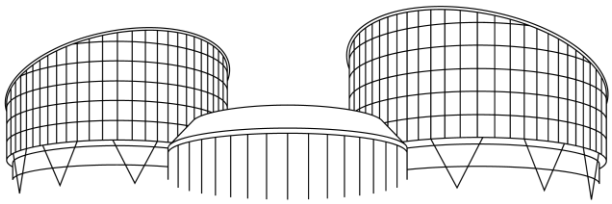

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MOKHOV v. RUSSIA

(Application no. 28245/04)

JUDGMENT

STRASBOURG

4 March 2010

FINAL

04/06/2010

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

In the case of Mokhov v. Russia**,**

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

Peer Lorenzen, *President,*
Karel Jungwiert,
Rait Maruste,
Anatoly Kovler,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 9 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 28245/04) 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 Aleksey Vladimirovich Mokhov ("the applicant"), on 6 July 2004.

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

3. On 1 September 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972 and lives in Kostroma. He is currently serving a sentence in correctional facility ZhKh–385/5 in the village of Lepley, Mordoviya.

5. On an unspecified date criminal proceedings were instituted against the applicant on charges of abuse of powers by a public official, aggravated bribery and forgery.

6. On 8 April 2000 the applicant was arrested and placed in custody on suspicion of aggravated murder and robbery.

7. On 18 April 2000 the applicant was officially charged with aggravated murder and robbery.

8. On 9 December 2000 the applicant was convicted of abuse of powers, aggravated bribery and forgery and sentenced to five years' imprisonment.

9. On 15 and 18 January 2001, whilst the pre-trial investigation into the murder and robbery was pending, the State local television company, KTRK, broadcast the *Na grani* ("On the Edge") programme which contained an interview with Mr T., an investigator from the prosecutor's office of the Kostroma Region ("the prosecutor's office"), who informed the public that the applicant had committed a series of offences. In particular, he stated that:

> "The murder was committed while the investigation into bribery and abuse of power [with which the applicant had been charged] had been pending for a sufficiently long time and it was possible to refer the case to a court. And we found out that Mokhov had committed a second, more serious, crime – a murder, connected to the robbery and attack."

10. On 26 January 2001 the applicant lodged a civil claim against the prosecutor's office and KTRK. Referring to Article 49 of the Constitution of the Russian Federation, he sought compensation for non-pecuniary damage resulting from the alleged violation of the presumption of innocence.

11. On 13 June 2001 the Leninskiy District Court of Kostroma ("the district court") held a hearing in the applicant's presence and decided that it could not examine the claim while the criminal proceedings against the applicant were pending, because it was essential to know the outcome of those proceedings in order to determine whether the disseminated information was true or false. Therefore, the district court ordered the proceedings to be suspended.

12. On 30 July 2001 the Kostroma Regional Court upheld the decision of 13 June 2001.

13. On 5 September 2002 the Kostroma Regional Court convicted the applicant of murder and robbery and sentenced him to twenty-two years' imprisonment. On 26 May 2003 the judgment became final.

14. On 25 June 2003 the district court informed the applicant that the proceedings in respect of his defamation claim had been resumed and a hearing had been scheduled for 9 July 2003. The court asked the applicant if he wished to continue with his claim, and requested him to submit written explanations.

15. In his reply of 28 June 2003 the applicant modified his statement of claims, withdrew the claim against KTRK and affirmed his wish to continue

with his claim against the prosecutor's office. He also asked the court to examine the case in his presence.

