



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

FIFTH SECTION

CASE OF YAREMENKO v. UKRAINE

(Application no. 32092/02)

JUDGMENT

STRASBOURG

12 June 2008

FINAL

12/09/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yaremenko v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Volodymyr Butkevych,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*.

Having deliberated in private on 13 November 2007 and on 20 May 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 32092/02) 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 Oleksandr Volodymyrovych Yaremenko (“the applicant”), on 13 August 2002.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs V. Lutkovska and Mr Y. Zaytsev, of the Ministry of Justice.

3. The applicant alleged that he had been subjected to ill-treatment in police custody and that his complaints about this had not been given due consideration. He further complained that he had been deprived of legal assistance of his own choosing during part of the proceedings and that the above violations had resulted in an unfair trial.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and is currently imprisoned in the city of Zhytomyr, Ukraine.

A. Criminal proceedings against the applicant

6. On 27 January 2001 the applicant was arrested on suspicion of murdering a taxi driver, M., and of several other crimes committed in 2001 (“the 2001 crimes”) and was placed in a cell at the Kyiv Kharkivsky District Police Department.

7. The same day the applicant requested Mr O. Kh. as his lawyer in the case. This was allowed and the lawyer attended the initial questioning of the applicant.

8. On 28 January 2001 the applicant was questioned in the presence of his lawyer by Mr G., an investigating prosecutor at the Kyiv Kharkivsky District Prosecutor’s Office (“the Kharkivsky Prosecutor’s Office”).

9. On 1 February 2001 Mr M., a police officer at the Kyiv Kharkivsky District Police Department (“the police department”), who was in charge of investigating the death of a taxi driver, Kh., in the summer of 1998, questioned the applicant with a view to establishing his possible involvement in that crime. The crime was classified as infliction of grievous bodily harm causing death, for which legal representation of a suspect was not obligatory. The applicant signed a waiver of his right to counsel. The applicant was then questioned and confessed that he and Mr S. had murdered Kh. in the summer of 1998 (“the 1998 crime”). On the same day that criminal case was transferred to the Kharkivsky Prosecutor’s Office on the ground that the applicant’s actions could be classified as murder and the investigation of such a crime was within the competence of the prosecutor’s office.

10. On 2 February 2001 the criminal cases in respect of the 1998 and 2001 crimes were joined.

11. On the same day, the applicant participated in a videotaped on-site reconstruction of the 2001 crimes. According to the minutes of this investigative action, which was attended by the applicant, his lawyer, two attesting witnesses, investigating prosecutor G. and police officer M., who had questioned the applicant on the previous day, the applicant made statements concerning the circumstances of the 2001 crimes, but denied his involvement in the 1998 crime.

12. On 2 February 2001, after the reconstruction had been conducted, the applicant signed a waiver in respect of his counsel, O. Kh., on the

ground that the latter had prevented him from confessing to the 1998 crime. According to the applicant, while the waiver bore the date of 2 February 2001 it had actually been signed on a later date under coercion from the police officers and the case investigator.

13. Following the reconstruction of 2 February 2001, the applicant's lawyer, O. Kh., sought a meeting with the applicant. However, his oral requests, as well as written requests of 6 and 7 February, were rejected by investigating prosecutor G.

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

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

16. On 9 February 2001 O. Kh. was informed that he had been removed from the case and was furnished with the investigator's decision to that effect dated 2 February 2001. The decision stated, *inter alia*, that the applicant had confessed to the 1998 crime but had later asserted his innocence on the advice of O. Kh. The investigator had therefore decided to remove O. Kh. from the case on the basis of Articles 61 and 130 of the Code of Criminal Procedure.

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

18. By letter of 10 February 2001, prosecutor V. informed the lawyer O. Kh. that his requests of 2, 6 and 7 February could not be met since he had been removed from the applicant's case.

19. In a complaint lodged on 12 February 2001 (see paragraph 36 below), the applicant's wife raised the issue, *inter alia*, of the allegedly unlawful removal of O. Kh. from the case against her husband.

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

21. In his letter of 4 March 2001 to the General Prosecutor's Office (GPO) (see paragraph 39 below), the applicant complained that he had signed the waiver in respect of O. Kh. under pressure from the police officers and the case investigator.

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

23. On 10 March 2001 the applicant submitted a request to investigating prosecutor G., asking that the lawyer M. be replaced by O. Kh., his first lawyer in the case, as his defence counsel.

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

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

26. On 1 June 2001 investigating prosecutor G. replied that the cross-examination would be conducted after additional questioning of S., in case any discrepancies emerged between the testimonies of the applicant and Mr S.

