Written observations of the applicant
Application no. 40544/18, Safonov v. Russia

Facts

1. The applicant does not dispute the statement of facts prepared by the Court's Registry.

2. However, the applicant would like to add that although the first-instance court found his statement of surrender and confession to be inadmissible evidence, the content of that statement was used to support the conviction — in the form of the statement by operative officer Sh. who had drawn up the applicant's statement and who told the court what exactly the applicant had told him when drawing up that applicant's statement (see p. 48 of the application lodged with the Court). The applicant would like to draw particular attention to this point as it was not reflected by the Court in the statement of facts prepared at the time of communication of the application. Whereas the application lodged with the Court expressly included complaints on the usage in support of the applicant's conviction of his statements, in the form of a statement by operative officer Sh., given by the applicant not only during his body search and the search of his vehicle (as reflected in the Court's statement of facts) but also during his surrender and confession (see paragraphs F.1, F.2 and F.8 on pages 8 and 9 of the form).

3. In addition, the applicant contests the Government's statement of facts in their written observations in the following five parts, each of which is allocated one of the following five paragraphs of these observations.

4. "According to the record, which was signed by the applicant, the applicant was informed of his rights to remain silent and to seek legal assistance" (§ 1 of the Government's written observations). The Government do not specify which record they are referring to. However, in the preceding sentence, they write about a body search. The next sentence is about just a search. But they specify that during that search "the applicant explained that he was in possession of a phone which was used to stash drugs" (so in the text of the Government's observations;

this does not correspond to the record, as explained below, but is not essential for the present case). According to the criminal case file, only two searches (досмотра) were carried out in respect of the applicant: a body search and a vehicle search (the Court calls it an examination, but here the same term is used as for a body search because it is so in Russian), of his car (see, for instance, the list of all the records and other written evidence on pp. 11-14 of the judgment — pp. 53-56 of the application lodged with the Court). The applicant's statements concerning the phone were included to the body search record only: "There is a phone ... which is used to communicate with buyers of drugs" (see p. 14 of the application lodged with the Court). The vehicle search record does not contain any statements by the applicant about the phone; it includes only the applicant's statements concerning the bank card found in his car: "There is a bank card ... to withdraw d/s [funds] received from the sale of n/s [drugs]" (see p. 16 of the application lodged with the Court). It follows that the next — after the one contested by the applicant — sentence of the Government's observations also refers to the body search, the applicant does not see any other reasonable interpretation. Thus, it is reasonable to assume that the sentence contested by the applicant also refers to the body search — the body search record. If so, the Government's allegation quoted above is inconsistent with the body search record, which consists of only two pages and was attached to the application form lodged with the Court as Appendix no. 1 (see pp. 14-15 of the application). In principle, this record does not mention in any form (either pre-printed or handwritten) any of the rights of the applicant, i.e. the "person being searched", apart from the right to make comments, as described below. At the beginning of the record, the following rights of "participating persons" are mentioned, which, judging by the signatures opposite the explanation of these rights, included only U. and Kh., i.e. persons invited to certify the fact, content and results of the actions, as stated in the record itself: to make comments, to get acquainted with the record, to bring complaints. At the end of the second page of the record, it is stated that "all persons who participated in the body search" have been explained their rights to make comments. In no other context is the word "right" mentioned in this record. Accordingly, in particular, it does not mention

anyone's right to remain silent and not to testify against himself, nor – in any form – the right to defence, including through assistant of a counsel, as well as the right to seek legal assistance. As the grounds for the body search, the record form refers to Articles 6 and 8 of the Federal Law "On operative-search activities" ("On OSA") no. 144-FZ of 12 August 1995 and Article 48(3) of the Federal Law "On Narcotic Drugs and Psychotropic Substances" no. 3-FZ of 8 January 1998. The texts of these Articles are not reproduced in the record, but even if we refer to them, we can find a mention of rights in the above provisions of these laws only in Article 8 of the Federal Law "On OSA": "carrying out operative-search activities which restrict the constitutional rights of man and of the citizen to the secrecy of correspondence, phone conversations, postal, telegraphic and other communications transmitted by electronic and postal networks, as well as the right to security of the home, is allowed on the basis of a court order..." (see Appendix 1 below). These provisions have nothing to do with explaining to a person being searched any rights, including the right to remain silent and not to testify against oneself and the right to counsel. Thus, even through an unspecified reference to the said legal provisions, the only record of the applicant's body search included in the case file does not contain any information that he have been informed of his rights to remain silent and to seek legal assistance, either with or without the applicant's signature. On what basis the Government claim otherwise, they have not indicated. They did not produce any documents to back up their assertions. The Government have not presented any claims in respect of the copy of the body search record submitted by the applicant together with the application form lodged with the Court. If we assume for the sake of thorough analysis that the record in the sentence cited by the applicant is the record of the applicant's arrest, which was indeed signed by the applicant and through which the applicant was indeed informed of his rights to remain silent and to seek legal assistance, then that record was not drawn up until 2:23 in the morning on 20 March 2016 (see p. 23 of the application lodged with the Court). Whereas the complaint under consideration concerns the use of the applicant's incriminating statements obtained before it.

