



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

FIFTH SECTION

CASE OF TRYMBACH v. UKRAINE

(Application no. 44385/02)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

12/04/2012

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

In the case of Trymbach v. Ukraine,

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

Dean Spielmann, *President*,

Karel Jungwiert,

Mark Villiger,

Ann Power-Forde,

Angelika Nußberger,

André Potocki, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 44385/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Viktor Alekseyevich Trymbach (“the applicant”), on 2 October 2002.

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

3. On 13 March 2006 the President of the Fifth Section decided to give notice of the application to the Government. On 26 January 2010 the Court invited the parties to submit further observations as regards the applicant’s complaint under Article 6 concerning his right to defence. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Due to the absence of a national Judge at the relevant time, Mr M. Buromenskiy was appointed to sit as *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1954 and lives in Krivyy Rig.

5. In the early morning of 23 May 2000 the applicant noticed three people trying to dismantle an electricity sub-station not far from his farm. According to the applicant, he approached them with a gun and warned them, but they threatened him and fired at him, forcing him to use his shotgun against them in self-defence. As a result, all three of them died.

6. The same day criminal proceedings were instituted and the applicant was questioned by the police.

7. According to the applicant, the investigator told him that it would take a lot of time to fetch a lawyer and he therefore agreed to be without a lawyer since he wanted to help the investigation.

8. On 24 May 2000 the applicant was arrested on suspicion of murder.

9. According to the applicant, on 24 May 2000 the Prosecutor of Kherson Region gave an interview to a TV channel and informed the public that the applicant was guilty of murdering three people and that he would be punished with up to fifteen years' imprisonment. In the proceedings before the Court, the Government could not confirm or deny this.

10. On the same day several people were questioned about the circumstances of the case. One of them, fifteen-year-old Mr R., said that two or four years previously he had seen an object which resembled a rifle in the possession of Mr K., one of the victims. However, he could not describe it and did not know whether anyone in the village had seen a small-bore rifle recently.

11. On 27 May 2000 the applicant was questioned by an investigator. Before being questioned he was given a paper explaining his right to be represented and not to incriminate himself, with an explanation of the pertinent legal provisions of the Constitution and the Code of Criminal Procedure. He signed this paper and wrote that he would defend himself. According to the applicant, he wrote this at the request of the investigator.

12. On 6 June 2000 the lawyer chosen by the applicant entered the proceedings.

13. The same day the *Hryvnia* newspaper published an article entitled 'Volnaya Ukraina is bleeding' ('Вольная Украина истекает кровью') about the incident of 23 May 2000 and about problems with power cuts caused by the theft of electric power cables for scrap metal. The article described the applicant's version of events, in which he stated that the victims had been trying to steal metal parts from an electricity transformer and he had warned them and then fired at their motorcycle with his shotgun. They had fired back with a rifle and he had fired two shots in their direction. The article continued as follows:

"The investigation is not able to confirm that there was an EXCHANGE OF FIRE near the sub-station. The Prosecutor of Golopristsansky District, Sergey Mikhalkov, stresses: 'Despite the efforts made, we did not find any spent cases from the sawn-off small-bore rifle. On the other hand, there were two unused cartridges. Searches in the houses of those killed produced no results either: neither ammunition packaging nor spare parts for the weapon have been found. The fingerprints did not stay on the rifle

– it was raining, and the barrel was oiled. Incidentally, none of the acquaintances of the deceased ever saw the sawn-off rifle in their possession. Therefore, the criminal proceedings against Victor Trymbach were initiated not on account of his exceeding the limits of self-defence, but under Article 93 ‘d’ of the C[riminal] C[ode]. Under this Article the sentence can be up to life imprisonment. In previous years a person could even risk execution (by shooting).”

14. On 13 July 2000 the applicant was questioned in the presence of his lawyer and confirmed his version of events, which had been stated when he had previously been questioned.

15. On 9 September 2000 the applicant’s lawyer lodged an application in which, among other things, he requested that a witness, K., be examined, and this request was granted.

