



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

FIFTH SECTION

CASE OF ZAGORODNIY v. UKRAINE

(Application no. 27004/06)

JUDGMENT

STRASBOURG

24 November 2011

FINAL

24/02/2011

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

In the case of Zagorodniy v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Mark Villiger,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 27004/06) 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 Aleksandr Vladimirovich Zagorodniy (“the applicant”), on 17 June 2006.

2. The applicant was represented by Mr V.M. Mikhalin, a lawyer practising in Kostyantynivka, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged, in particular, that he had been denied a free choice of defence counsel and that the proceedings against him had been unfair.

4. On 1 July 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in the town of Dimitrov, Ukraine.

A. Legal background of the case

6. Prior to November 2000 the legal representation of defendants in criminal proceedings could be conducted only by a licensed advocate. The advocate's rights and obligations, and the required standards of professional competence and conduct were set forth in a separate Act of Parliament (see paragraphs 39 to 42 below). Other persons, including those holding a university law degree, were excluded from providing legal representation in criminal cases.

7. On 16 November 2000 the Constitutional Court found the relevant provisions of the Code of Criminal Procedure unconstitutional and the parliament introduced relevant amendments to the Code in June 2001 (see paragraphs 37 and 38 below).

B. The criminal proceedings against the applicant

8. On 4 August 2004 the applicant was involved in a traffic accident, in which his car collided with another car. On the next day, criminal proceedings concerning the accident were instituted against the applicant.

9. On 9 November 2004 the applicant signed an agreement with Mr M. for legal representation in the above-mentioned criminal proceedings. The latter was a lawyer, who held a university degree in law and who had a private legal practice, but who was not a licensed advocate.

10. On 16 November 2004 the investigator allowed Mr M. to act as defence counsel.

11. On 5 August 2005 the Dimitrov Local Court ("the Dimitrov Court") held a committal hearing in the case and decided to remit the case for additional investigation on the grounds that the applicant's right to mount a defence had been breached during the pre-trial investigation. The court noted that, in accordance with Article 44 of the Code of Criminal Procedure, the right to provide legal assistance is conferred upon advocates and other legal specialists (the term used to describe degree-educated practicing lawyers who have not been called to the Bar), but the right of the latter to act as defence counsel required to be defined by a specific piece of legislation. As there was no such law authorising a legal specialist with a private practice, such as Mr M., to provide legal assistance in criminal matters, the decision of the investigator to allow such a specialist to take part in the case had been unlawful and therefore the applicant's right to mount a defence had been violated. The court ordered additional investigation with the participation of an advocate.

12. On 10 August 2005 the applicant appealed against the decision of 5 August 2005, claiming that limiting his right to a free choice of defence counsel was contrary to the Constitution and the decision of the Constitutional Court of 16 November 2000 (see paragraph 37 below).

13. On 13 January 2006 the court rejected his appeal.

14. On 24 March 2006 the investigator decided to allow Mr O., who was a licensed advocate, to take part in the criminal case as the applicant's defence counsel.

15. On 26 April 2006 the applicant appealed in cassation against the decisions of 5 August 2005 and 13 January 2006.

16. By letter of 3 May 2006, in reply to a request by the applicant that criminal proceedings be instituted against the relevant judge of the Dimitrov Court for alleged deliberate failure to comply with the decision of the Constitutional Court concerning the right to a free choice of defence counsel, the Donetsk Regional Prosecutor's Office informed the applicant that the court had rightly decided to remove Mr M. from the applicant's case because he was not a licensed advocate.

17. On 11 May 2006 the applicant asked the Dimitrov Court to remit his case for further investigation on the grounds that his right to mount a defence had been violated.

18. On the same date the court rejected his request. The court established that the applicant's right to mount a defence had been complied with as a result of the participation of Mr O. in the additional investigation.

19. On 12 May 2006 the applicant notified the court that Mr O. was not his defence counsel and that he had seen him only once, in April 2006, when he had pointed out to the investigator that he needed defence counsel but did not wish to be represented by Mr O. because he had not been freely chosen by him. Therefore, he contested the court's conclusion that his right to mount a defence had been complied with.

