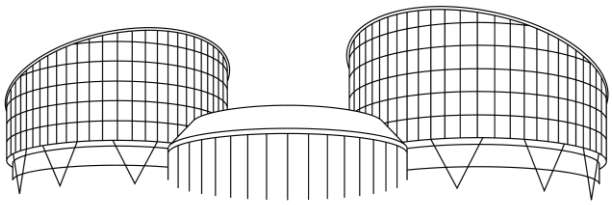

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SAYD-AKHMED ZUBAYRAYEV v. RUSSIA

(Application no. 34653/04)

JUDGMENT

STRASBOURG

26 June 2012

FINAL

26/09/2012

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

In the case of Sayd-Akhmed Zubayrayev v. Russia,

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 5 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 34653/04) 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 Sayd-Akhmed Saydemiyevich Zubayrayev ("the applicant"), on 19 July 2004.

2. The applicant, who had been granted legal aid, was represented by Ms K. Moskalenko, 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. The applicant alleged, in particular, that the criminal proceedings against him had been unfair because of the authorities' failure to ensure his presence at the appeal hearing.

4. On 23 October 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and is serving a prison sentence in the Sverdlovsk Region.

6. On 29 April 2003 the applicant was apprehended and taken into custody in the Chechen Republic. It appears that his detention was extended pending trial.

7. On 12 November 2003 the Supreme Court of the Chechen Republic found the applicant guilty of numerous offences including, but not limited to, the assassination of a law-enforcement officer, trafficking and possession of illegal firearms, terrorism, theft and rape, and sentenced him to twenty-one years' imprisonment and confiscation of his property. The court dismissed as unsubstantiated the applicant's allegations that the investigating authorities had subjected him to physical and mental pressure to make him confess. The court further stated, in the operative part of the judgment, that the applicant had a right to appeal against the conviction within ten days following the receipt of the text of the verdict and that he had a right to ask the appeal court to ensure his participation in the appeal proceedings should he decide to appeal.

8. The applicant received a copy of the judgment of 12 November 2003 on 22 November 2003.

9. On 24 November 2003 Ms Kh., a lawyer retained by the applicant, lodged a statement of appeal. Ms Kh. referred to the excessive severity of the sentence and sought, *inter alia*, to have the applicant's conviction for trafficking and possession of illegal firearms quashed, citing a lack of evidence. She reiterated the applicant's allegations of ill-treatment and claimed that the applicant's confrontation with one of the witnesses had been carried out in contravention of the applicable rules of criminal procedure. She did not indicate that the applicant wished to participate in the appeal hearing.

10. The Supreme Court of the Russian Federation scheduled the appeal hearing for 29 January 2004. According to the applicant, he retained another lawyer, Ms A., immediately before the appeal hearing. At the hearing Ms A. asked the court for an adjournment, arguing that she had not had sufficient time to study the case file. The court granted her request and scheduled the hearing for 19 February 2004.

11. On an unspecified date Ms A. filed an additional statement of appeal in which she asked the appeal court to acknowledge a violation of the applicant's rights as set out in Article 5 of the Convention. In particular, she argued that, following his arrest, he had been detained in the absence of a court order and that his pre-trial detention had not been based on relevant and sufficient reasons.

12. On 4 February 2004 Ms A. informed the Supreme Court of the Russian Federation of the applicant's wish to attend the appeal hearing.

13. On 11 February 2004 the applicant filed a similar request with the Supreme Court of the Russian Federation.

14. On 19 February 2004 the Supreme Court of the Russian Federation decided to proceed with the appeal hearing in the applicant's absence. As

the court reasoned, the applicant had filed his request for participation too late and, in any event, only his lawyer had submitted the statement of appeal. After hearing the judge rapporteur, Ms A. (the applicant's lawyer), and the prosecutor, the Supreme Court upheld the applicant's conviction in substance. The court removed the confiscation of property from the applicant's sentence and reclassified the charge of theft.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Russian Code of Criminal Procedure (hereinafter the "CCP")

1. Appeal proceedings

15. A judgment shall be quashed or amended on appeal if there is an inconsistency between the conclusions reached by the trial court and the facts of the case established by that court. Violation of procedural law and wrongful application of criminal law, as well as unfairness of the judgment, shall also constitute grounds for reversing or amending the judgment (Article 379 of the CCP).

16. A defendant may lodge a statement of appeal within ten days of receipt of the text of the verdict. The other parties to the proceedings may appeal against the verdict within ten days of its pronouncement (Article 356 § 1 of the CCP). If the defendant detained in custody wishes to participate in the appeal hearing, he should indicate as much in his statement of appeal (Article 375 § 2 of the CCP).

17. A statement of appeal lodged belatedly will be dismissed without consideration on the merits (Articles 356 § 3 of the CCP).

