



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

FIFTH SECTION

CASE OF YAREMENKO v. UKRAINE (No. 2)

(Application no. 66338/09)

JUDGMENT

STRASBOURG

30 April 2015

FINAL

30/07/2015

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

In the case of Yaremenko v. Ukraine (no. 2),

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

Vincent A. De Gaetano,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 7 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 66338/09) 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 Oleksandr Volodymyrovych Yaremenko (“the applicant”), on 8 December 2009.

2. The applicant, who had been granted legal aid, was represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, at the relevant time Ms V. Lutkovska, from the Ministry of Justice.

3. On 21 September 2010 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the alleged unfairness of the retrial in the applicant’s case to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1976 and is currently serving a life sentence in Zhytomyr Prison.

A. Background of the case

1. The first set of proceedings against the applicant

5. In 2001 the applicant was prosecuted for two counts of murder. Those criminal proceedings had been examined by the Court in the first case of the applicant (see *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008). The abridged facts from the above judgment, insofar as relevant, read as follows.

6. On 27 January 2001 the applicant was arrested on suspicion of murdering a taxi driver, M., and of several other crimes committed in 2001 (“the 2001 crimes”). At the applicant’s request, he was represented by lawyer O. Kh. during the initial questioning, which took place the same day.

7. On 1 February 2001 M., a police officer at the Kyiv Kharkivsky District Police Department (“the police department”), who was in charge of an investigation into the death of a taxi driver, Kh., in the summer of 1998, questioned the applicant with a view to establishing his possible involvement in that crime. The crime was classified as infliction of grievous bodily harm causing death, for which legal representation of a suspect was not obligatory. According to the applicant, he was beaten with truncheons on his wrists and shoulders by police officers, who forced him to sign a waiver of his right to counsel and to confess that he and S. had murdered taxi driver Kh. in the summer of 1998 (“the 1998 crime”). On the same day, that criminal case was transferred to the Kharkivsky Prosecutor’s Office on the grounds that the applicant’s actions could be classified as murder and the investigation of such a crime was within the competence of the prosecutor’s office.

8. On 2 February 2001 the criminal cases in respect of the 1998 and 2001 crimes were joined. On the same day, the applicant participated in a videotaped on-site reconstruction of the 2001 crimes. According to the minutes of this investigative action, which was attended by the applicant, his lawyer O. Kh., two attesting witnesses, investigating prosecutor G. and police officer M., who had questioned the applicant on the previous day, the applicant made statements concerning the circumstances of the 2001 crimes, but denied his involvement in the 1998 crime. His lawyer formally requested the authorities to conduct a medical examination of him. This request was handed to investigating prosecutor G., who acknowledged receipt by signing a copy of it. After the reconstruction had been conducted, the applicant signed a waiver in respect of his lawyer O. Kh., on the grounds that the said lawyer had prevented him from confessing to the 1998 crime. According to the applicant, while the waiver bore the date of 2 February 2001, it had actually been signed on a later date under coercion from the police officers and the case investigator.

9. On an unknown date investigating prosecutor G. replied to lawyer O. Kh., stating that his request of 2 February 2001 for a medical

examination of the applicant could not be granted since he had been removed from the case.

10. On 7 February 2001 the applicant, who was represented by a newly-appointed counsel, K., participated in a videotaped on-site reconstruction of the 1998 crime and confessed to having committed it with S.

11. On 8 February 2001 lawyer O. Kh. complained to prosecutor V. that investigating prosecutor G. had not replied to his request for a medical examination of the applicant, would not permit him to visit the applicant, and had tried to force the applicant to request a replacement lawyer.

12. On 9 February 2001 lawyer O. Kh. was informed that he had been removed from the case and was provided with the investigating prosecutor's decision to that effect dated 2 February 2001. The decision stated, *inter alia*, that the applicant had confessed to the 1998 crime but had later asserted his innocence on the advice of lawyer O. Kh. The investigating prosecutor had therefore decided to remove lawyer O. Kh. from the case.

13. On 9 February 2001 the applicant, who was represented by yet another lawyer, Mi., was formally charged with the 1998 and 2001 crimes, served with the indictment and questioned as an accused.

14. On 14 February lawyer O. Kh. complained to prosecutor V. about the decision to remove him from the case, and asked him to quash that decision. In his reply of 19 February 2001, prosecutor V. informed lawyer O. Kh. that his removal from the case had been well-founded and was in accordance with Article 61 of the Code of Criminal Procedure. It was further noted that the lawyer had breached his professional duties by advising his client to assert his innocence and retract part of his previous confession.

15. In a letter to the General Prosecutor's Office (GPO) dated 4 March 2001, the applicant complained that he had signed the waiver in respect of lawyer O. Kh. under pressure from the police officers and the case investigator.

16. On 6 March 2001 lawyer O. Kh. complained to the Kyiv Prosecutor's Office about his removal. In a reply dated 13 April 2001, it stated that the decision to remove him had been well-founded, and that, moreover, the criminal case file contained a waiver in this respect signed by the applicant.

17. On 10 March 2001 the applicant submitted a request to investigating prosecutor G., asking that lawyer O. Kh., his first lawyer in the case, replace lawyer Mi. as his defence counsel.

18. On 24 April 2001 the Kharkivsky Prosecutor's Office replied to the applicant's letter of 4 March 2001. It informed him that the replacement of his lawyer had taken place at his request, that lawyer O. Kh. was allowed to return to the case, and that they had found no violation of criminal procedure law in the investigation of the criminal case against him.