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

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

29. On the same date investigating prosecutor G. issued a new indictment, which was served on the applicant on the following day.

30. On 20 November 2001 the Kyiv Appellate Court, acting as a first-instance court, convicted the applicant and S. of the 1998 and 2001 crimes and sentenced them to life imprisonment. Three other individuals were sentenced to between three and six years' imprisonment. The court did not mention the fact of the lawyer's removal from the case in its judgment. The court also disregarded the denials by the applicant and S. of their involvement in the 1998 crime on the ground that their confessions during pre-trial investigation were detailed and consistent.

31. On 18 April 2002 the Supreme Court of Ukraine upheld the judgment of the appellate court. In reply to the applicant's complaint about a violation of his right to a defence, the Supreme Court in its judgment of 18 April 2002 stated that it found no evidence of a violation of the right to a

defence or of any other serious violation of criminal procedural law that could provide a basis for quashing the judgment of the appellate court.

B. Allegations of ill-treatment and investigation into them

32. On arrival at the Kharkivsky police station (according to the Government, on 30 January 2001) the applicant was examined by a paramedic who found him to be in good health.

33. According to the applicant, on 1 February 2001 he was beaten with truncheons on wrists and shoulders by officers from the police department, who forced him to sign a waiver of his right to counsel and to confess to the 1998 crime, which he had not committed and about which he knew nothing.

34. On 2 February 2001 the applicant informed his lawyer O. Kh. about the events of 1 February 2001. The lawyer advised the applicant to assert his innocence and to complain about the ill-treatment. The lawyer himself officially asked the authorities to conduct a medical examination of the applicant. This request was handed to the investigating prosecutor, G., who acknowledged its receipt by signing a copy of the request. On an unknown date prosecutor G. replied to O. Kh., stating that his request could not be granted since he had been removed from the case (see paragraph 16 above).

35. At the end of the interview on 9 February 2001 (see paragraph 17 above) investigating prosecutor G. asked the applicant whether he had any bodily injuries; the applicant answered that at the moment he had none.

36. On 12 February 2001 the applicant's wife, Mrs S., complained to the Kyiv City Prosecutor's Office ("the Kyiv Prosecutor's Office") that investigating prosecutor G. of the Kharkivsky Prosecutor's Office and (unnamed) police officers of the police department had ill-treated the applicant in order to extract confessions with regard to the 1998 crime. She further wrote that, during the investigative action of 2 February 2001, the applicant had retracted his confession and that the lawyer O. Kh. had requested a medical examination of the applicant. In addition, she complained that investigating prosecutor G. had also been threatening her. On 14 February 2001 the Kyiv Prosecutor's Office transferred the request to the Kharkivsky Prosecutor's Office.

37. Meanwhile, on 13 February 2001 the applicant was transferred to a pre-trial detention centre. On arrival the applicant was examined by a doctor and was found to be in good health. The applicant made no complaints of ill-treatment.

38. On 28 February 2001 the head of the Kharkivsky Prosecutor's Office, prosecutor V., issued a decision refusing to institute criminal proceedings in respect of the allegations that bodily harm had been inflicted on the applicant. The prosecutor noted that the applicant had denied any physical violence against him and that no evidence of unlawful actions by the police officers had been found. However, he did not refer to the

applicant's wife's allegations concerning his subordinate, investigating prosecutor G. That decision was sent to Mrs S. on 2 March 2001 with a cover letter saying that the applicant had denied any violence towards him.

39. On 4 March 2001 the applicant wrote a complaint to the Prosecutor General of Ukraine. In his complaint the applicant stated that on 28 January 2001 police officers had forced him to confess to the 1998 crime, which he had not committed, and that on 2 February 2001 he had been forced to sign a waiver in respect of his lawyer O. Kh., and had been warned by investigating prosecutor G. and by the officers from the police department that he would have problems if he refused to cooperate. The applicant asked the GPO to ensure that his case was given objective consideration and to reinstate O. Kh. as his defence counsel. On 23 March 2001 the Kyiv Prosecutor's Office forwarded this complaint to the Kharkivsky Prosecutor's Office. On 26 March 2001 the complaint was transferred to investigating prosecutor G. for examination in the context of the investigation into the criminal case against the applicant.

40. According to the Government, the applicant did not provide the names of the officers from the police department who had allegedly ill-treated him until he was questioned on 8 June 2001.

41. On 21, 23 and 24 June 2001 investigating prosecutor G. questioned three police officers who had been named by the applicant. All three denied any coercion or other unlawful actions on their part.