18. A defendant who is detained in custody and has asked to participate in the appeal hearing may take part in the proceedings either in person or by way of videoconference (Article 376 § 3 of the CCP).

2. Reopening of criminal proceedings

19. Article 413 of the CCP, setting out the procedure for the reopening 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 reopened if there are 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;

(c) other new circumstances."

B. Ruling of the Presidium of the Supreme Court of Russia of 12 April 2006

20. When discussing the issue of the defendants' participation in the appeal hearing, the Presidium indicated as follows:

"... a defendant held in custody may, within ten days of his receipt of a copy of the verdict, ask [the court] to ensure his participation in the appeal hearing.

The [rule] that an appellant may, prior to the appeal hearing, modify his appeal or submit new arguments, is not in contravention of the above finding. A request for participation in the appeal hearing indicated in a defendant's additional statement of appeal should not be construed as a new argument and, accordingly, does not impose an obligation on the appeal court to ensure the participation of the defendant who is detained in custody in the appeal hearing."

C. Decision no. 3-12/08 rendered by the Military Chamber of the Supreme Court of Russia (as reported in the Overview of the judicial practice adopted by the Presidium of the Supreme Court of Russia on 17 September 2008)

21. When deciding on the case of D., who had not been provided with an opportunity to participate in the appeal hearing, the court noted as follows:

"It follows from the materials in the case-file that D. did not appeal against the verdict. On 13 November 2006 he learnt about the appeals lodged [by other parties] upon receipt of the [relevant] documents dispatched by the [trial] court to the remand prison [where he was detained]. At the same time he was informed of the date, place, and time of the appeal hearing and his right to take part in it.

He expressed his wish to participate in the appeal hearing by indicating so in the proof of receipt. However, his request was denied.

Article 376 § 3 of the [CCP] provides that a defendant who is detained in custody and expresses the wish to participate in an [appeal hearing], may take part in the hearing directly or present his arguments by means of a video link.

...

The argument that [the defendant] missed the ten-day time-limit for lodging a request for participation in the appeal hearing, as indicated in the [appeal court's] decision of 1 December 2006, cannot justify the [appeal court's] decision to deny him an opportunity to present his arguments before the appeal court directly or by means of a videoconference."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained that he had been unable to participate in the appeal hearing held on 19 February 2004 in contravention of Article 6 § 3 (c) of the Convention. The Court will examine the complaint under Article 6 §§ 1 and 3 (c), which, in so far as relevant, 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 ... ."

23. The Government contested that argument. They submitted that the applicant had been duly apprised of his right to participate in the appeal hearing. However, he had not lodged his request within the time-limit prescribed by the applicable rules of criminal procedure. His belated application for participation in the appeal hearing had been dismissed by the appeal court as lodged out of time. The applicant's counsel had been present at the hearing and had made submissions to the appeal court.

24. The applicant maintained his complaint. He argued that the authorities' failure to ensure his participation in the appeal hearing, which had been of paramount importance given the severity of the sentence imposed, had rendered the criminal proceedings against him unfair. In the applicant's view, it had been essential for the fairness of the proceedings that he was afforded the opportunity to participate in the appeal hearing alongside his counsel and his failure to comply with the statutory time-limit for lodging his request to participate in the hearing was of no relevance. Alternatively, the applicant considered that the appeal court should have decided on the issue of his participation in the appeal hearing before the actual hearing, which would have allowed him, when working on the line of defence with his counsel, to take into account the fact that he would not appear before the appeal court.

A. Admissibility

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

B. Merits

1. General principles

26. The general principles concerning the right of an accused to participate in a hearing and waiver of the right to appear are well established in the Court's case-law and have been summarised as follows (see *Hermi v. Italy* [GC], no. 18114/02, ECHR 2006-...):

> "58. In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, judgment of 22 September 1994, Series A no. 297-A, p. 13, § 33; *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, p. 15, § 35; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), and the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005). ...
>
> 60. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski*, cited above, p. 44, § 106). ...
>
> 62. ... even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, judgment of 29 October 1991, Series A no. 212-C, p. 68, § 31). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see *Helmers v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, p. 15, §§ 31-32) and of their importance to the appellant (see *Kremzow*, cited above, p. 43, § 59; *Kamasinski*, cited above, pp. 44-45, § 106 *in fine*; and *Ekbatani*, cited above, p. 13, §§ 27-28). ...
>
> 64. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004). ...
>
> 76. In view of the prominent place held in a democratic society by the right to a fair trial (see, among many other authorities, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 14-15, § 25 *in fine*), Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the date of the hearing and the steps to be taken in order to take part where ... this is disputed on a ground that does not immediately appear to be manifestly devoid of merit (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV). ..."

