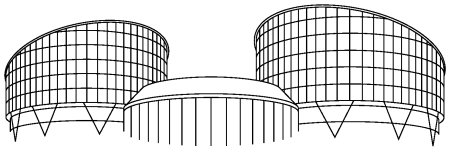

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GORBUNOV AND GORBACHEV v. RUSSIA

(Applications nos. 43183/06 and 27412/07)

JUDGMENT

STRASBOURG

1 March 2016

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 Gorbunov and Gorbachev v. Russia,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 9 February 2016,

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

PROCEDURE

1. The case originated in two applications (nos. 43183/06 and 27412/07) 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 two Russian nationals, Mr Vasiliy Konstantinovich Gorbunov ("the first applicant") and Mr Aleksey Aleksandrovich Gorbachev ("the second applicant") (jointly "the applicants"), on 5 February and 24 April 2007 respectively.

2. The applicants, who had been granted legal aid, were represented by Ms Yek. Yefremova and Ms Yel. Leontyeva respectively, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicants complained that the proceedings in their criminal cases had fallen short of the fair-trial guarantees.

4. On 17 December 2013 and on 16 September 2010 the complaints were communicated to the Government and the remainder of application no. 43183/06 was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1971 and is serving a prison sentence in the Vologda Region. The second applicant was born in 1975 and is serving a prison sentence in the Kostroma Region.

A. Application no. 43183/06

6. On 24 October 2005 the first applicant was arrested on suspicion of manslaughter. He remained in custody pending investigation and trial. His defence was carried out by a State-appointed lawyer, M.

7. On 24 July 2006 the Vologda Town Court found the applicant guilty as charged and sentenced him to nine and a half years' imprisonment. The applicant, but not his State-appointed lawyer, appealed.

8. On 13 and 21 November 2006 the applicant informed the Vologda Regional Court that he did not wish to be represented by M. in view of the perfunctory nature of the services that she had provided.

9. On 6 December 2006 another lawyer, Ye., was appointed to represent the applicant before the appeal court. On the same date she studied the case file.

10. On 7 December 2006 the Regional Court examined the applicant's case on appeal. The applicant was in a special room in a detention facility from which he could participate in the appeal hearing by means of a video link. Ye. was present in the courtroom. She did not submit fresh grounds for appeal and made oral submissions to the court that appeared to be based on the grounds for appeal originally filed by the applicant. The court upheld the applicant's conviction.

11. According to the applicant, at the beginning of the hearing he asked the court to provide him with an opportunity to meet with Ye. in private to discuss his line of defence. His request was refused. He was then removed from the room where the video conference equipment was installed and thus was prevented from following the appeal hearing which took place in his absence.

12. According to the Government, the applicant had had ample opportunity to communicate with Ye. prior to the appeal hearing via video link. He did not argue before the appeal court that he had been unable to discuss his case with Ye. in order to make sure that she had a sufficiently thorough knowledge of the case as to be able to carry out his defence effectively. The applicant stayed in the video-conference room throughout the appeal hearing and was not prevented in any way from participating in it.

B. Application no. 27412/07

13. On an unspecified date the second applicant was arrested and charged with murder and robbery. He remained in custody pending investigation and trial.

14. On 26 December 2006 the Kostroma Regional Court found the applicant guilty as charged and sentenced him to seventeen years' imprisonment. The applicant appealed, stating that he was not guilty and that the trial court had erred in assessing the evidence before it.

15. On 12 April 2007 the applicant asked the Supreme Court (acting as the appeal court) in writing to appoint a lawyer to represent him.

16. On 18 April 2007 the Supreme Court of the Russian Federation upheld the applicant's conviction on appeal. The applicant participated in the hearing by means of a video link. According to the applicant, the quality of the sound was very poor. He could not hear or understand the judges. He stated that he reiterated his request to be represented before the appeal court; that request was refused.