5. "The applicant [after the body search and during the vehicle search] again was informed of his rights to remain silent and to seek legal assistance and signed the record" (§ 2 of the Government's observations). The context suggests that this is a vehicle search record. The Government do not explicitly state here that information on explaining of these rights to the applicant was included in the vehicle search record which he signed. They refer to informing and signing as two different facts, with more or less explicit reference only to their chronological relationship. Irrespective of whether the Government were referring to the fact that information about the said rights had been included in the record of the vehicle search, or to the fact that the applicant had been allegedly informed about them without such information being entered to that record, the Government again failed to substantiate their assertions. However, the failure to inform the applicant of those rights in the vehicle search record is easily verifiable: a copy of the record was attached to the application form lodged with the Court as Appendix no. 2 (see pp. 16-17 of the application). And the Government have made no claims about the authenticity of this copy. In terms of the explanation of rights — other rights — the vehicle search record is exactly the same as the body search record analysed in the preceding paragraph of these observations, the only difference being that the "persons involved" in the vehicle search record are named differently, as "attesting witnesses". Moreover, the vehicle search record, in addition to referring to the same legal provisions referred to in the body search record, additionally contained references to Articles 27.9, 27.10 of the Code of Administrative Offences of the Russian Federation and Articles 60 §§ 3 and 4 and 160 of the Code of Criminal Procedure (CCrP) of the Russian Federation. However, these legal provisions do not mention any rights, let alone the right to remain silent and not to testify against oneself and the right to counsel: the only reference to the word "right" is found in Article 60 § 3(3) of the CCrP in the following context: "an attesting witness has the right ... to complain ..." (see Appendix 1 below). Thus, with regard to the vehicle search record, an explanation of the right to remain silent and not to testify against oneself and the right to counsel are not included in the form of the record or in the text handwritten therein, nor are they contained in the regulations referred to in the

text of the record. As regards the word "again" in the Government's assertion quoted at the beginning of this paragraph, it would seem to imply once again that the rights in question had previously been explained to the applicant. Since vehicle search had started, according to its record, at 18:40 on 19 March 2016 (see p. 16 of the application lodged with the Court), the applicant had in fact been arrested just over an hour before it, at 17:25 (see p. 18 of the application lodged with the Court), from 18:10 to 18:20 on the same day the body search record was drawn up (see p. 14 of the application lodged with the Court) and no other documents submitted by operative officers and drawn up between 17:25 and 18:40 on that day are contained in the case file (and no such documents are referred to by the Government), the applicant considers that the Government reiterate by implication that there was an explanation of the said rights to the applicant during his body search, which has been analysed in the preceding paragraph of the present observations.

6. "The applicant was again informed of his rights before every search" (§ 3 of the Government's observations). At the same time, the preceding sentence of their observations referred to the applicant's garage search. The Government do not state either in the contested sentence or in this paragraph of their observations as a whole what rights they are referring to. However, the only rights this complaint concerns are the right to remain silent and not to testify against oneself and the right to counsel. Accordingly, the applicant interprets this assertion by the Government in such a way that he was informed again of his named rights before every search of the garage. In such a case, firstly, it is not clear to the applicant why the Government are talking about searches of the garage in plural. According to his criminal case file, there was only one search (examination) of the garage (both these words appear in the title of the record, with the second word in brackets) with a record being drawn up on 19 March 2016 from 19:15 to 19:30. This is confirmed, *inter alia*, by the fact that the court refers in its judgment to one garage examination record only (see p. 13 of the judgment — on p. 55 of the application lodged with the Court and, in general, the list of all records and other written evidence on pp. 11-14 of the judgment — pp. 53-56 of the application). The Government did not back up their statement that there had been more than one searches (examinations)

