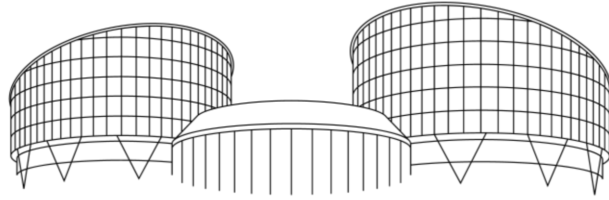

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SAKHNOVSKIY v. RUSSIA

(Application no. 21272/03)

JUDGMENT

STRASBOURG

2 November 2010

This judgment is final but may be subject to editorial revision.

In the case of Sakhnovskiy v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Boštjan M. Zupančič,
Anatoly Kovler,
David Thór Björgvinsson,
Danutė Jočienė,
Dragoljub Popović,
Mark Villiger,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Ann Power, *judges,*
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 20 January 2010 and on 22 September 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 21272/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Sergey Veniaminovich Sakhnovskiy ("the applicant"), on 18 April 2003.

2. In the proceedings before the Chamber the applicant was granted leave for self-representation. In the proceedings before the Grand Chamber the applicant was granted legal aid. He was represented by Ms K. Moskalenko and Ms O. Preobrazhenskaya, lawyers practising in Moscow, and Ms N. Lisman, lawyer practising in Boston (the United States). The Russian Government ("the Government") were initially represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant alleged, in particular, that the criminal proceedings against him had been conducted in violation of Article 6 §§ 1 and 3 (c) of the Convention, claiming that in the appeal proceedings he had not been given free legal assistance and that, moreover, he had been unable to defend himself effectively because he had communicated with the court of appeal by video link.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (former Article 27 § 1 of the Convention, now Article 26) was constituted as provided in Rule 26 § 1.

5. On 15 January 2009 a Chamber of that Section composed of the following judges: Christos Rozakis, Anatoly Kovler, Elisabeth Steiner, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou, assisted by Søren Nielsen, Section Registrar, examined the admissibility and merits of the case (former Article 29 § 3 of the Convention, now Article 29 § 1). The Chamber joined to the merits the Government's objection concerning the applicant's victim status, declared the complaints under Article 6 of the Convention admissible, and held unanimously that there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention in that the applicant had not received effective legal assistance during the appeal proceedings in his criminal case. It made an award in respect of non-pecuniary damage. The remainder of the application was declared inadmissible. Judges Rozakis, Spielmann and Malinverni expressed a joint concurring opinion, which was annexed to the judgment.

6. On 4 May 2009 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted the request on 14 September 2009.

7. The composition of the Grand Chamber was determined according to the provisions of former Article 27 §§ 2 and 3 (now Article 26 §§ 4 and 5) of the Convention and Rule 24 of the Rules of Court. At the final deliberations, Ann Power, substitute judge, replaced Renate Jaeger, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicant and the Government each filed written observations on the merits.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 January 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr N. MIKHAYLOV, Deputy Head of the Office of the Representative of the Russian Federation, *Agent*,
Ms T. KOROLKOVA,
Ms Y. TSIMBALOVA, *Advisers;*

(b) *for the applicant*
Ms K. MOSKALENKO,
Ms N. LISMAN, *Counsel,*
Ms O. PREOBRAZHENSKAYA, *Adviser.*

The Court heard addresses by Ms Moskalenko, Ms Lisman and Mr Mikhaylov.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1979. He is currently serving his sentence in the Novosibirsk Region.

A. First set of the proceedings

11. On 30 April 2001 the applicant was arrested on suspicion of having murdered his father and uncle. The applicant made a written request to be provided with a legal-aid lawyer. On the same day an expert examination of fingerprints and a forensic examination were ordered and on 3 May 2001 the applicant was remanded in custody.

12. On 4 May 2001 legal-aid counsel, Ms P., was appointed to assist the applicant, and he was charged with aggravated murder on 10 May 2001.

13. From May to September 2001 a number of expert examinations were carried out. Subsequently the applicant received copies of orders for such examinations. He signed each of them confirming their receipt and indicating that he had no comments or requests.

14. On 30 September 2001 the detention order was lifted and replaced with an undertaking not to leave his place of residence.

15. In October 2001 the applicant's former cellmate in the detention facility, Mr Zh., testified that the applicant had told him in detail how he had murdered his father and another man.

16. On an unknown date the applicant's friend, Mr R., gave a witness statement alleging that the applicant had asked him to murder his father and that when R. refused the applicant seemingly intended to do it himself.

17. On 5 November 2001 the applicant was again remanded in custody.

18. On 20 December 2001 the Novosibirskiy Regional Court examined the criminal charges against the applicant. The applicant pleaded not guilty. The court examined seventeen witnesses including Zh. and R., and found the applicant guilty of the murder of two persons, sentencing him to

eighteen years' imprisonment. In its judgment the court referred to witness statements, forensic reports and extensive material evidence.

19. The applicant and his lawyer appealed, alleging that Zh. and R. had given their statements under pressure from the police and claiming that the investigation had been vitiated by numerous violations of the applicant's defence rights. They also complained that they had received the expert examination orders belatedly.

20. On 12 May and 29 July 2002 the applicant requested to be assigned another lawyer to represent him in the appeal proceedings because Ms P. was unable to attend the hearing, as she was already engaged in another trial.

21. On an unknown date the applicant was informed that his participation in the appeal hearing would be ensured by video link. On 26 and 30 July 2002 he requested leave to attend the appeal proceedings in person because he did not consider that the video link would provide him with an adequate opportunity to participate in the hearing.

22. On 16 October 2002 the Supreme Court of the Russian Federation ordered the Moscow IZ-77/3 detention centre to ensure the applicant's participation in the appeal hearing, which was to take place on 31 October 2002, by video link.

23. On 31 October 2002 the Supreme Court of the Russian Federation examined the applicant's appeal. The applicant participated in the proceedings by video link. No defence counsel attended the hearing. The court dismissed the applicant's appeal, having found no proof that the testimony of Zh. and R. was false. As regards the alleged breach of his defence rights, the court found this to be unsubstantiated.

24. In the following months the applicant filed several supervisory review complaints. In letters of 24 April and 19 November 2003 the Novosibirsk Prosecutor's Office and the General Prosecutor's Office informed the applicant that they refused to entertain his complaints. The Novosibirsk Prosecutor's Office noted, in particular, that the applicant's right to take part in the appeal proceedings had been fully respected. On 2 July 2003 Judge R. of the Supreme Court refused to open supervisory review proceedings on the applicant's complaint. That decision was confirmed by the President of the Supreme Court on 5 December 2003. On 4 February 2004 another supervisory-review complaint by the applicant was returned without examination, with reference to the earlier decisions on that matter.