16. On 9 July 2003 the district court held the hearing in the applicant's absence. It does not appear from the case materials that it examined the applicant's request to appear in the courtroom. Having studied the applicant's written submissions and having heard the representative of the prosecutor's office, it rejected the claim. According to the Government, the representative of the prosecutor's office advanced no new arguments against the claim during the hearing. The district court found that the impugned statement had been based on facts which had subsequently been established in the court judgment of 5 September 2002. With regard to arguments by the applicant that the investigator was not entitled to publicly state that the applicant was guilty until this had been proved according to law, the court said that, by the date of the broadcast, the applicant had already been charged with murder and robbery, which, under the Code of Criminal Procedure, was possible only if sufficient evidence existed. The issue of the applicant's absence was addressed in the district court's decision as follows:

> "The plaintiff was not present at the hearing because he had been sentenced ... to twenty-two years' imprisonment... The court received [the plaintiff's] written comments about the claim made..."

17. The applicant appealed against this judgment. He claimed, *inter alia*, that the principle of equality of arms had been breached, as the court had refused to summon him and hear him in person.

18. On 21 January 2004 the applicant, then detained in the correctional facility in Mordoviya, was notified of the time and place of an appeal hearing in his defamation case.

19. On 4 February 2004 the Kostroma Regional Court held an appeal hearing in the absence of the parties and upheld the judgment of 9 July 2003 with minor changes. The appeal judgment, in so far as relevant, read as follows:

> "...[the district] court ensured Mokhov's participation in the hearing of 13 June 2001 although the laws on civil procedure in force do not require the court to ensure the presence in a courtroom of persons kept in custody or sentenced to imprisonment.
>
> [The district] court duly notified Mokhov of the date of the hearing. The plaintiff sent to the [district] court his written comments on the nature of his claims. The reasons given in those comments were studied and duly assessed by the [district] court."

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. Article 49 of the Constitution of the Russian Federation provides that everyone accused of committing a crime shall be considered innocent until

his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force.

21. Article 151 of the Russian Civil Code provides that compensation for non-pecuniary damage is payable only when physical or moral damage has been inflicted on a person through actions which violate his or her rights.

22. By virtue of Articles 58 and 184 of the Russian Code of Civil Procedure, a court may hold a session outside the courthouse if, for instance, it is necessary to examine evidence which cannot be brought to the courthouse.

23. On several occasions the Constitutional Court of the Russian Federation has examined complaints by convicted persons whose requests for leave to appear in civil proceedings had been refused by courts. It has consistently declared the complaints inadmissible, finding that the contested provisions of the Code of Civil Procedure and the Penitentiary Code did not, as such, restrict the convicted person's access to court. It has emphasised, nonetheless, that the convicted person should be able to make submissions to the civil court, either through a representative or in any other way provided by law. If necessary, the hearing may be held at the location where the convicted person is serving his or her sentence or, alternatively, the court hearing the case may instruct the court having territorial jurisdiction over the correctional colony to obtain the applicant's submissions or carry out any other procedural steps (decisions no. 478-O of 16 October 2003, no. 335-O of 14 October 2004, and no. 94-O of 21 February 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

24. The applicant complained that his right to benefit from the presumption of innocence had been breached. He relied on Articles 6 and 8 of the Convention, as well as on Article 14 of the International Covenant on Civil and Political Rights. The Court considers that his complaint falls to be examined under Article 6 § 2 of the Convention, which reads as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. The parties' submissions

25. The Government contested the applicant's argument. They claimed that the presumption of innocence had not been breached in the applicant's

criminal case. The information disseminated by the investigator on the TV show could not be considered libellous because the applicant had been convicted by a final judgment for the acts described by the investigator. By the time that the show had been broadcast, a bill of indictment had been drawn up in respect of the applicant, charging him with the crimes referred to by the investigator, which could not be done until sufficient evidence of the applicant's guilt had been collected. The investigator had had a right to disseminate information about the course of the investigation as he had seen fit. The final judgment of 4 February 2004 established that the investigator had only disseminated that part of the information about the investigation that he had been entitled to disseminate. In sum, they concluded that the applicant's complaint under Article 6 § 2 of the Convention was manifestly ill-founded.

26. The applicant maintained his complaint.

B. The Court's assessment

1. Admissibility

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

2. Merits

28. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308). It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62) but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, § 41; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-43, ECHR 2000-X; and *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II).