16. According to the applicant, as the police were unable to prove his guilt they threatened to turn him into a drug addict. During the night of 30-31 October 2000 his cellmates, who were criminals collaborating with the police, tortured him physically and psychologically to extract a confession from him. They persuaded him to write a note to his friend and even assisted him in drafting it. The note read:

“Hello B.! I met P. and he told me that you were interested in my problems. Thank you for your man’s attention. I will immediately answer your questions. I am sharing a cell with normal pals, the relations are normal. I know P. and trust him. As to what I said to the lawyer, it is my business. You should understand that I am accused under Article 93 and it is not a joke. Therefore I have to talk about prison pressure, but really everything is OK. P. advised me that before the court I should deny my testimony and say that they were killing (torturing) me here. That’s it, thank you for your concern. Yours, Viktor.”

17. On 2 November 2000 the applicant was transferred to a different cell.

18. On 3 November 2000 the applicant’s lawyer complained to the prosecutor that the applicant had been ill-treated by his cellmates, who were forcing him to confess.

19. According to the report prepared by the prosecutor from the Kherson Regional Prosecutor’s Office on 20 November 2000, on 3 November he proposed that the applicant undergo a medical examination in order to establish any signs of physical violence. The applicant refused and made a written statement in the presence of his lawyer that he had not been subjected to any physical violence.

20. On 22 November 2000 the Deputy Prosecutor of the Kherson Region informed the applicant’s lawyer that his complaint that the applicant had been ill-treated had been checked and the account could not be confirmed.

21. On 27 November 2000 the Kherson Regional Prosecutor’s Office charged the applicant with three murders and unlawful possession of weapons (additional proceedings concerning the latter offence were instituted on 20 November 2000). The indictment mentioned that relatives and friends of the victims, including those who had seen them just before

they left to dismantle the sub-station, did not see and were not told about any weapon in the possession of the victims. Searches of the victims' homes produced no result either. The indictment also mentioned three anonymous witnesses questioned by the prosecution under assumed names: Mr Ivanov, Mr Petrov and Mr Sergeyev, who were detained in the same cell as the applicant and to whom he had apparently confessed that on 23 May 2000 he had intentionally killed three people as they were trying to steal electric cables from the local electricity sub-station which supplied electricity to his farm. The applicant alleged that he had acted in self-defence and that he was responding to gunshots fired at him. The investigation revealed no evidence to corroborate the applicant's allegations.

22. On 4 December 2000 Kherson Regional Court opened judicial proceedings.

23. On 15 February 2001 the applicant's lawyer lodged an application for the examination of the anonymous witnesses. This application was granted and during the proceedings the three anonymous witnesses were examined in the presence of the applicant's lawyer, while the applicant himself was removed from the courtroom. Later, one of the witnesses agreed to disclose his identity; he participated in the proceedings under his real name and was questioned in the presence of the applicant.

24. On 30 May 2001 Kherson Regional Court remitted the case for further investigation, to check the applicant's allegations that his cellmates had forced him to write a note and even assisted him in drafting it and to conduct a handwriting analysis of a correction on the draft note which had allegedly been made by Mr N. On 17 July 2001 the Supreme Court overruled the above decision, considering that the handwriting analysis could be conducted within the judicial proceedings and therefore that there was no need to return the case for investigation.

25. The above-mentioned analysis could not establish who had written the corrections on the draft note, whether it was Mr N., the applicant or someone else.

26. On 21 March 2002 the Kherson Regional Court of Appeal sentenced the applicant to fifteen years' imprisonment for multiple murder and unlawful possession of a weapon. The Court of Appeal based the applicant's conviction on the following: the rifle found near one of the deceased was not loaded, there were only two full cartridges near it and no empty cases; the police officer who arrived first at the scene of the crime testified that the rifle was clean, although everything around, including the hands of the deceased, was covered in oil; statements by the applicant's cellmates Mr N. and Mr Y., who maintained that the applicant had told them that the rifle had been taken to the scene of the crime after the shooting; the statements of Mr and Mrs Shch., the applicant's neighbours, who stated that they had heard four shots, the forensic examination which concluded that the applicant had fired at the victims four times; all

three victims were hit in the vital organs from a distance of ten to fifteen metres (the first two shots) and four metres (the last two shots) and not from the place indicated by the applicant, which was thirty-one metres away from the bodies; the fact that the applicant had cartridges loaded with salt but actually used cartridges loaded with lead shot; and the testimony of two witnesses about previous aggressive behaviour by the applicant.

27. The applicant appealed in cassation. He complained, *inter alia*, that the authorities had not made enough effort to bring to the court Mr R., who was outside the territory of Ukraine, and that witnesses who could have given positive character references for him had not been summoned to the court. He also complained that due to his lack of knowledge and experience the investigation had left him without a lawyer until 6 June 2000.

