



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

FIFTH SECTION

CASE OF LYSYUK v. UKRAINE

(Application no. 72531/13)

JUDGMENT

Art 8 • Private life • Unlawful covert recording of applicant's conversations by police, later used as evidence in criminal proceedings against him
Art 6 § 1 (criminal) • Overall fair proceedings, despite admission in evidence of conversation recording • Recording having a limited role in applicant's conviction
Art 6 § 1 (criminal) • Excessive length of proceedings

STRASBOURG

14 October 2021

FINAL

14/01/2022

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

In the case of Lysyuk v. Ukraine,

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

Síofra O’Leary, *President*,
Mārtiņš Mits,
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Lətif Hüseyinov,
Lado Chanturia,
Mattias Guyomar, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 72531/13) 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 Leonid Vasylyovych Lysyuk (“the applicant”), on 14 November 2013;

the decision to give notice of the application to the Ukrainian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 7 September 2021,

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

INTRODUCTION

1. The case concerns the applicant’s complaints, under Article 6 § 1 and Article 8 of the Convention, that covert recordings of his conversations had been made unlawfully and subsequently used as evidence in criminal proceedings brought against him for bribery. He also raised other complaints concerning those criminal proceedings.

THE FACTS

2. The applicant was born in 1956 and lives in Radomyshl. The applicant was represented by Mr A.S. Kychenok, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Mr I. Lischchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant, at the time head of the State Bailiffs Service in the Radomyshl District, was convicted of bribery in relation to two separate incidents. The applicant’s key complaints in the present case concern his

conviction for the second incident although his complaint about examination of witnesses also touches on the first episode (see paragraph 57 below). The relevant events, as set out in the trial court's judgment (see paragraph 21 below), unfolded as follows.

6. In the first incident, the applicant, at the request of A.R., the managing director of the K. company, took steps to prevent the sale by auction of the company's assets by creating documents falsely showing that the company's debts had been paid up before the auction. In exchange for this favour, the applicant received a bribe from A.R. in May 2006.

7. In the second incident, in March 2006 the applicant solicited a bribe from O.L., the managing director of the P. company, in exchange for his help in managing the collection, by various creditors, of debt owed by the P. company, through valuing and selling the company's assets in a manner favourable to O.L. One bribe was paid in April 2006. The applicant then asked for another and in January 2007 O.L. complained to the police. The police apparently obtained an order from the President of the Zhytomyr Regional Court of Appeal ("the Court of Appeal") authorising the wiretapping of the applicant's office landline (see paragraph 17 below) and supplied O.L. with marked banknotes. On 24 January 2007 the police made a recording of a telephone conversation between the applicant and O.L. On 26 January 2007 the applicant visited O.L. in his home, from where he took the marked money. A video-recording of the events in O.L.'s home was made. When the applicant left O.L.'s home, the police approached him and he attempted to flee and discard the marked money, but it was discovered on the ground near him. He was arrested.

II. INVESTIGATION AND THE FIRST AND THE SECOND TRIAL

8. On 10 February 2007 the investigator drew up a report on his examination of the audio-recording made on 24 January and the audio and video-recordings made on 26 January 2007. According to the report:

(i) during the telephone conversation on 24 January 2007, the applicant and O.L. had discussed a transfer of money to the applicant for reasons that were unclear, a possible meeting and various business matters. It is not known whether that conversation was held on the landline of the State Bailiffs Service (see paragraph 17 below) or on another line; and

(ii) on 26 January 2007 the applicant, in the home of O.L., offered to ensure that O.L.'s business and assets would be protected; he subsequently received a stack of banknotes from O.L.

9. On 24 April 2007 the investigation was completed and the case was sent for trial.

10. The applicant stood trial before the Malyn Court, with Judge Z. sitting as the trial judge.

11. The applicant pleaded not guilty and refused to testify, arguing that there was no evidence against him and in particular that the audio and video-recordings had been obtained unlawfully.

12. During the trial all relevant witnesses were examined. Their testimony was audio-recorded.

13. On 27 November 2007 the trial court convicted the applicant; however, on 19 February 2008 the Court of Appeal quashed that judgment and remitted the case for a retrial before a different judge.

14. The retrial started before Judge M. In January 2009 the case was transferred to Judge Y., since the previous judge's appointment had come to an end, and in November 2010 to Judge T., owing to Judge Y.'s long-term illness. Each new judge undertook a fresh examination of the evidence and witnesses. Hearings were scheduled at regular intervals. Some of the adjournments were for longer than two months; for example:

(i) at the end of the hearing held on 1 July 2009 the next hearing was scheduled for 1 October 2009; and

(ii) on 16 May 2011 the next hearing was scheduled for 18 August 2011.