42. In its judgment of 20 November 2001, the Kyiv Court of Appeal stated that the applicant's retraction of his confessions and his allegations of ill-treatment had been examined and found to be groundless. The court based its conclusion on the fact that the applicant had not complained of ill-treatment during the investigation, that the first complaint about ill-treatment had been lodged by the applicant on 4 March 2001, more than two months after his arrest, and that the police officers and the investigating prosecutor had denied the applicant's allegations of ill-treatment. The court also noted that the applicant had been informed of his right to have a lawyer.

43. The applicant raised the issue of coercion in his appeal to the Supreme Court.

44. In its judgment of 18 April 2002 the Supreme Court stated that it found no evidence that the applicant had been ill-treated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine

45. The relevant provisions of the Constitution read as follows:

Article 28

“Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity...”

Article 59

“Everyone has the right to legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose the defender of his or her rights.

In Ukraine, the advocacy acts to ensure the right to a defence against accusation, and to provide legal assistance in deciding cases in courts and other state bodies.”

Article 63

“A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law.

A suspect, an accused or a defendant has the right to a defence...”

B. Code of Criminal Procedure (“the CCP”) (before 29 June 2001)

46. Article 4 of the Code provides that the court, prosecutor or investigator shall, within their competencies, institute criminal proceedings in every case where signs of a crime have been discovered and take all necessary measures provided by law to establish the commission of the crime and identify and punish the offenders.

47. Article 22 of the Code prohibits extracting confessions from an accused or any other participant in the proceedings through violence, threats or other illegal means.

48. Article 28 of the Code provides that any person who sustains material damage from a crime shall be entitled to lodge a civil claim against the accused person or persons who bear material liability for the actions of the accused.

49. Article 46 of the CCP as worded at the material time provided that a suspect, accused or defendant was entitled to waive his or her right to defence counsel. Such a waiver was permissible only on the initiative of the suspect, accused or defendant himself or herself.

A waiver was not permitted where the person concerned had not reached the age of majority (18 years), had disabilities that prevented him or her from defending his or her own interests, or had no command of the language of the proceedings.

A waiver was also not permitted if the possible penalty was capital punishment (later, a life sentence) or if the proceedings concerned coercive medical measures.

50. The last paragraph of Article 48 of the CCP provided that the investigator, the prosecutor or the court could not issue a ruling concerning the legal position of the lawyer in the case.

51. Article 61 of the CCP as worded at the material time provided that an individual could not act as defence counsel if he or she had participated in the same criminal proceedings in another capacity, or was a relative of the judge, civil party or victim, or was providing legal assistance to another person whose interests conflicted with those of the defendant, or had a relative who was participating in the same criminal proceedings in his or her official capacity.

In such cases the individual was to refuse the assignment or could be removed from the case by decision of the investigator, prosecutor or judge.

52. Article 130 provided that the investigator could issue procedural rulings in the case.

C. Resolution of 25 March 1988 by the Plenary of the Supreme Court of Ukraine on the application by the Ukrainian courts of the criminal procedural legislation regulating the remittal of cases for further investigation, with further amendments (repealed on 11 February 2005)

53. The relevant part of the Resolution, in the wording of 4 June 1993, reads as follows:

“7. ...Particular importance should be attached to verification of claims alleging illegal methods of investigation and other violations of legality that could lead to self-incrimination or the making of other untrue statements.

If in the court hearing it is established that such allegations by the accused are not groundless and the court is unable to verify them, the case shall be returned for additional investigation on the basis of bias, incompleteness or lack of objectivity in the preliminary or pre-trial investigation, with an indication that the claims should be examined by the prosecutor.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. Alleged ill-treatment in police custody

54. The applicant complained that he had been ill-treated in custody. He relied on Article 3 of the Convention, which provides:

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

1. The parties' submissions

55. The Government maintained that there was no evidence in support of the allegations of ill-treatment. The applicant had twice been examined by a doctor during the period in question and participated in video-recorded investigative actions together with witnesses and the lawyer. He had failed to raise this complaint immediately after the alleged events and had not done so until a month later. He had also denied any ill-treatment when asked during questioning on 9 February 2001.

56. The applicant disagreed. He maintained that only a medical examination immediately after the alleged ill-treatment could have proved his allegations. The applicant's lawyer O. Kh. had made such a request on 2 February 2001, but it had been refused on the ground that the lawyer had been removed from the case.