B. Supervisory review of the case and second set of the proceedings

25. On 26 March 2007 the Court decided to communicate the application to the Russian Government. On 4 July 2007 the Presidium of the Supreme Court granted an application for supervisory review by the Deputy

Prosecutor General and quashed the Supreme Court's appeal decision of 31 October 2002. The Presidium found that the applicant's right to legal assistance had been violated in the appeal hearing and remitted the case for a fresh examination before the appellate court.

26. The applicant requested to take part in the appeal hearing in person. On 10 August 2007 the Supreme Court, sitting as a bench of three judges, granted him leave to attend in person and ordered the applicant's temporary transfer from the prison in the Novosibirsk Region to a detention facility in Novosibirsk (over 3,000 km from Moscow), apparently to allow him to use the video link.

27. On 20 August 2007 the applicant made a new statement of appeal. He requested the Supreme Court to examine his appeal on the basis of this new statement alone and also requested leave to attend the appeal hearing in person rather than by video link.

28. On 29 November 2007 the Supreme Court, sitting in Moscow, examined the case. First, it considered the applicant's requests of 20 August 2007. In a separate decision on procedure it found that there were no grounds to accept the applicant's new statement of appeal and decided to examine the case on the basis of the statement by the applicant's former counsel, Ms P., from 2002. It also rejected the applicant's request to attend in person, finding that the video link would be sufficient to ensure that the applicant could follow the proceedings and make objections or other submissions, and that this form of participation would be no less effective than if he was personally present in the courtroom. The Supreme Court then introduced the applicant to Ms A., his new legal-aid counsel who was present in the Supreme Court's courtroom and then allowed them fifteen minutes of confidential communication by video link before the start of the hearing. All persons, both in the courtroom and in the detention facility, left the rooms.

29. The applicant rejected the assistance of Ms A. on the grounds that he needed to meet his counsel in person. The Supreme Court, having noted that the applicant did not rely on any divergence with Ms A. in his defence, did not request her replacement by another legal-aid lawyer, did not accept the Supreme Court's proposal to retain private counsel of his choosing and, taking into account the quashing of the previous appeal decision on the grounds of a lack of legal assistance, rejected the applicant's objection to the counsel's assistance. Accordingly, Ms A. represented the applicant in the appeal hearing.

30. On the same day the Supreme Court examined the merits of the case. It upheld the judgment of the Novosibirsk Regional Court of 20 December 2001, making one correction to the text and excluding one piece of evidence. The substantive findings and the applicant's sentence remained unchanged.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

31. Article 51 of the Code of Criminal Procedure of the Russian Federation (in force from 1 July 2002) provides for mandatory legal representation if the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty. Unless counsel is retained by the accused, it is the responsibility of the investigator, prosecutor or the court to appoint legal-aid counsel. Article 52 of the Code provides that the accused can waive his right to legal assistance, but such waiver must be established in the written form. The waiver can be revoked at any moment.

32. Article 373 of the Code provides that the appellate court (*суд кассационной инстанции*) examines appeals (*кассационные жалобы*) with a view to verifying the lawfulness, validity and fairness of judgments. Under Article 377 §§ 4 and 5 of the Code, it may directly examine evidence, including additional material submitted by parties.

33. Article 402 of the Code ("Appeal against judgments, decisions and rulings which have come into force") stipulates as follows:

> "1. Defendants who have been convicted or acquitted, ... and the public prosecutor shall be entitled to request review of court judgments ... which have come into force in accordance with the procedure set out in the present Chapter.
>
> 2. The public prosecutor's request shall be termed a supervisory-review application (*представление*). Other parties' requests shall be termed supervisory-review complaints (*жалоба*)."

34. Article 406 of the Code ("Examination of supervisory-review complaints or applications") stipulates as follows:

> "1. A supervisory-review complaint or application shall be examined by a supervisory-review court within 30 days of being lodged.
>
> 2. The judge who examines the supervisory-review complaint or application may, where necessary, obtain ... any criminal case file ...
>
> 3. After examining the supervisory-review complaint or application, the judge shall decide as follows: either
>
> (i) to dismiss the supervisory-review complaint or application; or,
>
> (ii) to institute supervisory-review proceedings and to pass the supervisory-review complaint or application for consideration to the supervisory-review court ...
>
> 4. The President of the [competent] court may decline to accept the judge's decision to dismiss the supervisory-review complaint or application. In this case he shall set aside this decision and give a decision according to paragraph 3 (ii) [above]."

35. Article 412 of the Code ("Lodging of new supervisory-review complaints or applications") stipulates as follows:

> “1. It is forbidden to lodge new supervisory-review complaints or applications with a court which has already dismissed such complaints or applications.
>
> 2. Where an earlier judgment, decision or ruling has been quashed on appeal or under the supervisory-review procedure, it is possible to lodge a supervisory-review complaint or application against it in accordance with the rules of the present Chapter, irrespective of the reasons why the original judgment, decision or ruling was quashed.”

Article 413 of the Code, setting out the procedure for re-opening of criminal cases, reads, in so far as relevant, as follows:

> “1. Court judgments and decisions which became final should be quashed and proceedings in a criminal case should be re-opened due to new or newly discovered circumstances.
>
> ...
>
> 4. New circumstances are:
>
> ...
>
> (2) a violation of a provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms committed by a court of the Russian Federation during examination of a criminal case and established by the European Court of Human Rights, pertaining to:
>
> (a) application of a federal law which runs contrary to provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
>
> (b) other violations of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms;
>
> ....”

B. Case-law of the Constitutional Court and of the Supreme Court of Russia

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

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

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

38. On 18 December 2003 the Constitutional Court of Russia dismissed a constitutional complaint by Mr R. as inadmissible. In its ruling (*определение*) the Constitutional Court held *inter alia* that Article 51 of the Code of Criminal Procedure, which defined situations where participation of a defence lawyer in the criminal proceedings was mandatory, also applied to the proceedings before the court of appeal.