15. All relevant witnesses were examined again by Judge Y., after he had made a considerable effort to summon them and ensure their presence at the hearings. In particular, he had issued a separate ruling addressed to the regional police chief, pointing out that the police officers had failed in their duty to comply with court orders to bring witnesses to court.

16. Granting the applicant's application, on 28 April 2010 the trial court requested information from the Court of Appeal as to whether judicial authorisation for the interception of the applicant's conversations in 2006 and January 2007 had been granted.

17. On 5 May 2010 the Court of Appeal replied that all information concerning the wiretapping of the landline of the State Bailiffs Service unit of which the applicant had previously been the head was kept by the relevant police department which had conducted the wiretapping.

18. During the re-examination of the evidence by Judge T. when he took over the case, all relevant witnesses were again re-examined, with the exception of those mentioned in the following paragraph.

19. At the hearing of 21 February 2011, O.L. appeared. According to the records provided by the Government, he was examined at that hearing. However, the trial court stated in its judgment that he had refused to repeat his previous statements in court and had asked that his pre-trial statement be relied upon instead. On the same day O.L. filed a statement with the court, asking it to accept his previous testimony concerning the case and no longer summon him. According to the Government, on the same day the applicant asked the court to read out the prior statements given by the auction's organisers, K.P. and T.M., and by the applicant's former subordinates, I.P. (in relation to the first incident – see paragraph 22 below) and T.B. (in relation to the second incident – see paragraph 23 below).

20. At the same hearing the applicant was released from detention.

III. CONVICTION

21. On 19 December 2011 the trial court convicted the applicant of abuse of his official position, bribery and forgery, and sentenced him to four years and twenty-four days' imprisonment.

22. In respect of the first incident, the trial court relied on A.R.'s testimony (see paragraph 6 above), and on other witness and documentary evidence, including the testimonies of the three witnesses mentioned in paragraph 19 above.

23. In respect of the second incident, the trial court relied on:

(i) O.L.'s pre-trial statement describing the events (see paragraph 7 above). The trial court stated in its judgment that O.L. had appeared at the retrial but had refused to testify, saying that he had already given his statement at the pre-trial stage and that the court had read out his pre-trial statement, with the agreement of all the parties;

(ii) evidence from O.L.'s driver, who had testified that he had learned from O.L. that the applicant had been demanding a bribe and had driven O.L. to meetings with the applicant and had seen O.L. preparing cash, supposedly for the bribes;

(iii) evidence from O.L.'s neighbour, who had seen the applicant in O.L.'s home on the day of his arrest;

(iv) evidence of attesting witnesses, who had observed the marking of cash to be used in the bribe and the discovery of the cash on the ground near the spot of the applicant's arrest, and police reports documenting the same;

(v) the results of a forensic examination, showing the identity of the marking substance on the cash, on the applicant's jacket and on swabs from his hands;

(vi) audio and video-recordings conducted in O.L.'s home on 26 January 2007 (see paragraph 8 above);

(vii) evidence given by the applicant's former subordinates (including T.B.) to the effect that the applicant had taken a personal interest in the enforcement proceedings against O.L. In particular, they had testified that in January 2007 the applicant had repeatedly ordered that the enforcement proceedings against O.L.'s company be discontinued since all assets had been transferred to O.L. and that he had assured them that he would personally deal with any related litigation.

24. Concerning the applicant's allegations of breaches of the law by the investigating authorities on various points, including "unlawful video and audio recordings", the court rejected them considering that they "had not been confirmed during the trial".

IV. APPEALS

25. The applicant appealed, arguing that the trial court had erred in the assessment of the evidence and the interpretation of domestic law and that by doing so it had committed a crime, as had the individuals who had testified against him. He described in detail why he considered that it had been they and not he who had broken the law. He filed lengthy submissions, without any table of contents or summary of the key points.

The applicant complained on page 100 of his appeal (out of a total of 118 pages) that the audio and video-recordings of 26 January 2007 and the audio-recording of the telephone conversation of 24 January 2007 had been conducted in breach of domestic law and without court authorisation, and that the relevant evidence was therefore inadmissible. He relied on section 8(2) of the Operational-Search Activities Act (see paragraph 32 below). He pointed out that, according to the information provided by the Court of Appeal (see paragraph 17 above), an authorisation had been issued only for the wiretapping of the landline of the applicant's unit within the State Bailiffs Service, and not for the audio and video-recordings of the conversation on 26 January 2007 in O.L.'s home. Accordingly, that latter evidence had been inadmissible.