of the garage. As the Government submitted the written observations in English only, it is impossible to judge unequivocally what they mean by "search" in this case. This is how both обследование (осмотр) (examination (inspection)) and обыск (search) can be translated. And in this case there was indeed a search (обыск) conducted. And during it, the applicant's rights were even explained to him. However, the search was not carried out in the garage, but in the applicant's home, his flat. And the search was conducted after the applicant's arrest record had been drawn up at 2:23 in the morning on 20 March 2016, explaining his right to remain silent and not to testify against himself and his right to counsel — the search was conducted in the applicant's flat between 5:04 and 5:17 in the morning on 20 March 2016 (see p. 14 of the judgment — at p. 56 of the application lodged with the Court). Another search, the record of which also constitutes evidence in the case, was conducted in S's flat. This search took place on 5 February 2016, a month and a half before the applicant's arrest (see p. 11 of the judgment — at p. 53 of the application lodged with the Court). Thus, the explanation to the applicant of any rights during the search of his flat on 20 March 2016 is irrelevant to the issue of whether they had been explained to him before the arrest record was drawn up, which is what the complaint under consideration by the Court is about. Secondly, the record of the search (examination) of the garage does not contain any information about explaining any rights to the applicant (see Appendix 2 below). The only right that according to this record was explained is the right of the "members of the public" to comment on actions taken. This record refers to Articles 4, 6-8, 13-15 and 17 of the Federal Law "On OSA". As noted above, Article 8 of the Law "On OSA" mentions other rights (see § 4 above), Article 14 of the same Law requires to take all measures to protect constitutional rights and freedoms, and Articles 13 and 15 list the rights of operative officers themselves. The right to silence, the right not to testify against oneself, the right to counsel or to legal assistance are not mentioned in these Articles of the Law in principle, let alone the need to explain them to anyone under any conditions. As to the word "again", the applicant can only repeat what is written in the preceding paragraph of these observations.

7. "The statement of surrender and confession, which was submitted by the applicant on 19 March 2016, was later excluded from the body of evidence by the court of the first instance, as it did not contain any indication whether the applicant was or was not informed of his rights to remain silent and to seek legal assistance" (§ 4 of the Government's observations). As expressly stated in the judgment of the court of first instance, the statement of surrender and confession was held to be inadmissible evidence with reference not to the fact that it itself did not contain information as to whether the applicant had been informed of those rights, but "since there is no information in the case file that [the applicant], at the time of accepting his surrender, was informed of Article 51 of the Russian Constitution [providing, *inter alia*, the right not to incriminate himself], informed of procedural rights and provided with the opportunity to get assistance and advice of a counsel. This circumstance is not critically important for the Court's consideration of the present application. However, it demonstrates that the domestic court itself acknowledged that the applicant had not been informed of those rights at the time of the body search and the vehicle search on 19 March 2016 — and not only when the statement of surrender and confession, which was declared inadmissible, was taken. This follows from the chronology of events showing that the searches took place before the statement of surrender and confession was drawn up and accepted (the surrender and confession record does not indicate the time of its drawing up). This, according to the judgment, was testified to by operative officer Sh. who had drawn up the surrender and confession record (see pp. 4-6 — at pp. 46-48 of the application lodged with the Court). And the Government did not explain in their written observations why their assertions about explaining the applicant's rights at the time of the body search and the vehicle search were also inconsistent with the findings of the domestic court.

8. "The rest of the self-implicating statements were used by the court of first instance, as they were given after the applicant was informed of his rights, and were either given in the presence of the government appointed defender, or were confirmed in the presence of the government appointed defender" (§ 5 of the Government's written observations). Although the Government do not indicate this,

the applicant assumes that they are referring to his "self-implicating statements". In such a case, the Government's allegations are inconsistent with the case file. According to it, the applicant was questioned three times during the pre-trial investigation. The first two times in the presence of appointed counsel P. and the third time in the presence of counsel G. with whom there was an agreement concluded. The first time he was questioned as a suspect between 2:28 and 2:45 in the morning on 20 March 2016 (see p. 25 of the application lodged with the Court), i.e. 5 minutes after the arrest record was drawn up, through which he was informed of his rights to remain silent and not to testify against himself and to be assisted by counsel. And in that first record of the interrogation as a suspect with the defence counsel the applicant had already exercised the right to remain silent and had explicitly refused to give statements on the merits of the case (see p. 26 of the application lodged with the Court). Having been questioned as an accused 7 minutes after being questioned as a suspect, between 2:52 and 2:56 in the morning on 20 March 2016, the applicant repeated that he refused to give statements on the merits of the case (see Appendix 3 below). During his interrogation as an accused on 21 October 2016, the applicant again explicitly refused to testify, apart from stating that he had not sold any drugs to S. (see Appendix 4 below). All the evidence referred to by the court of first instance are cited on pp. 2-16 of the judgment (pp. 44-58 of the application lodged with the Court). The court referred only to the applicant's statements given at trial, according to which he "did not plead guilty to the charge" (see pp. 2-4 of the judgment). The court also referred to the applicant's statement of surrender and confession but excluded it from the evidence (see pp. 14-15 of the judgment). No statements given by the applicant during the pre-trial investigation, including "self-implicating" ones, were cited by the court in the judgment. And the applicant did not give such statements at the trial, according to the judgment.