19. On 27 May 2001 the applicant asked investigating prosecutor G. to cross-examine him together with his co-accused S., since the accusations against him had been mainly based on statements made by S.

20. On 1 June 2001 investigating prosecutor G. replied, informing the applicant that a cross-examination would be conducted after S. was questioned further, in case any discrepancies emerged between their testimonies.

21. On 8 June 2001 the applicant was questioned in the presence of his first lawyer O. Kh. He confirmed all the statements with regard to the 2001 crimes he had made during the interview on 27 January 2001. He also claimed repeatedly that he was innocent of the 1998 crime, and explained that he had been forced to confess to the latter crime by officers from the police department.

22. On 24 June 2001 investigating prosecutor G. informed the applicant that his request for cross-examination had been rejected, since no discrepancies had been found between his and S.'s statements.

23. On 20 November 2001 the Kyiv Appellate Court, acting as a court of first instance, convicted the applicant and S. of the 1998 and 2001 crimes and sentenced them both to life imprisonment. Three other individuals were sentenced to between three and six years' imprisonment. In its judgment the court made no mention of the fact that the lawyer had been removed from the case. The court also disregarded the denials by the applicant and S. of their involvement in the 1998 crime on the grounds that their confessions during the pre-trial investigation had been detailed and consistent.

24. On 18 April 2002 the Supreme Court of Ukraine upheld the judgment of the appellate court. In reply to a complaint by the applicant of a violation of his right to defence, the Supreme Court stated in its judgment given the same date that it found no evidence of a violation of the right to defence or of any other substantial violation of criminal procedure law that could provide a basis for quashing the judgment of the appellate court. The Supreme Court also stated that it had found no evidence that the applicant had been ill-treated.

2. The applicant's first case before the Court

25. On 13 August 2002 the applicant lodged an application (no. 32092/02) with the Court, alleging that he had been subjected to ill-treatment in police custody and that his complaints in that regard had not been given due consideration. He also complained that he had been deprived of legal assistance of his own choosing during part of the proceedings, had been forced to incriminate himself, and that the above violations had resulted in an unfair trial.

26. By a decision of 13 November 2007, the Court declared his application admissible.

27. On 12 June 2008 the Court found a violation of Article 3 and Article 6 §§1 and 3 (c). The Court established in particular that:

“67. As concerns the adequacy of the investigation into the applicant’s allegations of ill-treatment, the Court considers that it had serious deficiencies. It notes in particular that no timely and specific medical examination was conducted on the applicant, despite the explicit request of his lawyer the day after the alleged ill-treatment took place.

68. The Court recalls that following a complaint by the applicant’s wife the prosecutor decided not to institute criminal proceedings in respect of the above allegations. It does not appear that any investigative actions were actually taken, given that neither the applicant nor his wife was questioned. The prosecutor’s decision of 28 February 2001 referred only to the fact that, during questioning on 9 February, that is, prior to his wife’s complaint of 12 February, the applicant had denied having any injuries. Furthermore, none of the alleged perpetrators of the offence were questioned at that time. In this connection the Court cannot agree with the Government that the applicant’s wife, in February 2001, and the applicant himself, in March 2001, provided information of so general a nature that the identity of the alleged perpetrators could not be established. In her complaint of 12 February the applicant’s wife referred to the investigating prosecutor G. and unnamed officers of the Kharkivsky District Police Department. In the Court’s opinion that information would have been sufficient for an independent investigator to identify those concerned, had the allegations of the applicant’s ill-treatment been considered seriously.

69. The Court further notes that the investigation into the applicant’s allegations lacked the requisite independence and objectivity. The first questioning of the applicant about his alleged ill-treatment was conducted by the investigating prosecutor G., whom the applicant’s wife, in her complaint of 12 February, clearly named among those who had coerced her husband. Moreover, in his refusal to institute criminal proceedings following the complaint of ill-treatment, prosecutor V., the head of the Kharkivsky District Prosecutor’s Office, did not even mention prosecutor G., who was from the same District Prosecutor’s Office. What is more, when the applicant provided the names of the other alleged perpetrators from the Kharkivsky Police Department, they were questioned by their alleged accomplice - investigating prosecutor G.

...

78. Notwithstanding the Government’s arguments that the applicant’s right to silence was protected in domestic law, the Court notes that the applicant’s lawyer was dismissed from the case by the investigator after having advised his client to remain silent and not to testify against himself. This reason was clearly indicated in the investigator’s decision. It was also repeated twice in the prosecutors’ replies to the lawyer O. Kh.’s complaints. In one of those replies (dated 19 February) it was also noted that the lawyer had breached professional ethics by advising his client to claim his innocence and to retract part of his previous confession.

79. Moreover, the Court finds it remarkable that the applicant and Mr S, over two years later, gave very detailed testimonies which according to the [*sic*] investigator contained no discrepancies or inconsistencies. This degree of consistency between the testimonies of the applicant and his co-accused raise suspicions that their accounts had been carefully coordinated. The domestic courts however considered such detailed testimonies as undeniable proof of their veracity and made them the basis for the applicant’s conviction for the 1998 crime, despite the fact that his testimony had been

given in the absence of a lawyer, had been retracted immediately after the applicant was granted access to the lawyer of his choice, and had not been supported by other materials. In those circumstances, there are serious reasons to suggest that the statement signed by the applicant was obtained in defiance of the applicant's will.

