



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

FIFTH SECTION

CASE OF BORTNIK v. UKRAINE

(Application no. 39582/04)

JUDGMENT

STRASBOURG

27 January 2011

FINAL

27/04/2011

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

In the case of Bortnik v. Ukraine,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 39582/04) 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 Valentyn Ivanovych Bortnik (“the applicant”), on 29 October 2004.

2. The applicant, who had been granted legal aid, was represented by Mr M. Anikin, a lawyer practising in Kerch, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that his right to defence under Article 6 § 3 (c) of the Convention has been breached.

4. On 19 January 2009 the President of the Fifth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and is currently serving a sentence in Correctional Colony no. 32 (*Виправна колонія №32*) in Makiyivka, Ukraine. He is disabled (his feet were partly amputated in 2001) and walks with a stick.

6. Late in the evening of 27 September 2002 P., the applicant's neighbour, was severely beaten in her house and received several knife wounds, concussion and broken bones. She died in hospital three days later.

7. On 30 September 2002 criminal proceedings for grievous bodily harm causing death were instituted by the police. On the same day the applicant was questioned. He submitted that he knew P. as she was his neighbour. She had lived alone and communicated with nobody. He further submitted that in September 2002 two persons, K. and M., had built an extension to P.'s house and on 28-29 September 2002 there had been a party in the neighbourhood.

8. On 1 October 2002 the applicant was arrested. In the report drawn upon his arrest it was indicated, without any further details, that the applicant had been arrested on suspicion of causing grievous bodily harm to P. The applicant was further questioned as a suspect. He submitted that in the evening of 27 September 2002 he had wanted to buy some home-made alcohol or to borrow some money from P. As the latter had refused, he had hit her with his wooden walking stick. P. told him that she would inform the police. The applicant decided that if she did that he would get a criminal record, he had taken a knife and struck P. several times "in order to intimidate her and take revenge". In his written statements he also wrote that he "refused to be represented by a lawyer and this was not related to his financial state".

9. On the next day the police held an on-site reconstruction of events with the participation of the applicant and witnesses Ku. and L.

10. On 4 October 2002 the applicant was charged with inflicting grievous bodily harm causing P.'s death; he pleaded guilty. The maximum possible punishment for this crime was ten years' imprisonment. The applicant again confirmed that he did not need a lawyer.

11. On the same day Konstyantinovskiy Town Court remanded the applicant in pre-trial custody.

12. On 13 November 2002, during a forensic psychiatric examination, the applicant stated that he had not committed the crime and had been subjected to physical and psychological pressure from the police. The experts stated that the applicant was lying and insincere. They also indicated that although the applicant was "socially dysfunctional" and suffered from chronic alcoholism, he was able to control his actions.

13. On 21 and 26 November 2002 the applicant submitted that he did not want to be legally represented and "would defend his rights himself". On the latter date he also pleaded guilty and indicated that he had not wanted to kill P.

14. On 25 November 2002 the Konstyantinovka town prosecutor decided not to qualify the applicant's actions as murder.

15. On an unknown date the case was transferred to the court.

16. On 14 January 2003 during the preliminary examination of the case by the court the applicant lodged a request for a lawyer.

17. On 28 January 2003 the applicant's representative, Mr Anikin, joined the proceedings as his lawyer.

18. On 26 February 2003 the court returned the case for further investigation. In the court hearing the prosecutor indicated that more witnesses should be questioned, the construction workers who built an extension to P.'s house in September 2002 should be found, and there should be a further forensic examination of samples of P.'s skin, hair and nails and the applicant's stick. The applicant submitted that he had not committed the crime in question. He had confessed to it only because, being disabled, he was afraid that the police officers would ill-treat him. The ambulance doctor, G., testified that P. had said that she had been beaten by "men" without giving any names. G. insisted that the word was used in the plural. P.'s neighbours testified that P. lived alone and would never let strangers, including the applicant, who had lived on their street for a month, into her house.

19. On 11 April 2003 the applicant's actions were reclassified as murder committed for financial gain, since the nature of the victim's injuries confirmed the attacker's intention to kill her. The possible penalties for this crime included a life sentence.

20. On 12 May 2003 the applicant was questioned in the presence of his lawyer and denied guilt.

21. On 25 November 2003 the Donetsk Regional Court of Appeal found the applicant guilty of murder and robbery. In particular, it found that the applicant had hit P. with his walking stick and with a knife, and had stolen a half-litre of home-made alcohol, an apple and a glass. In a court hearing the applicant contested the charges and submitted that he had pleaded guilty because the police officer Ki. had beaten him and the investigation officer Ko. had promised him the minimum punishment if he pleaded guilty. In the applicant's opinion, P. had been murdered by the people who had built the house extension, because she had not paid them.