20. On 22 May 2006 the Supreme Court rejected his appeal on the grounds that decisions as to the remittal of a criminal case were not subject to appeal in cassation.

21. On 17 July 2006 the Dimitrov Court rejected a request by the applicant that Mr M. be allowed to represent him as his defence counsel because the law did not provide that a private practice lawyer could act as defence counsel in a criminal case. At the same time, the court accepted the refusal by the applicant to have Mr O. appointed as his defence counsel.

22. In July 2006 the same court returned the applicant's appeal against the decision of 17 July 2006 without consideration on the grounds that the contested decision was not subject to a separate appeal.

23. By a decision of 6 September 2006, following another request by the applicant to institute criminal proceedings against the judge of the Dimitrov Court for alleged failure to comply with the decision of the Constitutional Court, the Dimitrov Prosecutor's Office again refused to institute criminal proceedings.

24. On 12 March 2007 the Krasnoarmeysk Local Court rejected an appeal by the applicant against the prosecutor's decision of 6 September

2006. The decision of 12 March 2007 was upheld by the Donetsk Regional Court of Appeal on 14 August 2007.

25. During a court hearing on 13 March 2007 the Dimitrov Court examined a request from the applicant asking it to accept his dismissal of a lawyer, Mr K., who had been appointed by the court to represent him after the decision of 17 July 2006, and to appoint his wife as his representative. The court allowed his request in part. It allowed the applicant's wife to be his defence counsel but rejected the applicant's dismissal of Mr K. on the grounds that the applicant had complained on numerous occasions about a violation of his right to mount a defence and therefore determined that he should be legally represented.

26. On 10 April 2007 the applicant wrote a letter dismissing Mr K. He claimed that the appointed advocates, Mr O. and Mr K., had only formally represented him and had not properly defended him. He noted, however, that he did need defence counsel, although not a formally admitted one.

27. On the same date the court rejected the applicant's dismissal letter, stating that he had claimed that he needed defence counsel.

28. On 21 March 2008 the court rejected the applicant's request to remit the case for additional investigation. It also rejected the applicant's dismissal of Mr K. and the applicant's request asking that Mr M. be allowed to take part in the case again.

29. On 27 March 2008 the applicant was found guilty of a breach of traffic rules which had caused medium bodily injury and sentenced to three years' restraint of liberty (*обмеження волі*). However, he was discharged from serving his sentence owing to the expiry of the statutory time-limit for the prosecution. He was also ordered to pay compensation for pecuniary and non-pecuniary damage caused to the victims.

30. The applicant appealed against that judgment, claiming, *inter alia*, that his right to a free choice of defence counsel had been violated.

31. On 13 June 2008 the Donetsk Regional Court of Appeal upheld the judgment of 27 March 2008 in part. The court noted that there had been no procedural violations that would require the judgment to be quashed. At the same time, the quantum of damages had not been substantiated and therefore the court remitted this part of the case for fresh consideration in separate civil proceedings.

32. The applicant appealed in cassation to the Supreme Court, claiming, *inter alia*, that his right to a free choice of defence counsel had been violated.

33. On 24 February 2009 the Supreme Court upheld the decision of the Court of Appeal. In reply to the applicant's complaint of a violation of his right to mount a defence, the court noted:

"It is not worth paying attention to the arguments [submitted in] the cassation appeal by the convict that his right to mount a defence was violated, because, in rejecting the request of the convict, the court reasonably noted that, in accordance with Article 44

of the Code of Criminal Procedure of Ukraine, only a person who is the bearer of an advocate's licence for practice in Ukraine is allowed to act as defence counsel and M. is not the bearer of such a licence."

34. By a judgment of 5 February 2009 of the Dimitrov Court, the applicant was ordered to pay compensation to the victims of the traffic accident for pecuniary and non-pecuniary damage caused to them.

35. On 29 April and 30 June 2009 respectively the Donetsk Regional Court of Appeal and the Supreme Court upheld the judgment of 5 February 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine

36. Relevant provisions of the Constitution read as follows:

Article 22

"Human and citizens' rights and freedoms affirmed by this Constitution are not exhaustive.

