, not constitutive of a State secret) at the request of a foreign intelligence service. The Court considers that the consequences of failure to comply with those laws were adequately foreseeable, not only with the assistance of legal advice, but also as a matter of common sense (compare *Kuolelis and Others v. Lithuania*, nos. 74357/01, 26764/02 and 27434/02, § 121, 19 February 2008). Furthermore, the Court reiterates that an interpretation of the scope of the offence which was – as in the present case – consistent with the essence of that offence, must, as a rule, be considered as foreseeable (see *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-... (extracts)). There has therefore been no violation of Article 7 of the Convention.

242. As the Court has noted above, the offence of high treason in the form of espionage comprised both acts involving State secrets and acts involving non-classified information. Whether one or both types of acts were found to have been committed in an individual case had no impact on the characterisation attributed to those acts in law. Given that the legal characterisation was identical in both situations, the Court does not discern any legal basis to assume that in either case a heavier penalty would be imposed. In these circumstances, having regard to the above finding that the applicant's conviction for communication of non-classified information was not in breach of Article 7 § 1 of the Convention, the Court does not consider it necessary to examine separately whether the applicant could reasonably have foreseen that he would be convicted under the same provision of the Criminal Code for communication of sensitive information which was subsequently found to constitute a State secret.

X. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF RESTRICTIONS ON FAMILY VISITS

243. The applicant complained under Article 8 of the Convention about unlawful and disproportionate restrictions on family visits. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

> in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Submissions by the parties

244. The applicant pointed out that no family visits had been authorised during the first nine months after his arrest. In subsequent periods visits had been limited in number and time: he had been permitted two visits a month for one hour each. Moreover, he had been separated from his wife or daughter by a glass partition and could talk to them only through an interphone and in the presence of a warden. In addition, owing to the established administrative practice of the Supreme Court, he had not been permitted any family visits from 3 March to 5 September 2000 and from 7 December 2001 to 10 January 2002, while the appeals against his conviction were being examined.

245. The Government submitted that during the pre-trial investigation the investigators had “reasonably restricted” visits by the applicant’s relatives, pursuant to section 18 of the Custody Act. In subsequent periods the applicant’s relatives had been allowed to visit him on a regular basis.

B. The Court’s assessment

246. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee’s right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision. Nevertheless, any restriction of that kind must be applied “in accordance with the law”, must pursue one or more of the legitimate aims listed in paragraph 2 and, in addition, must be justified as being “necessary in a democratic society” (see, among other authorities, *Estrikh v. Latvia*, no. 73819/01, § 166, 18 January 2007; *Kučera v. Slovakia*, no. 48666/99, § 127, ECHR 2007-... (extracts); and *Klamecki v. Poland (no. 2)*, no. 31583/96, § 144, 3 April 2003).

247. It was submitted by the applicant, and not contested by the Government, that during certain periods of his detention he had not been allowed any family visits, that in the remaining period family visits had been limited to two one-hour meetings per month, and that he had always been separated from his family by bars and a glass partition. The Court

finds that these restrictions amounted to an interference with the applicant's right to respect for his family life (see *Messina v. Italy (no. 2)*, no. 25498/94, § 62, ECHR 2000-X). It will now proceed to examine whether each of the above-mentioned restrictions was justified in the present case.

1. Refusal of family visits

248. The applicant was not authorised to receive any family visits from July 1998 to April 1999 and from March to September 2000, and also in December 2001 and January 2002.

249. The Court must first examine whether the refusal of family visits was "in accordance with the law". The interference was based on section 18 of the Custody Act, which provided for the discretionary right of the investigator to authorise up to two family visits per month. The Court is therefore satisfied that the refusal had a basis in domestic law. It reiterates, however, that the expression "in accordance with the law" does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question. The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures. In addition, domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law for legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference (see, for instance, *Lupsa v. Romania*, no. 10337/04, §§ 32 and 34, ECHR 2006-..., and *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002).

