



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

FIFTH SECTION

CASE OF SOBKO v. UKRAINE

(Application no. 15102/10)

JUDGMENT

STRASBOURG

17 December 2015

FINAL

17/03/2016

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

In the case of Sobko v. Ukraine,

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

Angelika Nußberger, *President*,

Ganna Yudkivska,

Khanlar Hajiyeu,

Erik Møse,

Faris Vehabović,

Síofra O’Leary,

Carlo Ranzoni, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 15102/10) 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 Fedorovych Sobko (“the applicant”), on 3 March 2010.

2. The applicant was represented by Mr I.M. Gavrylchenko, a lawyer practising in Cherkasy. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr B. Babin, of the Ministry of Justice.

3. The applicant alleged that he had had no access to a lawyer during his initial police questioning and that the cassation hearing had taken place in his and his lawyer’s absence, but with the participation of the prosecutor.

4. On 3 February 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981. He is currently serving a prison sentence.

6. On the morning of 3 October 2008, the applicant was digging potatoes together with his wife and G. (Ms), a neighbour, near his house. The applicant and G. had consumed some vodka at breakfast.

7. The applicant's eleven-month old daughter was in the house, together with his four-year old stepson, V., who was watching cartoons on a DVD player. The house was locked, and the key was in the applicant's pocket.

8. At about 11.15 a.m., when the applicant was carrying a sack of potatoes to the cellar, his wife asked him to have a look at the children. He was gone for about twenty minutes. When he returned, he said that he had had some beer.

9. At about 12.30 p.m., when the work was finished, the applicant went to the house. He came out and told his wife that her son was dead. When she entered the living room, she saw V. lying on the floor with a cable around his neck. The television set was overturned on the floor nearby. The applicant expressed a presumption that V. had tried to reach the remote control on top of the television, had overturned the television and, as a result, had accidentally been strangled by the cables.

10. Somebody called the police. By the time they arrived, V. had been put in his bed and the television had been placed on a bed in a different room. The applicant and his wife were questioned as witnesses. They admitted that they had relocated the body and the television, and explained that they had done so because they had felt stressed.

11. An autopsy of the child was carried out and in the evening of the same day the expert who had conducted it called the investigator and informed him that the boy had been strangled by somebody, and had not died as a result of an accident.

12. The investigator, together with the police officer on duty, returned to the applicant's house and inspected the scene once again. The applicant maintained his account that there had been an accident. The police officers took him to the police station, without formally deciding on his procedural status. The applicant did not object.

13. The police officer on duty had a conversation with the applicant and suggested that he "tell the truth". As a result, at 10.30 p.m. the applicant wrote a statement of "voluntary surrender to the police", in which he explained that he had strangled V. having got angry about the mess in the room. The statement contained a note that the applicant had been familiarised with the content of Article 63 of the Constitution (see paragraph 37 below).

14. On the same day, 3 October 2008, a criminal case was opened against the applicant on suspicion of murder of a child.

15. The applicant spent the night in the police station.

16. At about 1 a.m. on 4 October 2008, the applicant was formally arrested as a suspect. He wrote in the arrest report that he waived his right to legal defence and regretted what he had done.

17. On the same day the applicant wrote another statement of "voluntary surrender to the police" with the same content as the previous one.

18. On 5 October 2008 the applicant was granted legal aid and a lawyer was appointed for him. During his questioning as an accused and during the reconstruction of the crime, in the presence of his lawyer, the applicant maintained his confession.

19. On 6 October 2008 the applicant underwent a forensic medical examination, apparently in the context of the judicial decision on his pre-trial detention. No injuries were found on him and he did not raise any complaints before the expert.

20. In October 2008 (the exact date is not legible in the available copy) a forensic medical expert confirmed the findings of the autopsy report that V. had died as a result of strangulation.

