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

FIRST SECTION

CASE OF SIBGATULLIN v. RUSSIA

(Application no. 32165/02)

JUDGMENT

STRASBOURG

23 April 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision

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

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

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

Having deliberated in private on 2 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 32165/02) 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 German Nailyevich Sibgatullin ("the applicant"), on 10 December 2002.

2. The applicant, who had been granted legal aid, was represented by the Centre for the International Protection. The Russian Government ("the Government") were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his right to a fair trial had been violated in that the appeal hearing of his criminal case had been held in his absence.

4. On 8 July 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. On 13 September 2007 the President of the First Section invited the Government to submit further written observations on the admissibility and merits of the application under Rule 54 § 2 (c) of the Rules of the Court.

6. The Government objected to the joint examination of the admissibility and merits of the application. The Court examined and dismissed their objection.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in Nizhniy Tagil, Sverdlovsk region. He is currently serving a prison sentence in Nizhnyy Tagil.

8. In September 2001 the applicant and a certain B. were arrested on suspicion of three murders and were placed in detention. The applicant alleged that he was ill-treated while in detention. However, he did not lodge any complaints in that respect with the competent domestic authorities.

9. On 22 February 2002 the Sverdlovsk Regional Court ("the trial court") heard the case in the presence of the applicant, his counsel Ch. and his co-accused B. The applicant submitted that B. had tried to strangle the first victim with a cord, but had not managed to do so and asked him for help. So, he had tightened the cord. Afterwards he strangled the second victim. He further maintained that the third victim was killed by his co-accused. Co-accused B. submitted that the applicant had killed the third victim with a knife.

10. The trial court considered that B.'s testimony regarding the third murder was coherent and consistent with other evidence submitted at trial and therefore deserved more credit. It found the applicant guilty of three murders and theft and sentenced him to twenty years' imprisonment. It found B. guilty of complicity in committing the first and the second murders as well as of theft and sentenced her to fifteen years' imprisonment. The judgment stated that the applicant and his co-accused could appeal to the Supreme Court of the Russian Federation within seven days of the date on which they received a copy of the judgment.

11. In their appeal against the judgment of 22 February 2002 the applicant and his counsel complained, in particular, that the trial court's conclusions regarding the applicant's guilt in the first murder were not supported by the evidence submitted at trial. The first victim had been strangled by B. and when the applicant approached her, she was already dead. The applicant's conviction for the third murder had been based solely on B.'s testimony which was supported by nothing else but the court's suppositions. The applicant and his counsel requested that the judgment be quashed and the case be remitted for a fresh trial. When lodging the appeal the applicant did not expressly state that he wished to take part in the appeal hearing. The applicant's co-accused did not appeal against her conviction.

12. On 15 August 2002 the Supreme Court of the Russian Federation ("the Supreme Court") examined the applicant's appeal in the presence of the prosecutor and dismissed it. Neither the applicant nor his counsel were present at that hearing.

13. On 26 October 2005 the Deputy Prosecutor General of the Russian Federation lodged an application for supervisory review of the appeal decision of 15 August 2002 with the Presidium of the Supreme Court, on the ground that the applicant and his lawyer had not been properly notified of the appeal hearing of 15 August 2002 and therefore, could not attend it. He requested that the above decision be quashed and the case be remitted for a fresh appeal examination.

14. On 5 April 2006 the Presidium of the Supreme Court quashed the decision of 15 August 2002 and remitted the case for a fresh examination of the appeal. It appears that neither the applicant nor his representative were present at that hearing.

15. On 23 May 2006 the head of the detention facility in which the applicant was held received a telegram which read as follows: "Inform Sibgatullin that his case will be heard by the Supreme Court of the Russian Federation at 10 am on 29 June 2006". On the same date the applicant read that telegram. A similar notification was also sent to the applicant's legal counsel Ch.

16. On 29 June 2006 the Supreme Court held an appeal hearing in the absence of the applicant and his counsel. It heard the prosecutor who requested that the applicant's conviction on three counts of murder be upheld and that the sentence imposed for theft be lifted as the prescription period had expired.

17. Having studied the materials of the case, the appeal court found, in particular, that the trial court had rightly concluded on the basis of evidence submitted at trial that when the applicant had been tightening the cord, the first victim was still alive and that therefore, he had killed her. It further confirmed the trial court's conclusion that the applicant had also killed the third victim. The Supreme Court concluded that the trial court had correctly characterised the applicant's actions as murders and had imposed an appropriate sentence. It upheld the applicant's conviction for the murders, lifted his sentence in respect of theft and sentenced the applicant to nineteen years and six months' imprisonment.

18. It does not appear from the decision of 29 June 2006 that the appeal court verified whether the applicant had been duly informed of the hearing and whether he had expressed a wish to take part in it.