26. On 9 October 2012 the Court of Appeal modified the trial court's judgment, discontinuing as time-barred the proceedings on all charges other than bribery, and upheld the conviction in so far as it concerned bribery in respect of both incidents. The Court of Appeal considered that the evidence was sufficient to support the conviction and that "the investigation authorities and the trial court did not commit any substantial breaches of the criminal procedure legislation which would justify quashing the conviction".

27. On 16 May 2013 the Higher Specialised Court for Civil and Criminal Matters dismissed a cassation appeal by the applicant, in which he had raised essentially the same arguments in the same extensive manner, and upheld the lower courts' decisions, finding no indication of any illegality. Without referring specifically to the recordings, the court of cassation stated that the alleged "violations of criminal procedure legislation alleged by the applicant in his appeal are not substantial and, therefore, cannot be grounds for quashing or amending the lower courts' decisions".

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CONSTITUTION OF 1996

28. Article 55 guarantees to everyone the right to challenge in court the decisions, actions or omission of public authorities and officers and

Article 56 guarantees to everyone the right to compensation for damage caused by their unlawful actions and decisions.

II. CODE OF CRIMINAL PROCEDURE 1960 (AS IN FORCE AT THE MATERIAL TIME)

29. Under the Code of Criminal Procedure 1960, the courts had the power to issue a separate ruling (*окрема ухвала*) drawing the attention of State bodies, public organisations or officials to the facts surrounding a violation of the law that had been established in a particular case and the reasons and conditions that contributed to the commission of the crime, and to request appropriate measures (Article 23-2). The courts of appeal and cassation were also empowered to issue such separate rulings (Articles 380 and 400-2).

30. Other relevant provisions of the Code can be found in *Berlizev v. Ukraine* (no. 43571/12, §§ 21-26, 8 July 2021, not yet final).

III. COMPENSATION ACT 1994

31. Section 2 of the Compensation Act 1994 (the Law on the procedure for compensation for damage caused to a citizen by the unlawful actions of bodies of inquiry, pre-trial investigative authorities, prosecutors or courts) provides for the possibility of claiming compensation for damage caused by the actions of investigating authorities in the event of an acquittal or the discontinuation of criminal proceedings on “rehabilitating” grounds. In addition, with effect from 1 January 2006, the list of cases where the right to compensation would arise was expanded by the inclusion of the following point:

“(1-1) [W]here a court establishes, in a verdict or other judicial decision (except for a decision ordering fresh consideration [of a criminal case]), that there has been an unlawful charge, unlawful remand and detention in custody, [an] unlawful search [and] seizure in the course of criminal proceedings, an unlawful attachment of property, an unlawful suspension from work and other procedural actions restricting a citizen’s rights [or] unlawful conduct of operational-search activities;”

IV. OPERATIONAL-SEARCH ACTIVITIES ACT 1992

32. Section 8(2) of the Operational-Search Activities Act (as worded at the relevant time) provided that the use of technical means of obtaining information during operational-search activities had to be authorised by a court decision.

33. Section 9 of the Act provides for the obligation of units conducting operational-search activities to compensate for any damage caused by their activities if the latter resulted in a breach of human rights and freedoms.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained of a breach of his rights on account of the recording of his conversations on 24 and 26 January 2007. He relied on Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The parties’ submissions

1. The Government

35. The Government submitted that the applicant had not exhausted effective domestic remedies. In particular, he had not brought proceedings against the police officers for damages under the Compensation Act. They also submitted that Articles 55 and 56 of the Constitution and section 9 of the Operational-Search Activities Act provided for the possibility of challenging the actions of investigation authorities before the domestic courts (see paragraphs 28 and 33 above). Since the applicant had not had recourse to the available remedies, the six-month period had to be counted from the act in issue, namely the drawing up of the report of 10 February 2007 (see paragraph 8 above).

36. The Government further submitted that the interference with the applicant’s correspondence had been lawful, having been based notably on section 8 of the Operational-Search Activities Act. The interference had been of an exceptional and temporary nature.

2. The applicant

37. The applicant submitted that he had exhausted all available domestic remedies. Only criminal proceedings could be an effective remedy for an alleged breach of the right to privacy. The applicant had raised the issue of the unlawful recording of his conversations throughout the criminal proceedings, including in his appeals.

38. On the merits, the applicant argued that there had been no legal grounds for the interference and that, accordingly, there had been a violation of Article 8 of the Convention.

