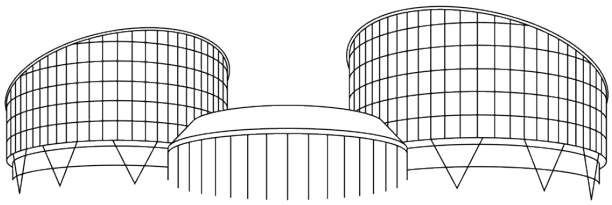

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ZHUPNIK v. UKRAINE

(Application no. 20792/05)

JUDGMENT

STRASBOURG

9 December 2010

FINAL

09/03/2011

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

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

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

Peer Lorenzen, *President,*
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 16 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 20792/05) 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 Mikhail Petrovich Zhupnik ("the applicant"), on 20 May 2005.

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

3. The applicant alleged, in particular, that the length of criminal proceedings against him was unreasonable and that he had been deprived of the possibility to properly prepare his defence on account of the trial court's legal re-characterisation of the charge against him.

4. On 23 November 2009 the President of the Fifth Section decided to give notice of the application 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 1944 and lives in Odessa.

6. In 1993 the applicant was responsible for the privatisation of a State company "A." by way of a buyout of A. by its employees.

7. On 26 August 1995 criminal proceedings were initiated against the applicant on suspicion of having defrauded A.'s employees in the privatisation process.

8. On several occasions between September 1995 and March 1999 the proceedings were suspended (in particular, between 9 July 1997 and 3 April 1997; 25 March and 1 September 1999; and 5 September and 1 December 1999).

9. On 26 January 1999 the applicant was placed under an obligation not to abscond.

10. On 15 December 1999, in response to a complaint by the applicant's advocate, the Odessa Prosecutors' Office acknowledged that the proceedings had suffered unnecessary delays and inactivity on the part of the investigative authorities and informed him that disciplinary measures had been taken against the investigator in charge.

11. In April 2000 the Malinovskiy District Prosecutors' Office of Odessa approved the final indictment and committed the applicant for trial. According to the indictment, the applicant was accused of fraud and an attempt to misappropriate State property by way of abuse of his position (Articles 17, 84 § 2 and 172 § 1 of the Criminal Code in force at the material time).

12. Between September 2000 and October 2003 the Primorskiy District Court of Odessa scheduled some thirty-three hearings in the applicant's case. Twenty-four of these hearings were adjourned: nine on account of the absence of the prosecution or at the prosecution's requests; five on account of the absence of one of the injured parties; six on account of other court business; and four on account of the applicant's absences.

13. On 3 October 2003 the Primorskiy District Court of Odessa ruled that the applicant's actions did not fall within the ambit of the provisions of the Criminal Code relied upon by the prosecution. His actions did, however, qualify as abuse of position punishable by Article 165 § 1 of the Criminal Code in force at the material time. Consequently, the court convicted the applicant of abuse of position and sentenced him to one year's imprisonment, but absolved him from punishment, granting him an amnesty.

14. The applicant appealed, contending that the prosecution had never charged him with violating Article 165 § 1 of the Criminal Code. Consequently, the trial court had acted *ultra vires* in convicting him of the crime punishable by that statute. The applicant next presented various arguments in his appeal against the charge of abuse of position under Article 165 of the Criminal Code.

15. On 19 August 2004 the applicant complained to the Odessa Regional Court of Appeal of unreasonable delays in the proceedings against him, in particular, a protracted failure by the trial court to submit the case file to the Odessa Regional Court of Appeal.

16. On 21 August 2004 the Primorskiy District Court informed the applicant that his case had been transferred to the Odessa Regional Court of Appeal on 27 July 2004.

17. On 9 December 2004 the Odessa Regional Court of Appeal held an oral hearing in the applicant's presence and upheld the applicant's conviction. It found, in particular, that by re-qualifying the applicant's charges under a different Article of the Criminal Code, the first-instance court had correctly assessed the facts and had in no way increased the burden on the applicant. It had therefore not exceeded the scope of its competence.

18. The applicant appealed on points of law, raising essentially the same arguments as in his ordinary appeal.

19. On 25 May 2006 the Supreme Court rejected the applicant's appeal on points of law.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of 1960 (repealed with effect from 1 September 2001)

20. Pertinent provisions of the Criminal Code of 1960 (in force at the material time) read as follows:

Article 84. Misappropriation of State or collective property by way of appropriation, depletion or abuse of position

"... Misappropriation of State or collective property by an official by way of abuse of his position -

Shall be punishable by deprivation of liberty from three to five years with or without confiscation of property and by deprivation of the right to occupy certain positions or carry out certain activities for a term of up to three years ..."