19. On 4 July 2006 the applicant, who allegedly was not aware of the appeal hearing of 29 June 2006, but at some point learned that the appeal decision of 15 August 2002 had been quashed on 5 April 2006, sent additional grounds of appeal to the appeal court. On the same date he also lodged a special request for leave to appear at the appeal hearing and requested the appeal court to provide him with legal counsel.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Code of Criminal Procedure of the Russian Federation of 18 December 2001, in force since 1 July 2002 ("the CCrP")

20. Appeal courts shall verify the legality, validity and fairness of the judgment of the trial court (Article 360).

21. If a convicted person wishes to take part in the appeal hearing, he shall indicate this in his statement of appeal (Article 375 § 2).

22. Parties shall be notified of the date, time and place of an appeal hearing no later than fourteen days in advance. Whether a convicted person held in custody shall be summoned shall be decided by the court. A convicted person held in custody who expressed a wish to be present at the examination of the appeal shall be entitled to participate either directly in the court session or to state his case by video link. The court shall make a decision with respect to the form of participation of the convicted person in the court session. A defendant who has appeared before the court shall always be entitled to take part in the hearing. If persons who have been given timely notice of the venue and time of the appeal hearing fail to appear, this shall not preclude examination of the case (Article 376 §§ 2-4).

23. At the hearing the appeal court shall hear the statement of the party who lodged the appeal and the objections of the opposing party. The appeal court shall be empowered, at a party's request, to directly examine evidence and additional materials provided by the parties in an attempt to support or disprove the arguments cited in the statement of appeal or in the statements of the opposing party (Article 377).

24. The appeal court may decide to dismiss the appeal and uphold the judgment, to quash the judgment and terminate the criminal proceedings, to quash the judgment and remit the case for a fresh trial, or to amend the judgment (Article 378).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained under Article 6 of the Convention that criminal proceedings against him had been unfair because appeal hearings on 15 August 2002 and 29 June 2006 had been held in his absence. The relevant parts of Article 6 of the Convention provide as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial 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. Submissions by the parties

26. The Government acknowledged that neither the applicant nor his representative had been notified of the appeal hearing of 15 August 2002 in breach of Article 376 of the CCrP. In that connection, supervisory review proceedings were initiated on the application of the Deputy Prosecutor General. On 5 April 2006 the Presidium of the Supreme Court of the Russian Federation quashed the appeal decision of 15 August 2002 and remitted the case for a fresh appeal hearing. A fresh appeal examination took place on 29 June 2006. The applicant and his counsel were duly informed of that hearing by telegrams sent on 4 May 2006. The applicant received that notification on 23 May 2006, however he submitted a request for participation in the appeal hearing only on 4 July 2006. He did not ask to be brought to the appeal hearing in his grounds of appeal. Therefore, taking into account that the applicant and his counsel were duly informed of the hearing, that the applicant failed to make a special request for participation in the hearing in due time, that his counsel failed to appear without any valid reasons and did not ask to postpone the hearing, the appeal court examined the case in their absence. The Government concluded that the applicant had been able to take part in the appeal hearing of 29 June 2006, but had failed to use that opportunity. Consequently, the Russian authorities had complied with the requirements of Article 6 §§ 1 and 3 (c) of the Convention.

27. The applicant submitted that neither he nor his counsel had been informed of the supervisory review proceeding and of their outcome. The telegram of 4 May 2006 which he received on 23 May 2006 stated that a hearing of his case would take place on 29 June 2006, but it did not say what kind of hearing it would be. Furthermore, the Government did not submit any proof that his counsel had received that notice. Therefore, it cannot be said that his counsel was duly informed of the appeal hearing. Furthermore, four years had elapsed since the date of the first appeal hearing and the contract concluded between the applicant and his counsel had expired. The authorities were under an obligation to verify whether the applicant was still represented, and provide him with another representative

if necessary. The applicant concluded that the authorities' failure to inform him about the developments in his case and failure to notify his counsel of the appeal hearing of 29 June 2006 violated his right to a fair trial and had not provided appropriate redress for their failure to notify him and his counsel of the appeal hearing of 15 August 2002.

B. The Court's assessment

1. Admissibility

28. According to the Government, the supervisory review and the new appeal proceedings had remedied the shortcomings of the initial appeal proceedings. Therefore, they may be understood to claim that the applicant had lost his victim status in respect of the appeal hearing of 15 August 2002.

29. In this respect, the Court reiterates that an applicant is deprived of his or her status as a victim if the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for, a breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-93, ECHR 2006-...).

