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

FIFTH SECTION

CASE OF BOROTYUK v. UKRAINE

(Application no. 33579/04)

JUDGMENT

STRASBOURG

16 December 2010

FINAL

16/03/2011

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

In the case of Borotyuk v. Ukraine,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 23 November 2010,

Delivers the following judgment:

PROCEDURE

1. The case originated in an application (no. 33579/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Viktor Yuriyovych Borotyuk (“the applicant”), on 5 September 2004.

2. The applicant, who had been granted legal aid, was represented by Mr A. Kristenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant complained, in particular, that his continued pre-trial detention had been unjustified and that he had not been legally represented in the early stages of the criminal proceedings.

4. On 13 October 2009 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and is currently serving a sentence in Polytska no. 76 Prison in the Rivne region.

A. Background events

6. The applicant had had a relationship with his neighbour, Ms M. He received from her a duplicate of the key to her house, which he never returned. The relationship was terminated in December 2002 at the instigation of Ms M., whose husband had returned home from a long business trip.

7. During the night of 18-19 April 2003 Mr M., the husband of Ms M., was sleeping in his house, which was locked from the inside, while his wife was at work, and was attacked by a man wearing a mask. The victim's son, ten years old, who was sleeping in the same room, was woken by the noise and saw the intruder leaving the room with an object which looked like a stick. After the incident the entrance door to Mr M.'s house remained locked. Mr M. died without regaining consciousness.

B. The applicant's pre-trial detention

8. On 19 April 2003, at 11:20 p.m., the applicant was arrested on police premises on suspicion of infliction of grievous bodily harm on Mr M. causing his death (see also paragraph 18 below).

9. On 22 April 2003 the Sarny Town Court ("the Sarny Court") remanded the applicant in custody in Rivne no. 24 Detention Centre ("the SIZO") at the investigator's request. The court based its decision on the seriousness of the charges against the applicant, as well as the fact that he had no family of his own and might therefore abscond.

10. On 19 June 2003 the Sarny Court extended the applicant's pre-trial detention to four months. It justified this decision with the necessity to undertake a number of investigative measures, the seriousness of the charges against the applicant and the inherent risk of his absconding or hindering the investigation if at liberty. The court examined the applicant's argument about his frail health and noted, referring to a medical report, that his condition was not incompatible with detention.

11. During both the pre-trial investigation and the judicial proceedings the applicant's lawyer introduced numerous requests for the applicant's release on bail, referring to his illness and specific medical needs which could not be accommodated by the SIZO administration and placed an excessive financial burden on his parents (for more details see paragraphs 45-47 below). It was also noted in the requests that the applicant did not have a criminal record and had a permanent place of residence and elderly parents to care for. By way of bail the applicant's father offered his minibus, whose value was estimated at 24,732 Ukrainian hryvnias (UAH), which at the time was equal to about 3,700 euros (EUR).

12. By rulings of 15 and 26 March, 26 April, 27 May, 23 June, 13 and 22 July, 12 August and 2 September 2004, the Sarny Court rejected the

aforementioned requests for the applicant's release. The reasoning of all those nine rulings was identical and read as follows:

> "[The applicant] is accused of a serious crime punishable by imprisonment of over seven years. Therefore, to prevent [him] from attempting to abscond or hindering the establishment of the truth, the preventive measure – detention – should remain unchanged."

13. Seven of the rulings contained an additional phrase following the first sentence in the above quotation:

> "There are considerable discrepancies in the witnesses' testimonies concerning the same circumstances of the case."

14. All the rulings, with the exception of that of 15 March 2004, also noted that the applicant was "free to address requests to the [SIZO] administration for medical assistance under the [legislation on pre-trial detention]."

15. On 8 November 2005 the Rivne Regional Court of Appeal ("the Court of Appeal"), in its ruling ordering an additional investigation in the case, noted that "the preventive measure in respect of [the applicant was to] be unchanged – pre-trial detention" (see also paragraph 33 below).