80. In light of the above considerations and taking into account that there was no adequate investigation into the allegations by the applicant that the statement had been obtained by illicit means (see paragraphs 67-70), the Court finds its use at trial impinged on his right to silence and privilege against self-incrimination.

...

86. The Court notes that in the instant case the applicant's conviction for the 1998 crime was based mainly on his confession, which was obtained by the investigators in the absence of a lawyer and which the applicant retracted the very next day and then from March 2001 on.

87. The Court further notes with concern the circumstances under which the initial questioning of the applicant about the 1998 crime took place. As can be seen from the relevant provisions of the Code of Criminal Procedure cited in the Domestic Law part, there is a limited number of situations in which the legal representation of the suspect is obligatory. One of the grounds for obligatory representation is the seriousness of the crime of which a person is suspected, and hence the possibility of life imprisonment as a punishment. In the present case the law-enforcement authorities, investigating the violent death of a person, initiated criminal proceedings for infliction of grievous bodily harm causing death rather than for murder. The former was a less serious crime and therefore did not require the obligatory legal representation of a suspect. Immediately after the confession was obtained, the crime was reclassified as, and the applicant was charged with, murder.

88. The Court is struck by the fact that, as a result of the procedure adopted by the authorities, the applicant did not benefit from the requirement of obligatory representation and was placed in a situation in which, as he maintained, he was coerced into waiving his right to counsel and incriminating himself. It may be recalled that the applicant had a lawyer in the existing criminal proceedings, yet waived his right to be represented during his questioning for another offence. These circumstances give rise to strong suspicion as to the existence of an ulterior purpose in the initial classification of the offence. The fact that the applicant made confessions without a lawyer being present and retracted them immediately in the lawyer's presence demonstrates the vulnerability of his position and the real need for appropriate legal assistance, which he was effectively denied on 1 February 2001 owing to the way in which the police investigator exercised his discretionary power concerning the classification of the investigated crime.

89. As to the removal of lawyer O. Kh. on 2 February 2001, the Government's argument that this was done solely at the applicant's request seems scarcely credible, since this was not mentioned in the removal decision itself, and in the replies of the prosecutors it was referred to as an additional ground for the lawyer's removal.

90. The Court notes that the fact that two other lawyers who represented the applicant saw him only once each, during questioning, and never before the questioning took place seems to indicate the notional nature of their services. It considers that the manner of and reasoning for the lawyer's removal from the case, as well as the alleged lack of legal grounds for it, raise serious questions as to the fairness of the proceedings in their entirety. The Court also notes that the lawyer was

allowed back onto the case in June 2001 without any indication that the alleged grounds for his removal had ceased to exist.”

The Court’s judgment became final on 12 September 2008.

B. The review of the case

28. The judgment of the Court and the possibility of a retrial in the applicant’s case attracted media attention in Ukraine. Reports mentioned, among other things, that the applicant’s co-defendant S. had died several years earlier, while serving his sentence.

29. On 30 December 2008 the applicant lodged a request with the Supreme Court of Ukraine for an extraordinary review of his criminal case under Article 400 § 4 of the Code of Criminal Procedure and Article 10 of the Law of Ukraine “On the Execution of Judgments of the European Court of Human Rights” (see paragraphs 34 and 36 below). The request was based on the Court’s judgment of 12 June 2008 (cited above), in which violations of Articles 3 and 6 had been found. The applicant also asked to be present during the examination of his request.

30. The Deputy Prosecutor General also lodged a request for review of the applicant’s case with the Supreme Court. He asked the court to exclude the applicant’s original confessions to the murder committed in 1998 as evidence, and maintained that the judgment had otherwise been lawful and well-founded. According to the applicant, his lawyer B. only learned of the content of the request at the hearing.

31. On 31 July 2009 the Supreme Court examined the case in the absence of the applicant but in the presence of his lawyer and the prosecutor. It allowed the applicant’s request in part and the prosecutor’s request in full. The Supreme Court noted that the domestic courts, having found the applicant guilty of the 1998 crime, had relied on his confession of 1 February 2001 and his questioning of 2 February 2001. It further noted that the European Court of Human Rights had held that there had been a violation of the applicant’s rights as guaranteed by Article 6 §§ 1 and 3 (c) of the Convention, namely his right to defence, since he had admitted his guilt to the police officers and made a written confession to the 1998 crime in the absence of a lawyer. The Supreme Court further held:

“In review of the case (При перегляді даної справи), the judges at their joint meeting concluded that the written confession and statements of O.V. Yaremenko during his questioning as a suspect of murder of Kh. could not be considered admissible evidence that prove O.V. Yaremenko’s guilt in respect of that episode, since they were obtained in violation of the requirements of criminal procedure law.

In these circumstances, they should be excluded from the body of evidence accusing O. V. Yaremenko of this episode of criminal activity.

However, the exclusion of those pieces of evidence from the court decisions does not significantly affect the correctness of the conclusion of the court as to the proof of

O.V. Yaremenko's guilt on the count of the murder of Kh., because the case file contains other pieces of evidence that prove his guilt of that offence."

32. The Supreme Court next listed other pieces of evidence that proved the applicant's guilt, namely confessions made by him and S. during the on-site reconstruction of the crime and during further questioning with the participation of the lawyers, as well as a toolbox, which according to the witnesses belonged to Kh. and which S. left with his acquaintance D. in 1998. The Supreme Court further noted that the confessions made by the applicant and S. corresponded to the conclusions of the forensic expert examinations as to the circumstances of Kh.'s murder. It finally noted that the applicant's allegations that the investigation into his alleged ill-treatment had been inefficient were not supported by the materials in the case file, and that there was no evidence that the applicant had been forced to confess. It concluded that there had been no substantial violation of criminal procedure law which would require a quashing of the judgment in the applicant's case.