B. The Court's assessment

1. Admissibility

(a) Admissibility of the complaint concerning the recording of the telephone conversation on 24 January 2007

39. The Court need not examine the Government's objections in respect of this part of the complaint as it considers that, in any event, the applicant has failed to make an arguable complaint under Article 8 of the Convention concerning the recording of his telephone conversation on 24 January 2007 because he failed to explain clearly whether that conversation was held on the landline wiretapped under the authorisation of the Court of Appeal or on a different telephone line not covered by that authorisation (see paragraphs 8 and 17 above). It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

(b) Admissibility of the complaint concerning the recording of the conversation in O.L.'s home on 26 January 2007

40. In *Volokhy v. Ukraine* (no. 23543/02, § 59, 2 November 2006), where the relevant events occurred between 1996 and 2004, the Court found that a claim under the Compensation Act could in principle serve as an effective domestic remedy for individuals affected by surveillance measures. The Court held, however, that on the facts of that case such a claim did not function as an effective remedy for the applicants, who were not defendants in the relevant criminal proceedings. At the relevant time, the Compensation Act only provided for compensation in the event of acquittal or the discontinuation of proceedings on "rehabilitating" grounds.

41. Since the judgment in *Volokhy* (cited above), the Compensation Act has been amended to expressly provide for the right to compensation even where, as in the present case, there was no acquittal or discontinuation of criminal proceedings but where investigative or covert ("operational-search") police operations were found to have been unlawful in a judicial decision other than a decision remitting the case for further investigation or re-examination by a lower court (see *Orlovskiy v. Ukraine*, no. 12222/09, §§ 50 and 55-61, 2 April 2015, and paragraph 31 above).

42. In the present case the applicant complained of the unlawfulness of the surveillance measures whose alleged illegality was an issue before the courts dealing with his criminal case; those courts, including the courts of appeal and cassation, had the power to examine the issue and adopt, separately from their decisions on the merits of the criminal case, a ruling pointing to any illegality in respect of those surveillance measures (see paragraph 29 above and *Berlizev v. Ukraine*, no. 43571/12, § 33, 8 July 2021). The trial court did in fact issue such a ruling concerning the summoning of witnesses to the court hearings (see paragraph 15 above).

Alternatively, it was open for the national courts to establish any such unlawfulness in their decisions on the merits of the criminal case, such as the trial judgment.

43. A separate ruling of this type, if it had been issued in respect of the surveillance measures in issue or a decision on the merits of the criminal case acknowledging such unlawfulness, would have constituted grounds for a claim under the Compensation Act (see *Orlovskiy*, cited above, §§ 14 and 58, and *Tikhonov v. Ukraine*, no. 17969/09, §§ 22 and 39, 10 December 2015).

44. The Court has already observed in *Lelyuk v. Ukraine* (no. 24037/08, § 39, 17 November 2016) that obtaining a judicial declaration of the unlawfulness of an act was the first step in a two-step system of remedies under the Compensation Act, the second step being a claim for damages. While *Lelyuk* concerned allegations of unlawful detention, the above considerations are equally valid in respect of allegedly unlawful surveillance measures.

45. It follows that by raising in his appeals in the criminal proceedings the issue of the alleged unlawful surveillance, the applicant had recourse to a domestic remedy which was in principle effective, as the first step in a two-step acknowledgment and compensation mechanism. It was not open to the applicant to undertake the second step, a compensation claim before the civil courts, as the criminal courts neither issued a separate ruling acknowledging that the surveillance measures had been unlawful nor acknowledged that in any of their decisions on the merits of the criminal case.

46. The Court observes that the applicant's complaint raised before the Court is limited to the alleged unlawfulness of the recording in terms of domestic law. It has not been questioned that it was open to the domestic courts, in the context of criminal proceedings against the applicant, to deal with this complaint and acknowledge any such unlawfulness had they established it (compare *Bălteanu v. Romania*, no. 142/04, § 37, 16 July 2013, and contrast *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, § 123, 4 June 2019, with further references). Therefore the applicant exhausted the domestic remedies that were available in the circumstances in respect of that complaint. The six-month period ran from the final decision in his criminal case, given on 16 May 2013 (see paragraph 27 above).

47. The Court therefore dismisses the Government's objections in respect of non-exhaustion of domestic remedies and compliance with the six-month time-limit.

48. This complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. *Merits*

49. The relevant principles of the Court's case-law can be found in *Berlizev* (cited above, §§ 38 and 39, not yet final).

50. The first question arising is whether there was an interference with the applicant's rights under Article 8 of the Convention. The recording was made in O.L.'s home by the police. It can be assumed that it was carried out with O.L.'s consent, although there is no specific information on that point in the file.

