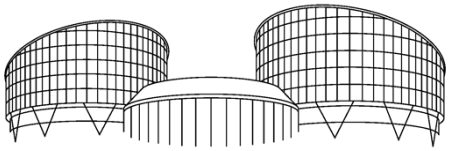

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF LOBAREV AND OTHERS v. RUSSIA

(Applications nos. 10355/09 and 5 others - see appended list)

JUDGMENT

Art 6 § 1 and Art 6 § 3 d) • Fair hearing • Use at trial of pre-trial statements of absent witnesses • Good reasons for non-attendance of the witnesses • Impugned testimony carrying significant weight • Sufficient counterbalancing factors

STRASBOURG

28 January 2020

FINAL

28/05/2020

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Lobarev and Others v. Russia,

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

Paul Lemmens, *President,*
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Lorraine Schembri Orland, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 7 January 2020,

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

PROCEDURE

1. The case originated in six applications (nos. 10355/09, 14358/11, 12934/12, 76458/12, 25684/13 and 49429/14) 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 six Russian nationals whose names are listed in the Appendix ("the applicants"), on the dates listed in the Appendix.

2. The applicants were represented by lawyers whose names are listed in the Appendix. The Russian Government ("the Government") were initially represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicants alleged, in particular, that the domestic courts had read out the pre-trial statements of prosecution witnesses without good reason and thus restricted the right to have those witnesses examined at the trial.

4. On 21 September 2015 the complaints under Article 6 §§ 1 and 3 (d) were communicated to the Government and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the cases, as submitted by the parties, may be summarised as follows.

6. Between 2008 and 2014 different trial courts in unrelated criminal proceedings convicted the applicants of drug-related offences, except for Mr Dumler, who was convicted of fraud, and sentenced them to terms of

imprisonment. An outline of the relevant proceedings is presented in the Appendix.

7. The prosecution witnesses, who were suspects or accused in certain other criminal proceedings, did not appear in court and their pre-trial statements were read out at trial.

8. The trial courts admitted the above statements as evidence referring to Article 281, section 2 of the Code of Criminal Procedure, which allowed for testimony of a witness to be read out in "exceptional circumstances" precluding appearance in court (see paragraph 15 below).

9. In the cases of Mr Lobarev and Mr Shkarin the trial courts in the text of the judgments merely referred to the above legislative provision. However, it follows from the trial records that the decision to read out the pre-trial statements was based 1) on information given by a police officer that the witness had been on a national wanted list in the case of Mr Lobarev and 2) on information from an investigator that the witness was wanted by the police and had been searched for months in the case of Mr Shkarin.

10. In the case of Mr Dumler the trial court mentioned in the text of the judgment that the witness had gone into hiding without providing further details. However, it follows from Mr Dumler's grounds of appeal that according to the information of the Federal Security Service the witness had gone into hiding and was evading the authorities.

11. In the cases of Mr Kazakovskiy, Mr Kosov, and Mr Novgorodov the trial courts provided further reasons in the texts of the judgments to justify the witnesses' absence. In particular, the trial courts referred to 1) a decision of the investigator to place the witness on a wanted list in the case of Mr Kazakovskiy; 2) a decision of another court to place the witness on a wanted list in the case of Mr Kosov; 3) the witness being on a national wanted list in the case of Mr Novgorodov. In the latter case in addition to the text of the judgment it follows from the trial records that meanwhile another district court was examining a criminal case against the witness, it decided to place him on a national wanted list as he had been evading justice, and suspended the criminal proceedings. It further follows that Mr Novgorodov supported the prosecutor's motion before the trial court to send an official request to the said district court inquiring about the absent witness's whereabouts. The motion was granted and an official document confirming that the district court had placed the absent witness on a wanted list was received and presented to the prosecutor and Mr Novgorodov.

12. All of the applicants' convictions were based on a multiplicity of evidence, including:

a) statements made by the applicants at the pre-trial stage and at trial in the presence of their lawyers, by police officers conducting undercover operations, attesting witnesses, other witnesses for prosecution;

b) testimonies of witnesses during cross-examinations in the court room;

c) physical evidence (in the cases of Mr Lobarev, Mr Shkarin and Mr Kazakovskiy – various amounts of seized drugs, in the case of Mr Novgorodov – almost one kilogram of drugs; in the case of Mr Kosov – seized drugs, scales and more than two hundred plastic zipper bags; in the case of Mr Dumler – second-hand equipment);

d) documentary evidence, such as records of the investigative actions and forensic examination reports;

e) in the cases of Mr Lobarev, Mr Kazakovskiy and Mr Novgorodov – transcripts of the telephone calls between them and buyers or suppliers of the drugs;

f) in the case of Mr Lobarev – a video recording of the test purchase;

g) in the case of Mr Shkarin – records of his pre-trial confrontation with a buyer of the drugs;

h) statements of the defence witnesses, including the applicants' spouses, relatives and friends, who were examined at the trials.