30. As regards the first condition, namely the acknowledgment of a violation of the Convention, the Court considers that the Presidium's decision to quash the appeal decision of 15 August 2002 does amount to an acknowledgment that there had been a breach of Article 6 of the Convention.

31. With regard to the second condition, namely, appropriate and sufficient redress, the Court must ascertain whether the measures taken by the authorities, in the particular circumstances of the instant case, afforded the applicant appropriate and sufficient redress in order to determine whether he could still claim to be a victim. As the Government's objection under this head is closely linked to the merits of the applicant's complaints, the Court decides to join them.

32. The Court considers that the applicant's complaint about holding the appeal hearings of 15 August 2002 and 29 June 2006 in his absence is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

33. The Court reiterates that the object and purpose of Article 6 taken as a whole implies that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of

paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89). Based on that interpretation of Article 6 the Court has held that 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).

34. The personal attendance of the defendant does not necessarily take on the same crucial significance for an appeal hearing as it does for the trial (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved – account must be taken of the entirety of the proceedings in the domestic legal order and of the role of appeal court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134).

35. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity to be heard in person by the appeal or cassation court, provided that he had been heard by a first-instance court (see, among other authorities, *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 58, Series A no. 115, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74, as regards the court of cassation).

36. In appeal proceedings reviewing 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*, 29 October 1991, § 33, Series A no. 212-C). 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 appeal court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see, among many other authorities, *Kremzow v. Austria*, 21 September 1993, § 59, Series A no. 268-B; *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II; and *Hermi v. Italy* [GC], no. 18114/02, § 62, ECHR 2006-...). For instance, where an appeal court has to 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).

37. The Court further reiterates that the principle of equality of arms is another feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations made and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66-67, Series A no. 211).

(b) Application of the above principles to the instant case

38. The Court reiterates that 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. Therefore, it will examine the applicant's complaint under these provisions taken together (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

39. The Court observes that in Russian criminal procedure, appeal courts have jurisdiction to deal with questions of law and fact pertaining both to criminal liability and to sentencing. They are empowered to examine the evidence and additional materials submitted by the parties directly. As a result of the examination, the appeal courts may dismiss the appeal and uphold the judgment, quash the judgment and terminate the criminal proceedings, quash the judgment and remit the case for a fresh trial, or amend the judgment (see "Relevant domestic law and practice" above, paragraphs 20 and 23-24).

40. In their grounds of appeal the applicant and his counsel contested the applicant's conviction on factual and legal grounds. They submitted, in particular, that the applicant's guilt in the first and the third murders had not been supported by evidence submitted at trial and that the trial court attached undue weight to the applicant's co-accused's statements. They asked the appeal court to quash the conviction for those two murders and remit the case for a fresh trial. The Prosecutor asked to uphold the applicant's conviction for the three murders. Consequentely, the issues to be determined by the appeal court in deciding the applicant's liability were both factual and legal. The appeal court was called on to make a full assessment of the applicant's guilt or innocence regarding the charges of the first and third murders.

41. The Court further observes that the proceedings in question were of utmost importance for the applicant, who had been sentenced to twenty years' imprisonment at first instance and who was not represented at the appeal hearing of 29 June 2006. It also does not lose sight of the fact that the prosecutor was present at the appeal hearing and made submissions.

42. Having regard to the criminal proceedings against the applicant in their entirety and to the above elements, the Court considers that the appeal court could not properly determine the issues before it without a direct assessment of the evidence given by the applicant in person. Neither could it ensure equality of arms between the parties without giving the applicant the opportunity to reply to the observations made by the prosecutor at the hearing. It follows that in the circumstances of the present case, it was essential to the fairness of the proceedings that the applicant be present at the appeal hearing.

43. The Government have acknowledged and the Court agrees that the appeal proceedings of 15 August 2002 fell short of the guarantees of fair trial because neither the applicant nor his legal counsel were duly notified of the appeal hearing. However, the Government contended that the appeal decision of 15 August 2002 had been quashed by way of supervisory review and that in new appeal proceedings the applicant had been given an opportunity to apply for participation in the hearing, which he did not use.

44. In order to assess whether the supervisory review indeed remedied the defects of the original proceedings, as alleged by the Government, the Court has to verify whether the guarantees of fair trial were afforded in the ensuing appeal proceedings and whether the applicant lost the opportunity to be present at the hearing by failing to submit a special request.

45. In that respect 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 in which this right should be exercised. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their legal systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirement of a fair trial (see *Quaranta v. Switzerland*, 24 May 1991, § 30, Series A no. 205). The Court considers that the requirement to lodge a prior request for participation in the appeal hearing would not in itself contradict the requirements of Article 6, if the procedure is clearly set out in the domestic law.