51. Having regard to the fact that the recording was organised and carried out with the authorities' involvement, in this case direct, it falls within the ambit of Article 8 of the Convention even if conducted in private premises with the consent of or at the invitation of the premises' private owner (see *Van Vondel v. the Netherlands*, no. 38258/03, §§ 47-50, 25 October 2007).

52. There has accordingly been an interference by public authorities with the applicant's private life within the meaning of Article 8 of the Convention.

53. The applicant alleged that the recording of his conversations in O.L.'s home on 26 January 2007 had been conducted by the police without judicial authorisation. Although he raised this issue before the domestic courts, there is no indication in the file of any concrete response to that allegation and the Government did not dispute it in their observations. The Court, therefore, has no choice but to accept that the recording was carried out by the police without judicial authorisation.

54. In *Berlizev* (cited above, §§ 40 to 42, not yet final) the Court found it established that conducting such recordings in the absence of a judicial authorisation was in breach of domestic law. The present case concerns the same domestic legal framework and the Court sees no reason to reach a different conclusion.

55. This is sufficient for the Court to find that there has been a violation of Article 8 of the Convention on account of the recording of the applicant's conversation on 26 January 2007.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION IN RESPECT OF THE FAIRNESS OF THE PROCEEDINGS

56. The applicant complained that the unlawful covert recordings of his conversations of 24 and 26 January 2007 had been used as evidence in the criminal proceedings against him. He further complained that he had been unable to examine some of the witnesses for the prosecution during his retrial. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which 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:

...

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

...

(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. The parties' submissions

1. The applicant

57. In his application form the applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he had been unable to examine the witnesses O.L. and A.R. (the persons who had given the bribes), I.P. and T.B. (the applicant's former subordinates involved in the first and second incidents respectively), and K.P. and T.M. (the organisers of the public auction in relation to the first incident). In his observations in reply to those of the Government, the applicant submitted that there had been contradictions between the evidence of O.L. and that of other witnesses. O.L. had been at risk of being prosecuted for bribery and he had therefore avoided the initial court hearings until that risk had receded.

58. The applicant also submitted that by failing to discard as inadmissible the unlawful covert recordings of his conversations with O.L. on 24 and 26 January 2007, the domestic courts had violated Article 6 § 1.

2. The Government

59. The Government submitted that the applicant had been able to cross-examine O.L. As to the other witnesses, their statements had been read out during the retrial with the defence's consent. The applicant had not raised any complaint in that regard before the trial court but had done so in his appeals.

60. As to the admission of the recordings in evidence, the Government submitted that the applicant's conviction had been based on a wide range of evidence. The surveillance material reflected the circumstances of the transfer of the bribe to the applicant, which corresponded to the testimony of O.L. and did not contradict the applicant's statements. The courts of appeal and cassation had not questioned the legality of the evidence obtained by the investigating authorities.

B. The Court's assessment

1. Alleged violation of the right to examine witnesses

61. The Court observes that all the witnesses referred to by the applicant (see paragraph 57 above) were in fact examined and cross-examined at various points in the course of the trial and retrial before Judge M., the first judge in the retrial. The only issue which can possibly arise is whether the applicant had the opportunity to cross-examine the witnesses before Judge T., who was the third and final judge in the retrial and who ultimately convicted him (see *Chernika v. Ukraine*, no. 53791/11, §§ 35-78, 12 March 2020).

62. However, A.R. was in fact examined by the final judge in the retrial. There is no indication that the applicant had any difficulty in examining him.

63. As to the other witnesses mentioned by the applicant in his application form, he did not repeat his complaint on this issue after the Government pointed out that he himself had asked for their evidence to be read out and had not raised the issue at the trial (see paragraphs 57 and 59 above). Even assuming that he can be considered to have pursued his complaint on this issue before the Court, he did not contest the Government's allegation that he had asked for the statements of those witnesses to be read out before the final judge in the retrial and, as far as O.L. was concerned, that he had consented to his statement being read out (see paragraphs 23 (i) and 57 above). There is no indication that the applicant at any point changed his position during the retrial or asked for those witnesses to be re-examined by the Court of Appeal (see *Palchik v. Ukraine*, no. 16980/06, § 36, 2 March 2017, and contrast *Gabrielyan v. Armenia*, no. 8088/05, § 85, 10 April 2012).