39. In a number of cases (decisions of 13 October 2004 and 26 January, 9 February, 6 April, 15 June and 21 December 2005, 24 May and 18 October 2006, 17 January 2007, 3 September and 15 October 2008) the Presidium of the Supreme Court of the Russian Federation quashed judgments of appeal courts and remitted cases for fresh consideration on the ground that the courts had failed to secure the presence of defence counsel in the appeal proceedings, although it was obligatory for the accused to be legally represented. That approach was also confirmed by the Presidium of the Supreme Court in its report concerning cases adopted in the third quarter of 2005 (Decree of 23 November 2005) and by the Decree of the Plenary of the Supreme Court of 23 December 2008, as amended on 30 June 2009. In the later document the Supreme Court emphasised that the accused could waive his right to a lawyer only in writing, and that the court was not bound by that waiver.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Concerning the alleged non-exhaustion of domestic remedies

40. In their request for referral the Government put forward two preliminary objections. The Government maintained that the applicant had failed to exhaust domestic remedies as regards his complaint about the second set of the appeal proceedings. In particular, he had not lodged an application for supervisory review against the judgment of 29 November 2007. In support of that position the Government referred to the decisions of the Constitutional Court of Russia and of the Presidium of the Supreme Court of Russia in other cases where legal assistance had been denied to defendants at the appeal stage (see paragraphs 38 - 39 above).

41. The applicant argued that the pursuit of that remedy (supervisory review) was a virtually interminable process and for that reason this Court had not considered it to be an “effective remedy”. Further, he indicated that his own efforts to obtain supervisory review of the first judgment (that of 2002) had been futile until such time as the Prosecutor General's office had

felt compelled to intervene following notification that the applicant had turned to this Court for redress.

42. The Court confirms that it has consistently refused to recognise a supervisory review appeal as an "effective remedy" for the purposes of Article 35 of the Convention (see *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts); *Shulepov v. Russia*, no. 15435/03, § 23, 26 June 2008; *Adzhigovich v. Russia*, no. 23202/05, § 21, 8 October 2009; and *Shilbergs v. Russia*, no. 20075/03, § 118, 17 December 2009). That approach is based to a large extent on the procedural particularity of the supervisory review in Russian criminal procedure, which does not establish any time-limits for bringing such an action. In *Berdzenishvili* the Court noted that, under the Code of Criminal Procedure supervisory-review appeals could be lodged at any time after a judgment became enforceable, even years later. The Court concluded that "if the supervisory-review procedure under [that Code] were considered a remedy to be exhausted, the uncertainty thereby created would render nugatory the six-month rule".

43. The domestic case-law referred to by the Government cannot support their assertion that a supervisory-review appeal would be an effective remedy. Even if it has worked in some other cases, it still has procedural features which have led the Court to characterise it as an extraordinary remedy and not part of the normal exhaustion process. None of the decisions referred to by the Government could have led to the automatic reopening of the applicant's case; access to the Presidium of the Supreme Court would still depend on the discretion of judges or prosecution officials and would remain, as the applicant put it, a "virtually interminable process" owing to the absence of time-limits.

44. Finally, the Court notes that the problem addressed by the Constitutional Court and the Presidium of the Supreme Court was not the same as the matter at issue in the present case. The decisions cited by the Government concerned the refusal to appoint a legal-aid lawyer in appeal proceedings. The Court points out that the Government's plea of non-exhaustion concerned the second set of the appeal proceedings, in which the applicant had been given a lawyer to represent him. The central question raised before this Court in respect of the hearing of 29 November 2007 was not the absence of the lawyer, but rather the absence of effective legal assistance by her. None of the cases cited by the Government concerned that issue and could not therefore be relied upon by the applicant in his supervisory-review complaints.

45. In sum, the Court concludes that a supervisory-review appeal against the judgment of 29 November 2007 was not an effective remedy for the purposes of exhaustion under Article 35 § 1 of the Convention. The Government's objection should therefore be dismissed.

B. Concerning the applicant's victim status

46. The Government claimed, as they had already done in the proceedings before the Chamber, that owing to the reopening of the applicant's case in 2007 the applicant had lost his victim status in respect of his original complaint. Accordingly, any subsequent development should not fall within the scope of the present proceedings and constituted a new case.

47. The Grand Chamber notes that this objection was examined by the Chamber in its judgment of 15 January 2009. The Chamber considered that it was closely linked to the merits of the applicant's complaints under Article 6 of the Convention. The Grand Chamber sees no reason to depart from this approach. Indeed, the assessment of the victim status largely depends on the legal characterisation of the second set of the proceedings as a separate case or, alternatively, as part of the same criminal case. This appears to be the principal subject of controversy. The Court thus prefers to join the Government's objection concerning victim status to the merits of the case and examine them together.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

48. The applicant complained that the criminal proceedings against him had been unfair. In particular, he complained that at the hearing before the appellate court in 2002 he had not been provided with legal assistance and that his only contact with the courtroom was by video link. The applicant further complained that in the new appeal proceedings in 2007, following the quashing of the earlier judgment, his rights had not been restored. In particular, he had not been brought to the courtroom in person, despite his requests, and he had been deprived of effective communication with court-appointed legal counsel. The applicant relied on Article 6 §§ 1 and 3 (c) of the Convention, which reads as follows:

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

A. The Chamber judgment

49. The core findings of the Chamber in its judgment of 15 January 2009 can be summarised as follows. It had been acknowledged by the Government and affirmed by the Chamber that the first set of proceedings

that ended on 31 October 2002 fell short of the guarantees relating to legal assistance (§ 47 of the judgment). Further, as regards the appeal hearing of 29 November 2007, the Chamber found that "the lack of personal contact with the applicant at the hearing and the absence of any discussion with him in advance of the hearing, combined with the fact that she had to plead the case on the basis of the points of appeal lodged five years earlier by another lawyer, reduced Ms A.'s appearance at the appeal hearing to a mere formality" (§ 50). The applicant's dissatisfaction with the manner in which his legal assistance had been organised was made sufficiently clear to the Supreme Court, and was reasonable and justified in the circumstances. The Chamber found that the applicant could still claim to be a victim within the meaning of Article 34 of the Convention, since "the Supreme Court [had] failed to ensure the applicant's effective legal representation in the appeal hearing that took place on 29 November 2007, as it had in the earlier proceedings" (§ 52). In the operative part of the judgment the Chamber held that "there [had] been a violation of Article 6 §§ 1 and 3 (c) of the Convention in that the applicant [had] not receive[d] effective legal assistance during the appeal proceedings".

B. The parties' submissions

50. The parties observations submitted in writing and presented orally during the hearing of 20 January 2010 can be summarised as follows:

1. The Government

(a) Loss of victim status

51. The Government's central argument was that the quashing of the judgment and the very fact of the retrial were *per se* "sufficient redress" for the violation complained of in the original application. In support of this they referred to a number of Russian cases: *Ponushkov v. Russia*, no. 30209/04, 6 November 2008; *Ryabov v. Russia*, no. 3896/04, 31 January 2008; *Davidchuk v. Russia* (dec.), no. 37041/03, 1 April 2008; *Mikhail Brinzevich v. Russia* (dec.), no. 6822/04, 11 December 2007; *Babunidze v. Russia* (dec.), no. 3040/03, 15 May 2007; *Fedosov v. Russia* (dec.), no. 42237/02, 25 January 2007; *Nikishina v. Russia* (dec.), no. 45665/99, 12 September 2000; and *Wong v. Luxemburg* (dec.), no. 38871/02, 30 August 2005.