16. On 26 May 2006 the Sarny Court, following a preparatory hearing prior to the applicant's retrial (see also paragraph 38 below), rejected his request for release on bail or subject to an undertaking not to abscond. The court noted that the applicant was suspected of a dangerous crime and there was a risk of his absconding given his young age, single status and the fact that he had no children. The court examined the applicant's argument about his health and noted, referring to some medical findings, that it was not incompatible with detention.

C. Pre-trial investigation

17. On 19 April 2003 the police searched the applicant's house and seized the key to Ms M.'s house. The applicant was delivered to the police station, where he was questioned from 8:45 p.m. to 10 p.m. as a witness. He denied involvement in the crime being investigated.

18. Later that evening, at 11:20 p.m., the applicant was arrested on police premises on suspicion of infliction of grievous bodily harm on Mr M. causing his death. The arrest report listed all the possible reasons for an arrest contained in the report template, without giving any details. As noted there, the applicant refused to sign it, for unspecified reasons.

19. At an unspecified time on 20 April 2003 the applicant wrote a statement of surrender to the authorities *("явка з повинною")*, in which he confessed to beating Mr M. to death with a car axle (kept in the applicant's garage). The investigator accepted that statement, relying on Article 96 of the Code of Criminal Procedure (see paragraph 54 below).

20. On the same date – according to the applicant, at 4:10 p.m. – the investigator delivered an “Act of explanation to the suspect of his rights”. It contained the applicant's handwritten note as follows: “For this questioning, I waive legal assistance. I will be testifying of my own will.” The applicant also signed a formal legal assistance waiver “for the period of questioning”, and the investigator accepted it.

21. Later on 20 April 2003 the applicant was questioned as a suspect and repeated his confession.

22. In the evening of 20 April 2003 the applicant was questioned again, during which he drew the car axle in question and stated that he would be able to recognise it.

23. At some point during the day on 20 April 2003 the applicant's parents signed a contract for legal representation by lawyer O. The lawyer tried to get access to the applicant, but was refused it on the pretext that he was being questioned as a witness and therefore his status did not warrant legal representation.

24. During the night of 20 to 21 April 2003, between 1.20 a.m. and 2 a.m., a videotaped reconstruction of the crime was conducted, during which the applicant again repeated his confession.

25. On 21 April 2003 the classification of the investigated crime was changed from infliction of grievous bodily harm causing the victim's death to premeditated murder.

26. On 24 April 2003 the applicant's parents signed a contract with lawyer R. for legal representation of the applicant, and on 30 April 2003 they informed lawyer O. that her services were not needed any longer.

27. On 30 April 2003 lawyer R. requested to be involved in the investigations as the applicant's legal representative. The investigator granted the request, and he received permission to have meetings with the applicant “without any time restrictions”.

28. On the same date, 30 April 2003, the investigator delivered another “Act of the explanation to the suspect of his rights”, in which the applicant noted that he wished to be represented by lawyer R.

29. As soon as the applicant was legally represented he retracted all his earlier confession statements.

30. On 3 July 2003 the pre-trial investigation was declared complete and the applicant was committed for trial.

D. Trial

31. On 17 November 2004 the Sarny Court found the applicant guilty of premeditated murder and sentenced him to twelve years' imprisonment. It dismissed his not-guilty plea made at the hearing as untruthful and found his guilt proved by the confessions he had made on 20 April 2003 and repeated in the course of the reconstruction of the crime on 21 April 2003, as well as

the corroborating material evidence (the duplicate key and the car axle). The court noted that the applicant had had explained to him his right not to incriminate himself before he had confessed and that he had voluntarily waived his right to legal representation. Having heard lawyer O., who stated that she had been refused a meeting with the applicant on 20 April 2003, the court found her allegation unsubstantiated, with a reference to “a thorough investigation into the matter”. The court also found no evidence that the applicant had admitted guilt under duress, given the fact that he had raised no complaints in that regard before any authorities.