Constitutional rights and freedoms are guaranteed and shall not be abolished.

The content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force."

Article 59

"Everyone has the right to legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose his or her own defence counsel.

In Ukraine, advocacy acts to ensure the right to mount a defence against an accusation and to provide legal assistance during the determination of cases by the courts and other State bodies."

Article 63

"... A suspect, an accused or a defendant has the right to mount a defence ..."

Article 92

"The following are determined exclusively by the laws of Ukraine:

(1) human and citizens' rights and freedoms, the guarantees of these rights and freedoms; the main duties of a citizen ...

(14) the judicial system, judicial proceedings, the status of judges, the principle of judicial expertise, the organisation and operation of the prosecution service, bodies of inquiry and investigation, the [status of] notaries, bodies and institutions [pertaining to] the execution of punishments, the fundamentals of the organisation and activities of the Bar ...”

B. Decision of the Constitutional Court of Ukraine of 16 November 2000 regarding the free choice of defence counsel

37. In this case, the Constitutional Court decided that:

“1. The provisions of Article 59 of the Constitution of Ukraine, that "everyone is free to choose his or her own defence counsel”, in terms of the constitutional application of citizen G.I. S. shall be understood as the constitutional right of a suspect, an accused or a defendant in their defence from an accusation ... in order to obtain legal aid, to choose, as his or her defence counsel, anyone who is a legal specialist and who is entitled by law to provide legal assistance [on his or her own account] or on behalf of a legal person.

2. The provisions of part 2 of Article 59 of the Constitution of Ukraine that "in Ukraine, advocacy acts to ensure the right to mount a defence against an accusation ..." shall be understood as one of the constitutional guarantees, giving a suspect, an accused or a defendant the opportunity to exercise his or her right to freely choose, as defence counsel in criminal proceedings, an advocate, that is, a person who has the right to provide advocacy.

3. The following shall be considered not to be in conformity with the Constitution of Ukraine (unconstitutional):

- a provision of part 1 of Article 44 of the Code of Criminal Procedure of Ukraine which limits the right for a suspect, an accused or a defendant to freely choose as his or her own defence counsel, apart from an advocate, another legal specialist, who, in accordance with the law, is entitled to provide legal assistance [as a sole practitioner] or on behalf of a legal person;

...

4. The provisions of part 1 of Article 44 of the Code of Criminal Procedure of Ukraine ... deemed to be unconstitutional, lose their force from the day that this decision by the Constitutional Court has been rendered.

C. The Code of Criminal Procedure (as amended in June 2001)

38. Relevant provisions of the Code read as follows:

Article 44
Defence counsel

“Defence counsel is the person who, in accordance with the procedure prescribed by law, shall be authorised to protect the rights and legitimate interests of a suspect, an accused, a defendant, a convict or an acquitted person, and to provide them with necessary legal assistance in criminal proceedings.

Persons bearing a licence to exercise the right of advocacy in Ukraine and other legal specialists, who are entitled by law to provide legal assistance [as a sole practitioner] or on behalf of a legal person shall be allowed to act as defence counsel

...

The powers of defence counsel to participate in a case shall be confirmed:

...

(2) for an advocate who is not a member of the Bar Association by an agreement, for other legal specialists who are entitled by law to provide legal assistance [as a sole practitioner] or on behalf of a legal person by an agreement or by the authority of the legal person ...”

D. The Bar Act of 19 December 1992

39. Section 2 of the Act provides that, in addition to having a university degree in law, an advocate must pass special qualification exams, obtain an advocate’s licence and be sworn in as an advocate of Ukraine.

40. Sections 6 and 7 set forth the professional rights and obligations of the lawyer, including those in respect of evidence gathering and restrictions on representation.

41. Section 9 of the Act sets out the provisions for advocate-client confidentiality and section 10 sets forth the privileges enjoyed by the advocate in carrying out his professional activities, including the prohibition on the search and seizure of the advocate’s professional papers without his consent and the special procedure for instituting criminal proceedings against him.