17. On 16 September 2010 the Court gave notice of the application to the Government.

18. On 16 March 2011 the Presidium of the Supreme Court of the Russian Federation considered a supervisory review appeal lodged by Deputy Prosecutor General. The court acknowledged that the applicant's right to be provided with legal counsel had been infringed, quashed the appeal judgment of 18 April 2007, and remitted the matter for fresh consideration to the appeal court. The applicant participated in the proceedings by means of a video link. He was represented by a State-appointed lawyer, U.

19. On an unspecified date another lawyer, M., was appointed to represent the applicant. Prior to the hearing before the appeal court, she studied the material in his case file.

20. On 19 May 2011 the applicant discussed his case with M. by means of a video link.

21. On the same date the Supreme Court held the appeal hearing. The applicant participated in the proceedings by means of a video link. According to the transcript of the appeal hearing, the applicant agreed that his defence would be carried out by lawyer M. He further asked the court for additional time in which to meet with M. to discuss his defence. The court adjourned the hearing in order to ensure that the applicant could meet with M.

22. On 20 May 2011 the Supreme Court resumed the hearing. The applicant informed the court that he had discussed the case with M. by means of a video link. The court heard the applicant, M., and the prosecutor. M. did not submit any grounds for appeal; she only made oral submissions to the court that appeared to be based on the grounds for appeal originally

filed by the applicant. The Supreme Court upheld the applicant's conviction in substance, but reduced his sentence to sixteen and a half years' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. For a summary of the relevant domestic provisions and practice, see the case of *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 31-39, 2 November 2010.

THE LAW

I. JOINDER OF THE APPLICATIONS

24. In accordance with Rule 42 § 1 of the Rules of the Court, the Court decides to join the applications, given their similar factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicants complained that the appeal and supervisory review proceedings had fallen short of the requirements of fairness. In particular, they alleged that the legal assistance provided by State-appointed counsel had not been effective and that the video links provided had been of poor quality. The first applicant also complained that the appeal court had ordered his removal from the hearing and had proceeded in his absence. The applicants relied on Article 6 of the Convention, 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:
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> ...
>
> (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."

26. The Government contested that argument. In their view, the State-appointed lawyers had carried out their duties diligently and the legal assistance provided had met the Convention standards. The lawyers had studied the case file and discussed the case with the applicants. Moreover,

they had participated in the hearing and had made submissions to the appeal court. As regards the first applicant's case, the Government challenged the applicant's allegations regarding his removal from the hearing. According to the Government, the applicant had been present and had made submissions to the appeal court without any restrictions having been imposed. As regards the second applicant's case, the Government asserted that the applicant could no longer claim to be a victim of the alleged violation. While the applicant had not been provided with legal assistance at the appeal hearing of 18 April 2007, the relevant judgment had been later quashed, by way of a supervisory review, expressly because of the State's failure to provide legal assistance to the applicant. In a new appeal hearing, the applicant had been represented by a State-appointed lawyer, who had diligently carried out his defence.

27. The applicants maintained the complaint. The first applicant submitted that he had not been informed, prior to the appeal hearing, that lawyer Ye. had been appointed to represent him. She had not met with him to discuss the case. Nor had she ever communicated with him by telephone or prepared a statement of appeal. The second applicant claimed that the quashing by way of supervisory review of the appeal judgment in his case and the fresh consideration of his case by the appeal court had not restored those of his rights that had been infringed in the course of the criminal proceedings against him. The quality of the video link in the supervisory review and appeal hearings had been poor. The lawyer who had represented him before the supervisory-review court had had very little knowledge of his case and had performed his duties in a perfunctory manner. As to the appeal hearing, communication between the applicant and his lawyer had been by means of a video link, which had not ensured privacy. In the second applicant's opinion, lawyer M. had not acquainted herself with the materials in the case file. Before the appeal court, she had confined herself to reading aloud the statement of the appeal that had been prepared earlier by the applicant himself. Lastly, he submitted that the quality of the video link during the new appeal hearing had been unsatisfactory. There had been delays in the video feeds and sometimes the onscreen image had become frozen. The applicant had thus been unable to gauge the judges' reactions which, in view of his lawyer's lackadaisical attitude, had been indispensable.