64. The Court concludes therefore that the applicant's complaint is manifestly ill-founded and should be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

2. Alleged violation of Article 6 § 1 on account of the admission in evidence of the recording of the telephone conversation on 24 January 2007

65. For the reasons stated above (see paragraph 39 above) in respect of the applicant's related complaint under Article 8 of the Convention, this complaint is likewise manifestly ill-founded and should also be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

3. *Alleged violation of Article 6 § 1 on account of the admission in evidence of the recording of the conversation in O.L.'s home on 26 January 2007*

66. This complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

67. The relevant principles of the Court's case-law can be found in *Bykov v. Russia* ([GC], no. 4378/02, §§ 88-90, 10 March 2009). They were recently restated in *Berlizev* (cited above, §§ 51 and 52).

68. Applying those principles in the present case, the Court notes that the unlawfulness in question pertained to compliance with domestic law but did not involve a breach of the applicant's defence rights.

69. The evidence in question played a limited role in the applicant's conviction. The key element of evidence against him was the evidence of O.L., who was not a police agent and whom the applicant had an opportunity to cross-examine (see *Bykov*, cited above, § 96). Moreover, the fact that, despite not being on any official business, the applicant visited the home of a debtor in respect of whom he was conducting enforcement proceedings and left it in possession of marked money was also seriously incriminating.

70. It does not appear that the video-recording conducted in O.L.'s home added anything substantial in that respect. It should be noted that the domestic courts did not rely on any specific statements in the conversation recorded in O.L.'s home (compare *Bykov*, cited above, § 103), and indeed no conclusively incriminating statement was uttered during that conversation, notably as to the nature of the money handed over. What mattered was the handover of cash recorded on the video. However, as stated above, that fact was sufficiently established by other evidence (compare *Tortladze v. Georgia*, no. 42371/08, §§ 73-75, 18 March 2021).

71. There is no indication that the recording in question was unreliable. Indeed, the applicant never raised any arguments to that effect either before the Court or before the domestic courts (see *Berlizev*, cited above, § 54 (not yet final), and *Dragojević v. Croatia*, no. 68955/11, § 131, 15 January 2015; and contrast *Bykov*, cited above, § 94, and *Nițulescu v. Romania*, no. 16184/06, §§ 53-55, 22 September 2015).

72. The applicant was given unrestricted opportunity to contest the admissibility of the relevant evidence in adversarial proceedings at three levels of jurisdiction. It is true that the courts did not comment on the applicant's arguments in that respect in much detail (see paragraph 24 above). The higher courts limited their reasoning to observing essentially that any alleged breaches of the procedural rules did not have an impact on the conviction (see paragraphs 26 and 27 above).

73. However, in view of what was said above concerning the role of the impugned evidence in the conviction and its reliability, the higher courts'

assessment does not appear unreasonable. Moreover, the succinctness of the courts' reasoning should also be seen against the background of the fact that the applicant had made a mass of repetitive and often irrelevant arguments on other points (see paragraph 25 above and compare *Berlizev*, cited above, § 54).

74. In view of that fact and of the limited role of the relevant evidence in the case against the applicant, the domestic courts' failure to comment on that specific issue in detail is not sufficient in itself to render the proceedings overall unfair.

75. It is true that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 185, 6 November 2018). However, given the above considerations concerning the role the disputed evidence played and given its reliability, the applicant's submissions could clearly not have been decisive for the outcome of the proceedings.

76. There has therefore been no violation of Article 6 § 1 of the Convention on account of the admission of the recording of the applicant's conversation on 26 January 2007 in evidence against him.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF LENGTH OF PROCEEDINGS

77. The applicant submitted that the length of proceedings in his case had been excessive. The Government contested that argument.

78. The relevant principles of the Court's case-law can be found in *Pélissier and Sassi v. France* ([GC], no. 25444/94, § 67, ECHR 1999-II).

79. The Court observes that the proceedings started on 26 January 2007 and ended on 16 May 2013. They thus lasted for six years and three months at three levels of jurisdiction.

80. The Court does not consider that the applicant's case was particularly complex.

81. It is prepared to assume that the applicant contributed to a certain extent to extending the length of the proceedings. For example, the extent of his submissions on appeal appears to have been disproportionate to the degree of complexity of his case and the issues involved (see paragraph 25 above). Nevertheless, the Court is unable to identify any periods of considerable delay specifically attributable to the applicant.

82. The same cannot be said about the conduct of the authorities.

83. Firstly, even though the case had already been delayed owing to its remittal for a retrial, the trial court, despite the accumulated delays, still scheduled trial hearings, for no apparent good reason, at considerable intervals, sometimes exceeding three months (see paragraph 14 above). Secondly, primarily due to the repeated changes of trial judges, the

proceedings before the trial court lasted for four years and nearly eight months.