42. Section 13 of the Act provides for special qualifications and disciplinary boards that assess the professional competence of advocates and deal with any disciplinary matters in the event of a breach of the requirements of the Act or other relevant legislation.

E. Resolution no. 8 of the Plenary Supreme Court of Ukraine of 24 October 2003 on the application of legislation that ensures the right to mount a defence in criminal proceedings

43. The relevant extracts from the Resolution of the Plenary Supreme Court read as follows:

“In order to ensure the correct and uniformed application by the courts of the legislation that ensures the right of a suspect, an accused, a defendant, a convict or an acquitted person to mount a defence, the Plenary Supreme Court decides:

5. The powers of defence counsel to participate in the case should be confirmed:
...

(c) for any other legal specialist, who, in accordance with the law, is entitled to provide legal assistance [as a sole practitioner] or on behalf of a legal person – by the documents specified in the specific legislation which confers on these persons the right to participate in criminal proceedings as defence counsel, as well as by a contract or through the authority of the legal person;

...

In deciding whether a legal specialist has the authority to conduct the defence in a criminal case, it should also be established by exactly what law the right to participate in criminal proceedings as defence counsel was conferred on him or her. This should be recognised as the proper practice of the courts, which, in the absence of a specific piece of legislation, do not allow such specialists to conduct the defence in criminal cases ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained that the domestic authorities had unlawfully denied him the right to a free choice of defence counsel and therefore that the trial against him had been unfair, contrary to Article 6 §§ 1 and 3 (c) of the Convention, which reads insofar as relevant 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:

(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

45. 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 parties' submissions

46. The applicant maintained that the decision of the Constitutional Court had clearly indicated that a private practice lawyer could act as counsel in criminal proceedings. The lawyer of his choice had had a law degree and had been registered as a private entrepreneur; therefore, he had satisfied the requirements of the law. The applicant considered that the lack of disciplinary liability for private practice lawyers could not be a valid obstacle for the performance of their activities. The applicant also pointed out that the Resolutions of the Supreme Court could not serve as a legal basis for restricting his right to choose a lawyer.

47. The applicant further maintained that the lawyers appointed in his case had proved to be ineffective. He noted that the domestic authorities had allowed his wife, who had not had a law degree, to act as his second defence counsel, but had not allowed a lawyer, M., to act in his defence.

48. The Government noted that under the Court's case-law the right to legal assistance of one's own choosing was not absolute and could be subject to restrictions. They maintained that the Constitutional Court had found unconstitutional the provisions of the Code of Criminal Procedure concerning the choice of defence counsel being limited to a member of the Bar and that Parliament had accordingly amended the relevant provisions of the aforementioned Code. The new provisions of the Code, however, had required a further legislative act, which had not been adopted. The Government observed that the applicant had disagreed with the Resolution of the Supreme Court, which meant that he had misunderstood domestic law, given that the Resolution of the Supreme Court had been a logical continuation of the interpretation of the Constitutional Court. Therefore, they considered that the refusal to allow Mr M. to act as the applicant's defence counsel had not been contrary to the provisions of domestic law and that there had been no violation of Article 6 § 3 (c) of the Convention.

49. The Government maintained that allowing a legal specialist to conduct the defence in the applicant's case would not have provided the applicant with sufficient legal assistance. Given that the legal status of a specialist, in other words a lawyer who is not a licensed advocate, had not been determined by law, such a specialist was not subject to the Rules of Advocate's Ethics and to qualification requirements established for advocates. Furthermore, such a specialist was not disciplinarily liable.

50. The Government finally maintained that the interests of justice had not required the applicant's representation by Mr M. and that the domestic

authorities had provided the applicant with legal assistance by other counsel. Moreover, the applicant had not been prevented from defending himself or presenting his version of events.

2. The Court's assessment

51. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports of Judgments and Decisions* 1997-III, p. 711).