32. The applicant appealed, alleging that the sole evidence of his guilt had been his confession extracted by the police under duress and in the absence of a lawyer. He submitted in particular that during the initial questioning and investigative activities he had been deprived of his medicines, and that he had not been receiving proper nutrition, water and sleep. Moreover, according to the applicant, he had been threatened with deprivation of legal assistance unless he confessed, and the police officers from time to time hit him on the back of the head with their hands or files. The applicant also insisted that he could not be regarded as having surrendered to the police under Article 96 of the CCP, as presented by the investigator, given the fact that prior to his statement in that regard he had already been arrested as a suspect. Furthermore, lawyer O. had not been allowed to see him on 20 April 2003, that is after his arrest, on the ground that he was being questioned as a witness, but not because he had waived his right to legal assistance.

33. On 8 November 2005 the Court of Appeal quashed the first-instance judgment and remitted the case for additional investigation, having allowed the applicant's appeal in part. It found in particular that an additional investigation and a retrial were required in order to rectify certain shortcomings. The Court of Appeal noted that the applicant's conviction had largely been based on mere presumptions, namely that the Sarny Court had relied on the confession he had made during the pre-trial investigation in the absence of a lawyer; this confession was not corroborated by any strong evidence against him. It further criticised the first-instance court for its failure to address the applicant's complaint that he had had no access to a lawyer following his arrest as a suspect. Although it disregarded the lawyer's statements made under oath as untruthful, the Sarny Court did not initiate criminal proceedings against her for perjury. According to the Court of Appeal, the first-instance court had selectively admitted and interpreted evidence (thus, according to the report of the first questioning of the victim's son, he had replied in the negative to a quite suggestive question from the investigator as to whether the intruder looked like the applicant to him, while it was noted in the verdict that he had stated the contrary). Lastly, the Court of Appeal pointed out some issues, which, although pertinent, remained uninvestigated: for example, that the victim was visited by

unidentified persons on the eve of his murder, and the disorder in his house, which was not mentioned in the applicant's confession.

E. Additional investigation

34. Following the additional investigation, on 27 January 2006 the applicant was again charged with premeditated murder.

35. On 30 January 2006 the Sarny Town Prosecutor delivered a ruling, refusing to institute criminal proceedings against the investigator who had allegedly refused the applicant's lawyer permission to represent him on 20 April 2003. The prosecutor noted firstly that on 20 April 2003 the applicant was questioned as a witness and therefore did not require legal representation, and secondly that even when he was recognised as a suspect he had voluntarily waived his right to legal assistance.

36. On 30 January 2006 the prosecutor delivered another ruling refusing to institute criminal proceedings in respect of the applicant's allegation of unlawful arrest and ill-treatment. The prosecutor referred in particular to the statements by the police officers involved, who denied any coercion. He also took into account the fact that the applicant had not raised any complaints about his health.

37. On 30 March 2006 the applicant was indicted as charged, and on the following day the case was sent to the court for trial.

F. The applicant's retrial and conviction

38. On 26 May 2006 the Sarny Court held a preparatory hearing.

39. On 2 March 2007 it issued a new judgment which in its operative part, was identical to that of 17 November 2004.

40. The court examined the applicant's complaint that he had had no access to a lawyer and dismissed it as unsubstantiated: on one hand, the court referred to the investigator's statements, according to which the lawyer had not submitted any documents to him authorising her to represent the applicant; and, on the other hand, it noted that the contract for legal representation submitted to it by the defence had indicated the applicant (but not his parents) as a party, while he was in detention at that time and could not have signed it. Furthermore, it was mentioned in the judgment that the prosecutor had examined the applicant's allegation that the investigator had refused to allow the lawyer to see him, and refused to institute criminal proceedings against the investigator for lack of *corpus delicti* in his actions, which the applicant had failed to challenge. The court also noted that on 20 April 2003 the applicant had waived his right to legal assistance. It dismissed his allegation of duress, because the applicant had not complained to anybody about it apart from his father. In any event, the prosecuting authorities had already examined that allegation and rejected it, and the

applicant had not appealed against that decision (see paragraph 35 above). The court therefore concluded that the applicant "had not been refused access to a lawyer".