2. The Court's assessment

57. The Court has observed on many occasions that Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such prohibits in absolute terms torture or inhuman or degrading treatment or punishment (see, for example, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 62, and *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 81). The Court further indicates, as it has held on many occasions, that the authorities have an obligation to protect the physical integrity of persons in detention and that in assessing evidence it has generally applied the standard of proof “beyond reasonable doubt” (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons

within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention.

58. The Court notes that the applicant alleged that he had been subjected to ill-treatment while in police custody in the Kharkivsky District Police Department. In support of these allegations, the applicant submitted that the request of his lawyer for him to undergo a medical examination had not been granted and he had been forced to waive his right to the lawyer of his choice and obliged to incriminate himself.

59. The Court notes that no special medical examination was conducted in respect of the ill-treatment allegations made by the applicant and his lawyer. There is no evidence that the applicant was actually ill-treated. The Court considers that the circumstances surrounding the applicant's detention in the Kharkivsky District Police Department, in particular his abrupt retraction of the confession immediately after arrival of his lawyer, evoke some suspicion of physical or psychological pressure having been put on him at the beginning of February, even though the medical examination of 13 February did not establish any signs of bodily harm. This medical examination, however, unlike in the *Altay* case (see *Altay v. Turkey*, no. 22279/93, §§ 13-14, 22 May 2001), was not specifically designed to verify the allegations of ill-treatment. It was a routine examination performed on arrival in a penitentiary establishment. Moreover, it was conducted twelve days after the alleged ill-treatment took place. In any event, the Court considers that on the basis of the evidence, it could not be established to the requisite standard of proof that the applicant was ill-treated while in police custody in breach of Article 3 of the Convention.

60. The Court accordingly finds no violation of Article 3 of the Convention in this regard.

B. Adequacy of the investigation

1. The parties' submissions

61. The applicant further complained under Article 3 of the Convention that the State authorities had failed to undertake a thorough and effective investigation into the complaints about his ill-treatment.

62. The Government raised a preliminary objection as to non-exhaustion of domestic remedies concerning that complaint under Article 3 of the Convention. They maintained that the applicant and his representative had failed to challenge the decision of the prosecutor refusing to institute criminal proceedings within the seven days provided for by law and that, therefore, the applicant had not exhausted the remedies available to him under domestic law as required by Article 35 § 1 of the Convention. The Government also submitted that the applicant's first complaint had been too vague and that he had not given the names of the police officers who had

allegedly ill-treated him until June 2001, more than four months after the alleged events had taken place. Had the applicant given the names earlier, the relevant authorities would have been in a better position to investigate the allegations. The Government maintained that the investigation conducted following the applicant's complaints had complied with the requirements of Article 3 of the Convention.

63. The applicant maintained that he had done what he could in the circumstances of the case to use the available remedies. Any shortcomings in his exhaustion of the domestic remedies could be explained by the deprivation of real legal assistance and other intimidation by his alleged offenders. On 2 February 2001 the applicant's lawyer O. Kh. had requested a medical examination of the applicant on account of his allegations of ill-treatment, but this request had remained unanswered. He argued that following the removal of his lawyer and further intimidation by the investigative authorities he was afraid to complain about the ill-treatment and did so only after he felt he was in relative safety. When he did complain about ill-treatment in March 2001 the authorities had conducted an investigation in the framework of the criminal proceedings against him and therefore he had raised his complaints of ill-treatment before the trial court, which was competent to act on those complaints. That practice was recommended by the Resolution of 25 March 1988 issued by the Plenary of the Supreme Court of Ukraine (see paragraph 53 above).

2. *The Court's assessment*

64. The Court reiterates that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the States' general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §§ 208-13, 24 February 2005).

65. The Court notes that in the instant case, following the applicant's complaints to the General Prosecutor's Office at the beginning of March 2001 (see paragraph 39 above), the investigation into his allegations was conducted in June 2001, when the alleged offenders were questioned. However, no separate procedural decision was taken and no appeal was

possible. Hence, when the prosecutor decided to conduct an investigation into the applicant's allegations in the framework of the criminal proceedings against him (see paragraph 39 above), the applicant had no other choice than to raise his complaints about ill-treatment before the trial court.

66. In the Court's opinion, it could therefore be said that the applicant himself took sufficient steps to bring his complaints to the attention of the relevant domestic authorities. Furthermore, they were supplemented by the steps taken by his wife and the lawyer O. Kh. (see paragraphs 34 and 36 above).