33. By letter of 3 September 2009 the decision of the Supreme Court was sent to the applicant's representative.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

34. The relevant provisions read as follows:

Article 370

Substantial violations of criminal procedure law

"1. A substantial violation of criminal procedure law is a violation of this Code that has prevented or could have prevented the court from conducting a complete and comprehensive examination of a case and from making a lawful, reasoned and fair judgment or decision..."

Article 395

Scope of review in cassation

"The court of cassation shall verify the lawfulness of a court decision in the light of the materials available in the case and those additionally adduced concerning the matters appealed against..."

Article 396

Outcome of the examination of a case by a court of cassation

"Having examined a case in cassation, the court shall:

- 1) uphold the judgment, ruling or resolution and dismiss the appeal in cassation;
- 2) reverse the judgment, ruling or resolution and refer the case for additional investigation, retrial or fresh consideration on appeal;
- 3) reverse the judgment, ruling or resolution and discontinue the proceedings;

- 4) amend the judgment, ruling or resolution.”

Article 398

Grounds for reversing or amending a judgment, ruling or resolution

“Grounds for reversing or amending a judgment, ruling or resolution are:

- 1) a substantial violation of criminal procedure law;
- 2) an incorrect application of the criminal law;
- 3) the punishment imposed on the convicted person being disproportionate to the seriousness of the crime...”

Article 400 § 4

Grounds for review of final judgments under the extraordinary review procedure

“Any judgment that has entered into force may be reviewed under the extraordinary review procedure (*в порядку виключного провадження*) if:

- 1) there are newly discovered facts;
- 2) there were errors in application of the criminal law and substantial violations of criminal procedure law that have significantly affected the correctness of the judgment ...”

Article 400 § 10

“... A judges’ application for judicial consideration of a request for the review of a judgment on grounds envisaged by sub-paragraph 2 of the first part of Article 400 § 4 of this Code shall be examined ... in cassation...”

B. Code of Criminal Procedure 2012 (in the wording of 12 February 2015)

35. The relevant provision of the Code reads as follows:

Article 445

Grounds for review of the judicial decisions by the Supreme Court of Ukraine

“1. Grounds for review by the Supreme Court of Ukraine of the judicial decisions which came into force shall be:

...

- 4) finding by an international judicial body, which jurisdiction is accepted by Ukraine, of a violation by Ukraine of its international obligations during the judicial examination of the case.”

C. Law on the Execution of Judgments of the European Court of Human Rights 2006

36. Section 10 of the Law provides for additional individual measures with a view to the execution of judgments of the Court, including the review of a case by a court and the reopening of judicial proceedings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained under Article 6 § 1 of the Convention that the Supreme Court, instead of referring the case to a trial court for fresh consideration, had reassessed the facts and evidence in his case, despite having no jurisdiction to do so. The applicant further complained under the same provision that his right to remain silent and his right to defence had been violated anew, given that the Supreme Court had excluded part of the evidence obtained in breach of these rights but had relied on other pieces of evidence obtained in the same manner. The applicant also complained under Article 6 § 3 (a-d) that the retrial had been conducted in his absence, that he had had no adequate facilities to prepare his defence as he had not been informed of the evidence on which the prosecution had intended to rely if his initial confessions had been excluded, and that the exclusion of some of the evidence from his case had changed the situation to the extent that it had required the witnesses to be re-questioned, but this had not been done. The relevant parts of Article 6 of the Convention 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:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(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. *Applicability of Article 6*

(a) **The parties’ submissions**

(i) *The Government*

38. The Government considered the applicant’s complaints to be incompatible *ratione materiae* with the provisions of the Convention. They submitted that after the judgment of the Court of 12 June 2008 in the

applicant's case, the Supreme Court had not quashed his original conviction and had not initiated a fresh examination of the criminal case against him, but had confirmed the previous findings of the domestic courts about the proof of his guilt.

39. They argued that the present application was mostly based on the applicant's contentions about a violation of his rights guaranteed by Article 6 of the Convention in the proceedings before the Supreme Court. They further submitted that although the applicant had mentioned only once that the Supreme Court's decision not to initiate a fresh examination of his criminal case had deprived him of the opportunity to obtain *restitutio in integrum* under the judgment of 12 June 2008, that latter complaint was decisive for their conclusion that the present application was incompatible *ratione materiae* with the provisions of the Convention. In particular, while the applicant's complaints were mainly formulated with reference to Article 6 of the Convention, it appeared from the circumstances of the case that the proceedings in which he had requested a review of the domestic courts' judgments convicting him of Kh.'s murder had their origin in earlier proceedings which had led to his conviction and which had been subsequently found by the Court to be unfair. In their opinion, therefore, the circumstances of the present case should be assessed in terms of whether the State had complied with Article 46 § 1 of the Convention, which imposed on the Contracting State an obligation to abide by the final judgments of the European Court of Human Rights, and such an assessment was the prerogative of the Committee of Ministers.

