



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

FIFTH SECTION

CASE OF ZHOGLO v. UKRAINE

(Application no. 17988/02)

JUDGMENT

STRASBOURG

24 April 2008

FINAL

24/07/2008

This judgment may be subject to editorial revision.

In the case of Zhoglo v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Volodymyr Butkevych,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*.

Having deliberated in private on 25 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 17988/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Ruslan Nikolayevich Zhoglo (“the applicant”), on 25 February 2002.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. The applicant alleged, in particular, that at no stage of the criminal proceedings against him had he had the chance to confront and question the victim.

4. On 11 April 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in the city of Kyiv, Ukraine.

6. On 14 August 2001 the applicant and Mr Kh. had a meeting with an acquaintance of the applicant, Mr S. According to the applicant, they left the city in Mr S.’s car and at some point they had an argument about the recovery of a debt that escalated into a fight. Mr Kh. hit Mr S. with an

empty bottle and then the applicant stabbed the latter with a knife several times. According to the applicant, he had used his pocket knife and had done so solely in self-defence. Mr S. subsequently escaped.

7. The applicant and Mr Kh. took Mr S.'s personal documents, money and car keys, moved his car to the side of the road and left.

8. Mr S. was picked up bleeding on the side of the road by Mr and Mrs Sh., who took him first to a police post and then, escorted by police, to a hospital.

9. On 15 August 2001 the applicant was arrested.

10. On 16 August 2001 a lawyer, chosen by the applicant's mother, was appointed to defend the applicant.

11. On 17 August 2001 the Boryspilskyy District Court of the Kyiv Region decided to keep the applicant in custody.

12. According to the applicant he was beaten by the police and forced to confess. He maintained that he had lodged complaints about this fact with the prosecutor's office, but received no reply.

13. On 5 October 2001 the victim, Mr S., was questioned by the investigator.

14. On 18 October 2001 Mr S.'s lawyer requested that Mr S. not take part in confrontations due to his worsened state of health.

15. On 26 October 2001 the forensic medical examination concluded that the victim had about fifteen knife wounds on his chest and neck, including one deep wound in the right side of the chest, the latter being classified as a grievous bodily injury and the other wounds as light bodily harm.

16. On 30 October 2001 the investigator refused the applicant's request for a confrontation to be organised with Mr S. on the ground that the latter was ill.

17. On 5 December 2001 the Kyiv Regional Court of Appeal held a hearing of the case. Mr S. participated at the beginning of the hearing, but during the break he felt unwell and was given urgent medical treatment. Mr S.'s lawyer requested that the court continue the examination of the case in Mr S.'s absence.

18. On 18 December 2001 the Kyiv Regional Court of Appeal, acting as a court of first instance, sentenced the applicant and Mr Kh. to ten and eight years' imprisonment respectively for attempted murder and robbery with violence. The court noted the version of events as presented by the applicant and Mr Kh. (see paragraphs 6 and 7 above). The court further established that the applicant and Mr Kh. had conspired to kill and rob Mr S. They had prepared the knife and empty glass bottle in advance and used them in the attempted murder. Since there were no other witnesses to the crime, the court based its findings about the way the crime had been committed and about the conspiracy to kill on the statements made by Mr S. during the pre-trial investigation:

“Having passed the village of Bortnichi, Zh. [the applicant] asked him [the victim] to stop the car, and he did so. When the car had stopped he heard Zh. shouting “Stun” and felt a strong blow to the back of his head, and when the glass shattered around he realised that Kh. had hit him on the head with a bottle. At that moment Zh. started hitting him with something sharp in the chest, neck and head, and the pain caused him to lose consciousness for a moment. Shortly afterwards he felt pain in the left of his neck, which brought him back to consciousness to find that Zh. was standing next to the driver’s door and trying to pull him out of the car and was continuing to stab him in the chest with the knife. Kh., who was near Zh. at that moment, was constantly shouting “Finish him off or he will give us up”, repeating these words several times. Zh. and Kh. then pulled him out of the car together and Zh. stabbed him several more times in the chest and neck with the knife. Then he [the victim] pushed both of them, broke free and escaped. Having hidden in the roadside ditch, he heard Kh. asking Zh. whether he, S., was alive, and Zh. reply “I cut all his veins, he will bleed dry”. Then Zh., trying to calm Kh. down, said that he [the victim] would bleed to death like a chicken ...”

The court further noted that:

“From the statements of the victim S., examined by the court, it can also be seen from their criminal actions that the defendants aimed to murder him.

This is confirmed by the fact that the defendants attacked him together, each of them performed certain actions, they discussed together the results that could occur from inflicting the bodily harm on him and they further did not chase him, being sure that he would die ...