21. On an unspecified date the applicant signed an agreement on his legal representation by Mr R.

22. On 20 October 2008 the applicant's father, acting on the applicant's behalf, signed a legal assistance agreement with Mr Gavrylchenko (the lawyer who also represented the applicant in the proceedings before this Court). On the same date Mr Gavrylchenko joined the proceedings as the applicant's lawyer. It appears that Mr R. too continued to represent the applicant.

23. On 13 November 2008 the applicant refused the services of Mr R.

24. On 3 December 2008 the investigator ordered the applicant's forensic psychiatric examination with a view to establishing whether he could be held liable for the criminal offence with which he was charged.

25. On 10 December 2008 experts completed the aforementioned examination. They concluded that the applicant, although showing an indication of "slight intellectual retardation on the verge of a slight mental disability" (*легка інтелектуальна недостатність на межі легкої дебільності*), was aware of his actions and could control them.

26. On 10 February 2009, during his questioning as an accused, the applicant retracted his confession and claimed his innocence. He submitted that he "had incriminated himself under the physical and psychological coercion of the police".

27. On 11 February 2009 the investigator decided that the applicant's allegation warranted a separate investigation. He therefore severed from the case file certain materials which could be of relevance (such as the applicant's confession, the transcript of his various questioning sessions and the report of his forensic medical examination).

28. On 23 February 2009 an additional forensic medical expert evaluation, which had been carried out at the request of the applicant's lawyer, was completed. The expert excluded the possibility that V. had been accidentally strangled by the television cables when the television set had fallen on him, as had been suggested by the applicant, and confirmed that that could not be the origin of his bruises either.

29. On 5 March 2009 the Chornobay Town Prosecutor's Office refused to open a criminal case in respect of the applicant's allegation that he had been coerced by the police, having found that there was no indication of a criminal offence.

30. On 30 March 2009 the applicant was indicted.

31. On 18 May 2009 the Cherkasy Regional Court of Appeal, sitting as a court of first instance, found the applicant guilty of murder of a child and sentenced him to twelve years' imprisonment. It relied, in particular, on the applicant's statement of "voluntary surrender to the police" of 3 October 2008 and the confessions he had made on 5 October 2008 and maintained thereafter until 10 February 2009. The court decided, however, not to take into account his statement of 4 October 2008 on the grounds that it could no longer be regarded as a "voluntary surrender to the police" and the applicant should have been questioned as a suspect and legally represented. Furthermore, the court relied on the material and expert evidence. The applicant's allegation of police coercion was dismissed as unsubstantiated. The trial court took into account the fact that the applicant had decided to write a "voluntary surrender to the police" as a mitigating factor in fixing his sentence.

32. On 28 May 2009 a copy of the judgment was served on the applicant.

33. On 10 June 2009 the applicant appealed on points of law. He complained, in particular, of the lack of access to a lawyer during his initial questioning at the police station on 3 October 2008. He submitted that he had been coerced into confessing by "physical violence and psychological pressure". The applicant also challenged the accuracy of the expert findings and disagreed with the assessment of the facts by the trial court. The first page of the applicant's cassation appeal was stamped by the Cherkasy Pre-Trial Detention Centre (SIZO), in which he was detained at the time, confirming that the appeal was sent out on 10 June 2009.

34. On 24 June 2009 the applicant's lawyer also submitted an appeal on points of law with similar arguments. The stamp of the trial court on the first page of the appeal shows that it was received on 25 June 2009.

35. According to the Government, neither the applicant nor his lawyer applied to the Supreme Court to participate in the cassation hearing. However, the case file contains a copy of such a request signed by both the applicant and his lawyer and dated 24 June 2009. It has not, however, been stamped by the Supreme Court and there is no other acknowledgment of its receipt.

36. On 15 September 2009, in a hearing with the participation of the prosecutor, but in the absence of the applicant or his lawyer, the Supreme Court upheld the judgment of the first-instance court. It considered that the applicant's right to legal defence had not been violated, as his confession of 4 October 2008 had been excluded from the evidence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine (1996)

37. The relevant provisions can be found, for example, in the Court's judgment on the case of *Ogorodnik v. Ukraine* (no. 29644/10, § 65, 5 February 2015).