52. As to the second set of the proceedings (the hearing of 29 November 2007), the Government claimed that even if the circumstances complained of amounted to a violation of Article 6, these new events bore no relation to the present case and should have been presented by the applicant as a new application and communicated to the Government as a separate case. The

Government claimed that they had not had the opportunity to comment on those new submissions.

(b) Waiver of legal assistance

53. The Government maintained that the applicant's rights under Article 6 § 3 (c) had not been breached in the appeal hearing of 29 November 2007. The State could not be held responsible for every shortcoming on the part of counsel appointed for legal-aid purposes. The Government suggested that the applicant should bear the consequences of the conduct of Ms A. (the court-appointed lawyer) in the proceedings, namely her failure to ask in writing for a replacement lawyer or for an adjournment. The Government further claimed that the applicant had not requested a personal meeting with his lawyer in his additional statement of appeal or the additional motions he lodged with the Supreme Court before the start of the hearing. He had not asked the Supreme Court to replace the counsel, neither had he expressed the wish to be represented by counsel of his own choosing. The Government appeared to claim that in order to have the benefit of the legal-aid scheme he should have asked for a replacement lawyer whom he trusted. By failing to do so the applicant had waived his right to legal assistance.

(c) Effective legal assistance

54. The Government claimed that Ms A. herself had not considered that a personal meeting between her and the applicant had been necessary. She had taken her appointment quite seriously: she had studied the case file in advance, and had consulted with the applicant in private before the start of the hearing. She had not asked for a face-to-face meeting with the applicant; however, the authorities could not tell lawyers how to defend their clients, and whether or not a personal meeting was necessary.

55. The Government further maintained that the applicant's claim was far-fetched. Ms A. had acquired sufficient knowledge of the case, and the applicant had not disagreed with her position on legal matters. To the Supreme Court he had declared that he had wished to know her "as a person". However, "personal relations were not of great importance to effective and adequate legal aid". Ms A. had all the necessary legal skills to defend the applicant.

(d) Personal attendance

56. The last arguments raised by the Government concerned the hearing of 29 November 2007 as such. The Government acknowledged the importance of the right of the accused to participate effectively in his defence. However, they indicated that the Convention and the Court's case-law did not indicate the manner in which that right should be exercised. Participation in the proceedings through a video link was an acceptable form of participation (see *Marcello Viola v. Italy*, no. 45106/04, ECHR 2006-XI (extracts), and *Golubev v. Russia* (dec.), no. 26260/02, 9 November 2006). The transportation of a detainee from the Novosibirsk region to Moscow is a long and costly procedure; in addition, it would have caused the applicant a lot of inconvenience. The Government further claimed that the applicant had not complained about the quality of the video communication, and that it had not limited his ability to participate in the proceedings in any other way.

2. The applicant

(a) Loss of victim status

57. According to the applicant, the Government's contention that the Court should declare the supervisory-review decision a complete and adequate remedy *per se*, without any consideration of subsequent rehearing, was in direct contradiction with the principles enunciated in the Court's case-law. An upper court decision ordering a rehearing represented, at most, a promise of a correction, but the result – actual correction – could be obtained only in the subsequent proceedings.

58. In the applicant's view, the Government's reading of the Court's case-law was incorrect. None of the cases cited by the Government supported their proposition that an order for rehearing was in itself sufficient redress. On the contrary, the judgments or decisions in five of the above cases (*Ponushkov*, *Fedosov*, *Babunidze*, *Gavrilova* and *Wong*) were at odds with the Government's position, while the remaining three (*Ryabov*, *Davidchuk* and *Nikishina*) were so distinguishable from the present case on their facts as to be altogether inapposite.

59. The Chamber was correct in treating the second set of the proceedings as part of the domestic redress for the acknowledged breach of his right to a fair trial in the initial proceedings. This was compatible with the Court's previous case-law, in particular in the case of *Scordino*, where the Grand Chamber held that "[t]he issue as to whether a person [might] still claim to be the victim of an alleged violation of the Convention essentially entail[ed] on the part of the Court an *ex post facto* examination of his or her situation" including, in particular, an examination of the "effectiveness of the remedy" afforded by the national authorities (see *Scordino v. Italy* (*no. 1*) [GC], no. 36813/97, §§ 180-182, ECHR 2006-V). The Court's *ex*

post facto examination of the situation had to focus on the practical results of the remedy's actual application. Thus, for example, where the claimed remedy for the excessive length of judicial proceedings was a subsequent action for compensation, the Court had to determine not only the availability of such an action under the domestic law, but also the timeliness of the adjudication of that action because "excessive delays in an action for compensation [would] render the remedy inadequate" (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 86, ECHR 2006-V).

60. According to the applicant, the Government's position in the case – that the applicant's complaints about the rehearing could not be considered within the context of the pending case but only on a new application – was essentially a way of evading this Court's review of the initial and repeated violations of the applicant's rights. Were the applicant to lodge a new application concerning the rehearing, the Government would insist on a new round of steps to exhaust domestic remedies and a new "opportunity to examine the applicant's allegations and remedy the violation of the rights guaranteed by the Convention". Such an opportunity could then be used to obtain another decision identical to the decision of the Presidium of 4 July 2007, which the Government would again present as *per se* ending the applicant's victim status, and this cycle could continue *ad infinitum*.

(b) Waiver of legal assistance

61. The applicant denied that he had waived any of his rights under Article 6. There was no evidence that the applicant had expressly decided to forego any of the rights at issue or had engaged in any conduct from which such a waiver could be fairly implied. On the contrary, he had made express written requests to be present during the appeal proceedings and to have a meaningful opportunity to meet his lawyer in a private setting, and had informed the Supreme Court of disruptions in the video link. The applicant concluded that the responsibility for the fact that his rights had not been observed in connection with the rehearing lay solely with the authorities.

(c) Effective legal assistance

62. The applicant claimed that, notwithstanding the fact that the Supreme Court had appointed a defence lawyer to represent him at the rehearing, it had done so in a manner that had made it impossible for the lawyer to provide effective legal assistance. The applicant had formed the impression that the participation of Ms A. in the proceedings had been especially ineffective since she had been only partially familiar with the case.