The statements of the victim are not refuted by anything, and are sufficiently confirmed by the objective evidence about the circumstances of the crime: the minutes of the examination of the crime scene, the examination of the material evidence, and the conclusions of the forensic medical examination of the bodily injuries inflicted on the victim.”

19. The applicant appealed in cassation. In the appeal, the applicant’s lawyer noted in particular that the statements of Mr S. had been read out at the court hearings and that the court had based its conclusions mainly on those statements, even though Mr S. had refused to take part in a confrontation with the applicant during the pre-trial investigation and the defence had had no opportunity to question him in court.

20. On 20 June 2002 the Supreme Court of Ukraine upheld the decision of the first-instance court. It noted that there had been no violation of the law on criminal procedure that would warrant the quashing of the decision of the appellate court.

II. RELEVANT DOMESTIC LAW

21. Article 263 of the Code of Criminal Procedure provides:

“In the court hearing the criminal defendant shall be entitled to: (...)

7) put questions to other defendants, witnesses, experts, specialists, victims ...”

22. The relevant provisions of the Criminal Code of 1960 (in force at the time when the crime had been committed) provided:

Article 17 – Liability for preparation for a crime and criminal attempt

Preparation for a crime shall mean looking for or adapting means and tools, or the otherwise intentional creation of the conditions for committing an offence.

A criminal attempt shall mean an intentional act which is aimed directly at the commission of a criminal offence where that criminal offence has not been consummated for reasons beyond that person's control.

Preparation for a crime and criminal attempt shall be punishable under the same law that provides liability for that crime.

In imposing a punishment, the court shall take into account the nature and the degree of social danger of the acts committed by the guilty party, when the criminal attempt was made and the reasons for which the offence was not consummated.

Article 93 – Murder under aggravated circumstances

Murder: a) based on mercenary motives; ...i) committed by a group of persons upon prior conspiracy or by an organised group, shall be punishable by imprisonment for a term of eight to fifteen years, or life imprisonment with forfeiture of property in the case provided for by subparagraph a) of this Article.

Article 183 – Armed Robbery

...3) Armed robbery committed with infliction of grievous bodily harm or accompanied by the breaking into of a residence or committed by a particularly dangerous recidivist shall be punishable by imprisonment for a term of six to fifteen years with forfeiture of property.

THE LAW

I. SCOPE OF THE CASE

23. The Government noted that in his application the applicant had not complained about his inability to question a witness, K.

24. The applicant made no comments.

25. The Court confirms that the applicant has never raised the issue referred to by the Government and that it did not take this matter up upon communication of the application to the respondent Government. Therefore, this issue is outside the scope of the present case.

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

26. The applicant complained about the unfairness of the proceedings against him. He submitted in particular that he had not been informed about his right not to testify against himself. Moreover, he had not had legal assistance from the very beginning of the investigation and could not fully trust the lawyer appointed to defend him. Furthermore, he had had no opportunity to question the witnesses, Mr and Mrs Sh., and the victim, Mr S., either during the investigation or at the court hearings. He invoked Article 6 §§ 1 and 3 (c) and (d) of the Convention which provides in its relevant part:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

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

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...”

27. The Government contested those arguments.

A. Admissibility

28. Concerning the applicant's complaints that he had not been informed about his right not to testify against himself and that he could not question the witnesses Mr and Mrs Sh., the Court notes that the applicant did not raise the issues in the domestic proceedings. Accordingly, he did not exhaust domestic remedies in these respects.

29. As regards the applicant's further complaint about a breach of his right to defence, the Court notes that the applicant was represented by a lawyer from the day after the day of his arrest, and that this lawyer had been chosen by the applicant's mother. The Court recalls that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes and the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention

in some other way (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168). Moreover, the applicant did not argue that he was prevented from employing another legal counsel, which he never did (see *Zhelezov v. Russia* (dec.), no. 48040/99, 23 April 2002). Accordingly, this part of the applicant's submissions does not disclose any breach of his rights under Article 6.

30. It follows that these aspects of the case must be rejected in accordance with Articles 35 §§ 1, 3 and 4 of the Convention.

31. However, the Court considers that the applicant's complaint that he was prevented from questioning the witness Mr S. is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

a. Submissions of the parties

32. The applicant doubted the seriousness of the health problems of Mr S. and maintained that the only way to decide the case fairly was to bring together him, his co-accused and the victim.

