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

THIRD SECTION

CASE OF VOZHIGOV v. RUSSIA

(Application no. 5953/02)

JUDGMENT

STRASBOURG

26 April 2007

FINAL

26/07/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vozhigov v. Russia,

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

Mr B.M. Zupančič, *President*,
Mr C. Bîrsan,
Mr A. Kovler,
Mrs A. Gyulumyan,
Mr E. Myjer,
Mr David Thór Björgvinsson,
Mrs I. Ziemele, *judges*,
and Mr S. Quesada, *Section Registrar*,

Having deliberated in private on 29 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 5953/02) 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 Andrey Valeryevich Vozhigov (“the applicant”), on 21 December 2001.

2. The applicant was represented by Ms O. Mikhaylova, a lawyer practising in Moscow. The Russian Government (“the Government”) were represented by Mr Pavel Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that criminal proceedings against him were not fair because of a number of procedural irregularities.

4. By a decision of 8 December 2005, the Court declared the application partly admissible.

5. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1974 and lives in Bryansk.

1. Preliminary investigation

7. In October 2000 the applicant was taken to a police station in the Bezhitskiy District of Bryansk on suspicion of the murder of a man who had been beaten to death.

8. The applicant submitted that he was arrested on 17 October 2000 and interrogated in the absence of a lawyer. According to the applicant, on the same date he was ill-treated by policemen and wrote a confession under pressure from them. He further submitted that a medical examination was conducted only ten days later, when bruises could no longer be seen.

9. The Government submitted that the applicant was arrested and first interrogated on 18 October 2000. In the report on his arrest the applicant stated that he "agreed to be detained". In the course of the interrogation between 9.07 p.m. and 9.57 p.m. he waived his right to legal assistance, as was noted in the record of the interrogation.

10. On 21 October 2000 detention as a measure of restraint was applied to the applicant.

11. During interrogation on 26 October 2000 the applicant confirmed the waiver of his right to legal assistance, which was also noted in the minutes of the interrogation.

12. On 27 October 2000 he was charged with murder. During the interrogation on the same date the applicant refused to make any statements and denied his guilt.

13. In the course of the investigation a witness, Ms Y., stated to the investigative authorities that she had seen the applicant beating the man. On an unspecified date the applicant was confronted with Ms Y., where it was open to him to put questions and comment on her statements. Ms Y. confirmed her earlier statement.

14. On an unspecified date the public prosecutor's office instituted criminal proceedings against the policemen who had allegedly ill-treated the applicant. As a result of the investigation conducted, the proceedings were discontinued on account of lack of indication of a crime.

15. On 30 October 2000 the applicant sent a request for legal assistance to the prosecutor. He indicated that he wanted to be represented by one of the following counsel: Mr V., a lawyer from the Moscow law firm Vedischev and Partners; Ms M., a lawyer of the Moscow Bar Association; or an unspecified lawyer from the Legal Advice Office of the Bezhitskiy District of Bryansk. According to the Government, the request was received

by the public prosecutor's office on 8 November 2000. The prosecutor then transferred the request to the investigator.

16. On 21 December 2000 the investigator sent three letters to the counsel chosen by the applicant, asking them to inform him whether they could participate in the investigative measures – the serving of the bill of indictment and studying of the case file – scheduled for 21, 25 and 26 December 2000.

17. On 21 December 2000 the letter was received by the Legal Advice Office of the Bezhitskiy District of Bryansk and on 10 January 2001 by the law firm Vedischev and Partners. It is not clear whether it was received by Ms M.

18. The Government submitted that no investigative measures were undertaken on either 21 or 25 December 2000.

19. The applicant submitted that the investigative measures were not postponed, and that he was not provided with the opportunity to study the case file.

20. On 25 December 2000 advocate K., a member of the Bryansk Bar Association, was assigned to assist the applicant. According to the Government, advocate K. worked for the Legal Advice Office of the Bezhitskiy District of Bryansk.