63. The fact that the applicant's legal-aid counsel was appointed and introduced to him at the last minute, combined with the fact that they had been given only fifteen minutes to communicate by video link, had precluded any possibility of her serving as his defence lawyer other than

nominally. That was why the Supreme Court's suggestion that the applicant should pick a different lawyer, in response to his objection, had been quite beside the point: he had not had any objection to Ms A. personally, even though he had not known her previously, but had pointed to the fact that they had been deprived of any opportunity to form even a semblance of a meaningful lawyer-client working relationship.

64. Two further facts had supported the Chamber's conclusion, in addition to those summarised in its judgment. First, given the setting in which he had had to converse with his lawyer, the applicant had not felt he could have a frank and open discussion with her. A comparison by the Court of that arrangement with such alternatives as a telephone line secured against any attempt at interception (see *Marcello Viola*, cited above, § 41) had revealed that the applicant's perception had been quite understandable. Second, since the applicant had not had any contact with his lawyer prior to the rehearing, he had been left to his own devices with respect to pre-hearing motions, all of which the Supreme Court had ultimately denied. Given that the reason the case had been sent back to the Supreme Court for a rehearing had been its violation of the applicant's right to legal representation at the initial hearing, and in view of the seriousness of the charges to be considered at the rehearing (double murder), this had surely been a case where the Supreme Court should have used its best endeavours to ensure that the applicant had effective representation.

(d) Personal attendance

65. The applicant alleged that he had not been afforded effective legal representation and an opportunity to confer privately with counsel, his ability to actively participate in and follow the proceedings in the courtroom had been impaired by technical disruptions in the video transmission. He had sought to disprove before the appeal court the evidence of certain witnesses at his original trial, and had thereby raised the issue of his own credibility, so his personal appearance was particularly crucial in such circumstances. Finally, he had not had an opportunity to present his case under the same conditions as the prosecution: the prosecutor had been present in the courtroom, whereas the applicant had participated via a video link.

C. The Court's analysis

1. Whether the applicant lost victim status after the reopening of proceedings

(a) General principles of the Court's case-law: the notion of "redress"

66. The Court has developed two lines of case-law regarding the victim status of an applicant under Article 34 of the Convention. The first line

concerns the nature and extent of the conditions for claiming to be a victim of a violation of the Convention when lodging an application with the Court, namely whether a person can be regarded as being directly affected by the impugned measure (see, among other authorities, *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008-...). The second line of cases relates to the question whether, where an alleged violation has already taken place, subsequent events can give rise to a loss of victim status. The Court would emphasise that the two lines of case-law are independent of each other (see *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], no. 56672/00, ECHR 2004-IV). Having and losing victim status are two different situations, although they are both based on the notion of "victim".

67. It is a well-established principle of the Court's case-law that an applicant may lose his victim status if two conditions are met: first, the authorities must have acknowledged, either expressly or in substance, the breach of the Convention and, second, they must have afforded redress for it (see, among many other authorities, *Scordino*, cited above, § 180). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Arat v. Turkey*, no. 10309/03, § 46, 10 November 2009). The alleged loss of the applicant's victim status involves an examination of the nature of the right in issue, the reasons advanced by the national authorities in their decision and the persistence of adverse consequences for the applicant after the decision (see *Freimanis and Līdums v. Latvia*, nos. 73443/01 and 74860/01, § 68, 9 February 2006).

68. It is clear that in the present case the authorities acknowledged the original violation of the applicant's rights under Article 6 of the Convention, at least as regards the lack of appropriate legal aid in the appeal proceedings of 2002. Therefore, the Court should concentrate on the question whether they complied with the obligation to "redress" it.

69. In *Scordino* (cited above) the Grand Chamber formulated the requirements for redress in respect of excessively lengthy civil proceedings. In particular, the Court held that excessive delays in an action for compensation may render the remedy inadequate (§ 195). Further, the access to a compensatory remedy should not be hindered by high court fees (§ 201). The Court also examined whether the monetary redress was sufficient in quantitative terms.

70. The Court notes that the above findings concerned a compensatory remedy for a breach of a very specific guarantee of Article 6 § 1 – the "reasonable time" requirement. Breach of other provisions of the Convention may require other kinds of "redress", to which the logic of *Scordino* does not necessarily apply. The Court also reiterates in this

connection that different types of remedy may redress the violation appropriately (see, *mutatis mutandis,* the Court's analysis under Article 13 in *Kudła v. Poland* [GC], no. 30210/96, §§ 154-55, ECHR 2000-XI). The appropriateness and sufficiency of redress depend on the nature of the violation complained of by the applicant.

71. In the context of the criminal-limb guarantees of Article 6, full acquittal or discontinuation of the proceedings against the applicant have been regarded as appropriate redress (see, for example, *Carboni v. Italy* (dec.), no. 51554/99, 12 February 2004; *Üstün v. Turkey*, no. 37685/02, 10 May 2007, § 24; and *Oleksy v. Poland* (dec.), no. 1379/06, 16 June 2009). However, this is the case when an applicant is no longer affected and has been relieved of any effects to his disadvantage. An applicant can maintain his victim status if he has already served all or part of his sentence and no compensation has been offered or is available for the alleged violation (see, for example, *Hooper v. the United Kingdom* (dec.), no. 42317/98, 21 October 2003; *Menesheva v. Russia* (dec.), no. 59261/00, 15 January 2004; and *Arat*, cited above, §§ 46-47). In the case of *Freimanis and Līdums*, cited above, which concerned the question whether the case had been heard by a "tribunal established by law", the Court took into account the persistence of adverse consequences for the applicants after a decision to quash a conviction and remit the case for fresh consideration (§ 68). The Court noted (in §§ 71-72) that the applicants did not complain about the unfairness of the new set of the proceedings, and the case was re-examined by a newly composed tribunal, which had this time been created in accordance with the law. In such circumstances the Court concluded that the defects of the previous proceedings had been remedied after the reopening.

(b) The Court's case-law in Russian cases

72. There are two groups of cases concerning Russia which treat the issue of "victim status" in criminal proceedings differently. In the first group, the Court has accepted the reopening of criminal proceedings as a form of redress in itself. Thus, the Government referred to the case of *Ponushkov*, cited above, where the Court had held, in a similar situation, as follows:

> "70. In the instant case, the Presidium of the Supreme Court explicitly acknowledged that the applicant's right to free legal representation at the hearing before the appeal court had been infringed, quashed the appeal judgment of 29 January 2004 and ordered a new appeal hearing.
>
> 71. Therefore, having regard to the contents of the Presidium's decision of 1 March 2006, the Court finds that the national authorities have acknowledged, and then afforded redress for, the alleged breach of the Convention."