40. The Government referred to the Court's case-law in which applicants' unsuccessful attempts to obtain a reopening of proceedings, which the Court had previously found to be in violation of the Convention, had been declared inadmissible (*Lyons and Others v. the United Kingdom*, (dec.), no. 15227/03, ECHR 2003-IX, and *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, 11 May 2010). They reiterated that the Convention does not give the Court jurisdiction to direct a State to open a retrial or reverse the judgment (*Saïdi v. France*, 20 September 1993, § 47, Series A no. 261-C). They maintained that the circumstances of the present case should be assessed exclusively in terms of the State's compliance with Article 46 § 1 of the Convention, and it was for the Committee of Ministers to decide in their resolution whether proceedings before the Supreme Court could be regarded as a sufficient measure taken by the State in order to comply with their obligations under Article 46 § 1 of the Convention.

41. The Government further submitted, referring to the Grand Chamber judgment in the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, ECHR 2009), that the Court had previously found that it had been competent to deal with relevant "new information" in the context of a fresh application. In this connection, the Government submitted that the refusal of the domestic courts to quash a

conviction and to order a retrial had not been found by the Court to give rise to a new breach of Article 6 of the Convention (*Lyons and Others* and *Steck-Risch and Others*, both cited above).

42. In the light of the above case-law, the Government objected to the presence of “new information” in the present application. They maintained that the proceedings before the Supreme Court had not concerned any new criminal charge against the applicant, but had concerned the same person, the same facts and the same original proceedings, which had been found unfair by the Court. Having accepted the Court’s finding that basing the applicant’s conviction for Kh.’s murder on a confession extracted from him in violation of his defence rights had constituted a breach of his right to fair proceedings, the Supreme Court found that the confessions obtained from the applicant by the investigator in the absence of a lawyer could not be regarded as admissible evidence to confirm his guilt. As a result, the Supreme Court had excluded that piece of evidence from the body of evidence of the applicant’s guilt in Kh.’s murder which had been referred to by the domestic courts in the course of the original proceedings. In deciding not to order a retrial, the Supreme Court had found that the remaining body of evidence was sufficient to consider reasonable the findings of the domestic courts in the original proceedings that the applicant’s guilt had been established. In this regard, the Government stressed that the Supreme Court had acted within its competence and in accordance with the domestic law, in particular Articles 396 and 398 of the Code of Criminal Procedure (see paragraph 34 above).

43. The Government reiterated that the Supreme Court had reduced the body of evidence which had been formed during the original proceedings and had not added any new pieces of evidence or changed any remaining pieces of evidence. There was therefore no new information or new grounds to give rise to a new violation of the Convention provisions. The Government disagreed with the applicant’s contentions that the Supreme Court had reassessed the remaining body of evidence. The Government considered that the Supreme Court’s opinion that the original conclusions of the domestic courts concerning the applicant’s guilt had been correct could not be in principle a result of an activity the applicant referred to as a “reassessment of evidence”. They submitted that, according to the principles laid down in the procedural law, activities aimed at “assessment of evidence” comprise verification of whether: the evidence is relevant, admissible, credible and sufficient. They therefore insisted that the assessment of evidence in the present case had been performed in the course of the original proceedings, when the domestic courts had assessed the evidence by questioning witnesses, examining relevant documents and exhibits during the hearings, analysing the parties’ objections to the proceedings to any particular piece of evidence, and by comparing one piece of evidence to another. It was the findings made as a result of this

examination that constituted the subject-matter of the cassation proceedings at the domestic level and, subsequently, the proceedings before the Court.

44. In the Government's opinion, a violation of the fair trial guarantees of Article 6 of the Convention could only occur in the course of a full assessment of evidence in terms of its relevance, admissibility, credibility and sufficiency. Yet, the Supreme Court had assessed the remaining body of evidence only in terms of its sufficiency, and such an assessment could not give rise to the procedural aspects capable of engaging the liability of the State for a violation of the applicant's rights under Article 6 of the Convention. The Government maintained that if the Supreme Court found the remaining evidence insufficient for a correct decision, it would certainly order a retrial. The Government contended that "new information" or "new grounds" capable of giving rise to a fresh violation of provisions of the Convention could have only emerged in the course of a retrial, that is, in the process of studying pieces of evidence in terms of their relevance, admissibility, credibility and sufficiency.

45. The Government submitted that since the remaining body of evidence, which the Supreme Court had found to be sufficient for leaving the applicant's sentence unchanged, included only those pieces of evidence that had been assessed during the original proceedings, the applicant had no reason to complain that the Supreme Court had violated his right to effectively prepare his defence in the face of the allegedly "new charge" and that, by not ordering a retrial, the Supreme Court had violated his right to have the witnesses re-examined. According to the Government, the applicant had no grounds for stating that a retrial could result in an alteration of the substance and the body of evidence that had remained after the proceedings before the Supreme Court. They also submitted that this Court's findings of a violation of the applicant's procedural rights during the evidence gathering at the original proceedings concerned some of the evidence but not all of it (*Yaremenko v. Ukraine*, no. 32092/02, § 86, 12 June 2008). In support of their latter argument, the Government referred to the observation made by the Vice-President, Lord Justice Rose in *Lyons and Others* (cited above), that "the concept of restoring as far as possible the situation existing before the breach is somewhat elusive, the more so when the challenge is to the use of some but not all of the material deployed at trial".

46. They concluded that the proceedings before the Supreme Court did not lead to the emergence of "new information" or "new grounds" capable of giving rise to a fresh violation of provisions of the Convention. They therefore considered the applicant's complaints under Article 6 incompatible *ratione materiae* with the provisions of the Convention.