28. On 25 June 2002 the Supreme Court rejected the applicant's appeal against the judgment of 21 March 2002, finding no infringements of procedural or substantive law in the examination of the case. It noted in particular that Mr and Mrs Shch had only heard shots from a shotgun and not shots from a small-bore rifle, and they had confirmed this during the on-site reconstitution. The Supreme Court also observed that there had been no serious procedural violations that would require quashing of the judgment. It decided, however, to reduce the applicant's sentence to ten years' imprisonment, given that the victims had also been acting unlawfully.

29. On 31 August 2005 the President of Ukraine issued a decree granting amnesty to a number of convicted persons, including the applicant, whose sentence was reduced to eight years' imprisonment.

II. RELEVANT DOMESTIC LAW

A. Criminal Code (1960) (in force at the material time)

30. Under Article 93 of the Code, the murder of several people was punishable by imprisonment for eight to fifteen years or by a life sentence.

B. Code of Criminal Procedure (1960)

31. Article 46 of the CCP, as worded at the time of the initial stage of the investigation, 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, *inter alia*, if the possible penalty was a life sentence.

32. According to paragraph 1 of Article 370, as worded at the time of the trial, substantial violations of the requirements of the criminal procedural legislation are considered to be those which have impeded or could have

impeded the court in the complete and thorough examination of a case and in issuing a lawful, reasoned and just verdict. Paragraph 2 of this Article lists a violation of the right of an accused to defence among the substantial violations of the requirements of the criminal procedural legislation which warrant the quashing of a verdict in any event (that is, regardless of whether the requirements of paragraph 1 have been met).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 § 2 AND 13 OF THE CONVENTION

33. The applicant complained that the day after the incident the Regional Prosecutor had declared in a TV interview that the applicant was definitely guilty and had guaranteed that he would be sentenced to fifteen years' imprisonment. Furthermore, a local newspaper had published an article two weeks after the tragedy in which the prosecutor allegedly called him a serial killer who would be sentenced to life imprisonment. The applicant invoked Article 6 § 2 of the Convention, which reads:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

34. The Court further considered that this complaint might raise an issue under Article 13, which read as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

35. The Government submitted an article, a copy of which was kept in the applicant's criminal case file and to which the applicant referred. They neither confirmed nor denied the existence of a TV interview with the Regional Prosecutor.

36. With respect to the article in question (see paragraph 13 above) the Government noted that it did not contain any reference to the applicant as a “serial killer” and the prosecutor had not said anything about the applicant's guilt.

37. The Government maintained that the applicant could institute defamation proceedings against the relevant prosecutors and media if he considered any statements to be defamatory. This was provided for by Article 7 of the Civil Code and this remedy was effective.

38. The applicant considered that the article in question contained a statement of his guilt and also reiterated that there had been a TV interview

with the Regional Prosecutor. He further stated that he had no effective remedies as he had no press or TV set in his cell.

39. The Court reiterates that Article 6 § 2 requires that no representative of a State or a public authority should declare a person guilty of an offence before their guilt has been established by a “court” (see, among other authorities, *Allenet de Ribemont v. France*, 10 February 1995, §§ 35-36, Series A no. 308). Whether a statement by a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Daktaras v. Lithuania*, no. 42095/98, § 43, ECHR 2000-X).

40. In the instant case the applicant alleged that there had been two statements that he was guilty made by the prosecutors through the media.

41. The Court will proceed first with the newspaper publication which is available to it. The Court notes that the prosecutor’s statement, as quoted in the facts, does not appear to contain any statement of the applicant’s guilt but explains why the criminal proceedings were initiated on a charge of murder rather than excessive self-defence. The Court considers that the quote from the prosecutor was couched in terms that cannot be characterised as a statement of the applicant’s guilt and, therefore, that the statement by the prosecutor in his interview given to the newspaper did not breach the principle of the presumption of innocence.

42. As to the alleged TV interview with the Regional Prosecutor, the applicant gave no details as to what channel had broadcast it or what exactly had been said. Furthermore, in view of the applicant’s own admission that he had had no access to television while in detention, the applicant’s allegations appeared to be hearsay, without any reference to a source. Lastly, the applicant’s interpretation of the above-mentioned newspaper article leaves doubts as to the applicant’s accuracy in presenting the essence of the prosecutor’s TV interview, even assuming that it actually took place. Therefore, this complaint by the applicant is unsubstantiated.