9. Thus, the applicant considers that, applying the applicable standard of proof which is "beyond reasonable doubt" and having regard to the conduct of the Government (see Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161), which make allegations of facts inconsistent

with those made by the applicants and presented by the Court in the statement of facts, without any supporting evidence being adduced and without refuting any such evidence submitted by the applicant, it must be concluded that: the body search record and the vehicle search record of 19 March 2016 contain no reference to the applicant's rights to remain silent and not to testify against himself and right to counsel, there is nothing to suggest that these rights were explained to the applicant before the record of his arrest was drawn up at 2:23 in the morning on 20 March 2016, immediately after these rights were explained to the applicant for the first time, he used both of these rights, asking to appoint a counsel and refusing to testify on the merits of the case, and from that moment he never admitted his guilt in the crimes, he was charged with, either at the preliminary investigation or in the courts.

10. The applicant would like to add that pursuant to Article 50 § 2 of the CCrP, only a person conducting the initial inquiry, an investigator or a court can ensure the participation of a defence counsel by appointment (see Appendix 1 below). According to the Federal Law no. 63-FZ of 31 May 2002 "On Advocacy", an advocate must only participate as a defence counsel in criminal proceedings if appointed by an inquiry authorities, a preliminary investigation authorities or a court (see ibid.). The law does not provide otherwise for compulsory participation as a defence counsel by appointment. The Law "On OSA" does not even mention a defence counsel or the right to defence. The body search record in respect of the applicant was drawn up with reference only to the Law "On OSA" and the Federal Law "On Narcotic Drugs..." (which moreover does not mention either a defence counsel or the right to defence). The body search record was drawn up by an operative officer of the Federal Drug Control Service of the Russian Federation (FSKN). There is nothing to indicate that it was drawn up by this officer in his capacity as an inquirer. Moreover, no inquiry, which is a form of preliminary investigation (предварительное расследование), was held in respect of the applicant of the acts the applicant was charged with. The investigation of his case, initiated subsequently, took the form of a preliminary investigation by an investigator (предварительное следствие), which was set by the category of crimes he was charged with. Thus, the FSKN officer could not in principle have

provided the applicant with a defence lawyer on appointment even if he had asked for one, including in response to an explanation to the applicant of his right to one. And that, in the applicant's view, indirectly further demonstrates that the FSKN officer had not explained to him the right to counsel and also directly indicates that the exercise of that right in terms of providing counsel on appointment (and the applicant, having been informed of his right to counsel when drawing up his arrest record, requested exactly a counsel on appointment) could not have been ensured in any event by the FSKN officer. And this applies equally to the vehicle search record drawn up by the same operative officer. And the additional references in this record to the Code of Administrative Offences and the CCrP, in the absence of the officer's right and, consequently, the opportunity to ensure the participation of defence counsel on appointment, do not change anything.

Law

Answers to the Court's questions

Starting-point of the applicant's rights

11. The guaranties of the right to remain silent and not to testify against himself under Article 6 §§ 1 and 3 of the Convention started to apply in respect of the applicant from the moment of his actual apprehension, which is also consistent with the Russian Constitutional Court's explanation on the starting-point of those guaranties under Russian law (see, e.g. *Rodionov v. Russia*, no. 9106/09, § 146, 11 December 2018). That is, these guaranties started to apply to the applicant at 17:25 on 19 March 2016. And the Government did not raise any objection as to the time of the applicant's actual apprehension, as indicated by the Court in its statement of facts prepared at the communication of the application in question. That was the time indicated by operative officer Sh. when he was questioned at the trial (see p. 47 of the application lodged with the Court). In the judgment the court of first instance explicitly mentioned as the time of the applicant's arrest almost the same time — 17:30 (see p. 44 of the application lodged with the Court), which also appeared in Sh.'s statements (see p. 47 of the application lodged with the Court).