(ii) *The applicant*

47. The applicant submitted that the cases of *Lyons and Others* and *Steck-Risch and Others*, referred to by the Government, concerned failed requests for a reopening of proceedings, and that after an examination of those requests the previous judgments complained of remained unchanged. His case was different. Although the Supreme Court had refused a retrial, it had taken note of the Court's judgment and excluded reference to the applicant's confessions and reassessed the evidence in the case. The Supreme Court had found the remaining body of evidence enough to conclude that the applicant was guilty of murder. In the applicant's opinion, those findings distinguished his case from those in which the Court had found Article 6 inapplicable.

48. The applicant referred to the Court's judgment in the case of *Verein gegen Tierfabriken Schweiz (VgT)*, in which the Court concluded that it might entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 62, ECHR 2009).

49. In the applicant's opinion, the key issue of his present case was not whether the proceedings before the Supreme Court had stemmed from the previous judgment of the Court, but whether those proceedings had been "the determination of a criminal charge against [him]". He disagreed with the Government's contentions that the proceedings in question had not concerned a new "criminal charge" against him. He drew attention to the fact that the Supreme Court had not simply rejected his request and refused to quash the previous judgments in the case, but had partly allowed his request and amended the original judgment (see paragraphs 31 and 32 above). The applicant maintained that any amendment to a judgment immediately involves three stages: repealing (quashing) the conclusions at issue, developing new conclusions, and replacing the repealed conclusions with new ones. In amending the judgment, the Supreme Court could not avoid those steps. The applicant claimed that once the conclusions of the trial and appellate courts had been repealed, the new "charge against him" had appeared. He referred to the Court's case-law in which the change of the cause of accusation, which included material facts alleged against a person which were the basis of the accusation, was considered to be a change of accusation or charge against that person.

50. The applicant further submitted that the Court had a consistent approach to situations in which appeals for retrial had been allowed and had resulted in an amendment by the national courts to the judgments complained of. He referred to the case of *Vanyan v. Russia* in which the Court held that the new proceedings, after the reopening had been granted, could be regarded as proceedings concerning the determination of a criminal charge (*Vanyan v. Russia*, no. 53203/99, § 56, 15 December 2005). He

further submitted that in the case of *Alekseyenko v. Russia*, in which the Presidium of the Supreme Court had initiated supervisory review proceedings, reopened the applicant's criminal case and partly changed the decisions in the case, the Court took the view that as far as the amendments were concerned, the supervisory review proceedings concerned the determination of a criminal charge against the applicant and, accordingly, Article 6 was applicable under its criminal head (*Alekseyenko v. Russia*, no. 74266/01, §§ 56 and 57, 8 January 2009). The Court also found Article 6 applicable to supervisory review proceedings in a case against Armenia (*Stepanyan v. Armenia*, no. 45081/04, §§ 31 and 32, 27 October 2009). The applicant claimed that there were no significant differences between his case and the above cases on supervisory review, since the Supreme Court had also examined his extraordinary appeal, reviewed his case and amended the previous decisions.

51. As to the Government's contention that the Supreme Court had not reassessed the evidence in the case, the applicant argued that it was impossible to assess the "sufficiency" of evidence without the other elements of assessment indicated by the Government (see paragraph 43 above). He argued that the exclusion of a piece of evidence, especially key evidence like in his case, would affect the body of evidence as a whole and its separate pieces, and therefore it was impossible to assess the sufficiency of the remaining body of evidence without a fresh assessment from the viewpoint of their "relevance", "admissibility", "credibility" and "sufficiency". The applicant disagreed with the Government's submissions that the body of evidence consisted of separately assessed pieces and that their weight and value did not change after some of them were excluded. As an example, he referred to the Court's findings in the judgment of 12 June 2008 concerning the testimonies made by him and his co-accused, in which the Court noted that the domestic courts had taken the high degree of consistency between the testimonies of the applicant and his co-accused as undeniable proof of their veracity, and had made them the basis for his conviction for the 1998 crime (*Yaremenko v. Ukraine*, no. 32092/02, § 79, 12 June 2008). The applicant submitted, therefore, that his testimonies had been one of the main elements determining the veracity of the testimonies of his co-accused. Thus, the exclusion of his testimonies by the Supreme Court had directly affected the veracity or, as the Government put it, the credibility of the testimonies of his co-accused, since the national courts had found that those testimonies, given their mutual consistency, supported each other. However, the Supreme Court, having excluded the testimonies of the applicant and, thus, having undermined the veracity of the testimonies of his co-accused, referred to the latter as one of the reasons for its conclusion that the remaining evidence was sufficient to establish the applicant's guilt.

(b) The Court's assessment

52. Firstly, the Court reiterates that under its well-established case-law, Article 6 § 1 does not guarantee a right to the reopening of proceedings (see, *inter alia*, *Zawadzki v. Poland* (dec.), no. 34158/96, 6 July 1999, and *Sablon v. Belgium*, no. 36445/97, § 86, 10 April 2001) and is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, unless the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants (see, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 50, 5 February 2015).

53. Secondly, the role of the Committee of Ministers, under Article 46 § 2 of the Convention, to supervise the execution of the Court's judgments does not mean that measures taken by a respondent State to implement a judgment delivered by the Court cannot raise a new issue undecided by the judgment and thus form the subject of a new application that may be dealt with by the Court (see, *inter alia*, *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV, and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 62, ECHR 2009). Reference is made, in this context, to the criteria established in the case-law concerning Article 35 § 2 (b) of the Convention, by which an application is to be declared inadmissible if it "is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information" (see *Verein gegen Tierfabriken Schweiz (VgT)*, cited above, § 63).