43. In the absence of any arguable claim under Article 6 § 2 of the Convention, the Court is not required to consider whether there were effective domestic remedies, as required by Article 13, in respect of the above complaint.

44. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

45. The applicant complained under Article 6 § 1 that the trial proceedings against him had been too long and unfair and in particular that the courts, in violation of Article 6 § 3 (d), had based their findings, that he

had planted the sawn-off rifle at the crime scene to pretend that there had been an exchange of fire, on the testimony of three anonymous witnesses, whom he personally had not been allowed to question at the hearing. He complained that the courts had not summoned witnesses in his defence.

46. The applicant also complained under Article 6 § 3 (b) and (c) of the Convention that at the initial stage of investigation he had not had a lawyer, although legal representation was obligatory under the domestic law. The Court considers that this complaint shall be examined under Article 6 § 3 (c), which is the relevant provision.

47. Article 6 provides, in so far as relevant, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time 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;

(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

1. Length of the proceedings

48. The applicant complained that the proceedings against him had been unreasonably long.

49. The Court notes that the impugned proceedings lasted from 23 May 2000 to 25 June 2002, that is two years, one month and two days. They included investigation and hearings at two levels of jurisdiction. In the Court’s opinion, this period is not so excessive as to raise an arguable claim under Article 6 § 1 of the Convention. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention..

2. Right to summon witnesses

50. The Government noted that the three witnesses in question had agreed to testify in court only on condition that they were protected as witnesses. It was therefore decided that they would participate anonymously

and under false names. The Government submitted records of the hearings, testifying that although the applicant and his relatives had been removed from the courtroom when the anonymous witnesses were questioned, the applicant's lawyer had been present and had been able to put any questions to them. Furthermore, one of the anonymous witnesses later agreed to reveal his identity and participated in the proceedings under his real name and in presence of the applicant. The Government noted that all witnesses had been questioned on an equal footing and the applications of the applicant's lawyer to question particular witnesses had been granted.

51. The applicant challenged the reliability of the anonymous witnesses, alleging that he knew their identity anyway and that they were all criminals who had collaborated with the police and who had testified against him at the request of the investigator. He also complained that Mr R., who had testified during the pre-trial investigation that he had seen a rifle in the possession of the victim, had not been summoned before the court, and that other witnesses for the defence had not been summoned either.

52. The Court reiterates that all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. 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 witnesses against him, either when they make their statements or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, § 49, Series A no. 238). 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, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 76, *Reports* 1996-II).

53. Turning to the facts of the present case, it should be noted that the arrangements made by the domestic authorities to question the anonymous witnesses in court and with the direct involvement of the applicant's lawyer seems to be compatible with the requirements of Article 6 § 3 (d). Furthermore, one of the anonymous witnesses further agreed to reveal his identity, and participated in the proceedings under his real name and gave evidence in the applicant's presence. Therefore, it could not be said that the courts' findings in this part were based on the statements of witnesses whom the defence could not challenge. The Court concludes that this complaint of the applicant is manifestly ill-founded.

54. As to the witnesses who did not appear before the court, the applicant's allegations focus on the failure to summon Mr R., who had been questioned during the pre-trial investigation at the age of fifteen and who said that he had seen some object resembling a rifle in the possession of one of the deceased two or four years prior to the events but could not give any more details. As is apparent from the case file material, Mr R. could not be summoned because he was abroad. As to the other witnesses, the applicant

did not specify why their appearance before the court was crucial for his case. In this connection the Court observes that the domestic courts are better placed to assess the evidence before them, that the applicant did not challenge the Government's contentions that all the requests of the defence to hear particular witnesses had been satisfied, and lastly, neither in his appeal to the Supreme Court nor in his application to this Court did the applicant substantiate his argument that the failure of the above-mentioned witnesses to appear had affected the fairness of the proceedings in their entirety.

55. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

3. Right to defence

56. The Court notes that the applicant's complaint about lack of legal assistance at the initial stage of investigation 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

57. The applicant noted that he had agreed to be without a lawyer at the beginning of the investigation, because he wanted to help the investigation. However, legal representation was obligatory under the law, given the gravity of the charges against him. He maintained that because of the absence of a lawyer, the gathering of evidence at the initial stage had been unsatisfactory and had influenced the outcome of the proceedings.