46. The Court further 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. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...), and it must be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A). Furthermore, in view of the prominent place held in a democratic society by the right to a fair trial Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to know of the date of the hearing and

the steps to be taken in order to take part where, as in the instant case, 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, and *Hermi*, cited above, § 76).

47. The Court observes that no explicit waiver was made in the present case. The question is whether there was a tacit one. In order to reply to that question, the Court will have to establish in the first place, whether, as the Government submitted, the applicant and his representative were duly informed of the appeal hearing of 29 June 2006.

48. The Court observes that on 23 May 2006 the applicant was informed that "case will be heard by the Supreme Court of the Russian Federation at 10 am on 29 June 2006". However, according to the applicant, by that date he was not aware that his case had been sent to a fresh appeal hearing as a result of the supervisory review and therefore, he could not know what kind of hearing would be held by the Supreme Court. The Court notes that the Government have not provided any information to prove that the applicant and/or his counsel were duly informed of the supervisory review proceedings or of their outcome. The Court further notes that on 4 November 2005 it forwarded to the applicant a copy of the Government's observations in which they submitted that on 26 October 2005 the Deputy Prosecutor had applied for a supervisory review of the appeal decision of 15 August 2002. On 23 May 2006 the Court forwarded to the applicant the Government's letter from which it followed that on 5 April 2006 the Presidium of the Supreme Court had quashed the appeal decision of 15 August 2002 and had remitted the case for a fresh appeal examination. It follows that, at least until the date on which the applicant received the Court's letter of 23 May 2006 he was not aware of the results of the supervisory review proceedings. It means that on 23 May 2006, the date on which the applicant read the telegram informing him that his case would be heard by the Supreme Court, he could not have known what hearing was to be held by the Supreme Court, a supervisory review hearing or a fresh appeal hearing. In those circumstances, the Court considers that the applicant was not duly notified of the appeal hearing of 29 June 2006. The Court also notes that the Government have not submitted any document which demonstrates that the applicant's counsel received notification.

49. Furthermore, it follows from the appeal decision of 29 June 2006 that the appeal court did not verify whether the applicant and his representative had been duly notified of the hearing. Neither did that decision state that the applicant had failed to submit a request for participation in the hearing and had waived his right, and that his failure to appear would not preclude examination of the case. In such circumstances, the Court considers that it cannot be said that in the present case the applicant had waived his right to take part in the hearing in an unequivocal manner.

50. Having regard to its findings in paragraphs 42, 48 and 49 above, the Court considers that the appeal hearing of 29 June 2006 did not comply with the requirements of fairness. It follows that the measures taken by the authorities, failed to provide appropriate redress to the applicant in respect of the violation of his right to take part in the appeal hearing of 15 August 2002. 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 objection under this head and finds that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of holding the appeal hearings of 15 August 2002 and 29 June 2006 in the applicant's absence.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. The applicant complained under Article 3 that he had been ill-treated while in pre-trial detention. The Court notes that the applicant did not lodge any complaints in that respect with the competent state authorities. It follows that this complaint must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

53. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be submitted in writing within the time-limit fixed for the submission of the applicant's observations on the merits, "failing which the Chamber may reject the claim in whole or in part".

54. In the instant case, on 4 November 2005 the applicant was invited to submit his claims for just satisfaction. He failed to submit any such claims within the required time-limit. Therefore, the Court makes no award under Article 41 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's objection concerning the victim status of the applicant and rejects it;

2. *Declares* the complaint concerning holding the appeal hearings of 15 August 2002 and 29 June 2006 in the applicant's absence admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of holding the appeal hearings of 15 August 2002 and 29 June 2006 in the applicant's absence;

4. *Decides* to make no award under Article 41.

Done in English, and notified in writing on 23 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

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

C.L.R.
S.N.

JOINT CONCURRING OPINION OF JUDGES ROZAKIS, SPIELMANN AND MALINVERNI

1. As in the case of *Sakhnovskiy v. Russia*, (no. 21272/03, 5 February 2009), we voted in favour of finding a violation of Article 6 §§ 1 and 3 (c) of the Convention.

2. In the present case the majority follows the approach adopted in *Sakhnovsksiy*, finding that the second appeal hearing did not provide appropriate redress for the shortcomings of the first appeal hearing and holding that there was a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) on account of the fact that both appeal hearings were held in the applicant's absence.

3. In our view however the applicant was no longer a victim of the shortcomings of the first appeal hearing, because by quashing the appeal decision and sending the case for a fresh appeal examination the authorities had acknowledged and provided appropriate redress for the shortcomings of the first appeal hearing.

4. Our reasoning therefore differs from the majority's approach and we would like to refer in this respect to our joint concurring opinion in *Sakhnovskiy* and in particular to paragraph 5 of that opinion.