54. The Court must therefore first ascertain whether the present application contains relevant new information possibly entailing a fresh violation of Article 6 § 1, for the examination of which the Court is competent *ratione materiae*, or whether it concerns only the execution of the initial application without raising any relevant new facts.

55. The Court notes that the Supreme Court, by its decision of 31 July 2009, allowed the requests for review submitted by the applicant (in part) and by the prosecutor (in full). As a result, it excluded some pieces of evidence from the applicant's case and concluded that the remaining body of evidence was sufficient proof of the applicant's guilt. The Supreme Court itself mentioned that it made those conclusions "in review of the case" (see paragraphs 31 and 32 above). In the light of those facts, it cannot be said, as the Government suggested, that the decision of the Supreme Court had been merely a refusal of a retrial. Nor could this review by the Supreme Court be considered to be a simple textual amendment of the original judgment in execution of this Court's judgment. In fact, the Supreme Court made a rather critical assessment of the Court's findings in the applicant's previous case (cited above in paragraph 27), by accepting only one of the Court's

conclusions under Article 6 § 3 (c) (see paragraph 31 above) and disagreeing, either openly or not, with the rest of them (see paragraph 32 above). The Court recalls that in its partial decision as to admissibility of the present case, the Court considered that the disagreement with the Court's conclusions as to lack of effectiveness of the investigation into the applicant's allegations of ill-treatment was rather an issue for supervision of the execution of judgments by the Committee of Ministers (see *Yaremenko v. Ukraine (II)* (dec.), no. 66338/09, 21 September 2010).

56. The Court points out that Article 6 of the Convention applies to proceedings where a person is charged with a criminal offence until that charge is finally determined. The new proceedings, after the reopening has been granted, can be regarded as concerning the determination of a criminal charge (see *Vanyan v. Russia*, no. 53203/99, § 56, 15 December 2005, with further references). The Court considers that the Supreme Court when excluding the confession made by the applicant in absence of his lawyer from the body of evidence following the Court's previous judgment and reassessing the remainder of evidence to conclude that the applicant's conviction could stand, undertook a re-examination of the applicant's case. The legal situation in which the applicant found himself is similar to that of the applicant in the case of *Bochan* (no. 2). The Court concluded therein that Article 6 applied given that the Supreme Court conducted a "reconsideration" of the applicant's claim on new and fresh grounds linked to its interpretation of the Court's judgment, albeit deciding not to change the outcome of the case and, in particular, not to order a full re-hearing of the case by a lower court (see *Bochan v. Ukraine (no. 2)* [GC], cited above, § 54). Thus, the proceedings at issue concerned the determination of the applicant's guilt of a criminal offence within the meaning of Article 6 of the Convention. Such a re-examination constitutes relevant new information in the context of a fresh application which the Court can deal with. The Government's objection of lack of jurisdiction *ratione materiae* must therefore be dismissed.

2. *Otherwise as to admissibility*

57. 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*

58. The applicant submitted that the Supreme Court had actually re-examined his case, despite not being empowered to do so under the

extraordinary review procedure envisaged by Article 400 § 4 of the Code of Criminal Procedure. He stressed repeatedly that the sufficiency of the evidence could not be assessed independently and required a full reassessment of the new body of evidence from the standpoint of its relevance, admissibility, credibility and sufficiency. He claimed that in its assessment of the evidence within the extraordinary procedure the Supreme Court had gone beyond its jurisdiction defined by the Code of Criminal Procedure, and therefore could not be considered a “tribunal established by law” within the meaning of Article 6 of the Convention.

59. The applicant further complained that the procedure chosen by the Supreme Court for the review of his case did not ensure the procedural guarantees set forth in Article 6 § 3 (a-d) of the Convention, and the legal solution of the Supreme Court had come unexpectedly and prevented him from exercising his above-mentioned procedural rights.

60. Lastly, the applicant complained that the Supreme Court had repeatedly violated his right to remain silent and his right to defence by reaffirming his guilt on the basis of evidence which, according to the findings of the Court, had been in violation of Article 6 of the Convention (*Yaremenko*, cited above, §§ 79, 88 and 90; also cited in paragraph 27 above). In particular, he submitted that the Supreme Court had based his guilt on statements he had made during the reconstruction of the events and his questioning as an accused, despite those statements had been obtained in the same circumstances as those that had been excluded by the Supreme Court (*ibid.*).

61. The Government maintained that, under the law in supervisory review proceedings, the Supreme Court acted in accordance with the procedure foreseen for the examination of appeals on points of law. The procedure provided the Supreme Court with the competence to quash judgments and decisions of the lower courts and to remit the case for fresh consideration. Such competence, in the Government’s opinion, implied that the court of cassation had no power to “assess the evidence”, given that such an assessment could only be made during the trial. They reiterated their conclusion that the diminution of the body of evidence by the Supreme Court could not be regarded as a reassessment of the evidence, given that every piece of that evidence had already been assessed within the original trial.

62. The Government further submitted that the Supreme Court only examined points of law and the applicant’s absence during the hearing did not affect his procedural rights, since the domestic court had not been reassessing evidence. Furthermore, the applicant was represented during the hearing by his representative, therefore the equality of arms between the parties was also ensured.