250. The Court notes that the Custody Act was officially published and therefore accessible to detainees. However, it fell short of the requirement of foreseeability because it conferred unfettered discretion on the investigator in the matter of family visits but did not define the circumstances in which a family visit could be refused. The impugned provision went no further than implying the possibility of refusing family visits, without saying anything about the length of the measure or the reasons that could warrant its application. No mention was made of the possibility of challenging a refusal to issue an authorisation or whether a court was competent to rule on such a challenge. It follows that the provisions of Russian law governing family visits did not indicate with reasonable clarity the scope and manner of exercise of the relevant

discretion conferred on the public authorities, so that the applicant did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (compare *Ostrovar v. Moldova*, no. 35207/03, § 100, 13 September 2005, and *Calogero Diana v. Italy*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, §§ 32-33). In view of the above, the Court considers that the refusal of family visits cannot be regarded as having been "prescribed by law". In the light of this finding, it is not necessary to assess whether the other conditions set out in paragraph 2 of Article 8 have been complied with.

251. There has therefore been a violation of Article 8 on account of refusal of family visits to the applicant during the periods of his detention concerned.

2. Limitation on the frequency and duration of family visits

252. In the remaining period of the applicant's detention he was allowed to have no more than two short family visits per month.

253. The limitation on the frequency and duration of family visits afforded to detainees was introduced by section 18 of the Custody Act and had therefore a lawful basis. The Court accepts that the limitation pursued the legitimate aims of protecting public safety and preventing disorder and crime.

254. As to the necessity of the impugned measure in a democratic society, the Court reiterates that in a series of Italian cases it has already examined a prison regime substantially similar to that to which the applicant was subjected. The regime at issue restricted the number of family visits to not more than two per month and provided for prisoners' separation from visitors by a glass partition. Taking into account the specific nature of the phenomenon of Mafia-type organised crime, in which family relations often play a crucial role, the Court noted that the special regime was instrumental in curtailing the contacts of imprisoned Mafia members with the outside world and preventing them from organising and procuring the commission of crimes both inside and outside their prisons. This led the Court to accept that in the critical circumstances of the investigations of the Mafia being conducted by the Italian authorities, the measures complained of were necessary and proportionate to the legitimate aim (see, among others, *Messina (no. 2)*, cited above, §§ 65-67, and *Indelicato v. Italy* (dec.), no. 31143/96, 6 July 2000).

255. In the present case the Government did not put forward any argument for justification of the restriction beyond a reference to the applicable section of the Custody Act. The Court notes with concern that the Custody Act restricted the maximum frequency of family visits to two per month in a general manner, without affording any degree of flexibility for determining whether such limitations were appropriate or indeed necessary

in each individual case. As regards the applicant's personal situation, the Court is unable to discern the necessity for such stringent limitations on the frequency and duration of family visits. It notes that the applicant's wife was neither a witness nor a co-accused in the criminal proceedings against him, which removed the risk of collusive action or other obstruction to the process of collecting evidence (see, by contrast, *Kučera*, cited above, § 130; *Bagiński v. Poland*, no. 37444/97, § 92 et seq., 11 October 2005; and *Klamecki*, cited above, § 135). The same can be said of the applicant's daughter, who was still a minor at the material time. Furthermore, the security considerations relating to criminal family links which had been found to be justified in the above-mentioned Italian cases were conspicuously absent in the instant case. In these circumstances, and having regard to the duration of the limitations on the applicant's contact with his family, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.

256. There has therefore been a violation of Article 8 on account of the restrictions on the frequency and duration of family visits.

3. Separation by glass partition

257. The Court notes that the Government did not refer to any legal or regulatory act as the basis for installing a glass partition in the cabin for meetings between detainees and their visitors. The wording which could be considered as authorising such a measure in remand centres could be found in the Internal Rules for Remand Centres of the Ministry of Justice (paragraph 147 of order no. 148 of 12 May 2000). However, these provisions were not applicable in the applicant's case because at that time the Lefortovo remand centre was outside the jurisdiction of the Ministry of Justice and under the management of the Federal Security Service. Although comparable provisions might be contained in the rules for the remand centres under the jurisdiction of the Federal Security Service, such rules – assuming they had been adopted as required by section 16 of the Custody Act – were never published or made otherwise publicly accessible. It follows that the impugned measure was not "prescribed by law".

