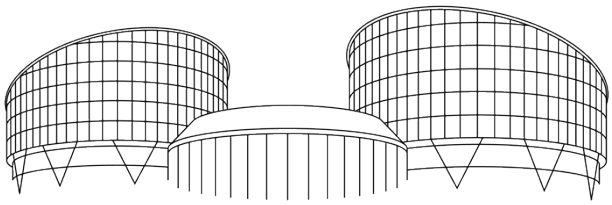

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ZHUK v. UKRAINE

(Application no. 45783/05)

JUDGMENT

STRASBOURG

21 October 2010

FINAL

11/04/2011

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

In the case of Zhuk v. Ukraine**,**

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

Peer Lorenzen, *President,*
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, Section Registrar,

Having deliberated in private on 28 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 45783/05) 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 Viktor Yevgenyevich Zhuk ("the applicant"), on 1 December 2005.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that his conviction had been unlawful under Article 6 § 1 of the Convention because, *inter alia*, the Supreme Court of Ukraine had examined his appeal on points of law in his absence, in breach of the principle of equality of arms.

4. On 1 September 2009 the President of the Fifth Section decided to give notice of the above complaint to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Kyiv.

A. Criminal proceedings against the applicant

6. According to the applicant, on 16 September 2001 he was assaulted by officers of the Anti-Drug Police Unit at the entrance to his apartment. When he lost consciousness the police allegedly planted evidence on him, putting a wrap of heroin into his pocket. Later, the police conducted a search of his apartment. As a result, some more wraps of drugs (allegedly also planted), a gun and chemical equipment were discovered. The applicant alleges that certain property items (for example, money and jewellery) were unlawfully taken during this search.

7. After the search the applicant was taken to the police station, where he remained until 25 September 2001 when the Shevchenkivsky District Court of Kyiv ("the District Court") remanded him in custody. The applicant further contends that he had no means (namely that he lacked stationery) to appeal against the court detention order and that subsequently, although he sent an appeal, it was not examined and allegedly was lost.

8. The applicant was provided with a lawyer through the legal aid scheme on 21 September 2001 and the latter's performance was allegedly poor and of little help to his defence. In particular, notwithstanding the applicant's requests that the lawyer visit him more frequently and consult on his case, that lawyer allegedly visited him only on 24 September and 12 December 2001; furthermore, the lawyer allegedly did not attend the court hearings on 25 September and 19 November 2001 when the court remanded the applicant in custody. During the trial, the applicant was legally represented but it is not clear whether this representation was undertaken by another lawyer or by the same lawyer that the applicant claims was deficient.

9. According to the applicant, he requested on several occasions that the trial court summon K., his partner, but the court rejected his requests.

10. On 18 November 2003 the District Court found the applicant guilty of drug dealing and sentenced him to six years' imprisonment. In doing so, the court relied on evidence seized during the search on 16 September 2001, forensic examinations and witnesses' testimonies.

11. The applicant appealed, challenging, *inter alia*, the lawfulness of the search and the evidence produced against him as a result of it. On 11 June 2004, the Kyiv City Court of Appeal allowed the applicant's appeal in part and reduced his sentence to four years. It found that the search was lawful as the applicant had consented to it and that the conviction was not based solely on evidence produced as a result of the search.

12. The applicant, who was no longer legally represented, appealed to the Supreme Court of Ukraine, challenging his conviction on points of law. He also expressed his wish to be present at the hearing.

13. On 5 April 2005, in the presence of the public prosecutor but in the absence of the applicant, a panel of three judges of the Supreme Court of

Ukraine considered the appeal on points of law submitted by the applicant. Having heard the prosecutor, who maintained that the appeal was unsubstantiated, the panel found that there were no grounds for the cassation review of the case and dismissed the applicant's appeal. In doing so it nevertheless examined the case on the merits. According to the applicant, he was not informed of the date of the hearing at the Supreme Court of Ukraine. He was notified of the Supreme Court's decision on 2 June 2005.

B. Proceedings against the police

14. On 29 September 2001 the applicant complained to the local prosecutor about the actions of the police on 16 September 2001.

15. On 29 October 2001 the prosecutor refused to institute criminal proceedings because of the lack of evidence that a crime had been committed. In particular, he found that the applicant had attempted to flee and had resisted the policemen.

16. According to the applicant, he challenged this decision before the District Court, which upheld the initial decision on 26 September 2003. The applicant made a further appeal but, according to him, the court found that the latter decision was not subject to appeal. He also raised this issue during his trial and in appeals against his conviction. In a judgment of 18 November 2003 the District Court upheld the conclusions of the impugned prosecutor's decision; the higher courts did not expressly address this issue.

