



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

FIFTH SECTION

**CASE OF MAKSIMENKO v. UKRAINE**

*(Application no. 39488/07)*

JUDGMENT

STRASBOURG

20 December 2011

**FINAL**

***20/03/2012***

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

**In the case of Maksimenko v. Ukraine,**

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 29 November 2011,

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

**PROCEDURE**

1. The case originated in an application (no. 39488/07) 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 Russian national, Mr Sergey Ivanovich Maksimenko (“the applicant”), on 20 August 2007.

2. The applicant, who had been granted legal aid, was represented by Mr M.O. Tarakhkalo, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent Mr Yuriy Zaytsev, succeeded by Ms Valeria Lutkovska.

3. The applicant complained, in particular, about the lack of free legal assistance for him during the cassation appeal proceedings following his being sentenced to life imprisonment by the first-instance court.

4. On 24 November 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).

5. The Russian Government, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), indicated that they did not wish to exercise that right.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and is serving a sentence of life imprisonment in Temnivka Prison no. 100.

7. On 3 December 2001 the dead body of a Mr L. was found, with a blood-stained axe lying next to it. A criminal investigation was initiated in respect of a suspected premeditated murder.

8. From 14 January to 13 March 2002 the applicant underwent medical treatment for an unspecified psychiatric condition in the medical centre V.

9. On 19 July 2002 he was arrested in the framework of an unrelated murder investigation.

10. In March 2006 the applicant, who was at the time serving a fixed-term prison sentence for several counts of premeditated murder, made a confession, first to the prison administration and later to the investigation authorities, that on 3 December 2001 he had twice hit Mr L. on the head with the back of an axe without having the intention of killing him.

11. Free legal counsel was appointed for, and represented, the applicant during the pre-trial investigation and the proceedings before the first-instance court.

12. During the pre-trial investigation the applicant unsuccessfully requested the investigator to arrange for the translation into Russian of some materials in the case file which were in Ukrainian.

13. On 7 November 2006 the Kyiv Regional Court of Appeal (“the Kyiv Court”), sitting as a court of first instance, found the applicant guilty of premeditated murder committed repeatedly and sentenced him to life imprisonment. It noted that although the applicant had alleged that he had had no intention to kill, the fact that he had hit the victim with an axe on a vital part of his body twice and with considerable force, indicated the opposite. While taking into account the applicant’s voluntary confession, the Kyiv Court noted that it was the fourth murder he had committed and considered life imprisonment to be the appropriate penalty. At the applicant’s request, the proceedings before the Kyiv Court were held in Russian.

14. The applicant, who was no longer represented, lodged a cassation appeal in which he mentioned, *inter alia*, that he had no means to pay for legal assistance.

15. On 22 February 2007 the Supreme Court, following a hearing in which the applicant participated, upheld his conviction.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Criminal Code (2001)

16. Under Article 115 § 2 (13), premeditated murder committed repeatedly (with some exceptions not applicable to the circumstances of the instant case) is punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

### B. Code of Criminal Procedure (1960)

17. Article 45 § 1 provides that legal representation during an inquiry, a pre-trial investigation and a trial before a court of first instance is obligatory if, *inter alia*, a life sentence is a possible penalty. Under Article 45 § 2, the legal representation envisaged by Article 45 § 1 is obligatory in the proceedings before the appellate court if the appeal could potentially worsen the situation of the convicted (or acquitted) person.

18. According to Article 383 § 1, verdicts of appellate courts delivered at first instance may be reviewed under the cassation appeal procedure.

19. Pursuant to Article 398 § 2, a verdict delivered by an appellate court as a court of first instance may be quashed or modified on the grounds of partiality or incompleteness of the inquiry, pre-trial investigation or trial, or because the court's conclusions in its verdict are not consistent with the circumstances of the case.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (C) OF THE CONVENTION IN RESPECT OF THE LACK OF FREE LEGAL ASSISTANCE FOR THE APPLICANT IN THE PROCEEDINGS BEFORE THE SUPREME COURT

20. The applicant complained that he had not been afforded free legal assistance during the proceedings before the Supreme Court. He relied on 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**

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

### **B. Merits**

22. The applicant maintained that the complexity of his case, the risk of his being sentenced to life imprisonment which was the gravest criminal punishment, as well as his lack of any income, required that his free legal representation be ensured by the State in the proceedings before the Supreme Court. Given that the domestic legislation recognised such a need during a pre-trial investigation and a trial at the first-instance court, the applicant considered it incomprehensible and unjustified that the free legal assistance was not retained for him further on.

23. The Government submitted that the domestic courts had acted in compliance with the criminal procedural legislation, which did not provide for obligatory legal representation in cassation proceedings where, as in the applicant’s case, no possible worsening of the convicted person’s situation was at stake. The Government noted, in this connection, that the applicant had been sentenced by the first-instance court to life imprisonment, the heaviest penalty, which could not be worsened any further. They did not consider the lack of free legal assistance for him at that stage to have run counter to the interests of justice.