The moment of explaining his rights to the applicant — delay in explaining them

12. However, those rights were not explained to the applicant until after 2:23 in the morning on 20 March 2016, when his arrest record began to be drawn up (see § 9 above). Consequently, the delay amounted to more than 8 hours and 58 minutes, during which time the applicant had not been informed of his rights, which meant that his right to be assisted by counsel had been restricted (see *Rodionov v. Russia*, § 159).

Lack of reference to compelling reasons for
restricting the right to be assisted by counsel and to justification that
the fairness of the proceedings as a whole was not prejudiced

13. In such circumstances, the Government had to prove that there were compelling reasons to justify such a restriction of the right to be assisted by counsel (although Russian law, as interpreted by the Russian Constitutional Court, does not provide for such restrictions at all — as the Court has already noted) and also prove that the fairness of the criminal trial in respect of the applicant as a whole was not prejudiced by such a restriction (see *Rodionov v. Russia*, §§ 160-162).

14. However, the Government, which in principle did not acknowledge that those rights had been explained to the applicant with the delay referred to above (see §§ 4-6 above) and, accordingly, did not acknowledge the restriction of the applicant's right to legal assistance itself, did not take the opportunity to justify all the points made in the preceding paragraph and not only failed to prove all that but did not even refer to any compelling reasons, nor did they attempt to justify that the fairness of the criminal trial in respect of the applicant had not been prejudised, including in the light of the questions expressly raised by the Court at the communication of the application under consideration as to the use by the court of first instance of the evidence in its judgment, the content of which consisted, *inter alia*, of self-incriminating statements by the applicant given without, before explaining to him the right to remain silent and not to testify against himself and the right to be assisted by counsel.

15. The applicant understands that this is sufficient to conclude that there has been a violation of his rights (see *Rodionov v. Russia*, §§ 161-164). However, he asks the Court not to stop there, but to conduct the analysis of the situation for this kind of violation to its very end. Since he is afraid that if the Court were to confine itself to this, as, for example, in the Commeette's judgment in the case of *Kuzhil v. Russia*, no. 32702/13, § 37, 25 February 2020, the likelihood of the violation being remedied at the national level after recognition by the Court would be much lower. Perhaps it was the meagre reasoning that prevented the applicant in the case of *Kuzhil* cited above from having his criminal case returned for review, if that is the case (see § 9 of the claims for just satisfaction in the present case).

The content of the applicant's incriminating statements,
given without explanation of his procedural rights and
used by the court to justify a conviction – and
the applicant's refusal to give statements till the very end of
pre-trial investigation, immediately after being explained his rights

16. Accordingly, the applicant requests the Court to draw attention in its judgment to the fact that during the aforementioned 8 hours and 58 minutes the records of his body search, his vehicle search, his garage search and his surrender and confession were drawn up. The records of the searches contained the applicant's statements given in response to questions put directly to him, recorded in the same records. According to the body search record, the applicant was asked: "Are you in possession of any prohibited items: narcotics, psychotropic or poisonous substances, money and other items criminally obtained?", to which he replied: "There is a phone ... which is used to communicate with buyers of drugs" (see p. 14 of the application lodged with the Court). According to the vehicle search record, the applicant was asked essentially the same question, to which he replied: "There is a bank card ... to withdraw d/s [funds] received from the sale of n/s [drugs]" (see p. 16 of the application lodged with the Court). Thus, these were not voluntary statements. These were answers to questions posed by the FSKN officer, who already had suspicions that the applicant had committed a crime. It is therefore a *de*

facto interrogation without explanation of procedural rights, including the right to remain silent and not to testify against himself and the right to be assisted by counsel (see *Rodionov v. Russia*, § 166).

17. And the court of first instance used those search records, including in the part of the applicant's statements cited above, to support the conviction (see pp. 53 and 54 of the application lodged with the Court).

18. Although the court of first instance found the applicant's statement of surrender and confession inadmissible as evidence, expressly referring as a reason for that decision to the fact that at the time it was drawn up the applicant had not been informed of his rights referred to above (see § 7 above), the court relied on the content of the statement of surrender and confession to support his conviction in the form of the statements by operative officer Sh. who drew up the record of the applicant's statement of surrender and confession and explained to the court what statements had been given by the applicant at the time of the surrender (see § 2 above).