13. Admitting the statements of the absent witnesses the domestic courts did not give them any particular value, analysed those statements, cross-referenced them with various pieces of the above evidence, and found them to be coherent and consistent.

14. The applicants appealed arguing, among other things, that the domestic courts did not make sufficient efforts to secure the presence of the witnesses at trial. Mr Dumler specifically argued that the information received from the department of the Federal Security Service about the fugitive witness had not contained indications as to which competent authorities the witness had been evading, whether any inquiry into the witness's whereabouts had been in place, whether a criminal case had been instituted against the witness, and if so by which authority, and what the reference number of the criminal case was. The judgments of the trial courts were upheld on appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Absence of witnesses at trial

15. The provisions of the domestic law and relevant practice on reading out of absent witnesses' pre-trial statements were previously set out in the judgment *Zadumov v. Russia* (no. 2257/12, §§ 28-38, 12 December 2017).

16. Articles 111 to 113 and 188 of the Code of Criminal Procedure set out the legal regime for summoning witnesses for examination, allowing the courts to compel them to appear, relying on the bailiffs service where appropriate.

B. Search of suspects and accused

17. Domestic law provides for a special legal regime for the search of suspects and accused who go into hiding and evade the authorities.

18. Article 210, section 1 of the Code of Criminal Procedure provides that if a location of a suspect, accused is unknown, an investigator may instruct an inquiry agency to search for that person. Article 5, section 38 of the Code stipulates that the search measures are to be taken by an inquiry officer, an investigator or an inquiry agency.

19. Under Article 2 of the Operational-Search Activities Act of 12 August 1995 a search for persons hiding from inquiry agencies, investigation bodies and courts or evading criminal sentence is one of the main tasks of the bodies entrusted with operational-search activities. Under Article 6 and 7 of the Act these activities may include questioning, inquiry, observation and identification.

20. Subparagraph 12 of paragraph 1 of the Police Act of 7 February 2011 provides that the police may conduct a search for individuals hiding from inquiry agencies, investigation bodies and courts. The specific rules governing the organisation and tactics of such search activities by the police were put in place by Order no. 213 of the Ministry of the Interior of the Russian Federation on 5 May 1993.

THE LAW

I. JOINDER OF THE APPLICATIONS

21. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicants complained that their right to a fair trial under Article 6 § 1 of the Convention had been violated on account of their inability to examine witnesses for prosecution as guaranteed by Article 6 § 3 (d) of the Convention. The relevant Convention provisions read as follows:

> "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 ...
>
> (d) to examine or have examined witnesses against him ..."

A. Admissibility

23. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

24. In all the cases, except for the cases of Mr Shkarin and Mr Novgorodov, the Government noted that the applications were already the subject of well-established case-law of the Court and no observations or submission of additional documents were required for the proper consideration of the cases.

25. In the case of Mr Shkarin the Government submitted the records of confrontation between Mr Shkarin and the absent witness and concluded that the applicant had exercised his right to question the witness at the pre-trial stage.

26. In the case of Mr Novgorodov the Government submitted observations. They stated that initially the trial court had attempted to summon the absent witness, who was an accused in parallel proceedings, had adjourned a hearing, and had inquired into the reasons for his absence. It appeared that the witness had absconded and had been placed on the wanted list, a search file had been opened and operational-search measures had been conducted to establish his whereabouts. The Ministry of Internal Affairs had been notified that his attendance in the current proceedings should be secured and they had been provided with information that he had connections to certain locations in the country and that he might leave the country. Accordingly, the absent witness's statements were read out at trial. The Government argued that the applicant's conviction was based on abundant other evidence, such as his pre-trial and trial testimony in which he had admitted that part of the drugs belonged to him and the remainder he had received from the absent witness for further transportation, testimony of the police officers who had conducted operational-search activities in respect of the applicant, and transcripts of the telephone calls between the applicant, absent witness and other buyers of the drugs. The Government argued further that in general the Russian legal system had afforded Mr Novgorodov sufficient procedural safeguards aimed at securing the right to examine witnesses testifying against him.

27. The applicants maintained their complaints and argued that the witnesses' statements were the only direct evidence incriminating them. Mr Lobarev, Mr Kazakovskiy and Mr Kosov did not provide the Court with further submissions on the merits of their cases. Mr Dumler, Mr Shkarin and Mr Novgorodov argued that there were no good reasons to admit the pre-trial statements of the absent witnesses. In their opinion, it would have been possible to locate them, but the authorities had failed to use effective means to do so. Mr Shkarin specifically argued that the trial court had not

verified the information about the witness being on the wanted persons' list, had not examined the witness's search file, and had failed to review the operational-search measures taken by the authorities. Mr Shkarin additionally stated that his pre-trial confrontation with the witness had been conducted outside his criminal case and had been tainted by procedural defects.