B. Criminal Code (2001)

38. Under paragraph 1 of Article 115, premeditated murder is punishable by imprisonment for a term of seven to fifteen years. Under paragraph 2 of Article 115, if premeditated murder has been committed in one of the aggravating circumstances listed in that paragraph (including murder of a child), it is punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

C. Code of Criminal Procedure (1960, repealed with effect from 19 November 2012)

39. Article 45 provided that legal representation during an inquiry, pre-trial investigation and trial before a first-instance court was mandatory if, inter alia, the possible penalty was a life sentence. It further specified that in such a case, legal representation should be provided from the time of the arrest or the bringing of charges against the person.

40. Article 96 defines a statement of surrender to the authorities (*явка з повинною*) as a personal voluntary written or verbal statement made by a person, before the institution of criminal proceedings against him or her, to an inquiry authority, a police officer, an investigator, a prosecutor, a judge or a court, concerning a crime committed or planned by him or her. Where a criminal investigation has already been initiated, such a statement must be made before formal charges are brought against the person.

41. The provisions governing the review of criminal cases in cassation proceedings, as in force at the material time and in so far as relevant, read as follows:

Article 383. Court decisions which may be reviewed in cassation proceedings

“Cassation proceedings may be instituted in respect of:

- 1) judgments, decisions and rulings made by an appeal court acting as a first-instance court; ...”

**Article 386. Time-limits for lodging cassation appeals
and introduction of cassation pleadings**

“Cassation appeals and pleadings with respect to the court decisions listed in paragraph 1 of Article 383 of the present Code may be lodged within one month of the date of delivery of the judgment or pronouncement of the decision or ruling which is being appealed against; a convicted defendant who is held in custody [may lodge an appeal] – within the same time-limit from the date of receipt of a copy of the judgment or decision. ...”

Article 391. Persons participating in the cassation proceedings

“... A request by a convicted defendant who is held in custody to be summoned to submit observations in the course of the cassation review of a court decision listed in paragraph 1 of Article 383 of the present Code shall be binding on the cassation court, if submitted within the time-limit for lodging a cassation appeal.

Participants in the court proceedings who appear at the court hearing shall have the right to make oral submissions.”

Article 395. Scope of review of the case by the cassation court

“The cassation court shall review the lawfulness and reasonableness of the court judgment in the light of the materials on file and additionally submitted materials, within the limits of the appeal. ...”

Article 396. Results of the case review by the cassation court

“Following review of the case in cassation proceedings, the court shall take one of the following decisions:

- 1) to uphold the judgment, decision or ruling and dismiss the cassation appeal or pleadings;
- 2) to quash the judgment, decision or ruling and remit the case for a new investigation or trial or an appellate review;
- 3) to quash the judgment, decision or ruling and discontinue the proceedings;
- 4) to amend the judgment, decision or ruling; ...”

**Article 398. Grounds for quashing or amending the judgment, decision or
ruling**

A judgment, decision or ruling shall be quashed or amended on the following grounds:

- 1) a substantial breach of the law of criminal procedure;
- 2) incorrect application of the criminal law;
- 3) incompatibility of the punishment imposed with the gravity of the offence or the character of the convicted defendant.

A judgment given by an appeal court acting as a first-instance court may be quashed or amended on account of bias, an incomplete inquiry, pre-trial or judicial investigation, or where the conclusions of the court stated in the judgment are incompatible with the factual circumstances of the case. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE INITIAL RESTRICTION OF THE APPLICANT'S RIGHT TO LEGAL DEFENCE

42. The applicant complained, under Article 6 §§ 1 and 3 (c) of the Convention, of lack of access to a lawyer during his initial police questioning. The relevant part of the provisions relied on 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:

... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

A. Admissibility

43. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

44. The applicant submitted that without the assistance of a lawyer he had not been able to fully understand the consequences of his confession. He added in this connection that he had a slight intellectual retardation, which had not been taken into account.