258. In any event, the Court reiterates that, although physical separation of a detainee from his visitors may be justified by security considerations in certain cases (see the above-cited Italian cases and also the Dutch cases concerning a prison regime designed to prevent escapes: *Van der Ven v. the Netherlands*, no. 50901/99, § 71, ECHR 2003-II, and *Lorsé and Others v.*

the Netherlands, no. 52750/99, § 85, 4 February 2003), the measure cannot be considered necessary in the absence of any established security risk (see *Ciorap v. Moldova*, no. 12066/02, § 117, 19 June 2007). As the Court has found above, in the present case there were no security considerations warranting the application of such restrictions. In addition, the Court notes that the applicant was denied any physical contact with his visitors for the entire duration of his detention, that is, for more than three and a half years. The effect of such a long period of time, which must have taken a heavy toll on the applicant and his family, is a further factor weighing in favour of a finding that the contested measure was disproportionate (compare *Ciorap*, cited above, § 118). In sum, the Court finds that in the absence of any demonstrated need for such far-reaching restrictions on the applicant's right to respect for family life, the measures at issue cannot be justified under the second paragraph of Article 8.

259. There has therefore been a violation of Article 8 on account of the physical separation of the applicant from his family by a glass partition.

XI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF RESTRICTIONS ON CORRESPONDENCE

260. The applicant complained under Article 8 of the Convention about unlawful and disproportionate restrictions on his correspondence.

A. Submissions by the parties

261. The applicant submitted that his incoming and outgoing correspondence had been subject to censorship. Moreover, he had been permitted to keep incoming letters for only twenty-four hours. The prison administration had restricted the number of photographs that his relatives could send to him. He had not been allowed to keep more than two photographs in the cell. The applicant claimed that the restrictions had not been founded on any domestic law and had been disproportionate.

262. The Government submitted that the censorship of the applicant's correspondence had been carried out in accordance with section 20 of the Custody Act.

B. The Court's assessment

263. It was submitted by the applicant, and acknowledged by the Government, that his incoming and outgoing correspondence had been subjected to censorship, or monitoring. While neither the Government nor the applicant specified the particular form of that measure, it appears that his letters were at least opened and read in the applicant's absence by the administration of the Lefortovo remand centre. In addition, the Government

did not dispute that specific restrictions had been imposed on the number of family photographs the applicant could keep in the cell. These measures amounted to an interference with the exercise of the applicant's right to respect for his correspondence.

264. The Court reiterates that any "interference by a public authority" with the right to respect for correspondence will contravene Article 8 of the Convention unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 of that Article and is "necessary in a democratic society" in order to achieve them (see, among many other authorities, *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, p. 32, § 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, § 34; and *Niedbała v. Poland*, no. 27915/95, § 78, 4 July 2000).

265. The Court is satisfied that the interference was based on section 20 of the Custody Act. As it has found in paragraph 257 above, this was the only publicly accessible legal provision governing the applicant's situation because the implementing rules for remand centres adopted by the Ministry of Justice found no application in the Lefortovo remand centre managed by the Federal Security Service and because the rules of the Federal Security Service, if ever adopted, had never been made public.