19. Just 5 minutes after the applicant's procedural rights had been explained to him, he refused — for the entire period of the pre-trial investigation — to give statements on the merits and never subsequently admitted his guilt, including during the trial (see §§ 8 and 9 above).

The problems that emerged in the applicant's case in
regulating, under Russian law,
the pre-trial proceedings and
the admissibility of the evidence obtained during it,
as well as the unsuccessful attempts by the applicant's defence
to have declared as inadmissible the evidence,
the content of which consisted of the applicant's self-incriminating statements
in the form of search records and testimonies of other persons

20. The Court has already recognised that the use as incriminating evidence of police officers' statements, the contents of which constituted the applicant's self-incriminating statements, which were declared inadmissible, in practical terms

amounts to exactly the same thing as the use of *per se* the applicant's self-incriminating statements, obtained in violation of his procedural rights; and this circumstance is relevant to the assessment the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with, in accordance with the principles set out in the Grand Chamber judgment in the case of *Ibrahim and Others* (see *Dimitar Mitev v. Bulgaria*, no. 34779/09, § 67, 8 March 2018). In the applicant's case this was exactly what happened: his self-incriminating statements, initially recorded in the statement of surrender and confession, which was declared inadmissible evidence by the court, were admitted into proceedings in another procedural form — the statements by operative officer Sh. who had drawn up that record. The applicant considers this to be one of the most important aspects of the present case. Since the Russian courts see absolutely no problem, no violation of the rights of defendants in the use of their self-incriminating statements obtained in violation of procedural rights — even when the courts themselves expressly recognise such a violation, if the same statements are 'clothed' in a procedural form which is not specifically designed to record such statements, i.e. neither a record of a statement of surrender and confession nor a record of explanation nor a statement given during interrogation by a person who later became a defendant and included into an interrogation record. Accordingly, in such cases Russian courts do not even question whether the defendants have been informed of their procedural rights, including the right to remain silent and not to testify against themselves and the right to be assisted by counsel. In particular, this is the case where the defendant's self-incriminating statements are in the form of statements by other persons (or records of interrogations of these persons) — as was also the case in respect of the applicant, against whom the statements by Sh. and Kh. were used, and these persons restated the statements by the applicant given during the searches and the surrender — and also in the form of records of investigative actions other than the interrogation of a suspect and a defendant, in particular, an examination of the scene of the incident and other examinations, a searche, a seizure, a check of the statement at the crime scene, an investigating experiments when conducted with a person who later

became a defendant, as well as records and other types of documents recording the course and results of operative-search activities, which again occurred in respect of the applicant, because the records of the searches were used against him. All the applications that the Court has communicated at the same time as the one under consideration are evidence and examples of this.

21. Accordingly, although the applicant's defenders explicitly pointed out, including in their appeals, the inadmissibility of the statements by Sh. and Kh., as well as the records of the searches in so far as they reproduced the applicant's self-incriminating statements, given without informing him of his right to remain silent and not to give such statements and his right to get the assistance of a counsel (see pp. 71-72 and 101-102 of the application lodged with the Court), the courts have refused to declare them as such, having literally demonstrated a lack of understanding of the defence arguments and without actually addressing the issue of whether the applicant's rights had been violated (cf. *Rodionov v. Russia*, § 167). Thus, the appeal court stated that "the statements by witnesses [Sh. and Kh.] were properly assessed by the court and there were no grounds for declaring them inadmissible because ... the witnesses identified the source of their knowledge. ...The fact that [the applicant] provided explanations as to the belonging of the mobile phone and the bank card during the body search and the vehicle search without a counsel does not constitute grounds for declaring inadmissible either the search records or the statements by the above witnesses" (see p. 128 of the application lodged with the Court). And the applicant considers it important for the Court to speak out directly and in detail about such a common problematic practice of the Russian courts.

22. The applicant also wishes to point out that although his actual apprehension had taken place at 17:25, the first record — of the body search — was not drawn up until 45 minutes later, at 18:10. However, the applicant explicitly told the court that after he had been actually apprehended and found in possession of the phone and the bank card — a parcel with which, as he also explained, he had found near his garage in the early hours of the same day — he had been beaten up and persuaded to confess to selling drugs, otherwise promising to prosecute also his

girlfriend, G., and to draw up his made-up resistance to the arrest, and he eventually agreed, also stating that he kept smoking mixtures for personal use in his garage and was prepared to hand them over, following which the searches were conducted (see p. 45 of the application lodged with the Court). Although these circumstances are not themselves the essence of the applicant's complaint before the Court, the 45 minutes which elapsed between the actual apprehension and the beginning of the drawing up of the first record, during which the applicant was not informed of his rights, like during the rest of the time before his arrest record was drawn up, were not addressed by domestic courts (cf. *Borisov v. Russia*, no. 48105/17, §§ 22-23, 9 July 2019).