21. On 26 December 2000, when the bill of indictment was served on the applicant, advocate K. assisted him in studying the case file. The applicant refused to sign a statement to the effect that he had studied the case file. However, the statement was signed by advocate K.

22. On 12 January 2001 the law firm Vedischev and Partners sent two replies, to the investigator and the applicant. The reply to the investigator read:

> "We have received your letter, in which you inform us that the following investigative measures ... are scheduled for 21, 25 and 26 December 2000 ... however, according to the postmark, the letter was sent on 21 December 2000 and it was received by us on 10 January 2001.
>
> By using such a method of notification you deliberately excluded the possibility of our lawyer's participation in the investigative measures indicated. By your action you have grossly violated the defence rights of the accused [Mr] Vozhigov, who expressed his wish to be assisted by a lawyer from our law firm.
>
> You must set a new date for [the investigative measures] and notify us about it in due time in order to provide a real opportunity for our lawyer to participate in the defence of [Mr] Vozhigov."

2. *Court proceedings*

23. On 30 January 2001 the Bezhitskiy District Court of Bryansk ordered a number of witnesses, including Ms Y., who appeared to be the only eyewitness, to be brought before the court. The hearing was fixed for

19 February 2001. On that date the bailiff went to Ms Y.'s residence. However, he did not find her at home as, according to her mother, since December 2000 she had been living in Moscow. The hearing was then postponed twice, until 19 March and 19 April 2001. Both times the court ordered to have Ms Y. brought to the hearing. According to the bailiff's report of 19 April 2001 Ms Y. had ceased to reside at the address indicated to the court and her new place of residence was not known.

24. On 7 May 2001 the court requested the prosecutor at the Bezhitskiy District Court of Bryansk to establish Ms Y.'s whereabouts. In the reply of 29 May 2001 the prosecutor informed the court that Ms Y. was not registered as resident either in Moscow or in the Moscow Region. The court issued another order to have Ms Y. brought to the hearing of 4 June 2001. The Government submitted that by the aforementioned date it appeared impossible to establish her whereabouts since she did not live at the address provided to the court and her relative did not have any information as to where she was.

25. At the hearing of 4 June 2001 the Bezhitskiy District Court of Bryansk decided to examine Ms Y.'s statements made during the preliminary investigation. The court asked both parties whether they had any objections. Neither party objected. The court based its judgment on the statements of Ms Y., the applicant's confession made at the beginning of the investigation – although he later changed his statements and pleaded not guilty before the court – and on a certain amount of indirect evidence, such as statements by indirect witnesses and expert reports. At the hearing the court also examined the applicant's doctor, Mr R., who had monitored the applicant since April 2000 in connection with a hip fracture he had sustained in August 1999, with a view to determining whether the applicant would have been able to commit the offence, taking into account his injury. Mr R. stated that because of the improvement of his state of health the applicant had not been operated on but had been recommended not to lift weights of over 12 kilograms. The court also found the applicant's allegations of ill-treatment unsubstantiated. The court reached that conclusion relying on oral evidence given at the hearing by another policeman, a medical certificate according to which the applicant had no injuries that could have been caused on the date of the alleged ill-treatment, and the results of the investigation conducted by the public prosecutor's office. Advocate K. assisted the applicant in the proceedings before the trial court. The court convicted the applicant of murder and sentenced him to 11 years and six months' imprisonment.

26. On 7 June 2001 the applicant applied to the Bezhitskiy District Court of Bryansk to examine the record of the hearing. On 21 June 2001 the applicant stated in writing that he had studied the record.

27. The applicant appealed against the conviction on the grounds, *inter alia*, that during the preliminary investigation he had been unduly refused

legal assistance and that the authorities had deliberately precluded him from being assisted by the lawyer of his choosing. He also claimed that his confession had been made under pressure from the police officials and stated that the key witness, Ms Y., had not been examined at the hearing.

28. On 6 July 2001 the Bryansk Regional Court upheld the conviction. The court held that the trial court had been correct to rely on Ms Y.'s statements made during the preliminary investigation because it had been impossible for her to appear at the hearing. The court also held that there had been no substantial breaches of procedural requirements, including any alleged breach of the applicant's right to defence, such as to render the conviction unlawful.