266. As was reiterated in paragraph 249 above, the expression "in accordance with the law" also refers to the quality of the law in question which must indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. The text of section 20 of the Custody Act provided for censorship of all correspondence by detainees in general terms, without distinguishing between different categories of correspondence, such as, for example, private correspondence and correspondence with legal counsel. The Court has already found that such a form of censorship, which effectively gave the remand prison administration an open licence for indiscriminate and routine checking of all of the applicant's correspondence, was incompatible with Article 8 of the Convention (see *Čiapas v. Lithuania*, no. 4902/02, § 25, 16 November 2006, and *Jankauskas v. Lithuania*, no. 59304/00, § 22, 24 February 2005). This reasoning applies *a fortiori* in the circumstances of the present case, where the Custody Act afforded the remand centre administration unchecked discretion in the matter of censorship, without defining the length or scope of the measure, the reasons that may warrant its application, or the manner of its exercise, be it opening, reading, stopping, withholding or another form of control. Furthermore, the Custody Act made no provision for an independent review of the scope and duration of censorship measures. The lack of any safeguards against the arbitrary exercise of discretion by the remand centre administration resulted in extraordinary and unusual restrictions imposed on the applicant, such as the prohibition on having more than two photographs in the cell or keeping his

letters for longer than twenty-four hours. It follows that the provisions of Russian law failed to afford a measure of legal protection against arbitrary interference by public authorities with the applicant's right to respect for his correspondence. The impugned restrictions on the applicant's correspondence cannot therefore be regarded as having been "prescribed by law". In the light of the above finding, it is not necessary to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with.

267. There has therefore been a violation of Article 8 on account of unjustified restrictions on the applicant's correspondence.

XII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

268. 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

269. As regards compensation in respect of pecuniary damage, the applicant claimed USD 53,594.60 for loss of income and USD 13,611.40 for the property confiscated pursuant to the court order. The applicant further claimed EUR 799,620 as compensation in respect of non-pecuniary damage.

270. Referring to the *Kalashnikov* case (cited above), the Government submitted that the applicant's claims were excessive, inadequate and unsubstantiated. They indicated that the validity of the confiscation order had not been contested in the present case.

271. The Court observes that the decision to press criminal charges against the applicant was not the subject of its review in the present case. There was no causal link between the violations found and the alleged loss of earnings. The complaint concerning the alleged violation of the applicant's property rights was not raised in the proceedings before the Court. In the light of the above, the Court rejects the applicant's claim for pecuniary damage.

272. As regards compensation for non-pecuniary damage, the Court notes that it has found a combination of serious violations of the applicant's fundamental human rights in the present case. The applicant spent more than three years in custody, in inhuman and degrading conditions, and was frequently transported to and from the courthouse and held at the courthouse in conditions which were likewise inhuman and degrading. His detention

was not based on sufficient grounds and also excessively long. His right to a fair trial and legal assistance was thwarted. He was denied the right to see his family for a lengthy period and severe restrictions were imposed on his correspondence. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

273. The applicant claimed USD 9,552.92 in respect of legal fees and USD 12,960 for the food and medicine his relatives had brought to the remand prison.

274. The Government pointed out that the applicant had not submitted receipts for the purchase of food or medicine and that the receipts for legal services had not listed the name of the lawyer or the case number.

275. The Court notes that the expenses relating to the purchase of food and medicine cannot be said to have been occasioned by the conditions of detention which led it to find a violation of Article 3. It therefore rejects this part of the claim. The Court further considers that a reduction should be applied to the amount claimed in respect of legal fees on account of the fact that some of the applicant's complaints were declared inadmissible. Having regard to the materials in its possession, the Court awards the applicant EUR 5,000, less EUR 1,027 already paid in legal aid, in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention in the Lefortovo remand prison;

2. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's transport between the remand prison and the courthouse;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's confinement at the Moscow City Court;

4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the Moscow City Court;

7. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of a breach of the "reasonable time" requirement;

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

9. *Holds* that there has been no violation of Article 7 of the Convention;

10. *Holds* that there has been a violation of Article 8 of the Convention on account of unjustified restrictions on family visits;

11. *Holds* that there has been a violation of Article 8 of the Convention on account of unjustified restrictions on the applicant's correspondence;

12. *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, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage plus any tax that may be chargeable;

(ii) EUR 3,973 (three thousand nine hundred and seventy-three euros) in respect of costs and expenses plus any tax that may be chargeable to the applicant;

(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;

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

Done in English, and notified in writing on 9 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Christos Rozakis
Deputy Registrar	President