58. The Government stated that the absence of a lawyer at the initial stage of the investigation did not affect the fairness of the proceedings. The applicant's statements during the investigation and trial had been the same whether the lawyer was present or not. The only issue that had to be decided was whether it was intentional killing or killing in self-defence, and the domestic authorities had proved that the applicant had intentionally killed three people, on the basis of material evidence and witness statements. Furthermore, the Supreme Court found no procedural violations which could call into question the first-instance court's findings as to the applicant's guilt in respect of the offences with which he had been charged. They concluded that the present case did not disclose any circumstance capable of giving rise to doubts as to the fairness of the proceedings as a whole.

2. *The Court's assessment*

(a) General principles

59. The Court reiterates that the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 of that Article and thus they are to be examined together (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I). On the whole, the Court is called upon to examine whether proceedings in their entirety were fair (see *Balliu v. Albania*, no. 74727/01, § 25, 16 June 2005).

60. The Court emphasises that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). As a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 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*).

61. Lastly, the Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner, and must be attended by minimum safeguards commensurate to the waiver's importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II).

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

62. The Court notes that, at the time of the applicant's arrest, Ukrainian legislation provided for obligatory legal representation as early as at the inquiry stage and namely from the moment of the arrest if, *inter alia*, a possible penalty for the offence of which the person was suspected was life imprisonment (see paragraphs 30 and 31 above). Although the applicant was ultimately sentenced to ten years' imprisonment, the above rule on obligatory representation applied to him.

63. The Court further observes that the case file material it has in its possession contains a waiver of legal representation and in his submissions to this Court he confirmed that he agreed to be questioned without a lawyer on 23 May 2000 (see paragraph 7 above). On 27 May 2000, he further signed a paper describing in detail his procedural right to defence and signed it confirming that he read them and wished to represent himself (see paragraph 11 above).

64. Although the absence of a lawyer during the first two weeks of the investigation were clearly not in compliance with the requirements of the

domestic law, the Court reiterates that while its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed the rights and freedoms protected by the Convention (see, among many other authorities, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 45, and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II). In the circumstances of the present case, the violation of the procedural requirement as to the applicant's representation does not appear to have had any bearing on the general fairness of the proceedings. There is no indication or allegation that the applicant made any statements against himself that he would later retract or change. It appears that the applicant consistently advanced his version of events (see paragraph 5 above), which did not change from the first time he was questioned to the submission made before this Court. His version had been overturned by the results of numerous forensic expert examinations and not through any illicit means or methods. Furthermore, in the appeal proceedings the applicant complained that his right to defence had been violated on the sole ground that he had to be legally represented under domestic law as the maximum possible punishment for the crime he had been charged with had been a life sentence. He did not advance any arguments and did not suggest the existence of any concrete prejudice caused by lack of lawyer during the initial stage of investigation. The higher courts did not find any such prejudice either. In particular, the Supreme Court established no procedural violations serious enough to necessitate a referral of the case for re-investigation or retrial (see paragraph 28 above).

65. The Court also considers that it was not suggested by the applicant that he had been forced to waive his right to legal representation or that he had not been aware that he was suspected, and eventually accused, of multiple murder which implied obligatory legal representation (see and compare *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 42, 28 October 2010). According to the applicant's own submissions, he agreed to be without a lawyer since he wanted to help the investigation (see paragraphs 7 and 57 above). The Court, therefore, concludes that the waiver was a genuine one.

In these circumstances the Court concludes that there has been no violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention in the present case.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant complained under Article 2 of the Convention that the domestic authorities had disregarded his contention that he had acted in

self-defence and was protecting his own life. Under Article 3 of the Convention, the applicant complained that he had been threatened and tortured by his cellmates, who were collaborating with the police and who were forcing him to confess.

67. The Court has examined the remainder of the applicant's complaints as submitted by him. However, 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.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the lack of legal assistance at the initial stage of the investigation admissible and the remainder of the application inadmissible;
2. *Holds* by four votes to three that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Spielmann, Power-Forde and Buromenskiy is annexed to this judgment.

D.S.
C.W.

JOINT DISSENTING OPINION OF
JUDGES SPIELMANN, POWER-FORDE AND
BUROMENSKIY

The lack of access to legal assistance during the first two weeks of the applicant's detention in custody, pending an investigation into serious criminal charges, is not in dispute. The majority finds no violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention. Its finding is based, essentially, upon the apparent absence of any concrete prejudice caused to the applicant by the lack of legal representation during this initial stage of investigation (§ 64). We consider that there has been a violation of the said provisions. Our reasoning is based upon what we deem to be well settled principles of this Court's jurisprudence.

Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Salduz v Turkey*, [GC] no. 36391/02, §54, 27 November 2008, § 51; *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A; and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). The Court has frequently repeated that in order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the proceedings, including, the pre-trial proceedings (see *Panovits v Cyprus*, § 64, and *Imbrioscia v Switzerland*, no. 13972/88, § 38, 24 November 1993).

That the right of access to a lawyer is 'triggered' as from the first interrogation of a suspect by the police is also firmly established in the Court's case law (see *Panovits*, cited above, § 66, and *Salduz*, cited above, § 55). Indeed, the concept of fairness enshrined in Article 6 "requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation" (see *Panovits*, cited above, § 66). This principle reflects the Court's recognition of the fact that evidence obtained during the investigation stage can determine the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, § 54). From the moment of arrest until the handing down of sentence, criminal proceedings form an organic and interconnected whole and an event that occurs at one stage may influence and, at times, determine what transpires at another. This 'holistic' approach to criminal proceedings is reflected in the Grand Chamber's finding in *Salduz* that neither the legal assistance provided subsequently nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the time spent in police custody (*Salduz*, cited above, § 58). Consequently, the Court proceeded to find a violation of Article 6 in that case.

In the circumstances of the present case, we take the view that, firstly, the test adopted by the majority in § 64 of the judgment (namely, whether the lack of legal assistance had any bearing on the general fairness of the

proceedings) is not the correct one. The correct test, in our view, is that Article 6 §1 requires, that as a rule, a suspect has a right of access to a lawyer from his or her first interrogation 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 (*Salduz*, cited above, §55). In other words, there is a presumption that a trial will be unfair unless access to a lawyer has been given from a suspect's initial interrogation by police. However, even proceeding upon the test used by the majority, we cannot share its view that the absence of legal assistance at the early stage of investigation appears to have had no bearing on the general fairness of the applicant's trial. One simply cannot speculate as to how that trial would have proceeded or how the defence would have been conducted had the applicant been given access to a lawyer at that initial stage of the proceedings.

We can accept, as does the majority, that in the present case the applicant did not retract any statements made during those early weeks in custody when questioned without the benefit of access to a lawyer. However, it does not follow that the lack of legal assistance at such a crucial stage in the criminal investigation had no bearing on the general fairness of the applicant's trial. To draw such a conclusion is to overlook the fact that access to a lawyer involves much more than advice in relation to the making of statements. The applicant complains that because of the absence of a lawyer the gathering of evidence in support of his defence was unsatisfactory. This submission appears to us to be entirely plausible. Legal assistance includes a whole panoply of services which are put at an accused person's disposal so that he can defend himself, effectively, in a criminal trial. As the Court has stated in *Dayanan v Turkey*, no. 7377/03, 13 October 2009:

Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.

None of the above was available to the applicant at the initial stage of the criminal investigation and thus we are not convinced that his criminal trial was 'fair' within the meaning of Article 6.

The majority also rely on the fact that, notwithstanding the provisions of domestic law (which required obligatory legal representation in view of the gravity of the offence in issue) the applicant had waived his right to legal assistance. It concludes that this waiver was a genuine one (§ 64). The applicant, however, claims that, prior to the waiver, he was informed by the

investigator that ‘*it would take a lot of time to fetch a lawyer*’ and that he agreed to forsake such assistance “*since he wanted to help the investigation*” (§ 7). The majority’s conclusion as to the genuineness of the ‘waiver’ fails, in our view, to pay sufficient regard to the reality of the vulnerable position of an accused person at such a critical time. As the Court noted in *Salduz* and subsequently reiterated in *Borotyuk c. Ukraine*, no. 33579/04, 16 December 2010:

[A]n accused person often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence.

The Court has held that in most cases, this particular vulnerability could only be properly compensated for by the assistance of a lawyer (see *Salduz*, cited above, § 54). Given the gravity of the charges in question and the applicant’s admitted desire to help the investigator, this, in our view, is such a case.

We consider that both the safeguards envisaged by the national legislation and the guarantee of fairness enshrined in Article 6 of the Convention required that the applicant should have had the benefit of access to a lawyer from his first interrogation as a suspect by the police. This is what the case law of the Court requires 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*, cited above, § 55). We find no such reasons in this case.