29. It has been the Court's consistent approach that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an

opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Böhmer v. Germany*, no. 37568/97, §§ 54 and 56, 3 October 2002, and *Nešťák v. Slovakia*, no. 65559/01, §§ 88 and 89, 27 February 2007).

30. Turning to the facts of the present case, the Court observes that, before the opening of the trial in the applicant's case on charges of murder and robbery, a State television channel broadcast on two occasions a statement by the investigator from the prosecutor's office.

31. As regards the contents of the statement, the Court notes that the investigator stated in affirmative terms that the applicant "had committed ... a murder, connected to the robbery and attack" (see paragraph 9 above). This statement was not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicant but represented, as an established fact, without any qualification or reservation, that he had committed the offences, without even mentioning that he denied it. In addition, the investigator emphasised that the murder in question had been committed while the investigation on other charges against the applicant had been pending, thus portraying him as a hardened criminal.

32. The Court considers that this statement by the public official amounted to a declaration of the applicant's guilt and prejudged the assessment of the facts by the competent judicial authority. Given that the investigator represented the prosecuting authorities when interviewed, he should have exercised particular caution in his choice of words when describing the criminal proceedings pending against the applicant (see, *mutatis mutandis*, *Khuzhin and Others v. Russia*, no. 13470/02, § 96, 23 October 2008). The Court does not share the Government's view that the applicant's subsequent conviction could have been of any significance in this respect. Therefore, it considers that the investigator's statements must have encouraged the public to consider the applicant a murderer before he had been proved guilty according to law. Accordingly, the Court finds that there was a breach of the presumption of innocence with regard to the applicant.

33. There has therefore been a violation of Article 6 § 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that the first-instance and appeal hearings in his defamation case had been held in his absence and that the court proceedings had thus been generally unfair. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law...

A. The parties' submissions

35. The Government contested that argument. They claimed that the applicant had been present at the hearing of 13 June 2001. Furthermore, the Constitutional Court did not find that the absence of a convicted person at a hearing in a civil case instituted on his or her request violated the Constitution. The applicant's right to equality of arms had not been breached because he had presented his arguments in writing and the domestic courts had meticulously examined them. The Government also claimed that the applicant had not requested the domestic authorities to reopen the civil proceedings because of newly discovered circumstances and thus had failed to exhaust effective domestic remedies.

36. The applicant maintained his complaint.

B. The Court's assessment

1. Admissibility

37. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII). The Court further reiterates that the domestic remedies must be "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR-XI).

38. In the present case, the Government vaguely asserted that the applicant could have applied for a reopening of the civil proceedings in his defamation case in the context of exhaustion of domestic remedies. The Court observes that the Government have not indicated which facts, in their

view, could have given grounds for a reopening of the proceedings on the basis of newly discovered circumstances. In particular they did not specify how the remedy referred to could have provided the applicant with adequate redress for the alleged violations of Article 6 § 1. The Court finds that the Government failed to substantiate their claim that it was effective (see, among other authorities, *Kranz v. Poland*, no. 6214/02, § 23, 17 February 2004, and *Skawinska v. Poland* (dec.), no. 42096/98, 4 March 2003).

39. Therefore, the Government's objection as to the non-exhaustion of domestic remedies must be dismissed.

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

2. Merits

41. The Court reiterates that the principle of adversarial proceedings and equality of arms, which is one of the elements of the broader concept of a fair hearing, requires that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000, and *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274). Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 59-60, ECHR 2005-II).