45. The applicant admitted that he was not able to prove that he had been subjected to pressure by the police. He considered, however, that the mere fact that he had retracted his confession on 10 February 2009 indicated that the police had resorted to inappropriate practices.

46. The applicant further contended that his confession was a decisive piece of evidence on which his conviction was based.

47. The Government submitted that the applicant had decided of his own free will to surrender to the police and to confess to the murder of his stepson on 3 October 2008. They emphasised that he had not been a criminal suspect at that stage and that the trial court had taken into account his statement of “voluntary surrender to the police” as a mitigating factor in defining the sentence. As to his allegation of coercion by the police, which had been couched in general terms and made for the first time with an

inexplicable delay of four months, it had been duly examined and dismissed as unsubstantiated.

48. The Government also drew the Court's attention to the fact that the applicant's confession of 4 October 2008 had been excluded from the body of evidence on the grounds that he had not been legally represented at that stage.

49. The Government further pointed out that the applicant had maintained his confession, even when being represented by the appointed lawyer starting from 5 October 2008 and by the lawyer of his choice starting from 20 October 2008. He had neither complained of the initial restriction of his right to legal defence nor decided to retract his initial confession until 10 February 2009.

50. Lastly, the Government submitted that there had been ample evidence of the applicant's guilt, in addition to his initial confession.

2. The Court's assessment

(a) General principles

51. The Court reiterates that the guarantees in paragraph 3 (c) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Imbrioscia v. Switzerland*, 24 November 1993, § 37, Series A no. 275; and, for a more recent reference, *Martin v. Estonia*, no. 35985/09, § 94, 30 May 2013).

52. In order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first questioning of a suspect 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. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008).

53. Under the Court's case-law, a person acquires the status of a suspect calling for the application of the Article 6 safeguards not when it is formally assigned to him or her, but when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence (see *Brusco v. France*, no. 1466/07, § 47, 14 October 2010).

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

54. Turning to the present case, the Court notes that on 3 October 2008 the police questioned the applicant several times. The first time, he was questioned, along with his wife, as a witness to the death of his stepson. It was not disputed that the house in which the supposed accident had taken place had been locked, that the applicant had had the key to it, and that he had been the last person to see the boy alive (see paragraphs 7-9 above). The Court observes that the police decided to question the applicant once again on that day following information from the forensic medical expert that the child's death had resulted from strangulation by a third person. While being repeatedly questioned in his home, the applicant maintained "the accident" version. He was then taken to the police station, where it was proposed to him that he should "tell the truth" and where he wrote his statement of "voluntary surrender to the police" (see paragraphs 11-13 above).

55. Looking beyond the appearances and formal domestic classifications of the applicant's procedural statuses, the Court considers that at least since the evening of 3 October 2008 the applicant was *de facto* treated as a suspect in the murder case and was therefore entitled to have access to a lawyer (see, for comparable examples in the case-law, *Stojkovic v. France and Belgium*, no. 25303/08, § 51, 27 October 2011; *Khayrov v. Ukraine*, no. 19157/06, § 74, 15 November 2012; and *Zamferesko v. Ukraine*, no. 30075/06, § 61, 15 November 2012; and, for converse examples, *Smolik v. Ukraine*, no. 11778/05, § 54, 19 January 2012, and *Bandaletov v. Ukraine*, no. 23180/06, §§ 59 and 60, 31 October 2013).

56. While there is no evidence that the applicant's initial confession was extracted from him by coercion, the Court considers that the mere fact that he had been taken to the police station and questioned there without having any legal assistance to rely on indicated his vulnerability. This was even more so given his low intellectual level, which, as established in the course of his forensic psychiatric examination, was close to a slight mental disability (see paragraph 25 above). Accordingly, the Court doubts that the applicant could have fully understood the consequences of his confession to the murder of his minor stepson.