A. Admissibility

28. As regards the Government's argument regarding the admissibility of the second applicant's complaint, the Court reiterates that the reopening of proceedings by means of supervisory review may not *per se* be automatically regarded as constituting sufficient redress capable of depriving the applicant of his victim status. To ascertain whether or not the

applicant has retained his victim status the Court must consider the proceedings as a whole, including those which followed their 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 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 (see *Sakhnovskiy*, cited above, § 83).

29. The Court accordingly considers that the mere reopening of the proceedings by way of supervisory review failed to provide appropriate and sufficient redress for the second applicant. He may therefore still claim to be a victim within the meaning of Article 34 of the Convention. The Court therefore dismisses the Government's objection.

30. The Court therefore considers that the complaints raised by both applicants are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established. They must therefore be declared admissible.

B. Merits

1. General principles

31. The general principles relating to effective participation in criminal proceedings are well established in the Court's case-law and have been summarised as follows (see *Sakhnovskiy*, cited above):

> "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).
>
> ...
>
> 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)."

2. Application to the present cases

(a) Application no. 43183/06

32. The Court notes that the parties' submissions significantly differed as regards the first applicant's participation in the appeal hearing by means of a video link. While the first applicant submitted that (1) the quality of the video link had prevented him from following the proceedings in an adequate way, and (2) he had been removed from the room and the appeal court had proceeded to hear the case in his absence, the Government submitted that (1) the video link had functioned well and (2) the first applicant had been present at the appeal hearing until the very end.

33. The Court considers that, in the circumstances of the case, there is no need for it to establish the veracity of each and every disputed or contentious point. It can find a violation of Article 6 on the basis of those of the first applicant's submissions which the respondent Government do not dispute. In this regard, the Court will take into consideration the following.

34. The Court accepts, and the Government do not argue to the contrary, that, in view of the complexity of the first applicant's case, the assistance of a professional lawyer before the appeal court was indispensable to ensure that the criminal proceedings against the first applicant were fair.

35. The Court also accepts the Government's argument that Ye. was a qualified lawyer who undertook certain preparations for the appeal hearing in the first applicant's case. However, this fact is not decisive. The Court must consider whether the arrangements for the conduct of the proceedings, and, in particular, for contact between lawyer Ye. and the first applicant, respected the rights of the defence (see *Sakhnovskiy*, cited above, § 101).

36. The Court reiterates that the relationship between a 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 temporal and logistical constraints in respect of meetings between a detained person and his lawyer. 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 (see *Sakhnovskiy*, cited above, § 102).

37. As in the situation in the *Sakhnovskiy* case (cited above), the first applicant in the present case was able to communicate with his newly appointed lawyer only immediately before the start of the appeal hearing. While it is not clear from the parties' submissions whether the time allotted for such communication was sufficient for the first applicant to discuss the case and make sure that his lawyer's knowledge of the case and the first applicant's legal position were appropriate, the Court's major concern is that the first applicant was able to talk to the lawyer only by means of a video link. It has earlier expressed doubts as to the lack of privacy of communication afforded by means of a video-conferencing system installed and operated by the State (see *Sakhnovskiy*, cited above, § 104). The Court has no reason to reach a different conclusion in the present case. It considers that the first applicant might legitimately have felt ill at ease when discussing his case with State-appointed counsel via a video link.

38. The Court further observes that the Government did not explain why it was impossible to make different arrangements for the conduct of the appeal hearing and the provision of the first applicant's legal counsel. It notes that the appeal hearing was held in Vologda. The first applicant and lawyer Ye. were also in Vologda. It is obvious that Ye. would not have encountered any difficulty in meeting the first applicant in person or being in the same room with the first applicant during the appeal hearing. Nor does the Court discern any compelling reasons to justify the authorities' decision to arrange for the first applicant's participation in the appeal hearing via video conference rather than ensuring his presence in the courtroom.

39. Regard being had to the above, the Court concludes that the criminal proceedings against the first applicant were unfair. The arrangements made by the Regional Court were insufficient and did not ensure that the first applicant had effective legal assistance during the appeal hearing.