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

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

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

70. In the Court's opinion, these facts provide sufficient basis for it to conclude that the State authorities fell short of their obligation to conduct an effective and independent investigation into the allegations of ill-treatment as required by Article 3 of the Convention. Accordingly, it dismisses the Government's preliminary objection and finds that there has been a violation of Article 3 of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

71. The applicant also complained that he had been forced to incriminate himself and that, therefore, the trial against him had been unfair. He relied on Article 6 § 1 of the Convention, which in so far as relevant provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. The parties' submissions

72. The Government maintained that the Ukrainian legislation provided for the rights of the suspect to keep silent and not to incriminate himself. They further noted that the applicant had been informed of these rights but had waived them and had voluntarily agreed to confess to the crimes of which he was suspected. They reiterated that he had raised the issue of coercion and claimed his innocence only at a later stage and that his allegations of ill-treatment had been unfounded. Therefore, the Government could not be responsible for the applicant's free choice to confess.

73. The applicant disagreed. He said that as far back as 2 February 2001 he had denied allegations of his involvement in the murder of 1998 and had confessed to the 1998 crime and testified about it only briefly and under coercion from the investigators.

B. The Court's assessment

1. General principles

74. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law

(see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, Reports 1998-IV, p. 1462, § 34).

75. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

76. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35, 37, and *Allan*, cited above, § 43).

77. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court recalls that these are generally recognised international standards which lie at the heart of the notion of a fair trial under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, Reports 1996-VI, p. 2064, § 68; *Heaney and McGuinness*, cited above, § 40; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan*, cited above, § 44).

2. Application of those principles to the present case

78. Notwithstanding the Government’s arguments that the applicant’s right to silence was protected in domestic law, the Court notes that the

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

79. Moreover, the Court finds it remarkable that the applicant and Mr S, over two years later, gave very detailed testimonies which according to investigator contained no discrepancies or inconsistencies. This degree of consistency between the testimonies of the applicant and his co-accused raise suspicions that their accounts had been carefully coordinated. The domestic courts however considered such detailed testimonies as undeniable proof of their veracity and made them the basis for the applicant's conviction for the 1998 crime despite the fact that his testimony had been given in the absence of a lawyer, had been retracted immediately after the applicant was granted access to the lawyer of his choice, and had not been supported by other materials. In those circumstances, there are serious reasons to suggest that the statement signed by the applicant was obtained in defiance of the applicant's will.

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

81. Accordingly, in this respect there has been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 3 (c) OF THE CONVENTION

82. The applicant complained that he had been deprived of legal assistance of his own choosing during a crucial part of the proceedings, in violation of Article 6 § 3 (c) of the Convention, which provides:

“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. The parties' submissions

83. The Government maintained that all the lawyers in the applicant's case had been appointed and removed on the basis of the applicant's

requests. They noted that the lawyer O. Kh. had been admitted back to the case at the applicant's request. They underlined that the applicant's initial complaints about a violation of his right to defence had been unclear and had been properly detailed only after a significant lapse of time.

84. The applicant maintained that his lawyer O. Kh. had been removed from the case unlawfully. He further maintained that two other lawyers who represented him had been only notionally involved, since they had seen the applicant just once each and only during questioning. He further complained that he had signed the requests for removal and appointment of lawyers under coercion. This was also borne out by the fact that he had requested that his lawyer O. Kh. be put back on the case as soon as he had been able.

B. The Court's assessment

85. The Court reiterates that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). Furthermore, Article 6 may also be relevant before a case is sent for trial and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36, and *Öcalan v. Turkey* [GC], no. 46221/99, § 131, ECHR 2005-...). The manner in which Article 6 §§ 1 and 3 (c) are applied during the investigation depends on the special features of the proceedings and the facts of the case. Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, pp. 54-55, § 63, and *Öcalan*, cited above, § 131).

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

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

legal representation of a suspect. Immediately after the confession was obtained, the crime was reclassified as, and the applicant was charged with, murder.

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

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

90. The Court notes that the fact that two other lawyers who represented the applicant saw him only once each, during questioning, and never before the questioning took place seems to indicate the notional nature of their services. It considers that the manner of and reasoning for the lawyer's removal from the case, as well as the alleged lack of legal grounds for it, raise serious questions as to the fairness of the proceedings in their entirety. The Court also notes that the lawyer was allowed back onto the case in June 2001 without any indication that the alleged grounds for his removal had ceased to exist.

91. There has therefore been a violation of Article 6 § 3 (c) of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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.”

93. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government’s preliminary objection;
2. *Holds* that there has been no violation of Article 3 of the Convention on account of the alleged ill-treatment;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the failure of the authorities to conduct an effective investigation into the applicant’s allegations that he was ill-treated by the police and prosecutors;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention;

Done in English, and notified in writing on 12 June 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President