84. No convincing reason was given for those delays, even though for much of that period the applicant remained in detention, which is a relevant factor in assessing the length of proceedings (see paragraph 20 above and *Abdoella v. the Netherlands*, 25 November 1992, § 24, Series A no. 248-A).

85. The Court, therefore, declares this complaint admissible, and finds that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the proceedings.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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

87. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

88. The Government contested his claim, deeming it unjustified and unsubstantiated.

89. Having regard to its case-law and the circumstances of the case, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage.

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

B. Costs and expenses

91. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Article 8 of the Convention concerning the recording of the applicant’s conversation on 26 January 2007 and under Article 6 § 1 concerning the admission of that recording in evidence against the applicant and the length of proceedings admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention on account of the recording of the applicant's conversation on 26 January 2007;
3. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention on account of the admission of the recording of the applicant's conversation on 26 January 2007 in evidence against him;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the proceedings in the applicant's case;
5. *Holds*, unanimously,
 - (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 5,000 (five 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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytkhik
Registrar

Síofra O'Leary
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Yudkivska is annexed to this judgment.

S.O.L.
V.S.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA

I voted with my colleagues for a finding of a violation of Article 8 of the Convention: that issue is fairly straightforward in the present case.

I cannot, however, subscribe to the finding that, despite the fact that clearly inadmissible evidence – a recording of the applicant’s conversation on 26 January 2007 – was used in the criminal proceedings against him, his fair trial rights were not impaired.

Firstly – and independently of the particular circumstances of the present case – I believe that the so-called *Bykov* test¹, introduced by the Grand Chamber in 2009, should be revisited.

As I recently argued in another separate opinion²,

“... .. It is widely accepted that the very logic of the ‘fruits of the poisonous tree’ doctrine is connected to the so-called ‘deterrent theory’, according to which the possibility of exclusion of evidence should discourage the law-enforcement authorities from resorting to unlawful conduct in future.

... A judge excludes unlawfully obtained evidence from criminal proceedings, thus making it pointless for police to obtain evidence by improper means. Consequently, the exclusionary rule decreases the number of violations committed by law-enforcement authorities in the course of investigations.

... This deterrent doctrine was explicitly indicated in the case of *Elkins v. United States*^[3], in which the Supreme Court stated that the admission of unlawfully obtained evidence by a federal court had served to defeat the State’s effort to assure obedience to the Constitution. ‘...if it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion’. In other words, exclusion of illegally obtained evidence is an important way to eliminate any motivation to violate the law. The rights of the accused in future cases are thus protected.

... In the same case the US Supreme Court referred to another rationale for the application of exclusionary rules, namely the integrity of the justice system. It quoted Justice Holmes’ viewpoint, expressed in *Olmstead v. United States*^[4]: ‘no distinction can be taken between the Government as prosecutor and the Government as judge... In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.’

... Or, as was stated much later, ‘by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action’^[5]. It is clear that the courts should not be perceived as forgiving serious breaches of the law –

¹ *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009.

² Concurring opinion of Judge Yudkivska in the case of *Bokhonko v. Georgia*, no. 6739/11, 22 October 2020.

their legitimacy must be preserved, and a strict position by them, refusing to benefit from lawlessness by the police, safeguards the general public. As argued, the goal of preserving the legitimacy of the justice system may trump the goal of factual accuracy, because it is legitimacy, rather than truth finding, which is the ultimate goal of the process[6]...”

Against this background, the *Bykov* test appears to be problematic, and I wholeheartedly support the opinion expressed by my learned colleagues Judges Pinto de Albuquerque and Bošnjak, who convincingly, in my view, demonstrated that the *Bykov* criteria “do not lend themselves to easy comprehension and applicability and therefore do not provide guidance to national courts” and that they call for a “purely casuistic, consequentialist and opportunistic view”³.

The *Bykov* test provides for three criteria to be carefully examined – whether the applicant was given an opportunity to challenge the authenticity of the evidence and its use, whether there are any doubts as to the reliability and accuracy of the evidence, and the role of the evidence. However, the Court’s post-*Bykov* jurisprudence demonstrates that only under the second criterion, that is, if the circumstances in which the evidence was obtained cast doubt on its reliability, will the Court in some exceptional cases come to the conclusion that evidence obtained in violation of Article 8 led to a violation of Article 6 § 1 (see *Lisica v. Croatia*, no. 20100/06, 25 February 2010, and *Kobiashvili v. Georgia*, no. 36416/06, 14 March 2019).