2. The Court's assessment

(a) General principles

28. The Court reiterates that the guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, 15 December 2015, with further references therein). In making this assessment the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victim(s) that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010, and S*chatschaschwili*, cited above, § 101) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, 15 December 2011). It is also notable in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Gäfgen*, cited above, § 162, and the references therein).

29. The principles to be applied in cases where a prosecution witness did not attend the trial and pre-trial statements were admitted as evidence have been summarised and refined in the Grand Chamber judgments *Al-Khawaja and Tahery* (cited above, § 152), and *Schatschaschwili* (cited above*,* § 118). According to these principles it is necessary to examine in three steps the compatibility of proceedings, which led to a conviction, with Article 6 §§ 1 and 3 (d) of the Convention. It must be examined whether:

(i) there was good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence;

(ii) the evidence of the absent witness was the sole or decisive basis for the defendant's conviction or carried significant weight and its admission might have handicapped the defence; and

(iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the

defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair.

30. In respect of the first step, the trial court must have good factual or legal grounds not to secure the witness's attendance at the trial (see *Schatschaschwili,* cited above, § 119). Where a witness does not attend because of unreachability, the trial court must have made all reasonable efforts to secure a witness's attendance, including by actively searching for that witness with the help of the domestic authorities including the police (ibid., §§ 120-21). The need for all reasonable efforts on the part of the authorities to secure the witness's attendance at the trial further implies careful scrutiny by the domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness (ibid., § 122).

31. Considering the possible reasons for a witness to be unavailable for examination at the trial and the scope of the corresponding obligations of the domestic courts to make all reasonable efforts to secure the witness's attendance, there is a distinction between witnesses who cannot be located and witnesses who are evading justice.

32. In respect of the former the Court has repeatedly noted that the domestic courts with the assistance of the respective authorities have a wide array of measures to locate a missing witness. For example, inquiries with the relatives and acquaintances (see *Klimentyev v. Russia*, no. 46503/99, §§ 30 and 125, 16 November 2006), police searches, including international legal assistance (see *Lučić v. Croatia*, no. 5699/11, § 80, 27 February 2014), inquiries with prison registers, national police and Interpol databases (see *Tseber v. the Czech Republic*, no. 46203/08, § 50, 22 November 2012), civil register services and municipal councils (*Sică v. Romania*, no. 12036/05, §§ 25 and 63, 9 July 2013), etc. It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable (see *Schatschaschwili,* cited above, § 121).

33. However, in cases where a witness has gone into hiding and has been evading justice the domestic courts face a situation where in practical terms they have no means to locate a witness and it would be excessive and formalistic to compel the domestic courts to take steps in addition to the efforts already taken by the respective authorities within a special legal framework for the search of persons evading justice.

34. In such cases the trial court prior to concluding that there is good reason for the non-attendance of a witness must satisfy itself, first, that the

witness is evading justice, and, second, that the defendant is informed thereof in a way affording a possibility to comment on the measures taken.

(b) Application of these principles to the present cases

35. In the present cases the domestic courts gave reasons for their decisions to read out absent witnesses' statements, namely that they had gone into hiding (Mr Dumler's case, see paragraph 10 above) or that they had gone into hiding and had been placed on the wanted lists (cases of Mr Lobarev, Mr Shkarin, Mr Kazakovskiy, Mr Kosov and Mr Novgorodov, see paragraphs 9 and 11 above).

36. The Court observes that the Russian courts relied on the information received from competent authorities such as a prosecutor, an investigator, a police officer, a regional department of the Federal Security Service or a district court that the witnesses had gone into hiding and/or had been placed on the wanted lists (see paragraphs 9-11 above), and satisfied themselves that the witnesses had been evading justice.

37. The applicants were each informed about the witnesses' absence and the reasons for it during the trial and nothing indicates that they were deprived of a possibility to comment on the reasons given and the measures taken. Indeed, the available material demonstrates that the relevant comments were made by the applicants, when they chose to do so. In particular, Mr Novgorodov supported the prosecutor's motion to request an official confirmation of the fact that the absent witness had been on a wanted list (see paragraph 11 above). Mr Dumler questioned before the appeal court the information received from an official authority about the fugitive witness (see paragraph 14 above).

38. Mr Shkarin, Mr Novgorodov and Mr Dumler claimed in their observations that it was possible to locate the witnesses, that the authorities disposed of different effective tools to do so, but had failed. In this regard the Court highlights that these claims should have been initially pursued in the domestic proceedings: it was open to the applicants to raise these arguments before the domestic courts, but the applicants did not do so.