22. The court rejected the applicant's submissions and referred to the applicant's testimony given during the pre-trial investigation. It also based its decision on the following evidence.

23. G., the ambulance doctor, testified that P. had told her that she had been attacked by a man, without giving a name. Ku. and L. testified that they had been present at the on-site reconstruction of events during which the applicant had explained how had he committed the crime. He was not subjected to any pressure. The police officer, Ki., explained that he had never met the applicant. The investigation officer, Ko., testified that the applicant had not been subjected to any pressure. K. and M. submitted that P. had paid them for their work. When they played football with the applicant he told them that they had not been paid enough. The forensic

medical examination confirmed that some of P.'s injuries could have been inflicted in the circumstances described by the applicant earlier. According to the DNA examination the blood from the blood spots on the applicant's trousers could have been P.'s, with a degree of probability of 1/2000.

24. The court finally sentenced the applicant to thirteen years' imprisonment, with obligatory treatment for alcoholism.

25. The applicant appealed against this decision. He complained, *inter alia*, that his actions had been wrongly classified at the pre-trial stage of the proceedings, which had breached his right to defence. The applicant indicated that P. knew him but while still alive she had never identified him as her attacker. Also, P.'s neighbours, including Pu. and Ma., who were drinking in the house next to the victim's, were not questioned at all, or only perfunctorily.

26. On 18 March 2004 the Supreme Court of Ukraine, in the presence of a prosecutor, upheld the applicant's sentence. Neither the applicant nor his lawyer were present at the hearing. The applicant was apprised of this decision on 3 August 2004.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure (“the CCP”) 1960

27. The relevant extracts from Article 45 of the CCP as worded at the material time read as follows:

Article 45 Compulsory participation of a defence lawyer

“Participation of a defence lawyer in the inquiry, pre-trial investigations and trial by the first-instance court is compulsory:

...

(2) in cases related to crimes committed by persons who, because of their physical or mental disabilities (dumbness, deafness, blindness, etc), are unable to realize themselves their right to defence – upon apprehension of, or bringing charges against, such person or upon establishing such disabilities;

...

(4) from the moment of the person's arrest or when he or she is [officially] charged with a criminal offence carrying a penalty of life imprisonment...”

28. Article 46 of the CCP as worded at the material time provided that a suspect, accused or defendant was entitled to waive his or her right to defence counsel. Such a waiver was permissible only on the initiative of the suspect, accused or defendant, himself or herself.

A waiver was not permitted if the participation of a defence lawyer was compulsory.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (c) OF THE CONVENTION

29. The applicant complained that his right to defence had been violated under Article 6 § 3 (c) of the Convention, which reads as follows:

“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

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

31. The applicant maintained that neither at the time of his arrest nor later had he been properly informed about his right to a lawyer.

32. The applicant stated that he had been ill-treated by the police officers (hit on the heels with a stick, forced to drink vodka and threatened). He did not complain about that treatment because he was afraid of the police officers. Also at that time the applicant was not legally represented and, having no legal knowledge, he did not know how to lodge complaints.

33. The applicant further indicated that he had had no “plan of defence” as stated by the Government but he had been a desperate person in a hopeless state, given that even the Government in their observations had not excluded the possibility of ill-treatment of detainees by police officers.

34. As for the evidence in support of the applicant's guilt, the applicant noted that the DNA-analysis had not confirmed that the bloodstains on his trousers belonged to the victim. Moreover, the victim had numerous knife wounds, including one which was 10.5 cm deep, and in those circumstances he should have been covered with blood. The national court had looked into the possibility that K. and M. had committed the crime, but had not looked into the hypothesis that P. was killed by people who had been drinking in the neighbouring house.

2. The Government's submissions

35. The Government maintained that the present case differed from the case of *Yaremenko v. Ukraine* (no. 32092/02, 12 June 2008), in which the Court held that because of a deliberately incorrect qualification of the applicant's actions he had not benefited from the requirement of obligatory representation in violation of Article 6 § 3 (c) of the Convention. In particular, in the present case the applicant had a prepared line of defence. Being a disabled person and fearing that he could be ill-treated by the police officers, the applicant decided “not to provoke” them and to confess as charged. However, when the case arrived at the court, the applicant “implemented his plan” - pleaded not guilty and requested the court to be provided with a lawyer, who would help him to prove his innocence.