23. Furthermore, Russian courts are not in principle prepared to question whether — through the self-incriminating statements by defendants obtained in violation of their procedural rights, presented in a form other than statements of surrender and confession or records of their interrogations and giving explanations — it was possible to obtain certain evidence which is in fact "the fruit of the poisonous tree", since the courts see no problem in any use of such evidence in forms such as — as in the applicant's case — search records and statements by other persons. Thus, the record of the applicant's garage search was obtained because the applicant had said shortly after his actual apprehension that he had smoking mixtures for personal use in his garage (see § 21 above as well as statements by Kh. on the matter on p. 7 of the judgment and p. 16 of the appeal decision — at pp. 49 and 124 of the application lodged with the Court). And although operative officer Sh. also stated that on 19 March 2016 the FSKN had received information that the applicant was storing drugs in his garage (see p. 5 of the judgment — on p. 47 of the application lodged with the Court), he never provided a specific source of such information other than the applicant's own statements.

The importance for the conviction of the applicant
of his self-incriminating statements
given without an explanation of his procedural rights –
and the content of other evidence used by the court

24. Lastly, and also crucially important, and the applicant asks the Court's to pay attention to it in its judgment, the evidence obtained in violation of his right to remain silent and not to testify against himself and his right to be assisted by a counsel, i.e., the records of the searches and the statements by Sh. and Kh. in part reproducing the applicant's self-incriminating statements provided in the course of these searches and the drawing up of the statement of surrender and confession, constituted the most important evidence for the prosecution (cf. *Rodionov v. Russia*, § 168).

25. As regards the conviction for the unlawful sale of drugs to S. on 4 February 2016, it is only and exclusively this evidence, i.e., the applicant's self-incriminating statements, given without an explanation of his procedural rights, that links him to the offence in question. The court referred to a lot of evidence confirming the fact that drugs were sold to S. — by someone — on 4 February 2016 through a stash, using the phone and the bank card discovered during searches, and confirming the fact that this one and another phone and the said bank card were in principle used to sell drugs through stashes (see §§ E.11.1-4 and E.12 of the application lodged with the Court — at pp. 6 and 7 of the application form). However, all these evidence did not, in principle, link the applicant to the offence in question. Even the statements by the applicant's girlfriend, G., given at the pre-trial investigation and not supported by her in court, about the applicant's involvement in "selling smoking mixtures through stashes, via text messages", that she had once seen him "repacking drugs", and the ones of witness Gr. that in the past he had purchased drugs through stashes and had used the number of the phone found in the applicant's car and that after the applicant had been arrested someone had told him that the applicant was the dealer; and a search of the applicant's flat, during which a laptop hard drive was seized, on which, according to an expert record, "several text messaging sessions, which, judging by their content, were related to the transmission of some items to recipients by means of stashes in different locations, probably having a significance for this case" (see pp. 41, 50, 51-52 of the application lodged with the Court), do not link the applicant with that specific crime he was charged with. In the worst case scenario, they could be

assessed by an impartial observer as indicating that the applicant was, in principle, involved in the sale of drugs. However, this was not what he was charged with, but the commission of a very specific sale of drugs to S. on 4 February 2016. The applicant was indirectly connected to this offence by the very discovery on him and in his car of the phone and the bank card, the use of which in the sale of drugs to S. was substantiated in detail by the court. Therefore, indirectly the applicant was connected with the crime, he was charged with, through the evidence of the discovery of the phone and the card, i.e. primarily the search records in part of recording the discovery of these items. However, it is clear that, using "beyond a reasonable doubt" as the standard of proof, which requires compliance with the presumption of innocence, this was clearly insufficient to conclude that the applicant was guilty of committing the crime in question. Evidence was needed to prove his usage of the phone and the card to sell drugs. And absolutely the only such evidence is the applicant's self-incriminating statements, obtained before, without explaining to him his right to remain silent and not to testify against himself and his right to assistance of a counsel, given during searches and drawing up the statement of surrender and confession and introduced into the process through the records of the searches and the statements by Sh. and Kh.