A similar line of reasoning was employed by the Court in the case of *Ryabov*, cited above, where it held:

> "51. ... Having regard to the contents of the Presidium's decision of 1 March 2006 and the appeal judgment of 19 July 2006 which indicated that a new trial should be held, the Court finds that the national authorities have acknowledged, and then afforded redress for, the alleged breach of the Convention."

The Court came to this conclusion despite the fact that the proceedings against the applicant were still pending, and there was no certainty that the defect complained of would be remedied during the retrial.

73. The second group of cases is consonant with the findings of the Chamber in the case at hand. For example, the case of *Fedosov*, referred to by the Government in support of their submissions, reflects the Chamber's position in the present case. In that case the Court did take into account the second set of the proceedings:

> "Having regard to the content of the judgment of 28 September 2005 [by the supervisory review instance], the subsequent retrial before the Troitsk Town Court and the mitigation of the sentence, the Court finds that the national authorities have acknowledged, and then afforded redress for the alleged breach of the Convention."

That decision suggests that, besides a retrial compatible with all the requirements of Article 6 the applicant should obtain something more – a mitigation of sentence, for instance.

74. Another case from this group is *Babunidze* (cited above), referred to by both parties. In that case the applicant had complained that he had been unable to attend hearings both before and after the quashing by the Supreme Court of the judgment in a civil case in which he was a defendant. In that case the parties agreed that the Supreme Court had acknowledged the violation of the applicant's rights by the district court's failure to summon him to the hearing of 19 March 2002. However, the applicant argued that in the course of the new examination the district and regional courts had once again failed to provide him with an effective opportunity to participate in the hearings. The Court accepted that the question of redress required the examination of "whether the applicant was provided with an opportunity to participate effectively in the re-examination of his case". Having considered that in the circumstances of the case the applicant had been given ample opportunity to attend the hearings in the fresh set of proceedings, the Court concluded as follows:

> "Therefore, having regard to the content of the Supreme Court's judgment of 14 October 2003 and the subsequent re-examination of the applicant's case during which he had been afforded an effective opportunity to attend hearings and present his arguments, the Court finds that the national authorities have acknowledged, and then afforded redress for, the alleged breach of the Convention which occurred as a result of the authorities' failure to summons the applicant to the hearing of 19 March 2002 ..."

75. The Court observes, against this background, that its case-law concerning the effects of reopening on the applicant's victim status needs to be clarified.

(c) Application to the present case

76. At the outset, the Court reiterates that the European system for the protection of human rights is founded on the principle of subsidiarity. The States should be given a chance to put right past violations before the complaint is examined by the Court; however, “the principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies” (see *Giuseppe Mostacciuolo v. Italy (no. 2)* [GC], no. 65102/01, § 81, 29 March 2006). Moreover, the principle of subsidiarity should not be construed so as to allow the States to evade the Court's jurisdiction.

77. Indeed, a criminal defendant cannot claim to be a victim of a violation of Article 6 § 3 before he is convicted (see *X v. the United Kingdom*, no. 8083/77, Commission decision of 13 March 1980, Decisions and Reports 19, p. 223; *Eğinlioğlu v. Turkey*, no. 31312/96, Commission decision of 21 October 1998, unreported; *Osmanov and Husseinov v. Bulgaria* (dec.), nos. 54178/00 and 59901/00, 4 September 2003; and *Witkowski v Poland* (dec.), no. 53804/00, 3 February 2003). This is also true in respect of most of the guarantees of Article 6 § 1 of the Convention (with some exceptions concerning, for instance, the requirement of reasonable length of the proceedings, access to court, etc. – see, for example, *Polonskiy v. Russia*, no. 30033/05, §§ 160 et seq., 19 March 2009; *Kart v. Turkey* [GC], no. 8917/05, §§ 71 et seq., 3 December 2009; see also, in the context of civil proceedings, *Mihajlović v. Croatia*, no. 21752/02, §§ 26 et seq., 7 July 2005). It may appear that the reopening of the case “returns” the applicant to the situation existing before he became a victim and restores the *status quo ante*.

78. However, in the opinion of the Court this approach is not appropriate in the circumstances of the present case. Acquiring and losing victim status are not necessarily governed by the same rules (see paragraph 66 above). It is clear that the applicant in the present case had become a victim before he lodged the application with the Court. It was for the State to provide the applicant with adequate and sufficient redress in respect of this complaint in a timely manner, that is to say before the Court examined the case (see *mutatis mutandis* the criteria established in the *Scordino* case, cited in paragraph 69 above).

79. In the Court's opinion, the mere reopening of the case was not sufficient to deprive the applicant of his victim status. This view is closely linked to the particular features of the Russian system of supervisory review, as it was at the material time (see paragraphs 42-45 above). In the first place, there were no limits as to the number of times and the circumstances in which the case could be reopened. Second, reopening depended on the discretion of the State prosecutor or judge who decided whether a supervisory-review complaint or application deserved to be examined on the merits. Whether it was a prosecutor lodging an application

for reopening or the president of the court reversing a decision of a judge not to entertain a supervisory-review complaint, the decision might be taken *proprio motu*. This would make it possible for the respondent State to evade the Court's substantive review by continuously reopening the proceedings.

80. Such a possibility was not only theoretical. In a number of Russian cases domestic criminal proceedings were reopened shortly after the communication of a case to the Government, but many months or even years after the closure of the original case – see, among other examples, the cases of *Zaytsev v. Russia*, no. 22644/02, §§ 9-11, 16 November 2006; *Laryagin and Aristov v. Russia*, nos. 38697/02 and 14711/03, §§ 18-19, 8 January 2009; *Sibgatullin v. Russia*, no. 32165/02, § 13, 23 April 2009; *Baklanov v. Russia* (dec.), no. 68443/01, 6 May 2003; *Mikadze v. Russia* (dec.), no. 52697/99, 3 May 2005; *Gorodnichev v. Russia* (dec.), no. 52058/99, 3 May 2005; *Fedorov v. Russia* (dec.), no. 63997/00, 6 October 2005; *Fedosov,* cited above; and *Makhkyagin v. Russia* (dec.), no. 39537/03, 1 October 2009. Similar examples can be found in the case-law concerning the use of supervisory review in civil cases (see, for instance, *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-IX and follow-up cases). These cases demonstrate a clear link between the communication and the reopening of a case.