2. Application of the above principles to the instant case

27. The Court observes that, in view of the particular features of the Russian criminal procedure, according to which appeal courts have jurisdiction to deal with questions of law and fact pertaining both to

criminal liability and to sentencing, it has consistently ruled that the appeal proceedings are of capital importance for an accused facing a severe sentence and that it is essential for the fairness of the proceedings that he takes part in the appeal hearing (see among other authorities, *Samokhvalov v. Russia*, no. 3891/03, §§ 52-54, 12 February 2009, and *Kononov v. Russia*, no. 41938/04, §§ 35-36, 27 January 2011). The Court does not see a reason to hold otherwise in the present case. It notes that the issues raised by the applicant's lawyers before the appeal court concerned, *inter alia*, the severity of the twenty-one-year imprisonment sentence imposed on the applicant and the lack of sufficient evidence to justify his conviction on the charge of trafficking and possession of illegal firearms. It concludes, accordingly, that the applicant's participation in the appeal hearing was required.

28. It further observes that the applicant did unequivocally state his intent to take part in the appeal hearing. On 4 February 2004 Ms A., the applicant's lawyer, submitted the request on his behalf and on 11 February 2004 the applicant lodged it himself. The appeal court, however, refused to grant the applicant's request, noting that it had been submitted belatedly.

29. In this regard the Court notes that, under Russian law, the applicant had an indisputable right to participate in the hearing, directly or by video link, on the condition that he made a request to participate (see paragraph 18 above). The Court considers that the requirement to make such request would not in itself contradict the guarantees of Article 6 if the procedure was clearly set out in the domestic law and complied with by all participants in the proceedings, including the courts (see *Sibgatullin v. Russia*, no. 32165/02, § 45, 23 April 2009, and *Kononov*, cited above, § 40).

30. Regard being had to the domestic practice, the Court cannot subscribe to the Government's opinion that it was, indeed, incumbent on the applicant to lodge such a request within ten days following his receipt of the copy of the verdict. The Court does not lose sight of the fact that the Supreme Court of Russia provided two irreconcilable opinions on the issue. While the ruling of the Presidium of the Supreme Court of Russia of 12 April 2006 confirms the Government's assertion, a decision by the Supreme Court's Military Chamber unambiguously found such reasoning without merit (see paragraphs 20 and 21 above).

31. In these circumstances, the Court finds that the procedure requiring a defendant to lodge a request for participation in an appeal hearing is not clearly set out in the domestic law. Accordingly, it accepts that the applicant had duly notified the domestic judicial authorities of his intent to participate in the appeal proceedings. It is also prepared to accept that two weeks' notification does not appear unreasonable and would have allowed the appeal court sufficient time to take the necessary steps to provide for such participation.

32. Admittedly, the applicant was detained in the Republic of Chechnya and the appeal hearing was to be held in Moscow, that is, some 1,770 kilometres away, and the applicant's transfer for the purposes of his participation in the appeal hearing in person would have called for certain security measures and needed to be arranged in advance. The Court notes, however, that it was also open to the domestic judicial authorities to ensure the applicant's participation in the appeal hearing by means of a video link prescribed by the domestic rules of criminal procedure and earlier found by the Court to be compatible with the requirements of Article 6 of the Convention (see *Marcello Viola v. Italy*, no. 45106/04, §§ 63-77, ECHR 2006-XI (extracts) and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 98, 2 November 2010). The Court notes that the Supreme Court did not discuss whether such an arrangement was feasible in the circumstances of the case.

33. In view of the above, the Court concludes that the applicant's absence from the appeal hearing rendered the criminal proceedings against him unfair. The fact that the applicant's lawyer was present at the hearing and made submissions to the court did not remedy the situation. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

34. The applicant made a number of complaints under Article 5 of the Convention relating to his pre-trial detention. However, having regard to all the material in its possession, the Court finds that domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention. The applicant failed to appeal against the relevant domestic court decisions. The fact that his lawyer raised the issue of the alleged unlawfulness and excessive length of the applicant's pre-trial detention in the statement of appeal is of no relevance. The appeal court dealt with the determination of the criminal charges against the applicant and had no competence to rule on issues concerning his pre-trial detention. It follows that this part of the application must be rejected pursuant to Article 35 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant asked for the restoration of his rights set out in Article 6 of the Convention at the domestic level. The applicant's representative also submitted a letter signed by the applicant's father, in which the latter claimed 2,100,000 euros (EUR) in respect of pecuniary damage and EUR 1,500,000 in respect of non-pecuniary damage.

37. The Government did not comment on the applicant's claims for damages.

38. In the circumstances of the case, the Court considers that the applicant has not submitted a claim for just satisfaction and there is no call to award any sum to him. The Court further refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see, *mutatis mutandis, 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 the basis for the reopening of the proceedings if the Court finds a violation of the Convention (see paragraph 19 above).

B. Costs and expenses

39. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicant's absence from the appeal hearing admissible and the remainder of the application inadmissible;

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

Done in English, and notified in writing on 26 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President