



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

FIFTH SECTION

CASE OF ZHUKOVSKIY v. UKRAINE

(Application no. 31240/03)

JUDGMENT

STRASBOURG

3 March 2011

FINAL

15/09/2011

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

In the case of Zhukovskiy v. Ukraine,

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

Dean Spielmann, *President*,

Boštjan M. Zupančič,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nussberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 8 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 31240/03) 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 Andrey Vasilyevich Zhukovskiy (“the applicant”), on 13 September 2003.

2. The applicant, who had been granted legal aid, was represented by Ms O.V. Shevchenko, a lawyer practising in Kiev. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged that the criminal proceedings against him had been unfair and that the courts had based his conviction on the testimony of witnesses whom he had not been allowed to question.

4. On 8 September 2009 the Court declared the application partly inadmissible and decided to communicate the complaint concerning unfairness of trial proceedings and inability to examine witnesses, under Article 6 § 1 and 3 (d) of the Convention, to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and serves his sentence.

6. In 1996 the applicant moved from Ukraine to the Sakha Republic in the Russian Federation.

7. On 21 June 1998 a Mr G. was murdered in the city of Yakutsk, Russia. According to the applicant, the murder was committed by Mr Gl. and the applicant only helped to transport and hide the body.

8. On 14 September 1998 the police instituted criminal proceedings into the murder of Mr G. The same day the applicant was arrested and questioned as a suspect. He showed the police the place where the decapitated corpse of Mr G. was hidden.

9. On 10 October 1998 the applicant's girlfriend Ms R. indicated to the police the place where the head of the murdered Mr G. was hidden.

10. The investigation conducted a number of forensic examinations and questioning, including cross-examination by the applicant of some of the witnesses.

11. On 12 February 1999 the applicant was released under an obligation not to abscond.

12. On 11 March 1999 Mr Gl., who had been on the run, was arrested. The next day the applicant breached his undertaking not to abscond and left for Ukraine.

13. On 19 November 1999 the Supreme Court of the Sakha Republic (the Russian Federation) sentenced Mr Gl. to fifteen years' imprisonment for the murder of Mr G. This judgment was upheld by the Supreme Court of the Russian Federation and became final on 19 April 2000.

14. On 2 December 1999 the General Prosecutor's Office of the Russian Federation requested the General Prosecutor's Office of Ukraine under the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 ("the Minsk Convention") to prosecute the applicant for the crime committed on the territory of the Russian Federation, given that the applicant, a Ukrainian national, could not be extradited to Russia.

15. On 4 April 2001 the applicant was arrested within another set of criminal proceedings and on 31 July 2001 the Chornobayivsky Local Court sentenced him to six months' imprisonment for another, unrelated offence. On 25 September 2001 the Cherkassy Regional Court of Appeal (the Cherkassy Court) upheld that judgment.

16. On 4 October 2001, under the request of 2 December 1999, the applicant was charged with murder committed on the territory of the Russian Federation in June 1998.

17. On 18 December 2001 the Cherkassy Court, sitting as a court of first instance, held its first hearing in the criminal case against the applicant. The applicant's lawyer requested the court to summon and examine the witnesses who had participated in the judicial proceedings on the territory of the Russian Federation, and also Mr Gl.

18. The Cherkassy Court summoned the witnesses to appear before it on 15 January and then on 19 February 2002

19. On 22 February 2002 the Cherkassy Court granted the request of the applicant's defence counsel to cross-examine the witnesses in the criminal proceedings who lived in the Russian Federation. The court noted that some witnesses had confirmed their statements by cable and stated that they could not travel to Cherkassy for financial reasons¹. The court ruled that it was necessary to examine the witnesses either in Ukraine or at their place of residence by a local judicial authority with jurisdiction under the Minsk Convention. Taking into account lack of sufficient funds for travel and accommodation for the witnesses from the city of Yakutsk in the city of Cherkassy, the court opted for the international legal assistance mechanism and ordered that the appropriate Russian authorities be requested to conduct a judicial examination of the witnesses in the Russian Federation. The records of that examination would be used by the Cherkassy Court as evidence in the criminal case against the applicant. The court also noted that as an alternative the witnesses could be brought to Cherkassy if the relevant authorities of the Russian Federation could cover their costs.