57. On the facts, the Court does not find any compelling reason for restricting the applicant's right to a lawyer during his initial questioning as a suspect on 3 October 2008, or during his subsequent questioning on 4 October 2008. A lawyer was not appointed for the applicant until 5 October 2008.

58. The Court is mindful of the fact that the applicant maintained his confession for about four months, while being legally represented (see paragraphs 18, 21, 22 and 26 above). The Court considers, however, that his initial confession must have affected the investigation strategy and set the framework within which his further defence had to be mounted.

Accordingly, regardless of whether the applicant chose to retract or maintain that confession, the initial breach of his right to defence could not be remedied by the mere fact that he was subsequently provided with legal assistance (see *Chopenko v. Ukraine*, no. 17735/06, § 52, 15 January 2015).

59. The Court observes that the trial court excluded from the body of evidence the applicant's statement made on 4 October 2008 on the grounds that his right to legal defence had been violated (see paragraph 31 above). At the same time, the Court notes that the domestic courts did rely on his initial confession of 3 October 2008 made in the absence of a lawyer. It follows that the aforementioned confession was used for the applicant's conviction, even if it was not the sole basis and was supported by other evidence in the case file.

60. The trial court did refer to the applicant's initial confession as being indicative of his remorse and mitigated his sentence on that ground. Thus, the applicant was sentenced to twelve years' imprisonment, while the possible penalty for murder of a child was from ten to fifteen years' imprisonment or a life sentence (see paragraphs 31 and 38 above). It might therefore appear that the applicant's confession had an advantageous bearing on his conviction. The Court notes, however, that he chose at that stage, on the advice of his lawyer, to deny his guilt altogether, let alone to show any remorse. In other words, the applicant would have preferred the exclusion of his confession, which had been made in the absence of a lawyer, even at the risk of a more severe sentence.

61. In sum, the Court concludes that the applicant's right to legal defence was restricted at the initial stage of the criminal investigation, that there were no compelling reasons for that restriction, and that his self-incriminating statements made during police questioning without access to a lawyer were used for his conviction.

62. It follows that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention in this regard.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S INABILITY TO TAKE PART IN THE CASSATION HEARING

63. The applicant also complained under Article 6 §§ 1 and 3 (c) of the Convention that the cassation hearing had taken place in his and his lawyer's absence, but with the participation of the prosecutor.

A. Admissibility

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

B. Merits

1. *Submissions by the parties*

65. The applicant maintained that his and his lawyer's absence from the cassation hearing had put him in a disadvantageous position *vis-à-vis* the prosecution.

66. The Government submitted that neither the applicant nor his lawyer had applied to the Supreme Court for their participation in the cassation hearing. The Government emphasised that, had such an application been lodged, it would have had a binding effect for the cassation court under the applicable legislation (see paragraph 41 above).

67. The Government further contended that the prosecutor's participation in the cassation hearing was of a purely formal nature and had not therefore placed the applicant in a disadvantageous position.

68. The applicant contested the role of the prosecutor as described by the Government. He did not, however, comment on the Government's submission concerning his and his lawyer's failure to request their participation in the hearing before the Supreme Court.

2. *The Court's assessment*

(a) General principles

69. The Court reiterates that Article 6 of the Convention, taken as a whole, guarantees that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the hearing concerning the determination of the criminal charges against him. This right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (see *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89, and *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A).

70. The Court has also established that the guarantees of Article 6, in particular the aforementioned right to be present and to participate effectively in a hearing, apply not only to first-instance trials, but also to proceedings in courts of appeal (see, among other authorities, *Kulikowski v. Poland* (revision), no. 18353/03, § 59, 21 December 2010).

71. The manner in which Article 6 applies to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appeal court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134). For instance, where an appeal court has to make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not

commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).

72. The Court also reiterates that the personal attendance of the defendant at the hearing is only one aspect of the wider concept of a fair trial in criminal proceedings. In the case at hand, the element of attendance has a direct bearing on the principle of equality of arms, which requires that each party be given a reasonable opportunity to present his or her case in conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI, and *Liepiņš v. Latvia*, no. 31855/03, § 48, 25 November 2014). Furthermore, the right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations made and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66-67, Series A no. 211).