Such a narrow assessment of the influence of an unlawful intrusion into private life on the fairness of the proceedings does not serve the purpose of strengthening the rule of law in the member States, and leads to results incompatible with a fair trial as it should be understood in the twenty-first century. At the end of the day, as was brilliantly said by the late US Supreme Court Justice Felix Frankfurter, “the history of liberty has largely been the history of observance of procedural safeguards”⁴.

Apart from these general considerations, I am convinced that in the present case even the application of the restricted *Bykov* criteria would lead to a finding of a violation.

It is true, as the majority admitted, that the disputed evidence did not play a crucial role in the applicant’s conviction – to the extent that it was highly improbable that its exclusion would have changed the outcome of the applicant’s criminal trial. In the light of that, it is even more striking that the Court completely ignored the applicant’s plea in this regard.

The first *Bykov* criterion is clear – the Court should examine “whether the applicant was given the opportunity of challenging the authenticity of

³ Joint partly concurring opinion of Judges Pinto de Albuquerque and Bošnjak in the case of *Dragoș Ioan Rusu v. Romania*, no. 22767/08, 31 October 2017.

⁴ *McNabb v. United States*, 318 U.S. 332 (1943).

the evidence and of opposing its use” (see § 90 of the *Bykov* judgment). “Opportunity to challenge” presupposes not only that a defendant *may challenge* the use of evidence, but that the court *must give* a clear and convincing *reply* as to why an (allegedly) illegally obtained recording should remain part of a body of evidence. Assessing this criterion, in paragraph 72 of the judgment the majority accept that “the courts did not comment on the applicant’s arguments in that respect in much detail”; however, they justify this lack of a reply by the fact that the other two *Bykov* criteria – the role of the impugned evidence and its reliability – did not pose any problem. This approach upsets the whole architecture of the *Bykov* test, in which all three criteria are independent and should be satisfied. To state that “in view of ... the limited role of the relevant evidence in the case against the applicant, the domestic courts’ failure to comment on that specific issue in detail is not sufficient in itself to render the proceedings overall unfair” (see paragraph 74 of the judgment) simply amounts to removing one criterion from the *Bykov* test on the basis that the other two criteria are sufficient (the same position is reflected in paragraph 75 of the judgment).

The further reference to the applicant’s “mass of repetitive and often irrelevant arguments on other points” (see paragraph 73) is even more worrying. First of all, the very fact that the applicant’s appeal was 118 pages long, without any table of contents (see paragraph 25 of the judgment), does not make his behaviour abusive or otherwise inappropriate *vis-à-vis* the domestic judicial authorities. Second, the *Bykov* test does not make the opportunity to challenge the use of disputed evidence conditional on a particular procedural conduct or on the number of other complaints a defendant might want to raise when his fate is at stake, and criminal proceedings – especially lengthy ones such as those in the present case – can be impaired by a number of procedural shortcomings.

Noticeably, the majority referred to another recent judgment of the Court (*Berlizev v. Ukraine*, no. 43571/12, 8 July 2021), in which a relevant complaint was declared manifestly ill-founded in the *opposite circumstances*: contrary to the applicant in the present case, Mr Berlizev had failed to raise his exclusionary plea before the trial court at first and second instance. “Having regard to ... the available procedural safeguards which the applicant failed to use in a consistent manner”, the Court was “unable to conclude that the global fairness of the criminal proceedings against him was compromised” (§ 55). In *Svetina v. Slovenia* (no. 38059/13, 22 May 2018), no violation of the applicant’s fair trial rights due to the use of unlawfully obtained evidence was established, since, *inter alia*, “his arguments were addressed by the domestic courts and dismissed in well-reasoned decisions” (§ 49). By contrast, in *Kobiashvili* (cited above), the Court found a violation of Article 6 § 1 because doubts as to the reliability of the evidence were coupled with “the inadequate judicial scrutiny both

before and during the trial, including the failure of the domestic courts to sufficiently examine the applicant's allegations that the drugs had not belonged to him" (§ 73).

In my judgement, the present case is much closer to *Kobiashvili*, as nothing "well-reasoned" was presented by the domestic judicial authorities to address the applicant's arguable claim about the admission in evidence of the recording of the conversation in O.L.'s home.

To use unlawfully obtained evidence to secure a person's conviction means to multiply unlawfulness. Both the rationales underlying the exclusionary rule for evidence obtained in breach of a Convention right – discouraging the police from unlawful behaviour and judicial integrity – require that if the "poisoned" evidence is not excluded, the trial court is obliged to convincingly explain the reason.

As this was not done in the present case, I voted for a violation of Article 6 § 1 of the Convention on account of the admission of the recording of the applicant's conversation in evidence against him.