26. However, the significance of this evidence, obtained without explaining to the applicant his procedural rights, was not confined to that. It was by reference to them that the courts found potentially exculpatory evidence against the applicant to be unreliable. The statements by witness V., who confirmed that the applicant had found a parcel containing a phone and a bank card near his garage on the morning of the same day on which he had been arrested (worth mentioning that the FSKN officers never explained as to where they had obtained information about the applicant's alleged involvement in the sale of drugs), as well as the applicant's own statements to that effect were declared inadmissible by the court of first instance with reference to that particular evidence: "the statements by witness [V.], as well as the defendant's version of the accidental discovery of the phone ... and the bank card ... contradict the testimony of witness [Kh.], who had participated in the body search of [the applicant] and the search of [the applicant's] vehicle on 19 March

2016, and testified that [the applicant] had said in his presence that he had used the phone seized from him ... to communicate with buyers of drugs, that he had a bank card in his car to which he transferred money got from selling drugs and that he kept drugs in his garage; during the search of [the applicant's] vehicle the bank card was seized, [the applicant] did not deny that the phone and the card belonged to him and said that the seized bank card had been used to transfer money got from selling drugs. The statements by witness [Kh.] are objectively corroborated by the [applicant's] body search record and the [applicant's] vehicle search record which reflect [the applicant's] statements concerning the ownership and purpose of the mobile phone ... and the bank card seized ... The [applicant's] arguments that he had been inexperienced and [from] surprise, persuaded and threatened and under the influence of drugs confessed to crimes which he had not committed, are not accepted by the court as the statements by [the applicant] and witness [Sh.] shows that at the time of [the applicant's] arrest, search and other activities involving him he was well aware of the offence he was suspected of having committed" (see pp. 57-58 of the application lodged with the Court). Similarly, the appeal court referred to the applicant's self-incriminating statements as evidence of the unreliability of his statements given at trial: "The arguments of [the applicant] and the defence that ... the mobile phone and the bank card were in the use of other persons and [the applicant] was not involved in the sale of drugs to [S.] are refuted by the evidence cited. Immediately after his arrest [the applicant] in the presence of attesting witnesses ... stated that the items in question were being used by him to carry out the illicit sale of narcotic drugs. This statement was recorded in the records of the body search and of the vehicle search, which was signed, *inter alia*, by [the applicant] himself" (see pp. 130-131 of the application lodged with the Court). And even the refusal to recognise as unreliable the statements given at the pre-trial investigation by the applicant's girlfriend, G., which she retracted at trial, was motivated by reference to the same "statements by [Sh. and Kh.], the record of the body search of [the applicant], the record of the search of the vehicle belonging to him and other [unnamed] evidence" (see p. 58 of the application lodged with the Court). In that connection, it is also impossible not to draw attention to the following

replies of the appeal court to the numerous pieces of evidence submitted by the applicant's defence that the phone number, the applicant was charged with the offence committed with the using of which, continued to be used after the applicant had been arrested, with money even being transferred from that number: "do not demonstrate the innocence of the convicted" and "do not relate to the facts to be established" (see p. 131 of the application lodged with the Court).

27. As to the applicant's charge with the attempted unlawful sale of drugs found in his garage (and distinct from the drugs that were sold to S. according to the first charge), the charge in this part depended entirely on the very fact that the drug had been found in the applicant's garage, which had been discovered, as shown above, precisely through the use of his self-incriminating statements, given in violation of the procedural rights (see § 22 above). The search of the garage, which normally required a prior court order, was carried out without such authorisation — referring to an "urgent matter", without any justification as to why this was such kind of matter (see Appendix 2 below), and consequently without respecting another of the applicant's rights — prior judicial control of FSKN officers' actions.

Conclusion

28. On the basis of the above and, in particular, in view of the fact that the applicant gave self-incriminating statements in the absence of a defence counsel, as well as on the basis of the applicable principles formulated by the Grand Chamber of the Court in the judgments in the cases of *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, §§ 255-74, 13 September 2016) and Beuze v. *Belgium* ([GC], no. 71409/10, §§ 119-50, 9 November 2018), the applicant claims that there has been a violation of Article 6 § 1 and 3(c) of the Convention and the criminal proceedings in the determination of criminal charges were not fair within the meaning of Article 6 of the Convention.

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Appendices:

1. Applicable national law.

2. A copy of the garage search record of 19 March 2016.

3. A copy of the record of the applicant's interrogation as an accused of 20 March 2016.

4. A copy of the record of the applicant's interrogation as an accused of 21 October 2016.