81. Further, in certain cases the connection between communication of the case and the reopening has been even more evident. Thus, in the case of *Nurmagomedov v. Russia* ((dec.), no. 30138/02, 16 September 2004) it was not until the European Court intervened that the prosecutor lodged an application for supervisory review of a court's ruling, whereas earlier the same prosecutor had dismissed the applicant's complaint about that very ruling saying that it had been "well-reasoned and lawful". In the case of *Adzhigovich* (cited above, §§ 11 and 12) the applicant's numerous supervisory-review appeals had been rejected several times prior to communication of the case, whereas the same appeals were accepted for examination after the case had been communicated to the respondent Government. Finally, in the present case the applicant's own efforts to obtain supervisory review of the first judgment were futile until such time as the Prosecutor General's office felt compelled to intervene following notification that the applicant had turned to this Court for redress (see paragraphs 24 and 25 above).

82. Against this background the Court has reached the following conclusion. Domestic proceedings are frequently reopened at the instigation of the Russian authorities when they learn that the case has been admitted for examination in Strasbourg. Sometimes it benefits the applicant, in which case the reopening serves a useful purpose. However, given the ease with which the Government uses this procedure, there is also a risk of abuse. If the Court were to accept unconditionally that the mere fact of reopening the proceedings was to have the automatic effect of removing the applicant's

victim status, the respondent State would be capable of thwarting the examination of any pending case by having repeated recourse to supervisory-review proceedings, rather than correcting the past violations by giving the applicant a fair trial.

83. The Court considers that the reopening of proceedings by itself may not automatically be regarded as sufficient redress capable of depriving the applicant of his victim status. To ascertain whether or not the applicant retained his victim status the Court will consider the proceedings as a whole, including the proceedings which followed the reopening. This approach enables a balance to be struck between the principle of subsidiarity and the effectiveness of the Convention mechanism. On the one hand, it allows the States to reopen and examine anew criminal cases in order to put right past violations of Article 6 of the Convention. On the other hand, new proceedings must be conducted expeditiously and in accordance with the guarantees of Article 6 of the Convention. With this approach the supervisory review can no longer be employed as a means of evading the Court's review thereby preserving the effectiveness of the right of individual petition.

84. In sum, the Court finds that the mere reopening of the proceedings by way of supervisory review failed to provide appropriate and sufficient redress for the applicant. He may therefore still claim to be a victim within the meaning of Article 34 of the Convention. The Court therefore rejects the Government's objections under this head. It must now examine whether the hearing of 29 November 2007 was compatible with the requirements of fairness.

2. Whether the case should have been re-communicated to the Government

85. The Government's argument about the loss of victim status by the applicant also had a procedural limb. They claimed that the Chamber should have re-communicated to them the applicant's complaints after it had received information about the second set of the appeal proceedings.

86. The Court observes that the applicant complained about the hearing of 29 November 2007 in his additional pleadings of March 2008. Those pleadings were added by the President of the First Section to the case file for consideration by the Court, and a copy was sent to the Government. The Government were not expressly invited to comment on them; however, nothing prevented them from doing so. The Government had sufficient time to present their additional comments (over nine months), and if the Court had received them, it would certainly have considered them together with the first and second sets of observations submitted by the Government in June and October 2007 respectively.

87. Moreover, it is noted that the information referred to by the applicant in his additional pleadings was well known to the Government and they

could have learnt about it from other sources. In any event, by accepting the Government's request for referral to the Grand Chamber, the Court gave the Government an additional opportunity to present their views on the matter. In that connection, the Grand Chamber reiterates that even after a Chamber has decided to declare a complaint admissible it may, where appropriate, examine issues relating to its admissibility, for example by virtue of Article 35 § 4 *in fine* of the Convention, which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings", and in cases where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII, and *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V). Having regard to the Strasbourg proceedings as a whole, the Court does not consider that the Government have been placed at any disadvantage *vis-à-vis* the applicant. Finally, the Court has an interest in ensuring that the proceedings are not unnecessarily protracted.

88. The Court concludes that the Government were able to present their position on the case in its entirety. It may thus proceed with the examination of the case.

3. Whether the applicant waived his right to legal assistance

89. The Government considered that the applicant had waived his right under Article 6 § 3 (c) of the Convention. It is suggested that Ms A. should be regarded as the applicant's representative from the time of her appointment by the Supreme Court. The Government argued that, as the applicant's representative, Ms A. should have asked for a replacement lawyer or for a private meeting with the applicant, which she had not done. They treated this as an implicit waiver.

90. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007). However, such a waiver must be established unequivocally and must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II).

91. The Court notes that the applicant is a lay person and has no legal training (see, *mutatis mutandis*, *Cooke v. Austria*, no. 25878/94, § 43, 8 February 2000 with further references to *Kremzow v. Austria*, 21 September 1993, Series A no. 268-B). He was unaware of Ms A.'s appointment and eventually refused her services for the very reason that he perceived her participation in the proceedings as a mere formality. He made his position known to the Supreme Court as best he could. The applicant should not be required to suffer the consequences of Ms A.'s passive attitude

when one of the key elements of his complaint is precisely her passivity. Accordingly, the inaction of Ms A. cannot be regarded as a waiver.

92. The Government emphasised that the applicant had refused to accept Ms A.'s services but had not asked to be assigned somebody else as a lawyer. Neither had he asked for additional time to meet the court-appointed lawyer or to find a lawyer of his own choosing. Again, the Court notes that in that context the applicant could not be expected to take procedural steps which normally require some legal knowledge and skills. The applicant did what an ordinary person would do in his situation: he expressed his dissatisfaction with the manner in which legal assistance was organised by the Supreme Court. In such circumstances, the applicant's failure to formulate more specific claims cannot count as a waiver either.

93. The Court, like the Chamber (see § 51 of the judgment), finds that the applicant's conduct, as well as the inaction of Ms A., did not absolve the authorities from their obligation to take further steps to guarantee the effectiveness of his defence.

4. *Whether the applicant received effective legal assistance at the hearing of 29 November 2007*

(a) General principles

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

95. The Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, 24 May 1991, § 30, Series A no. 205). In that connection it must be borne in mind that the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275).

96. A person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing. However, the attendance of the defendant in person does not necessarily take on the same significance for the appeal

hearing. Indeed, even where an appellate court has full jurisdiction to review the case on questions of both fact and law, Article 6 does not always entail a right to be present in person. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant (see *Helmers v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A; *Belziuk v. Poland*, 25 March 1998, § 37, *Reports* 1998-II; *Pobornikoff v. Austria*, no. 28501/95, § 24, 3 October 2000; and *Kucera v. Austria*, no. 40072/98, § 25, 3 October 2002).

97. An accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention (see *Castravet v. Moldova*, no. 23393/05, § 49, 13 March 2007). If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *inter alia* the *Artico* judgment, cited above, § 33).

98. As regards the use of a video link, the Court reiterates that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for (see *Marcello Viola*, cited above).