20. On 6 March 2002 and 19 April 2002, under the procedure envisaged by the European Convention on Mutual Assistance in Criminal Matters, the court lodged with the Ministry of Justice of Ukraine a request for letters rogatory to be sent to the Russian authorities in order to have nine citizens residing in the Russian Federation questioned or to ensure their appearance before the court.

21. The questioning took place in February and March 2003.

22. On 5 May 2003, having received the materials that had been requested by letters rogatory from the Ministry of Justice of the Russian Federation, the Ministry of Justice of Ukraine forwarded them to the court.

23. On 29 July 2003 the Cherkassy Court found the applicant guilty of murder and sentenced him to fourteen years' imprisonment. The court based its findings on the materials in the criminal case file received from the relevant Russian authorities and the materials obtained during the judicial examination of witnesses by the court in Russia in February and March 2003. The court also made a separate ruling noting the unlawfulness and irregularities of certain periods of the applicant's detention and lack of cooperation of the Ukrainian authorities responsible for international legal assistance.

24. The applicant appealed in cassation complaining, among other things, that the evidence obtained in the Russian Federation was not admissible, since the applicant and his lawyers had not participated in the questioning.

1. The distance between the city of Cherkassy and the city of Yakutsk is 5,667 kilometres.

25. On 18 November 2003 the Supreme Court upheld the decision of the Cherkassy Court. In its decision, it stated that the applicant and his representatives had been aware of the difficulty of obtaining the attendance of witnesses from Russia and had agreed to and supported the proposal to send a request to a Russian court to have the witnesses questioned in that country, but that they had not showed any interest in attending the questioning, which they had had the right to do. In the absence of any actions on the part of the applicant and his lawyer in this matter, the court did not establish any violation of the applicant's right to defence.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

26. Article 9 of the Constitution provides:

“International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.”

B. Code of Criminal Procedure of Ukraine

27. Relevant provisions of the Code provide:

Article 31

The procedure for communications between courts, prosecutors, investigators, or inquiry authorities and the respective authorities of foreign States

“The procedure for communications between the courts, prosecutors, investigators, or inquiry authorities and the respective authorities of foreign States as well as the procedure for execution of mutual letters rogatory shall be established by legislation of Ukraine and international treaties to which Ukraine is a signatory.”

Article 48

Duties and rights of defence counsel

“Defence counsel shall use remedies available under this Code and other legislative acts in order to ascertain the circumstances dispelling the suspicion or rebutting the charges, extenuating or excluding criminal liability on the part of the suspect, accused, defendant or convicted person, and shall provide them with the necessary legal assistance.

After having been permitted to provide legal representation in the proceedings, defence counsel shall have the right:

...

(7) to put questions in court to the defendants, victims, witnesses, and also to the expert, specialist, claimant or respondent, and to participate in the examination of other evidence;

(8) to adduce evidence, lodge requests or challenges, express in court his or her opinion on requests made by other participants in the judicial proceedings, appeal against acts or decisions of a person conducting an inquiry, or against those of the investigator, prosecutor, or court; ...

(13) to collect information on matters which can be used as evidence in the case; ...”

Article 65 Evidence

“Criminal evidence is any factual information on the basis of which the inquiry authority, the investigator and the court ascertain whether or not an act which is a danger to society has been committed, establish the guilt of the person who has committed the act, and any other circumstances relevant to the proper determination of the case.

Such information shall be established: from statements from witnesses, the victim, a suspect, an accused, and also from expert reports, material evidence, reports on investigative and judicial actions, reports – with relevant materials attached thereto – drawn up by the appropriate authorities on the results of detective and search activities, and other documents.”

Article 67 Assessment of evidence

“The court, prosecutor, investigator, or the person who conducts the inquiry shall assess evidence according to their inner convictions based on an extensive, full and objective review of all circumstances of the case in their entirety and in compliance with the law.