II. RELEVANT DOMESTIC LAW

1. Right to legal assistance

29. Article 48 of the Constitution guarantees everyone the right to qualified legal assistance. Under Article 48 § 2 an arrested person has the right to the assistance of a lawyer from the moment of the arrest.

30. Pursuant to Articles 47 and 52 of the RSFSR Code of Criminal Procedure of 1960, a suspect, from the moment of his arrest, has the right to be represented by defence counsel, if necessary to be paid for by the authorities.

2. Termination of the preliminary investigation

31. Pursuant to Article 199 of the Code of Criminal Procedure of 1960, the preliminary investigation ends by the drawing up of a bill of indictment. Article 201 further provides that an investigator has to notify the accused of the termination of the preliminary investigation and explain to him his right to examine the case file either in person or with the assistance of a lawyer. When the accused asks for the assistance of a lawyer the investigator has to provide the accused and his lawyer with the file on the case, which facility has to be deferred until the actual appearance of a lawyer, but not for longer than five days. After the accused and his lawyer have finished studying the case file, the investigator has to ask them whether they wish to make any applications to amend the investigation.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained under Article 6 of the Convention about a number of procedural irregularities. In particular, he complained about the failure to conduct an expert medical examination on him during the preliminary investigation so as to determine whether he could have committed the offence, taking into account his injury. Relying on Article 6 § 3 (b), he alleged that he had not been provided with the opportunity to study the case file. Invoking Article 6 § 3 (c), he complained that he had been *de facto* refused legal assistance because the investigator had sent his request to the law firm of his choosing too late, which rendered the presence of his lawyer impossible. Relying on Article 6 § 3 (d), the applicant also complained about the court's failure to examine the key witness Ms Y. at the hearing.

33. Article 6, in so far as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

a) The parties' submissions

34. In his observations submitted prior to the decision as to the admissibility of 8 December 2005, the applicant reiterated that the investigator had deliberately sent the letters to the counsel of his choosing too late, thus preventing them from participating in the investigative measures. He further claimed that by appointing advocate K., a member of the Bryansk Bar Association, as his counsel the investigator had violated his right to legal assistance of his choosing. Furthermore, advocate K. had

failed to represent his interests effectively. As regards the failure to examine Ms Y. at the hearing, the applicant contended that the authorities had not taken adequate measures to ensure her presence in the courtroom.

35. In their observations submitted prior to the decision as to the admissibility of 8 December 2005, the Government stated that the applicant had twice waived his right to legal assistance, on 18 and 26 October 2000. Following his request for legal assistance, lodged on 30 October 2000, the applicant had been assigned advocate K., who had assisted him in examining the case file on 26 December 2000. Therefore, the first investigative measure after the applicant had lodged the request for legal assistance had been taken in the presence of his lawyer, who had also assisted him before the trial court. Accordingly, there had been no breach of the applicant's right guaranteed by Article 6 § 3 (c). As regards the court's failure to examine Ms Y. at the hearing, the Government submitted that the court had taken all possible measures to ensure her presence at the hearing; however, it had appeared impossible to establish her whereabouts. Furthermore, the applicant had not objected to the examination of the statements she had made in the course of the preliminary investigation. Accordingly, there had been no breach of the applicant's rights guaranteed by Article 6 § 3 (d). In sum, the applicant's complaints under Article 6 were manifestly ill-founded.