52. The Court reiterates that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). A person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (see *Hanževački v. Croatia*, no. 17182/07, § 21, 16 April 2009, with further references). However, this latter right cannot be considered to be absolute either and, consequently, the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B). Furthermore, the legal requirement for defence counsel to hold a law degree is not in violation of the above provision (see *Shabelnik v. Ukraine*, no. 16404/03, § 39, 19 February 2009).

53. In the present case, the applicant's right to freely choose his defence counsel was restricted, as the representative of his choice was a lawyer, but not a licensed advocate. In the Court's opinion, such a restriction on the free choice of defence counsel may not in itself raise an issue under Article 6 § 3 (c) of the Convention, since the particular legal qualifications can be required to ensure the efficient defence of a person (see *Mayzit v. Russia*, no. 63378/00, § 68, 20 January 2005) and the smooth operation of the justice system (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 45, ECHR 2002-VII). However, as the applicant argued such restriction had been found unconstitutional as early as November 2000 (see paragraph 37 above), the relevant domestic legislation had to be brought in compliance with the Constitutional Court's decision. The legislative amendments to this end had been introduced in June 2001, but, according to the Government, further legislative actions were required (see paragraph 48 above). On this latter point, the applicant had disagreed with the Government, considering that the existing legislation did not provide for the restriction on his choice of a lawyer and his choice had been restricted due to wrong interpretation of the criminal procedural law by the Supreme Court. On this point, the Court notes that it is not its task to decide whether the restriction of the applicant's choice of a lawyer resulted from a

lack of further legislative amendments, as suggested by the Government, or from inconsistent practice in interpretation of the decision of the Constitutional Court, as maintained by the applicant.

54. The Court notes that it was not suggested by the domestic authorities that the interests of justice were a justification for this restriction on the applicant's choice of counsel. The Court considers that, even assuming that the restriction results, as the Government suggested, from a yet to be completed process of bringing the criminal procedural legislation in line with the decision of the Constitutional Court, such situation of continuous uncertainty in the relevant domestic legislation presently remains. The Resolution of the Plenary Supreme Court adopted in 2003 did not bring about consistent and uniform application of the law. The Court previously held that an interference with the Convention rights cannot be considered lawful merely because of the absence of any legal provision with which it may conflict. The interference itself must have sufficient basis in domestic law to avoid being arbitrary (see, *mutatis mutandis*, *Svershov v. Ukraine*, no. 35231/02, § 48, 27 November 2008, and *Garkavyi v. Ukraine*, no. 25978/07, § 74, 18 February 2010).

55. In the Court's opinion, leaving the issue of curtailment on the free choice of a defence counsel unsettled for a long period of time, the State authorities created a situation incompatible with the principle of legal certainty which is implied in the Convention and constitutes one of the basic elements of the rule of law (see, *mutatis mutandis*, *Ștefănică and Others v. Romania*, no. 38155/02, § 31, 2 November 2010). Accordingly, the applicant's right to a free choice of counsel had been restricted in a manner incompatible with the requirements of Article 6 §§ 1 and 3 of the Convention

56. Thus there has been a violation of these provisions.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

57. Lastly, the applicant complained about the length of the criminal proceedings against him. He also referred to Article 8 of the Universal Declaration of Human Rights. In his later submissions he further complained that one of the witnesses for prosecution had not been examined in court.

58. Having carefully examined the applicant's submissions in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant claimed 2,375.27 United States dollars (USD) in respect of pecuniary damage and 25,000 euros (EUR) in respect of non-pecuniary damage.

61. The Government considered that there was no causal link between the alleged violation and the damages claimed.

62. The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction in the circumstances of the present case.

B. Costs and expenses

63. The applicant also claimed 12,361 Ukrainian hryvnias (UAH) (around EUR 1,082) for costs and expenses incurred before the domestic courts and before this Court.

64. The Government maintained that not all of the claimed costs and expenses had been documented and proved to be relevant to the present case.

65. 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, regard being had to the documents in its possession and to the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 250 for the proceedings before the Court.

C. Default interest

66. The Court considers it appropriate that the default interest rate 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 concerning denial of the applicant's right to a free choice of defence counsel and unfairness of the proceedings against him admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 250 (two hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (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 24 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President