No evidence shall have a prejudicial effect on the court, prosecutor, investigator, or the person who conducts the inquiry.”

Article 68 Witness testimony

“Anyone known to be aware of the circumstances relating to the case may be summoned as a witness.

A witness may be questioned about the circumstances to be established in a particular case and, *inter alia*, about matters relating to the personality of the accused or the suspect and about the witness’s relationships with the accused or the suspect.”

C. CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 (“the Minsk Convention”)

28. Relevant provisions of the Convention provide:

Article 8
Execution procedure

“1. In executing letters rogatory for assistance in legal proceedings, the requested authority shall apply legislation of its State. If so requested by the requesting authority, it may also apply procedural rules of the requesting Party...

...

3. If so requested by the requesting authority, the requested authority shall inform in timely manner the requesting authority and interested parties of the time and place of execution of the letters rogatory in order to enable them to be present at the execution of the letters rogatory in accordance with legislation of the requested Party.”

Article 13
Validity of documents

“1. The documents made or certified in the territory of one of the Contracting Parties by the authority or duly authorised person within their competence and in due form, sealed with an official stamp, shall be accepted in the territories of the other Contracting Parties without any certification for such purposes.

2. The documents regarded as official in the territory of one of the Contracting Parties shall have evidential force of official documents in the territories of the other Contracting Parties.”

Article 60
The content and form of letters rogatory for assistance in criminal proceedings

“1. Letters rogatory for assistance in criminal proceedings shall be drawn up in accordance with Article 7 of this Convention.

2. The letters rogatory shall also contain:

...

b) the list of questions to be clarified at the interrogation;

D. European Convention on Mutual Assistance in Criminal Matters

29. Relevant provisions of the Convention provide:

Article 1

“The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.”

Article 3

“1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.”

Article 4

“On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.”

Article 14

“1. Requests for mutual assistance shall indicate as follows:

- a. the authority making the request,
- b. the object of and the reason for the request,
- c. where possible, the identity and the nationality of the person concerned, and
- d. where necessary, the name and address of the person to be served.

2. Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts.”

Article 17

“Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.”

Article 23

Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention. (...)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained under Article 6 §§ 1, 2, and 3 (b) and (d) of the Convention about unfairness of the proceedings and lack of opportunity to examine or have examined any of the witnesses in his case. The Court considers that among the provisions of Article 6 invoked by the applicant, those of Article 6 §§ 1 and 3 (d) are relevant to his complaints. These provisions read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

A. Admissibility

31. The Government asserted that the applicant had failed to exhaust the domestic remedies that had been available to him at the domestic level.

32. The Court notes that the Government’s objection is closely linked to the merits of the applicant’s complaint. It therefore joins it to the merits.

33. The Court notes that this part of the application 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 parties' submissions

34. The applicant considered that the Ukrainian and Russian authorities had acted in an accusatory manner, seeking to find him guilty. He noted that the prosecutor had been present during the questioning of the witnesses in the Russian Federation, while his representative had not been. He also contested the assessment of the body of evidence in his case by the domestic courts.

35. The Government noted that the applicant's lawyer had requested that witnesses residing in another State be examined, and therefore he had to be aware of the procedural rights guaranteed to the defence under two relevant international legal instruments: the Minsk Convention and the European Convention. However, it does not follow from the applicant's submissions or available materials that the applicant's defence counsel had ever requested to participate in the examination of witnesses in accordance with Article 48 of the Code of Criminal Procedure of Ukraine. Furthermore, should his request have been accepted the lawyer could have either participated himself or instructed local lawyer in Russia to participate on his behalf in the examination of the witnesses. They asserted that the trial court could not interfere in such a matter by arranging for such participation of its own motion. Therefore, the Government considered that the applicant had failed to avail himself of the remedy envisaged by the international conventions on legal assistance in criminal matters; in particular, he had not requested that his defence counsel be allowed to participate in the execution of the letters rogatory for examination of the witnesses residing outside Ukraine.