40. Accordingly, there has been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c) thereof.

(b) Application no. 27412/07

41. The Court observes that, according to the second applicant, the appeal hearing of 18 April 2007, the supervisory review hearing of 16 March 2011, and the new appeal hearing of 19-20 May 2011 all fell short of the requirements set out in Article 6 of the Convention.

42. In this connection the Court notes, and it is not disputed by the Government, that the appeal judgment of 18 April 2007 was quashed by way of supervisory review expressly because of the authorities' failure to provide the applicant with legal assistance in the appeal proceedings. However, the Government claimed that the authorities had done everything

in their power to ensure that at the rehearing of the case in 2011 the second applicant received effective legal assistance. Therefore, the Court will concentrate on the second set of appeal proceedings.

43. The Court has considered the arguments furnished by the Government in support of their position and accepts that lawyer M. was a qualified lawyer and that there was no explicit disagreement between her and the second applicant in respect of the substance or strategy of his defence. The Court also is also ready to accept that lawyer M. was prepared to assist the second 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 contact between lawyer M. and the second applicant) respected the rights of the defence (compare, paragraph 35 above).

44. In the present case, the second applicant was able to communicate with the newly appointed lawyer before the start of the hearing. The Court notes that the second applicant did not allege before the appeal court that the time allotted for such communication had been insufficient.

45. Nevertheless, the Court expresses doubts, as in the first applicant's case, as to whether sufficient privacy was afforded in respect of communication between the second applicant and his lawyer by means of a video link. Nor did the Government offer any explanation as to why it was not possible to organise at least a telephone conversation between the second applicant and the lawyer or to appoint a local lawyer from Kostroma who could have visited the second applicant in remand prison and been with him during the appeal hearing.

46. Regard being had to the above, the Court concludes that the arrangements made by the Supreme Court were insufficient and did not ensure that the second applicant had effective legal assistance during the second set of appeal proceedings. There has therefore been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) thereof, in the proceedings that ended with the judgment of 20 May 2011.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

47. Lastly, the second applicant complained about the conditions of his detention, alleged altercations with other inmates in the remand prison, a delay in his transfer to a correctional colony, and the trial court's alleged failure to summon witnesses.

48. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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."

50. The first applicant claimed 100,000 euros (EUR) and the second applicant claimed 1,100,000 Russian roubles (RUB) in respect of non-pecuniary damage.

51. The Government considered that no monetary award should be made to the applicants. In their view, a reopening of the proceedings at the national level would constitute adequate redress in the first applicant's case. As regards the second applicant, the Government considered that finding a violation would constitute sufficient just satisfaction.

52. 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 applicants' 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 *Sakhnovskiy*, cited above, § 112). The Court notes, in this connection, that, as pointed out by the Government, criminal proceedings against the applicants may be reopened if the Court finds a violation of Article 6 of the Convention.

53. As to the applicants' claims in respect of non-pecuniary damage, the Court considers that the applicants 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 to each of the applicants EUR 1,500 under this head, plus any tax that may be chargeable on those amounts.

A. Costs and expenses

54. The first applicant claimed EUR 1,200 for the costs and expenses incurred before the Court. The second applicant claimed RUB 10,000 for the costs and expenses incurred in the domestic proceedings and those before the Court.

55. The Government considered the applicants' claims unsubstantiated.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that EUR 850 has already been paid to each of the applicants by way of legal aid. Having regard to the documents submitted by the applicants in support of their claims, the Court does not consider it necessary to make any additional award under this head.

B. Default interest

57. The Court considers it appropriate that the default interest rate 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. *Decides* to join the applications;

2. *Declares* the complaints concerning the alleged ineffectiveness of legal assistance admissible and the remainder of application no. 27412/07 inadmissible;

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

4. *Holds*
   (a) that the respondent State is to pay to each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State;
   (b) 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;

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

Done in English, and notified in writing on 1 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Deputy Registrar	Luis López Guerra President