33. Referring to the Court's case-law the Government maintained that the Court's task under the Convention was to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. They further recalled that all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. This did not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage was not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected (see *Solakov v. The Former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

34. The Government maintained that in the present case the victim, Mr S., had sustained serious psychological damage as a result of the attempt on his life by the applicant and Mr Kh. Therefore, for medical reasons, his participation in the pre-trial investigation had been limited, and excluded the possibility of a confrontation. Nevertheless, the trial court had taken all possible measures to guarantee a fair hearing, and for this reason had summoned Mr S. to the hearings. Contrary to the doctor's advice, Mr S. had attended a hearing, but had had to leave early on account of his health problems and need for treatment. For this reason the victim's representative had lodged a petition in which he asked the court to examine the case in the victim's absence. Besides, the lawyer had submitted to the Court Mr S.'s

written statement, in which Mr S. confirmed the statements he had made during the pre-trial investigation. The applicant, the second accused and their representatives objected to that petition. The court had allowed the petition in an effort to guarantee the fair balance that has to be struck between the competing interests of both the accused on the one side and the victim on the other (see, *mutatis mutandis Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 148). The Government found that position to be well-founded, considering the fact that given that even attending the court hearing caused the victim considerable stress, having him interrogated would have had much more serious consequences for his health. In the Government's opinion, the primary task for the national court in that situation was to protect the victim, Mr S., from situations in which memories of the armed attack could cause him undue stress, and that made it impossible to allow the victim to be interrogated in the courtroom. They also considered necessary to point out that the victim's diagnosis, and the length of time for which he was in such a condition confirmed that his health problems were chronic. For this reason the court concluded that the victim's presence at the subsequent court hearings, which took place during a short period of time, could have had the above-mentioned consequences.

35. In this connection the Government stressed that the applicant did not have a real opportunity to question Mr S. on account of the latter's state of health.

36. Taking the above into account, the first-instance court examined all the statements made by Mr S. during the pre-trial investigation in conjunction with other evidence in the case and found the applicant guilty for the crimes he had been charged with. The court of cassation upheld the judgment of the first-instance court.

b. The Court's assessment

37. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 49).

38. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to

challenge (see, *mutatis mutandis*, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 472, § 76).

39. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov*, cited above, § 57).

40. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court recalls that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). However, provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005). Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002, and *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V). The defendant's conviction may not, in any event, be solely based on the statements of such a witness (see, in particular, *Mayali*, cited above, § 32).

41. The Court admits difficulties that could have been encountered by the domestic authorities due to the victim's state of psychological health and the necessity for him to confront his alleged aggressors (see, *mutatis mutandis*, *Mayali*, cited above). The Court takes into account that the applicant and his co-defendant presented their version of events, which significantly differed from the one given by the victim. They did not deny

the fact of their fight with Mr S. and there was a sufficient body of evidence to confirm that. What the parties disagreed on was the account of the events and the reasons for the fight. Nevertheless, the domestic courts fully relied on the version given by the victim, Mr S., during the pre-trial investigation without hearing evidence from him in person and without providing the applicant with an opportunity to contest his statements. Furthermore, the applicant's conviction in part of the conspiracy to kill, which is, moreover, a more serious crime than the armed robbery of which the applicant was also found guilty, was based to a decisive extent, if not solely, on the version of events provided by the victim. It is not the task of this Court to substitute the domestic courts in assessment of evidence or in proposing a concrete solution for balancing the interests of the parties. It observes, however, that the domestic courts did not make any effort to find a solution for testing the reliability of the victim, for example by doing it in a less invasive manner than direct questioning in the courtroom.

42. The Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

43. The applicant was therefore denied a fair trial. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

44. The applicant further complained under Article 3 of the Convention of ill-treatment in police custody and a lack of medical treatment for injuries sustained as a result.

The relevant provisions of the Articles relied on read as follows:

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

45. The Court has examined these complaints of the applicant and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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.”

47. The applicant informed the Court that he had spent about 5,000 United States dollars (USD) on lawyers’ fees in the domestic proceedings and that his family was spending USD 300 to 400 each month on parcels sent to him in prison. He claimed compensation for health-related damage caused to him and his family by his detention without providing any details to support the claim.

48. The Government maintained that those claims were irrelevant and unsubstantiated.

49. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It cannot speculate on what the outcome of the proceedings would have been had they complied with Article 6 §§ 1 and 3 (d). Consequently, it dismisses the applicant’s claims under this head (see *Lucà*, cited above, § 48, and *Cöeme and Others v. Belgium* [GC], nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII).

50. Moreover, with regard to his claim for non-pecuniary damage, the Court, having regard to the case as a whole, considers that the finding of a violation constitutes in itself sufficient just satisfaction.

51. As to the costs and expenses, the applicant did not make any specific claim, but mentioned a sum he allegedly spent on his legal representation. This assertion, however, is not supported by any documents. Therefore, even assuming that the information provided by the applicant could be considered to be a claim for costs and expenses, the Court reiterates that according to its case-law, an applicant is entitled to reimbursement of his 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 information in its possession and the above criteria, the Court makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applicant’s complaint under Article 6 §§ 1 and 3 of the Convention that he was prevented from questioning the witness Mr S. admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President