39. The Court notes that it was only in the cases of Mr Kazakovskiy and Mr Kosov that the texts of the judgments referred explicitly to the specific reasons for the witnesses' absence and identified the source of their information (see paragraph 11 above); in the other cases some or all of these details could be found in other documents (see paragraphs 9-11 above).

40. Nevertheless, it is evident from the available material that the Russian courts, having exercised the requisite careful scrutiny, concluded that there was good reason for the non-attendance of witnesses (see paragraphs 35-37 above). The Court has no grounds to disagree with their findings.

41. Turning to the second step of the *Al-Khawaja* test the Court notes that the pre-trial statements of the absent witnesses were neither sole, nor

decisive evidence, but nevertheless carried significant weight. The applicants' convictions were based on a multiplicity of evidence, including, besides the absent witnesses' testimony, statements from the applicants themselves and from prosecution and defence witnesses, physical and documentary evidence, records of the investigative actions, forensic examination reports, and video recordings. The manner in which the domestic courts construed the statements of the absent witnesses did not predetermine and shape the narrative of what happened in the respective cases and the applicants' conviction (see paragraphs 12-13 above, and compare with *Zadumov*, cited above, §§ 59, 61 and 74, and, *mutatis mutandis*, *Artur Parkhomenko v. Ukraine*, no. 40464/05, § 87, 16 February 2017).

42. In respect of the third step of the *Al-Khawaja* test that requires the Court to examine whether there were sufficient counterbalancing factors to compensate for the handicap under which the defence laboured, the Court, having regard to the available material concludes that the defence was able to effectively present their case to the domestic courts, to challenge the evidence presented at trial, including pre-trial statements of the absent witnesses, to question other witnesses for prosecution, to advance their versions of events and to point at the inconsistencies or incoherence of other evidence.

43. In all cases the domestic courts examined the weight, coherence and consistency of the absent witnesses' statements and cross-referenced them with other available evidence. In the case of Mr Shkarin the appeal court dismissed his allegation that the pre-trial confrontation had been conducted outside his criminal case and had been tainted by procedural defects and relied on it in connection with the large body of evidence against him.

44. The Russian courts examined the versions of events presented by the defence, verified and dismissed them on reasonable grounds. The defence in the applicants' trials was able to call witnesses on behalf of the accused (spouses, relatives, and friends) and to effectively question them. When the domestic courts refused the motions to call certain other defence witnesses they duly reasoned their decisions, which were not arbitrary.

45. Having regard to the above considerations, the Court concludes that the criminal proceedings against the applicants had been fair. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention in the applicants' cases.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints under Article 6 §§ 1 and 3 (d) of the Convention admissible;

3. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 28 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Paul Lemmens
President

APPENDIX

No.	Application no. Date of introduction	Applicant name Date of birth Place of residence Represented by	Applicant's conviction (trial court and appeal court)	Absent prosecution witnesses
1.	10355/09 15/01/2009	Pavel Igorevich LOBAREV 04/01/1979, Novosibirsk Petr Aleksandrovich BORISOV	Sovetskiy District Court of Novosibirsk 27/06/2008 Novosibirsk Regional Court 01/10/2008 Convicted of drug dealing	Mr Ch.
2.	14358/11 14/02/2011	Dmitriy Anatolyevich DUMLER 01/07/1965, Volgograd Olga Aleksandrovna SADOVSKAYA	Tsentralnuy District Court of Volgograd 22/02/2011 Volgograd Regional Court 11/04/2011 Convicted of fraud	Mr K.
3.	12934/12 16/02/2012	Stanislav Vitalyevich SHKARIN 10/02/1980, Moscow Vadim Ivanovich KUZMICHEV	Tushinksiy District Court of Moscow 01/11/2011 Moscow City Court 09/12/2011 Convicted of drug dealing	Mr P.
4.	76458/12 06/11/2012	Roman Yuryevich KAZAKOVSKIY 27/12/1985, Lesnoy Vladimir Aleksandrovich ROMANOV	Novocheboksarskiy Town Court of the Chuvash Republic 03/09/20102 Supreme Court of the Chuvash Republic 09/10/2012 Convicted of drug dealing	Ms G.
5.	25684/13 27/03/2013	Valeriy Petrovich KOSOV 06/11/1979, Reutov Andrey Vladimirovich KLYKOV	Reutovskiy Town Court of the Moscow Region 17/08/2012 Moscow Regional Court 01/11/2012 Convicted of drug dealing	Mr N.
6.	49429/14 30/10/2014	Vadim Olegovich NOVGORODOV 12/02/1970, Borovichi Oksana Vladimirovna PREOBRAZHENSKAYA	Novgorodskiy Town Court of the Novgorod Region 29/05/2014 Novgorod Regional Court 07/10/2014 Convicted of drug dealing	Mr. G.