36. The Government, however, further maintained that the applicant had not been ill-treated, since he had made no complaint to the national authorities.

37. The Government concluded that there were no reasons to doubt the applicant's waiver of his right to have a lawyer. Moreover, the applicant's confession was supported by other evidence indicated in the court decision of 25 November 2003.

38. Therefore, the Government considered that there had been no violation of Article 6 § 3 (c) of the Convention in the present case.

3. The Court's analysis

39. The Court emphasises the importance of the investigation stage for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. Therefore, Article 6 § 1 of the Convention requires that, as a rule, access to a lawyer should be provided from the first questioning of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling

reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 54-55, 27 November 2008). The right to defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (ibid.; see also *Panovits v. Cyprus*, no. 4268/04, §§ 84-86, 11 December 2008, and *Pishchalnikov v. Russia*, no. 7025/04, §§ 90-92, 24 September 2009).

40. The Court also observes that Article 6 of the Convention does not prevent a person from waiving of his own free will, either expressly or tacitly, the entitlement to certain guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000, and *Pishchalnikov v. Russia*, no. 7025/04, § 77, 24 September 2009). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrinol v. France*, 23 November 1993, § 31, Series A no. 277-A).

41. The Court notes at the outset that in the present case the Government recognised that the applicant had been afraid of possible ill-treatment and thus had pleaded guilty. Accordingly, he saw no need at that stage to be legally represented.

42. Although the applicant stated that he “would defend his rights himself”, he had agreed with all actions and conclusions of the investigation authorities and did not challenge any of them. However, every time the applicant found himself outside the authority of investigation bodies, he immediately claimed that he was innocent (see paragraph 12). Thus in the court the applicant immediately requested a lawyer and pleaded not guilty. He did not change his position after that.

43. It should be also noted that the applicant has a physical disability, was suffering from chronic alcoholism and belonged to a socially disadvantaged group, which could lead to the conclusion that he was particularly vulnerable, legally ignorant and susceptible to outside influence.

44. In these circumstances the Court finds that the applicant's waiver of legal representation at the initial stage was not genuine.

45. The Court further notes that initially the applicant's actions were qualified as serious bodily harm. Later the crime was reclassified as murder, because the nature of the victim's injuries clearly indicated the attacker's intention to kill her (see paragraph 19) and the applicant was convicted of premeditated murder. The nature of the victim's injuries was not a new element, unknown before, which could have explained the previous classification of the offence as less serious crime for which legal representation was not necessary. In these circumstances the applicant did not benefit from legal assistance during a crucial initial part of the proceedings.

46. Thus the applicant's conviction for murder was based mainly on statements he gave in the absence of his lawyer during the pre-trial

investigation. The applicant said he was guilty only in the presence of the investigating officer and at the reconstruction of events, where the applicant's lawyer was not present. Any other possible evidence of the applicant's guilt was of an indirect nature.

47. The Court has already held in similar situations that even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody could irretrievably affect his defence rights (see *Salduz*, cited above, § 56-62).

48. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 3 (c) of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLES 3 AND 5 § 1 (c) OF THE CONVENTION

49. The applicant complained under Article 5 § 1 (c) of the Convention that there had been no grounds for his arrest. In his response to the Government's observations the applicant also introduced new complaints of ill-treatment by the police officers and invoked Article 3 of the Convention.

50. The Court notes that the applicant was arrested on 1 October 2002. There is no evidence that he has ever challenged his arrest and pre-trial detention before the national authorities. In any event, the application was brought before this Court more than six months later (on 29 October 2004).

51. Similarly, the applicant's complaint of ill-treatment by the police officers was introduced for the first time on 21 July 2009, while the final decision in the applicant's case was adopted on 18 March 2004.

52. The Court considers that these complaints have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 156,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. In particular, the applicant's claims for

pecuniary damages concerned his inability to receive a pension for disabled persons while in detention.

55. The Government maintained that there was no causal link between the alleged violations and the damages claimed by the applicant.

56. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

57. The applicant also claimed EUR 850 for the costs and expenses incurred before the Court.

58. The Government did not comment on this claim.

59. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant has already obtained legal aid of EUR 850 from the Council of Europe. Therefore, the Court rejects the claim for costs and expenses.

C. Default interest

60. 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 complaint under Article 6 § 3 (c) of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention;
3. *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 3,000 (three thousand euros) to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(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;

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

Done in English, and notified in writing on 27 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President