36. In their additional observations submitted after the decision as to the admissibility of 8 December 2005, the Government stated that advocate K., being a member of the Bryansk Bar Association, worked for the Legal Advice Office of the Bezhitskiy District of Bryansk. Since in his request for appointment of a lawyer the applicant indicated three options, one of them being any lawyer from the aforementioned Legal Advice Office, the appointment of advocate K. was fully in accordance with the applicant's choice. As regards the court's failure to examine Ms Y. at the hearing, the Government reiterated their arguments submitted in the previous set of their observations. They also added that the judgment in the applicant's case was not based on Ms Y.'s statement alone but on other evidence as well. Therefore, the proceedings in the applicant's case were in compliance with Article 6 of the Convention.

b) The Court's assessment

(i) Alleged failure to conduct a medical expert examination of the applicant

37. The Court notes, firstly, that the applicant has submitted no evidence that he had requested either the investigative authorities or the courts to conduct a medical examination. In any event, the Court reiterates that Article 6 does not impose on domestic courts an obligation to order an expert opinion to be produced or any other investigative measure to be taken solely because it was sought by a party. It is primarily for the national court

to decide whether the requested measure is relevant and essential for deciding a case (see *mutatis mutandis H. v. France*, judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61). At the hearing in the present case the trial court examined Mr R., the doctor who had monitored the applicant in connection with a fracture of his hip, precisely to determine whether the applicant would have been physically able to commit the offence. The Court finds that the trial court therefore had sufficient information on this aspect of the case. Accordingly, there has been no violation of Article 6 § 1 of the Convention in this respect.

(ii) Opportunity to study the case file

38. From the facts of the case it follows that on 26 December 2002 the applicant studied the case file with the assistance of his counsel, advocate K. Although the applicant refused to sign a statement confirming that he had studied the case file, it was signed by advocate K. Later the applicant was provided with the record of the hearing, as is confirmed by his written statement. Accordingly, the Court finds that there has been no violation of Article 6 § 3 (b) in conjunction with Article 6 § 1 of the Convention.

(iii) Right to legal assistance of own choosing

39. The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same Article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom,* judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 755, § 52).

40. The Court reiterates at the outset that, read as a whole, Article 6 guarantees the right of an accused to participate effectively in a criminal trial. In general this includes not only the right to be present, but also the right to receive legal assistance, if necessary, and to follow the proceedings effectively. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of Article 6 § 3 (see, among other authorities, *Stanford v. the United Kingdom,* judgment of 23 February 1994, Series A no. 282-A, pp. 10–11, § 26).

41. The Court reiterates that Article 6 § 3 (c) entitles an accused to be defended by counsel "of his own choosing". Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to choose one's own counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is

necessary in the interests of justice (see *Croissant v. Germany*, judgment of 25 September 1992, Series A no. 237-B, § 29).

42. The Court further reiterates that Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36 and *Brennan v. the United Kingdom*, no. 39846/98, § 45, ECHR 2001-X).

43. The Court notes that the parties disagreed on certain factual matters concerning the date of the applicant's arrest and first interrogation. From the report on his arrest it follows that the applicant was arrested on 18 October 2000. The report was signed by the applicant, who also stated in writing that he "agreed to be detained". The Government also submitted the record of the applicant's interrogation on 18 October 2000, signed by him. The applicant has provided no evidence to support the allegations that he was arrested and interrogated on 17 October 2000. Accordingly, the Court is satisfied that the applicant's arrest and first interrogation took place on 18 October 2000.

44. The Court further notes that on 18 and 26 October 2000 the applicant waived his right to legal assistance. However, in his application of 30 October 2000, received by the public prosecutor's office on 8 November 2000, the applicant requested the assistance of a lawyer and indicated three alternative choices of counsel. The application was granted and on 21 December 2000 the investigator sent the letters informing the lawyers concerned of the applicant's wish to be represented by them and of the investigative measures to be taken on 21, 25 and 26 December 2000. The Legal Advice Office of the Bezhitskiy District of Bryansk received the letter on the same date. The law firm Vedischev and Partners received the letter on 10 January 2001. It is not clear whether the letter was received by Ms M. The Court observes that the domestic authorities should have handled the applicant's request for legal assistance with greater expedition.

45. On 25 December 2000 the investigative authorities appointed advocate K., a member of the Bryansk Bar Association, as the applicant's counsel. The Government submitted that advocate K. worked for the Legal Advice Office of the Bezhitskiy District of Bryansk, which was not contested by the applicant.