63. Lastly, the Government submitted that the accusations against the applicant had not changed since his conviction in 2001 and that the body of

evidence had been collected during the original criminal proceedings in which the applicant fully participated, therefore the extraordinary proceedings in the Supreme Court could not give rise to an issue of compliance by the State with the applicant's rights under Article 6 § 3 (a-d) of the Convention.

2. The Court's assessment

64. The Court notes that most of the parties' submissions on the merits of the case concern the issues of whether the examination of the applicant's case by the Supreme Court could be considered a retrial and, if so, whether such a retrial had complied with the requirements of Article 6 of the Convention. The Court has already concluded that the extraordinary proceedings conducted by the Supreme Court had concerned the determination of the applicant's guilt of criminal offence within the meaning of Article 6 of the Convention, had led to a reassessment of the applicant's case and eventually to a new decision (see paragraph 56 above). It shall now proceed to examine whether in the applicant's case the extraordinary review proceedings and the decision taken as the result of those proceedings, were in compliance with the fair trial guarantees under Article 6 of the Convention, in particular those of the right to silence, the right to defence, and freedom from self-incrimination (the relevant general principles are set out in *Yaremenko*, cited above, §§ 74-77 and 85, with further references).

65. In this connection, the Court reiterates its main findings in the *Yaremenko* judgment (see paragraph 27 above) that the previous decisions convicting the applicant of two counts of murder had been found to be based on a body of evidence obtained in violation of the applicant's right to remain silent and of his right to defence, as well as in absence of adequate investigation into his allegations that his confessions had been obtained by illicit means. These conclusions concerned not only the initial questioning of the applicant in the absence of his lawyer in which he confessed to the 1998 crime, but his further similar confessions during the reconstruction of events and further questioning. The Court had established that after the removal of lawyer Kh., the applicant was represented by two other lawyers but their services were of a "notional nature". The Court also found that the degree of consistency between the testimonies of the applicant and his co-accused raised suspicions that their accounts had been carefully coordinated and that nevertheless the domestic courts made them the basis for the applicant's conviction for the 1998 crime, despite the fact that they had been retracted and had not been supported by other evidence (see *Yaremenko*, cited above, §§ 79, 88 and 90; also cited above in paragraph 27).

66. Despite those findings, the Supreme Court excluded only part of the evidence found to have been obtained in violation of the rights guaranteed by the Convention. The Supreme Court, allowing the request of the

prosecutor (see paragraph 30 above), decided that the applicant's initial confession had been the only irregularity of the applicant's criminal case and that the exclusion of that evidence would have no impact on the conclusiveness of the remaining evidence in the case. In the Court's opinion, this latter issue in itself would require a thorough examination of the evidence in the present case in a full retrial instead of the very limited review as carried out by the Supreme Court. The Court finds that the new decision rendered in the applicant's case was again based to a decisive extent on the same pieces of evidence which had been obtained in violation of the applicant's procedural rights and there had been serious allegations, never properly dispelled by the authorities, that all self-incriminatory statements had been extracted under duress and had constituted "the fruit of the poisonous tree" (see, *mutatis mutandis*, *Gäfgen v. Germany* [GC], no. 22978/05, § 168, ECHR 2010). In particular, both the applicant and his co-defendant had denied any involvement in the 1998 crime and had complained that they had been forced to incriminate themselves. The exclusion of the applicant's initial confessions significantly undermined the Supreme Court's argument that his confessions and those of his co-defendant were consistent and supported each other. Moreover, they both retracted all their confessions during the trial. The remaining considerations advanced by the Supreme Court to uphold the applicant's conviction were in particular based on the results of forensic examinations and a single piece of material evidence (toolbox), the relying on which appears not to have been decisive for the outcome. The Supreme Court's conviction of the applicant was thus based mainly on the use of evidence obtained in violation of the Convention as found in the previous *Yaremenko* judgment.

67. In the light of the above considerations, the Court finds that in the review proceedings the Supreme Court perpetuated the violations of the applicant's right to a fair trial, right to defence, right to silence and privilege against self-incrimination.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and requested a retrial of his case.

70. The Government considered that the Court was not competent to examine the extraordinary proceedings in question or therefore to decide on any sufferings of the applicant as a result of those proceedings.

71. The Court notes that where an individual has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, reopening or review of the case in accordance with the Convention, if requested, represents in principle an appropriate way of redressing the violation (see, for example, *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 65, 28 October 2010). In the instant case the proceedings under examination concerned the review of the applicant's criminal case following the Court's judgment in the applicant's favour. That review, however, as it has been established above, did not comply with the requirements of Article 6. In such circumstances, the Court considers that the finding of a violation does not constitute sufficient just satisfaction under Article 41 of the Convention for the non-pecuniary damage suffered by the applicant. Ruling on the basis of equity, it awards the applicant EUR 5,000 under this head.

72. Furthermore, the possibility of a retrial, as envisaged under Ukrainian law, is available to the applicant, if requested. Such a re-trial must observe the substantive and procedural safeguards enshrined in Article 6 of the Convention and must take into full account the Court's conclusions in the present case and in the judgment of *Yaremenko* (cited above).

B. Costs and expenses

73. The applicant also claimed EUR 4,032 for the costs and expenses incurred before the domestic courts and EUR 6,720 for those incurred before the Court.

74. The Government considered the costs incurred in the domestic proceedings irrelevant, as they concerned redress for previous violations found. At the same time, they maintained that the amount claimed for the applicant's representation before this Court to be excessive. They considered that the claims under this head must be rejected as well.

75. 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 the above criteria, as well as legal aid granted to the

applicant, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
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,, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 30 April 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President