41. The judgment further referred to the statements of the victim's son, who had not recognised the murderer, although he noted that he was the same height as the applicant. The court further noted that although several witnesses had seen two unidentified persons looking for Mr M. on the eve of his murder, this fact did not negate the finding of the applicant's guilt. The court made a similar observation concerning the disorder in the victim's house not mentioned in the applicant's confession. It also relied on the material evidence obtained on the basis of the applicant's confession, namely the car axle found in his garage, having explained the lack of any traces of the crime on it with the fact that the applicant had wrapped it in cloth and plastic, which he had later burnt.

42. The applicant appealed against the judgment as based on unlawfully obtained confession statements and lacking a solid evidential basis. He reiterated his earlier grievances, namely that his right to defence during the early stages of the investigation had been restricted, and argued that the Sarny Court had failed to address a number of specific issues raised in the Rivne Regional Court of Appeal ruling of 8 November 2005.

43. On 19 June 2007 the Court of Appeal upheld the applicant's conviction, finding that the first-instance court had rightly relied on his confession statements as they had been given in compliance with the legislation on criminal procedure and were corroborated by other evidence.

44. On 21 January 2008 the Supreme Court rejected the applicant's request for leave to appeal in cassation as unsubstantiated.

G. The applicant's medical condition and treatment in detention

45. The applicant has been suffering for many years from diabetes insipidus *(нецукровий діабет)*[1]. In 1990 he was recognised as falling into the third category of disability (the mildest) on account of that condition. Apart from the diagnosis and the aforementioned fact about his disability, the applicant did not provide the Court with any details about his medical condition.

46. According to a note issued on 3 February 2004 by the local clinic at the request of the applicant's lawyer, the applicant had been being monitored by an endocrinologist, who had prescribed him certain

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[1]. A rather rare hormonal disorder resulting in the kidneys' inability to conserve water and characterised by excessive thirst and urination, general weakness, muscle pain and irritability. The amount of urine can be reduced by certain hormonal medications, usually in the form of a nasal spray. Those with the condition can live normal lives if they replace the fluids lost in the urine with a large intake of liquids to prevent dehydration. Information sources: http://diabetes.webmd.com/what-is-diabetes-insipidus and http://en.wikipedia.org/wiki/Diabetes_insipidus).

antidiuretic hormones, which cost about UAH 420 a package. The clinic provided the applicant with one package a month free of charge, while the required intake was three packages.

47. On 10 December 2003 the applicant's lawyer wrote a letter to the SIZO administration in which he referred to the applicant's medical needs as outlined above and enquired whether the SIZO was able to provide him with the medication he required. The reply was that the SIZO was providing the applicant with some symptomatic treatment. As to the "expensive medications of narrow specification", such as the antidiuretic hormone referred to, the administration was ready to accept those from the applicant's relatives. It was also noted in the letter that for the time being the applicant had an adequate supply of that medication.

H. Other facts

48. On 16 May 2008 the applicant authorised his father to represent him in the proceedings before the Court. The prison administration countersigned the authority form.

49. On 5 June 2008 the Court received a letter from the applicant's father dated 29 May 2008, in which he complained in particular that his son had been deprived of legal assistance for several days after his arrest and that a lawyer had been admitted to him only after he had made confession statements while he was in a state of physical and emotional exhaustion.

II. RELEVANT DOMESTIC LAW

50. Articles 59 and 63 of the Constitution concerning the right to legal assistance and the right not to incriminate oneself can be found in the judgment of 19 February 2009 in the case of *Shabelnik v. Ukraine* (no. 16404/03, § 25).

51. The Criminal Code envisages imprisonment of seven to fifteen years for deliberate murder without aggravating circumstances (Article 115 § 1) and seven to ten years for deliberate infliction of grievous bodily injuries causing death (Article 121 § 2).

52. The relevant provisions of the Code of Criminal Procedure ("the CCP") concerning preventive measures pending trial are quoted in the judgment in the case of *Yeloyev v. Ukraine*, no. 17283/02, § 35, 6 November 2008.