24. The Court notes at the outset that, according to its case-law, the guarantees of Article 6 § 3 (c) of the Convention do not cease to apply after the first-instance proceedings (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 40, ECHR 2002-VII).

25. The right of those charged with criminal offences to free legal assistance, which is one of those guarantees, is subject to two conditions: the person concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that he or she be granted such assistance (see, among other authorities, *Pham Hoang v. France*, 25 September 1992, § 39, Series A no. 243).

26. As regards the first-mentioned condition, the Court observes that the applicant was confronted with the criminal proceedings in issue while serving a prison sentence for a different offence, and there was no indication that he had any source of income. Furthermore, free counsel was appointed for him during the pre-trial investigation and the proceedings before the

lower court, which indicated the acknowledgement by the authorities of his financial hardships. Lastly, the applicant expressly stated that he could not afford to retain counsel in his appeal in cassation to the Supreme Court (see paragraph 14 above). There are therefore grounds to consider that he indeed lacked sufficient means to pay for his legal representation in the proceedings before the Supreme Court (see, and compare with, *Tsonyo Tsonev v. Bulgaria* (no. 2), no. 2376/03, § 39, 14 January 2010).

27. As to whether “the interests of justice” required that the free legal assistance, which had been provided to the applicant until then, be retained for him during the proceedings before the Supreme Court, the seriousness of the matter at stake and the nature of those proceedings are the key points for consideration (see, for example, *Granger v. the United Kingdom*, 28 March 1990, § 44, Series A no. 174, and *Boner v. the United Kingdom*, 28 October 1994, § 41, Series A no. 300-B).

28. The seriousness of the applicant’s situation is obvious in the present case. While, according to the Court’s case-law, the interests of justice in principle call for legal representation where a deprivation of liberty is at stake, the applicant was facing life imprisonment as the maximum possible penalty (see also *Shabelnik v. Ukraine*, no. 16404/03, § 58, 19 February 2009). It is therefore beyond question that he required legal assistance.

29. The Court further notes that, under the Ukrainian Code of Criminal Procedure, where the Supreme Court reviewed in cassation proceedings a judgment which had been delivered by an appellate court acting as a court of first instance – as in the present case – its assessment concerned not only points of law, but also extended to verifying the fairness and completeness of the pre-trial investigation and the trial before the first-instance court, and the consistency of the first-instance court’s conclusions with the factual circumstances of the case. Accordingly, the nature of the proceedings also warranted legal assistance to the applicant in the interests of justice.

30. This leads the Court to conclude that the applicant was unfairly denied free legal assistance in the proceedings before the Supreme Court.

31. More broadly, the Court considers that this limitation of his defence rights resulted from the absence of any procedures for appointing free legal representation at that stage of the proceedings where it was not deemed mandatory any longer under the Code of Criminal Procedure.

32. There has therefore been a violation of Article 6 § 3 (c) of the Convention.

## II. REMAINDER OF THE APPLICATION

33. The applicant complained, relying on Article 6 § 2 of the Convention, that his actions had been wrongly classified under the criminal legislation and that the domestic courts had sentenced him to an excessively severe penalty, having failed to take due account of his confession. He also

complained under Article 6 § 3 (b) that he had not had sufficient time for the preparation of his “last plea” before the first-instance court and that many materials in the case file had been in Ukrainian, a language which he did not understand. Lastly, the applicant complained under Article 6 § 3 (d) that some witnesses (namely, the forensic expert who had established the time and causes of the death of Mr L., and the staff members of the V. medical centre) had not been examined during the judicial proceedings.

34. 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 or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant Article 35 §§ 3 (a) and 4 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and requested a retrial in compliance with Article 6 of the Convention.

37. The Government contested this claim.

38. The Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case in accordance with the requirements of the Convention, if requested, represents in principle an appropriate way of redressing the violation (see, for example, *Leonid Lazarenko v. Ukraine*, cited above, § 65). The Court observes that the possibility of a retrial as requested by the applicant in the present case is envisaged in Ukrainian legislation (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 297, 21 April 2011). It emphasises that such a trial must observe, strictly, the substantive and procedural safeguards enshrined in Article 6 of the Convention (*ibid.*).

39. In the light of these considerations and having regard to all the circumstances of the case, the Court considers the finding of a violation constitutes in itself sufficient just satisfaction.

**B. Costs and expenses**

40. The applicant did not submit any claims for legal costs and expenses. Accordingly, the Court makes no award under this head.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the complaint about the lack of free legal assistance during the cassation appeal proceedings 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* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Dean Spielmann  
President