36. Furthermore, the Government contended that the request of the applicant's defence counsel for examination of the witnesses residing in the Russian Federation had referred only to general reasons for the witnesses to be examined again during the proceedings in the applicant's case before the Ukrainian court. However, the applicant have provided no indication that his defence counsel had tried to formulate any precise questions to be put to the witnesses residing in the Russian Federation. Nor did the case file contain any request from the applicant's defence counsel or the applicant as regards the necessity to put specific questions to the witnesses.

37. The Government considered that the applicant failed to exhaust domestic remedies as required by Article 35 of the Convention – in particular, the applicant did not avail himself of the opportunity, provided for by the international conventions on legal assistance in criminal matters, to participate in the execution of the letters rogatory or to indicate the questions to be put to the witnesses outside Ukraine.

38. The Government also submitted that the applicant's conviction was not based solely on the contested statements, as there were case file materials concerning the material evidence and the investigative actions conducted with the applicant in Russia before his departure to Ukraine.

39. The Government noted that it could not be said in this case that the applicant had not been allowed to participate in the questioning of the witnesses in the Russian Federation, since the applicant or his lawyer had never requested to participate.

2. The Court's assessment

(a) Applicable principles

40. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others*, cited above, p. 711, § 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67). All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.

41. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see *A.L. v. Finland*, no. 23220/04, § 37, 27 January 2009).

42. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Saïdi v. France*, judgment of 20 September 1993, Series A

no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

43. The Court further reiterates that the authorities should make “every reasonable effort” to secure the appearance of a witness for direct examination before the trial court. With respect to statements of witnesses who have proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court would emphasise that “paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner” (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII; *Trofimov v. Russia*, no. 1111/02, § 33, 4 December 2008; and *Makeyev*, cited above, § 36). Furthermore, in the event of a particular geographic obstacle, the Court must also examine whether the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant’s rights (see, *mutatis mutandis*, *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 10, 2 November 2010).

(b) Application of the above principles to the facts of the case

44. The Court notes that the importance of rehearing of the witnesses in the present case had been acknowledged by the domestic courts on many occasions and it was not disputed before this Court. The issue before this Court is whether the arrangements made by the domestic authorities in the present case to obtain statements from the witnesses were in compliance with the requirements of Article 6 §§ 1 and 3 (d) of the Convention.

45. The Court notes that the domestic authorities examined different ways of obtaining the statements and opted for the questioning of the witnesses in the Russian Federation through the international legal assistance mechanism. Such a solution, to which the defence did not object, could be found reasonable. However, in the circumstances of the case it led to the situation in which the applicant found himself convicted of a very serious crime mainly on the basis of evidence given by witnesses none of whom were present during his trial in Ukraine. The domestic courts did not hear the direct evidence of these witnesses and the applicant had no opportunity to cross-examine them. The Court is not persuaded that the materials of pre-trial investigation, in which the applicant partly participated, and the video of the questioning could compensate such complete lack of possibility for the courts and the applicant to examine the witnesses directly. Furthermore, being aware of difficulties in securing the right of the applicant to examine the witnesses in the present case, the Court

considers that the available modern technologies could offer more interactive type of questioning of witnesses abroad, like a video link.

46. The Court further notes, that although the applicant and his lawyer, and they did not contest this, did not take any available steps to be more actively involved in the questioning and did not provide any reasons for their failure to do so, the domestic authorities on their part had at least to ensure that they were informed in advance about the date and place of hearing and about questions formulated by the domestic authorities in the present case. Such information would give the applicant and his lawyer reasonable opportunity to request for clarifying or complementing certain questions that would deem important. In the light of these findings the Court rejects the Government's objection as to admissibility of the present part of the application.

47. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was unreasonably restricted in his right to examine witnesses and his conviction was based to a decisive extent on the testimonies of such witnesses.

There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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.”

49. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's objection, and rejects it after an examination on the merits;
2. *Declares* the remainder of the application admissible;
3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

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

Claudia Westerdiek
Registrar

Dean Spielmann
President