53. Article 154-1 of the CCP, as well as the relevant extracts from Resolution No. 6 of the Plenary Supreme Court of 26 March 1999 "on the practice of applying bail as a preventive measure", can be found in the judgment in the case of *Koval v. Ukraine*, no. 65550/01, §§ 60-61, 19 October 2006.

54. As regards admissions of guilt, Article 73 of the CCP requires verification of a suspect's statements. His or her admission of guilt may provide a basis for the accusation only if corroborated by the totality of the evidence. Article 96 of the CCP defines a statement of surrender to the authorities as follows: "a personal voluntary written or verbal statement made by a person, before the institution of criminal proceedings against him or her, to an enquiry authority, a police officer, an investigator, a prosecutor, a judge or a court, about a crime committed or planned for by him or her". Where criminal proceedings have already been instituted, such a statement must be made before formal charges are brought against the person.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

55. Relying on Article 3 of the Convention, the applicant complained about the length of his pre-trial detention and the rejections of his requests for release on bail. The Court will examine this complaint under Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

56. The Court notes that the present complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

57. The applicant submitted that once chosen as a preventive measure, his pre-trial detention had automatically been upheld thereafter. According to him, the domestic courts had failed to consider any alternative preventive measures, such as bail, which had been explicitly requested, or an undertaking not to abscond. Neither had they taken into account the factual circumstances of his case. The applicant noted in this connection that his numerous requests for release had been rejected by identically worded rulings, remaining unaffected by the passage of time and the progress of the investigation.

58. The Government disagreed. They contended that the applicant's continued pre-trial detention had been based on adequate and sufficient reasons, such as the seriousness of the crime he was suspected of, his denial of his guilt, and the inconsistent witness statements, which had to be checked. The Government further emphasised that the domestic courts had carefully examined the applicant's argument about his state of health and found it not to be an impediment to the chosen preventive measure.

59. The Court notes that the following two periods are to be taken into account (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI): from 19 April 2003 (the applicant's arrest) to 17 November 2004 (pronouncement of the verdict by the trial court) and from 8 November 2005 (quashing of the verdict of 17 November 2004 and remittal of the case for additional investigation) to 2 March 2007 (pronouncement of a new verdict). The Court will examine these periods together, given the continuous nature of the applicant's detention (see, for example, *Polonskiy v. Russia*, no. 30033/05, § 132, 19 March 2009). The applicant's pre-trial detention therefore lasted for a total of two years and almost eleven months.

60. The Court emphasises that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continuing detention (see *Yağcı and Sargın v. Turkey*, 8 June 1995, § 52, Series A no. 319-A). In order to meet that requirement, the national judicial authorities must examine all the factors for or against the existence of a genuine requirement of public interest, justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release. It is not the Court's task to establish such factors and take the place of the national authorities who ruled on the applicant's detention. It is essentially on the basis of the reasons given in the domestic courts' decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

61. The Court accepts that a reasonable suspicion that a criminal offence has been committed can suffice to warrant initial detention. It has however held on many occasions that the gravity of the charge cannot of itself serve to justify long periods of detention pending trial (see *Ječius v. Lithuania*, no. 34578/97, § 94, ECHR 2000-IX).

62. The presumption is in favour of release. Arguments for and against it must not be "general and abstract" (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts)). Whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, it being incumbent on the national authorities always to give due

consideration to such alternatives (see *Vrenčev v. Serbia*, no. 2361/05, § 76, 23 September 2008).

63. Turning to the present case, the Court notes that the domestic courts extended the applicant's pre-trial detention and rejected his requests for release, relying essentially on the gravity of the charges against him and using stereotyped formulae without addressing the specific facts of the case (see paragraphs 12-13 above). That reasoning did not evolve with the passage of time and failed to take into consideration any developments in the investigation. Although the applicant had requested to be released on bail many times, all his requests were rejected without any assessment given to the possibility of applying the sought alternative measure in his situation. As to his pre-trial detention following the remittal of the case for additional investigation on 8 November 2005, until the retrial began on 26 May 2006 it was judicially upheld without any reasoning at all (see paragraph 15 above).

64. In the light of the foregoing, the Court concludes that the applicant's continued pre-trial detention was not based on relevant and sufficient reasons.

65. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

66. The applicant complained that his right to legal defence at the early stages of the investigation had been restricted, contrary to Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which read as follows:

> "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:
>
> ...
>
> (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 ..."

A. Admissibility

1. Compatibility ratione personae

67. The Government denied that the applicant had formulated the above complaint, explicitly or in substance, in any of his submissions to the Court. They therefore submitted that, in the absence of his claim of being the

victim of the alleged violation of Article 6 §§ 1 and 3 (c) of the Convention, the requirements of Article 34 had not been met, and the complaint was to be rejected as incompatible *ratione personae* with the Convention provisions.

68. The applicant disagreed and submitted that he had worded the complaint in question with sufficient clarity.

69. The Court notes that on 5 June 2008 it received a letter from the applicant's father dated 29 May 2008 and containing a clearly worded complaint about the lack of the applicant's legal representation at the initial stages of the investigation (see paragraph 49 above). The Court further notes that the case file contains an authority form of 16 May 2008, by which the applicant authorised his father to represent him in the proceedings before the Court (see paragraph 48 above). It therefore concludes that the applicant did claim to be a victim of the violation of Article 6 §§ 1 and 3 (c) of the Convention, acting via a duly authorised representative.

70. It follows that the complaint cannot be declared inadmissible as incompatible *ratione personae* with the Convention provisions.

2. Compliance with the six-month time-limit

71. The Government asserted, as an alternative to their objection mentioned above, that the applicant had introduced this complaint out of the six-month time-limit. They submitted that the period during which the applicant had had no legal assistance was clearly determined in time, and the six months started running once that situation ceased to exist. As additional substantiation of this view, the Government noted that the applicant failed to bring any complaints in that regard during his police custody and subsequent detention in the SIZO – an indication, according to them, that he had believed he had no domestic remedies to pursue.

72. The applicant disagreed. He contended that the six-month time-limit could not have started running before the completion of his trial, in the framework of which he had duly raised the complaint in question.

73. The Court emphasises that the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by its paragraph 1 (see *Poitrimol v. France*, 23 November 1993, § 29, Series A no. 277-A). To assess to what extent the alleged violation of the applicant's procedural right would affect the fairness of his trial in its entirety, the applicant had to await the final resolution of his case and could raise the impugned complaint in his appeal in cassation to the Supreme Court, which is considered an effective remedy for complaints about the unfairness of criminal proceedings (see, *mutatis mutandis*, *Arkhipov v. Ukraine* (dec.), no. 25660/02, 18 May 2004). He could reasonably expect the domestic courts to deal with his complaint and to remedy any violation of his right to defence, if found (see *Shalimov v. Ukraine*, no. 20808/02, § 62, 4 March 2010).

74. The Court observes that the applicant did raise the complaint about the early restriction on his defence right in the framework of his trial completed by the final ruling of the Supreme Court on 21 January 2008 (see paragraph 42 above).

75. The Court therefore considers that his complaint to Strasbourg in that regard, which was introduced on 29 May 2008 (see paragraph 49 above), complied with the six-month time-limit under Article 35 § 1 of the Convention and dismisses this objection of the Government as well.

3. *Otherwise as to the admissibility*

76. The Court notes that this part of the application is neither manifestly ill-founded within the meaning of Article 35 § 3 of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

77. The applicant maintained that his conviction was based, to a decisive degree, on the confessions that he had made in the absence of legal advice in the initial stages of the investigation, while suffering from lack of medication and being confronted with the stress of the situation, complex legal issues beyond his comprehension and the prospect of a heavy prison sentence.

78. The Government disagreed. They submitted that the applicant's case did not warrant his mandatory legal representation under the national legislation and that he had waived his right to legal assistance of his own will. As soon as he expressed a wish to be represented – on 30 April 2003 by lawyer R. – his request was allowed without any restrictions. As regards the weight of the applicant's initial confessions, the Government noted that they had not been the sole basis for his conviction.

79. The Court emphasises that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (see *Poitrimol*, cited above, § 34). As a rule, access to a lawyer should be provided as from the first questioning of a suspect by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used to secure a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008).