46. On the next day, when the bill of indictment was served on the applicant, advocate K. assisted him in studying the case file. According to the Government's submissions, no investigative measures took place before 26 December 2000. The applicant submitted no evidence to the contrary.

47. The Court observes that in his request for legal assistance the applicant indicated three choices of counsel, one of them being any lawyer from the Legal Advice Office of the Bezhitskiy District of Bryansk. It is not in dispute between the parties that advocate K., who assisted the applicant in

the course of the investigative actions, worked for the aforementioned Legal Advice Office. Furthermore, the applicant has submitted no evidence that he objected to the appointment of this particular counsel of the Legal Advice Office or brought any complains concerning the quality of his assistance before domestic authorities. In such circumstances the Court concludes that the applicant's choice of counsel was fully respected.

48. Therefore, the Court finds that there has been no violation of the applicant's rights under Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention.

(iv) Right to examine prosecution witnesses

49. As the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, the Court will consider the complaint concerning the failure to examine Ms Y. in the hearing under the two provisions taken together (see *Asch v. Austria,* judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

50. The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (*ibid*., p. 10, § 26).

51. All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *A. M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX, and *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44).

52. Turning to the facts of the present case, as to the notion of witness, given its autonomous interpretation, the Court considers that, although Ms Y. did not testify at a court hearing, she should, for the purposes of Article 6 § 3 (d) of the Convention, be regarded as a witness because her statements, as taken down by the investigative authorities, were used in evidence by the domestic courts (see *Asch,* cited above, p. 10, § 25).

53. The Court notes that the applicant's conviction for murder was based, *inter alia*, on statements given by Ms Y. during the preliminary investigation. During the investigation she was also confronted with the applicant and confirmed her statements. Furthermore, the Bezhitskiy District Court of Bryansk adjourned the trial a number of times and several attempts were made to ensure the presence of Ms Y. in order to examine her as a witness. The trial court issued several orders to have her brought before the court. Furthermore, at the court's request the prosecutor made efforts to establish her whereabouts, which, however, proved impossible.

54. The Court finds that the domestic authorities were not negligent in their efforts to bring Ms Y. before the trial court. It would clearly have been preferable for Ms Y. to have given evidence in person, but, in view of the authorities' efforts, her unavailability did not in itself make it necessary to stay the prosecution (see *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21). Since it proved impossible to secure the attendance of Ms Y. at the court hearings, it was open to the national courts, subject to the rights of the defence being respected, to have regard to Ms Y.'s statements to the investigative authorities, especially since they could consider those statements to be corroborated by other evidence before it (*ibid.*, p. 10, § 22; see also *Doorson v. the Netherlands,* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 473, § 80).

55. The Court notes that the applicant was confronted with Ms Y. during the preliminary investigation, where it was open to him to put questions and make comments concerning her statements. Accordingly, he enjoyed the guarantees secured under Article 6 § 3 (d) to a significant extent (see *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 13, § 36).

56. The Court observes, moreover, that the applicant's conviction did not rest solely on Ms Y.'s statement. The courts also had regard to other evidence, in particular statements by indirect witnesses, expert reports and the applicant's statement made during the preliminary investigation.

57. Finally, it was open to the applicant to object to the reading out of Ms Y.'s statements at the hearing. However, both the applicant and his counsel explicitly stated that they had no objections. The Court reiterates that a waiver of the exercise of a right guaranteed by the Convention, in so far as such a waiver is permitted in domestic law, must be established in an unequivocal manner (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, pp. 14-15, § 28). The Court observes that neither the letter nor the spirit of Article 6 § 3 (d) prevented the applicant from expressly waiving his rights of his own free will (see, *mutatis mutandis*, *Osinger v. Austria*, no. 54645/00, § 46, 24 March 2005). The Court finds that in the present case the applicant has exercised such a waiver.

58. Therefore, in the circumstances of the case there is no indication that the failure to examine Ms Y. at the hearing infringed the rights of the

defence to an extent incompatible with Article 6 §§ 1 and 3 (d). Accordingly, there has been no violation of the above provisions.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 26 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President