42. The Court further observes that it has previously found a violation of the right to a "public and fair hearing" in a case where a Russian court, after having refused leave to appear to the imprisoned applicants, who had wished to make oral submissions on their defamation claim, failed to consider other legal possibilities for securing their effective participation in the proceedings (see *Khuzhin and Others*, cited above, §§ 53 et seq.). It also found a violation of Article 6 in a case where a Russian court refused leave to appear to an imprisoned applicant who had wished to make oral submissions on his claim that he had been ill-treated by the police. Despite the fact that the applicant in that case was represented by his wife, the Court considered it relevant that his claim had been largely based on his personal experience and that his submissions would therefore have been "an important part of the plaintiff's presentation of the case and virtually the only way to ensure adversarial proceedings" (see *Kovalev v. Russia*, no. 78145/01, § 37, 10 May 2007).

43. The Court also notes that the Russian Code of Civil Procedure provides for the plaintiff's right to appear in person before a civil court hearing his or her claim. However, neither the Code of Civil Procedure nor the Penitentiary Code make special provision for the exercise of that right by individuals who are in custody, whether they are in pre-trial detention or are serving a sentence (see *Khuzhin and Others*, cited above, § 104).

44. The issue of the exercise of procedural rights by detainees in civil proceedings has been examined on several occasions by the Russian Constitutional Court, which has identified several ways in which their rights can be secured (see paragraph 23 above). It has consistently emphasised representation as an appropriate solution in cases where a party cannot appear in person before a civil court. Given the obvious difficulties involved in transporting convicted persons from one location to another, the Court can in principle accept that in cases where the claim is not based on the plaintiff's personal experiences representation of the detainee by an advocate would not be in breach of the principle of equality of arms.

45. Turning to the circumstances of the present case, the Court points out that the district court did not examine the applicant's request for leave to attend the session of 9 July 2003. It merely stated in the judgment that the applicant's absence from the courtroom could be explained by the fact of his criminal conviction (see paragraph 16 above). The Kostroma Regional Court, in turn, emphasised that the applicant had been present at the hearing of 13 June 2001 despite the court not being duty-bound to summon him (see paragraph 19 above).

46. As regards the Government's assertion that the applicant's attendance at the hearing of 13 June 2001 ensured his effective participation in the examination of the case, the Court points out that on that date the district court did not decide on the merits of the defamation claim and merely ordered that the proceedings be stayed. The next court session was held on 9 July 2003. The Court doubts that the district court judge could have clearly recalled the applicant's oral submissions made more than two years before the hearing of 9 July 2003. In such circumstances the Court considers that, although the applicant appeared before the district court on 13 June 2001, the lapse between the two court sessions negated any impact that the applicant's presence in the courtroom on that date may have had on the proceedings.

47. The parties do not dispute that the applicant asked the district court to ensure his presence at the hearing of 9 July 2003. However, nothing in the materials at the Court's disposal suggests that his request was properly addressed and answered. Thus, the applicant was obviously unable to decide on a course of action for the defence of his rights because he had not been notified of the decision refusing him leave to appear (see, *mutatis mutandis*, *Khuzhin and Others*, cited above, § 107).

48. Moreover, the district court made no attempts to explain to the applicant that he had a right to be represented at the hearing either by a lawyer or a layperson of his choosing. The Kostroma Regional Court, in turn, did not deem it necessary to remedy the situation despite the applicant's specific reference to the violation of the principle of equality of arms. Thus, the Court considers that the domestic courts failed to take any measures to secure the applicant's effective participation in the civil proceedings.

49. Lastly, the Court points out that, in order to ensure the applicant's participation in the hearing, it was open to the domestic courts to hold a session in the applicant's correctional facility (see paragraph 22 above). However, it does not appear that this option was ever considered.

50. The Court considers therefore that the applicant was not given an opportunity to present his arguments in a defamation case before a court either in person or through representation, in breach of the equality-of-arms principle.

51. There has thus been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage he had sustained because of the alleged violations of the Convention.

54. The Government considered the amount claimed to be excessive.

55. The Court finds it appropriate to award the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant made no claims as regards the costs and expenses incurred both before the domestic courts and the Court.

57. Accordingly, the Court makes no award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President