80. The Court recalls at the same time that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for

Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II, with further references).

81. Turning to the present case, the Court notes that the applicant confessed to the murder of Mr M. several times on 20 and 21 April 2003 in the absence of legal advice, and that those confessions were used for securing his conviction. Both the national courts and the Government attributed specific weight to the fact that on 20 April 2003 the applicant had explicitly waived his right to counsel and had willingly participated in several investigative measures. While not denying the waiver as such, the applicant insisted that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice.

82. The Court notes that the applicant waived his right to legal assistance while being in a particularly vulnerable position given his medical condition (see paragraph 45 above) and without adequate understanding of the nuances of the legal classification of the incriminated crime (which changed over time from infliction of injury causing death to premeditated murder). Furthermore, the waiver in question concerned only one investigative measure, namely the applicant's questioning by the investigator, whereas the applicant was subjected to other investigative measures thereafter, including at night, without access to counsel. The Court next observes that the lawyer hired by the applicant's parents to represent him was denied access to the applicant, not on the basis of that waiver, but under such artificial grounds as that he was a witness (while at the time he was being questioned as a suspect) and that he had not signed the authority form (which he could not possibly have done as he was in detention). Lastly, the Court does not lose sight of the fact that the applicant retracted his confessions immediately once he was in the lawyer's presence and never repeated them while legally represented (see paragraphs 28 and 31 above). In the light of all these considerations, the Court concludes that there was no unequivocal waiver by the applicant of his right to legal assistance in the circumstances of the present case. Neither were there any other compelling reasons for restricting his right to legal assistance. The authorities were thus under the obligation to provide the applicant with access to a lawyer from his first questioning by the police, which they failed to comply with.

83. The Court observes that the applicant's self-incriminating statements, obtained in the absence of a lawyer and in circumstances giving rise to a suspicion that both his waiver of the right to legal assistance and his confessions were obtained in defiance of his will, were used as evidence on the basis of which he was convicted. Accordingly, the Court finds that the applicant was affected by the restrictions on his access to a lawyer to an extent undermining the overall fairness of his trial.

84. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c).

III. THE REMAINDER OF THE APPLICATION

85. The applicant complained under Article 3 of the Convention that he had been ill-treated in police custody and that no adequate medical assistance had been provided to him in detention.

86. He further complained under Article 6 § 1 of the Convention about the length of the criminal proceedings against him.

87. Having regard to all the material in its possession the Court finds that the evidence discloses no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. 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."

A. Damage

89. The applicant claimed EUR 10,000 in respect of non-pecuniary damage.

90. The Government contested that claim.

91. The Court considers that the applicant must have suffered non-pecuniary damage, in particular for the violation of Article 5 § 3 of the Convention, which cannot be sufficiently compensated by the finding of a violation alone. Ruling on an equitable basis, it awards him EUR 2,400 under that head.

92. As regards redress for a violation of Article 6 §§ 1 and 3 (c) of the Convention, the Court reiterates that its most appropriate form would be to ensure that the applicant is put as far as possible in the position in which he would have been had this provision not been disregarded. The most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Salduz*, cited above, § 72, and *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV). The Court notes, in this connection, that the Ukrainian legislation (Article 400-12 of the Code of Criminal Procedure, Article 38 of the

Judiciary and Judges' Status Act, and Article 10 of the “Law on Enforcement of Judgments and Application of the Jurisprudence of the European Court of Human Rights”) provides that court proceedings may be reopened if the Court finds a violation of the Convention. The Court therefore considers that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in itself constitutes sufficient just satisfaction.

B. Costs and expenses

93. The applicant made no claim for costs and expenses. Accordingly, the Court makes no award.

C. Default interest

94. The Court considers it appropriate that the default interest 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. *Declares* the complaints under Article 5 § 3 and Article 6 §§ 1 and 3 (c) of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

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

4. *Holds* that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant on that account;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,400 (two thousand four hundred euros) in respect of non-pecuniary damage on account of the violation of Article 5 § 3 of the Convention, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President