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

73. It is undisputed by the parties that on 15 September 2009 the Supreme Court heard the applicant's cassation appeal in his and his lawyer's absence, but with the participation of the prosecutor.

74. The Court observes that, according to the Government, it was the applicant's own fault that he missed the opportunity to be present at the cassation hearing, because although he was legally represented, he failed to inform the authorities of his wish to take part in the hearing by lodging a special request.

75. The Court will first examine whether the departure from the principle that an accused should be present at the hearing could, in the circumstances of the case, be justified at the cassation stage by the special features of the domestic proceedings viewed as a whole. It will then determine whether the applicant can indeed be regarded as having lost his right to be present at that hearing through his own fault.

76. The Court observes that, under the Ukrainian legal system, the Supreme Court, acting as a second-instance court, had jurisdiction to deal with questions of law, as well as questions of fact pertaining both to criminal liability and to sentencing. It was empowered to examine evidence and additional materials submitted by the parties directly, with the effect that it could uphold, quash or amend a first-instance judgment, or remit the case for a fresh trial (see paragraph 41 above).

77. Furthermore, the Court attaches importance to the fact that the applicant faced a twelve-year prison term, which is an indication of the considerable importance of the proceedings for him.

78. Accordingly, in view of the nature of the proceedings in question and their importance for the applicant, the Court considers that the Supreme Court could not properly determine the issues before it without a direct

assessment of the evidence given by the applicant in person. Neither could it ensure equality of arms between the parties without giving the applicant the opportunity to reply to the observations made by the prosecutor at the hearing. It follows that in the circumstances of this case, it was essential for the fairness of the proceedings that the applicant be present at the cassation hearing.

79. It remains to be determined whether, as argued by the Government, the applicant missed that opportunity by failing to submit a special request.

80. The Court observes that under Ukrainian law, convicted defendants who are held in custody have the right to be summoned to submit observations in the course of cassation proceedings if they concern the review of a judgment delivered by an appeal court acting as a first-instance court. The only precondition is that a request to that effect must be submitted within the time-limit for lodging a cassation appeal (see paragraph 41 above).

81. The Court considers that the requirement to make such a request would not in itself contradict the guarantees of Article 6 if the procedure was clearly set out in the domestic law and complied with by all participants in the proceedings, including the courts (see, for example, *Sibgatullin v. Russia*, no. 32165/02, § 45, 23 April 2009).

82. In the present case the applicant has not submitted that the existing procedure for requesting his participation in the cassation hearing was unclear, cumbersome or otherwise difficult to comply with. Moreover, he claimed to have lodged such a request with the assistance of his lawyer. There is no evidence in the case file, however, that the aforementioned request was in fact submitted. The Court notes in this connection that the cover page of the cassation appeal lodged by the applicant's lawyer on 24 June 2009 had been stamped by the court in confirmation of its receipt. There was no such stamp or other acknowledgment of receipt on the request for the applicant's participation in the cassation hearing of the same date (see paragraph 35 above). It is also noteworthy that the applicant did not comment on the Government's observation that he had not applied to participate in the cassation hearing. The Court therefore considers that the applicant's inability to participate in the cassation hearing resulted from his failure to comply with the existing procedural formalities, which had not been excessive or unclear to him.

83. There has accordingly been no violation of Article 6 of the Convention in this regard.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 23,000 euros (EUR) in respect of non-pecuniary damage.

86. The Government contested the claim as unsubstantiated and exorbitant.

87. The Court considers it appropriate to award the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

88. The applicant did not make any claim under this head. The Court therefore makes no award.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention on account of the initial restriction on the applicant’s right to legal defence;
3. *Holds* that there has been no violation of Article 6 of the Convention on account of the applicant’s inability to participate in the hearing before the Supreme Court;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction."

Done in English, and notified in writing on 17 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President