(b) Application to the present case

99. It is not disputed by the Government that the first hearing before the appellate court (in 2002) fell short of the requirements of Article 6 § 3 (c) of the Convention. However, they claimed that the authorities had done everything in their power to ensure that at the rehearing of the case in 2007 the applicant received legal assistance. Therefore, the Court will concentrate on the second set of the appeal proceedings.

100. The Court observes that the original conviction was quashed by the Presidium of the Supreme Court in 2007 specifically because of the breach of the applicant's right to legal assistance. It is thus clear that for the authorities the case was complex enough to require the assistance of a professional lawyer. Given that, as well as the Court's own assessment of the complexity of the issues raised before the appellate court, the Court concludes that the assistance of a lawyer was essential for the applicant in the second set of the appeal proceedings.

101. The Court has considered the arguments of the Government in support of their position and accepts that Ms A. was a qualified lawyer and

that there was no explicit disagreement between her and the applicant on the substance or strategy of his defence. While it is established that Ms A had read the case file, it is unclear how much time she spent on it and the Government have not submitted any specific information or evidence on this point. She was *a priori* prepared to assist the applicant, and this is, without doubt, a relevant consideration. However, these arguments are not decisive; the Court must consider whether the arrangements for the conduct of the proceedings, and, in particular, for the contact between Ms A. and the applicant, respected the rights of the defence.

102. The Court emphasises that the relationship between the lawyer and his client should be based on mutual trust and understanding. Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained person and his lawyer. Moreover, in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention (see *Kempers v. Austria* (dec.), no. 21842/03, 27 February 1997, or *Lanz v. Austria*, no. 24430/94, § 52, 31 January 2002). Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances.

103. In the present case, the applicant was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing. The Court considers that, given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that Ms A.'s knowledge of the case and legal position were appropriate.

104. Moreover, it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the *Marcello Viola* case (cited above, §§ 41 and 75) the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A.

105. In addition, in the *Marcello Viola* case (cited above), counsel for the defendant had also been able to send a replacement to the video-conference room or, conversely, attend on his client personally and entrust the lawyer replacing him with his client's defence before the court. A similar conclusion was reached in the case of *Golubev*, cited above, where the Court did not find a violation of Article 6 on account of a hearing via video link because, *inter alia*, “the applicant's two lawyers were present at the appellate hearing [in the hearing room] and could have supported or expanded the arguments of the defence ... The applicant was able to consult

with his lawyer in private before the hearing. Furthermore, since the applicant had two lawyers, he could choose one of them to assist him in the detention centre during the hearing and to consult with him in private.” None of the options described above was available to the applicant in the case at hand. Instead, the applicant was expected either to accept a lawyer he had just been introduced to, or to continue without a lawyer.

106. The Court notes that the Government did not explain why it was impossible to make different arrangements for the applicant's legal assistance. It accepts that transporting the applicant from Novosibirsk to Moscow for a meeting with his lawyer would have been a lengthy and costly operation (see paragraph 26 above). While emphasising the central importance of an effective legal assistance, the Court must examine whether in view of this particular geographic obstacle the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant's rights. The Court notes in this respect that nothing prevented the authorities from organising at least a telephone conversation between the applicant and Ms A. more in advance of the hearing. Nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention centre and have been with him during the hearing. Furthermore, it is unclear why the Supreme Court did not confer the representation of the applicant to the lawyer who had already defended him before the first-instance court and prepared the original statement of appeal. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with Ms A.

107. The Court concludes that the arrangements made by the Supreme Court were insufficient and did not secure effective legal assistance to the applicant during the second set of the appeal proceedings.

5. Whether the applicant's participation in the case via video link was compatible with Article 6 § 1 of the Convention

108. The applicant complained that he had been unable to present his case adequately because he had participated in the hearing before the court of appeal by video link and not personally. The Court considers that, in view of the above findings under Article 6 § 3 (c) taken together with Article 6 § 1 of the Convention, it is not necessary to examine separately the question whether in the circumstances of this case the applicant's participation in the appeal hearing by video link complied with Article 6 (see, *mutatis mutandis*, *Özcan Çolak v. Turkey*, no. 30235/03, §§ 51-53, 6 October 2009).

6. Conclusion

109. The Court concludes that the proceedings of 29 November 2007 fell short of the requirements of Article 6 § 3 (c) of the Convention, taken in conjunction with Article 6 § 1. Accordingly, the second set of the appeal proceedings failed to cure the defects of the first set: neither in 2002 nor in 2007 was the applicant able to enjoy effective legal assistance. The Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) thereof in the proceedings taken as a whole, which ended with the judgment of 29 November 2007.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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.”

111. Under the head of non-pecuniary damage, the applicant claimed 5,000 euros (EUR). The applicant also claimed EUR 300 for the costs and expenses incurred in the proceedings before the Chamber. The Government considered that the claim for non-pecuniary damage was excessive and unsubstantiated. As to the costs and expenses, the Government contested the claims, indicating that the applicant had submitted receipts only in respect of 4,189 Russian roubles (RUB).

112. The Court firstly notes that in the present case it has found a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) thereof. Inasmuch as the applicant's claim relates to the finding of that violation, the Court reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 35 above).

113. As to the applicant's claims in respect of non-pecuniary damage, the Grand Chamber fully endorses the Chamber's conclusion under Article 41 of the Convention: thus it decides that the applicant sustained non-pecuniary damage which would not be adequately compensated by the finding of a violation alone. Making its assessment on an equitable basis, it

awards the applicant EUR 2,000 under this head with EUR 120 for costs and expenses, plus any tax that may be chargeable on those amounts.

114. In addition, the applicant submitted claims for outstanding costs and expenses relating to the proceedings before the Grand Chamber in the amount of RUB 1,400 (postal expenses) and RUB 750 (translation expenses). He submitted documents supporting his claim. The Government accepted that claim. Having regard to all the materials in its possession, the Court therefore awards the applicant EUR 54 in respect of additional costs and expenses incurred in the proceedings before the Grand Chamber, plus any tax that may be chargeable on that amount.

115. 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. *Dismisses* the Government's objection of non-exhaustion;

2. *Joins to the merits* the Government's preliminary objection concerning the applicant's victim status;

3. *Holds* that the applicant has the status of "victim" for the purposes of Article 34 of the Convention in respect of his original complaint alleging unfairness of the appeal proceedings of 2002 and *rejects* the Government's preliminary objection in this respect;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) 1 thereof in the proceedings taken as a whole, which ended with the judgment of 29 November 2007;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that the respondent State is to pay the applicant, within three months, EUR 174 (one hundred and seventy four euros) in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant; and
(c) 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;

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

Done in English and in French, and notified at a public hearing on 2 November 2010 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President