C. Proceedings concerning the seized property items

17. In 2003 the applicant instituted civil proceedings in the District Court seeking return of his property that was allegedly subject to unlawful seizure. By a decision of 23 May 2003, the court rejected the claim as a result of procedural shortcomings (for instance, failure to indicate the defendant, to pay the court fee and so on). It appears that the applicant did not appeal against this decision.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of the Ukraine Code of Criminal Procedure ("the Code") (as worded at the material time) read as follows:

Article 383

Court decisions that may be reviewed in cassation proceedings

"The following decisions may be reviewed in cassation proceedings:

1) judgments, rulings and resolutions of an appellate court rendered by it as a court of first instance; and

2) judgments and resolutions of an appellate court rendered by it in appeal proceedings.

Judgments and resolutions of district (city) courts, inter-district (circuit) courts and garrison military courts may be also reviewed in cassation proceedings, as well as rulings of appellate courts rendered with regard to those judgments and resolutions."

Article 394

Examination of a case by a court of cassation

"Cassation appeals and petitions against court decisions referred to in part one of Article 383 of this Code shall be examined and notice of that examination served on the prosecutor and the persons referred to in Article 384 of this Code.

Cassation appeals and petitions against court decisions referred to in part two of Article 383 of this Code shall be examined within thirty days of receipt by the court of cassation, which shall be composed of three judges with the participation of a prosecutor. The court shall either assign the case for examination, and must notify the persons referred to in Article 384 of this Code accordingly, or dismiss it.

A case assigned for examination, with notice served on the prosecutor and the persons referred to in Article 384 of this Code, shall be examined by the court of cassation, which shall be composed of three judges with the participation of a prosecutor, in accordance with the procedure provided for by parts one, two and three of Article 362 of this Code.

The deliberations of the court of cassation's judges shall be conducted in accordance with the requirements provided for by Articles 322 and 325 of this Code."

19. Other provisions of the Code concerning examination of a case by a court of cassation are set out in *Arkhipov v. Ukraine* ((dec.), no. 25660/02, 18 May 2004).

20. On 12 January 2006 Article 394 § 2 of the Code was amended to remove the prosecutor from involvement in preliminary hearings before a court of cassation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (EQUALITY OF ARMS)

21. The applicant complained that the Supreme Court of Ukraine had examined his appeal on points of law in his absence, in breach of the principle of equality of arms. He relied on Article 6 § 1 of the Convention which reads as follows:

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

A. Admissibility

22. The Court notes that this complaint 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

23. The Government pleaded that there had been no violation of Article 6 § 1 of the Convention. In particular, they contended that the hearing at issue had been a preliminary one, with the aim of deciding whether the appeal on points of law was sufficiently well-founded as to be arguable and that Article 394 § 2 of the Code did not provide for such a hearing in an appellant's and/or his or her lawyer's presence. In this regard, they drew an analogy between the present case and *Stepenska v. Ukraine* ((dec.), no. 24079/02, 12 June 2006) where the Supreme Court of Ukraine, sitting in camera, rejected the applicant's request for leave to appeal in cassation, having found that there were no grounds for referring the case to the Civil Chamber of the Supreme Court. In the *Stepenska* case, the applicant's complaint about the lack of a fair hearing had been dismissed and the Government invited the Court to do so in the present case.

24. The applicant disagreed. He argued, in particular, that, unlike the prosecutor, he had been unable to make oral submissions before the Supreme Court. In his view, the analogy drawn by the Government was not appropriate because the proceedings in *Stepenska v. Ukraine* had been of a civil nature whereas in his case the proceedings had been criminal.

25. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do

not place him at a substantial disadvantage *vis-à-vis* his opponent. This implies, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see *Kress v. France* [GC], no. 39594/98, §§ 72 and 74, ECHR 2001-VI).

26. Moreover, Article 6 of the Convention, taken as a whole, guarantees that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the hearing concerning the determination of criminal charges against him. This right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (see *Sejdovic v. Italy* [GC], no. 56581/00, § 81, ECHR 2006-II with further references).

27. In this context, importance is to be attached to, *inter alia*, the appearance of the fair administration of justice and to the increased sensitivity of the public to the fair administration of justice (see *Borger v. Belgium*, 30 October 1991, § 24 *in fine*, Series A no. 214-B). Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see *A.B. v. Slovakia*, no. 41784/98, § 55, 4 March 2003).

28. In addition, the Court reiterates that a State which institutes courts of appeal or cassation is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see, for example, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).

29. Turning to the facts of the present case, the Court observes that the proceedings against the applicant were of a criminal nature. The applicant, who, had been convicted of drug-dealing and sentenced to four years' imprisonment (taking the reduction of sentence on appeal into account – see paragraph 11 above) and who was no longer assisted by a lawyer, challenged his sentence on points of law. Hence, given that his liberty was at stake, the Court considers that the examination of the applicant's appeal on points of law was of considerable importance for him.

30. The Court notes that the role of the prosecutor in the instant case was primarily that of presenting the case before the domestic courts on charges brought against the applicant and acting as the applicant's adversary (cf. *Borgers v. Belgium*, cited above, § 25, and *Kress v. France*, cited above, §§ 67-68, in which the relevant State counsels were variously argued not to be parties to the proceedings or the adversaries of any party or that their role was limited to that of an *amicus curiae*). The prosecutor's role, as defined above, is not disputed by the respondent State.

31. The Court further observes that, in compliance with the domestic law (namely Article 394 § 2 of the Code – see paragraph 18 above), the

Supreme Court held a preliminary hearing which aimed to decide whether the appeal before it was sufficiently well-founded for its examination in a public hearing in the presence of all necessary parties. Thus, the applicant's chance to be present and, accordingly, to make oral submissions at the hearing depended on whether his appeal passed the sifting-out procedure.

32. The Court has held on several occasions that proceedings concerning leave to appeal and proceedings solely involving questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, even though the appellant was not given an opportunity of being heard in person by the appeal court or court of cassation, provided that a public hearing was held at first instance and that the higher courts did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see, for example, *Hermi v. Italy* [GC], no. 18114/02, § 61, ECHR 2006-XII with further references).

33. As the competence of the Supreme Court in the present case was limited to questions of law, the lack of a public hearing before it was not in breach of Article 6 § 1 of the Convention *per se* (see, for example, *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74 and *Bulut v. Austria*, 22 February 1996, § 42, *Reports of Judgments and Decisions* 1996-II).

34. This is true in so far as the pertinent court – as in the above-mentioned cases – held a hearing in camera, which is not the case here. By virtue of Article 394 § 2 of the Code, the prosecutor had the advantage of being present at that preliminary hearing, unlike any other party, and to make oral submissions to the three judge panel, such submissions being intended to influence the latter's opinion. These submissions in fact were directed at having the applicant's appeal dismissed and his conviction upheld. The Court considers that procedural fairness required that the applicant should also have been given an opportunity to make oral submissions in reply. The panel, having deliberated, dismissed the applicant's appeal on points of law at the preliminary hearing, thus dispensing with a public hearing to which the applicant would have been summoned and been able to take part. It is also noted that the applicant had requested that the hearing be held in his presence (see paragraph 12 above).

35. In the light of these considerations, the Court finds that the procedure before the Supreme Court of Ukraine did not enable the applicant to participate in the proceedings in conformity with the principle of equality of arms.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

36. The applicant also complained under Article 3 of the Convention that he had been beaten by the police on 16 September 2001. The applicant further complained under the same provision that he had been detained until 13 July 2004 in poor conditions.

37. The applicant complained under Article 5 §§ 1 (c) and 3 of the Convention that his arrest and detention from 16 to 25 September 2001 had been unlawful and that he had not been brought promptly before a judge. He further complained under Article 5 § 4 of the Convention that he could not appeal against the court detention order.

38. Referring to Article 6 §§ 1 and 2 of the Convention, the applicant submitted that the length of the proceedings against him had been excessive, that his conviction had been unlawful (in particular, because it had been based on unlawfully obtained evidence) and that the domestic authorities had lacked impartiality. Further, he complained under Article 6 § 3 (c) of the Convention of poor performance on the part of his lawyer appointed through the legal aid scheme. He added that the trial court had rejected his requests for K. to be summoned, in breach of Article 6 § 3 (d) of the Convention.

39. The applicant complained under Article 8 of the Convention that the search of his apartment had been unlawful.

40. Lastly, he complained under Article 1 of Protocol No. 1 that certain property items (such as money and jewellery) had been illegally taken during the search.

41. In reply to the Government's observations the applicant also raised a complaint under Article 13 of the Convention on account of his conviction.

42. Having carefully considered the applicant's submissions in the light of all the material in its possession, the Court finds that, 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.

43. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLES 41 OF THE CONVENTION

44. 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

45. The applicant claimed an amount within the range of 200,000-240,000 euros in respect of pecuniary and non-pecuniary damage.

46. The Government contested these amounts.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As to non-pecuniary damage, it considers that, in view of the violation of Article 6 § 1, the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation (cf. *Matsyuk v. Ukraine*, no. 1751/03, § 36, 10 December 2009). Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 1,200 under this head.

B. Costs and expenses

48. The applicant did not submit any claim under this head. The Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 of the Convention concerning infringement of the principle of equality of arms admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national 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;

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

Done in English, and notified in writing on 21 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Peer Lorenzen President