Article 165. Abuse of power or position

"Abuse of power or position, i.e. intentional, promiscuous, or based on other personal interests or interests of third parties, use by an officer of his power or position contrary to the interests of the service, which causes significant damage to State or public interests or the rights and interests of certain physical or juridical persons protected by law, -

Shall be punishable by deprivation of liberty from two to five years or correctional labour for up to two years, with deprivation of the right to occupy certain positions or carry out certain activities for up to three years ..."

B. Code of Criminal Procedure

21. Pertinent provisions of the Criminal Code of 1960 (as worded at the material time) read as follows:

Article 275. Scope of judicial examination

"Examination of a case shall be only in respect of the defendants and within the scope of the indictment announced to them ..."

Article 362. Examination of a case by the appellate-instance court

"Having completed preparatory actions ... the presiding judge shall explain to the participants of the hearing their rights, including the right to give explanations concerning the appeals presented and to speak during judicial deliberations ...

After this, the presiding judge or one of the judges shall report the essence of the conviction or a ruling, shall inform who had appealed against it and to what extent, shall state the main arguments of the appeals and objections by other participants of the proceedings, if they had been submitted. The presiding judge shall verify whether the persons who have lodged the appeals support them.

...

If the court of appeal has not carried out a judicial investigation upon completion of the [above] actions ... the presiding judge shall familiarise the participants of the hearing with any additional materials, if they were submitted, materials that arrived from the first-instance court by way of fulfilment of assignment, shall hear their arguments with respect to the appeal submitted ... and shall proceed to judicial deliberations.

...

Before the court retires to the judges' deliberation chamber (*нарадча кімната*) for preparation of the ruling ... the defendant, if he participated in the appeal hearing, shall be given an opportunity to give a final speech.

..."

Article 366. Results of examination of a case by the court of appeal

"As a result of the examination of an appeal ... the court of appeal may:

1) make a ruling upholding the conviction or the decision and reject the appeal; quash the conviction or the decision and return the case to the prosecutor for additional investigation or for a new trial by the first-instance court; quash the conviction or the decision and terminate the proceedings; modify the conviction or the decision;

2) pronounce its own conviction, having quashed the conviction of the first-instance court in full or in part;

3) pronounce its own decision, having quashed the decision of the first-instance court in full or in part.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION WITH RESPECT TO THE LENGTH OF THE PROCEEDINGS

22. The applicant complained that the length of the criminal proceedings against him was unreasonable. He referred to Article 6 § 1 of the Convention, which, in so far as relevant, provides as follows:

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

23. The Government contested this view.

24. The Court notes that the criminal proceedings against the applicant in the present case were initiated on 26 August 1995. Nevertheless, the period to be taken into consideration began only on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time.

25. The period in question ended on 25 May 2006. It thus lasted eight years and eight months at three levels of jurisdiction.

A. Admissibility

26. 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

27. The Court observes that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case; the conduct of the applicant; and the conduct of the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

28. The Court finds that the overall length of the proceedings in the present case can be explained neither by the complexity of the criminal case, nor by the applicant's conduct. It considers that a number of delays were attributable to the domestic authorities (see, in particular, paragraphs 10, 12 and 15 above).

29. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Kobtsev v. Ukraine*, no. 7324/02, § 71, 4 April 2006; *Antonenkov and Others v. Ukraine*, no. 14183/02, § 46, 22 November 2005; and *Mazurenko v. Ukraine*, no. 14809/03, § 47, 11 January 2007).

30. Having regard to the material submitted to it and to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

31. There has accordingly been a breach of Article 6 § 1 in this respect.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION WITH RESPECT TO FAIRNESS OF THE PROCEEDINGS

32. The applicant also complained that the proceedings against him were unfair. In particular, the trial court had acted outside its competence as defined by Article 275 of the Code of Criminal Procedure in re-characterising the charge against him. Moreover, as he was not informed about this new charge until his sentence was pronounced, he had been denied an opportunity for properly preparing his defence against it. The applicant relied on Article 6 §§ 1 and 3 (a) and (b) of the Convention in respect of the above complaints. Paragraph 3 (a) and (b) of the Convention read as follows:

> "...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

A. Admissibility

33. The Government presented no comments concerning admissibility of the applicant's complaints concerning fairness of the criminal proceedings against him.

34. The Court considers that the above complaints are closely linked and should be examined jointly in light of the guarantees provided by Article 6

paragraph 3 (a) and (b) of the Convention. It further considers that they are not manifestly ill-founded and not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

35. The applicant alleged that offences punishable under Articles 84 and 165 of the Criminal Code of 1960 differed considerably and that the requalification of his actions by the trial court had been in breach of the fairness requirement of Article 6 of the Convention.

36. The Government contested that argument. They noted that the reformulation of the characterisation in law of the charges against the applicant had been lawful under domestic law and not in breach of the Convention. Moreover, the punishment for the offence of which the applicant was eventually convicted had been lesser than that associated with the offences as originally characterised. They further pointed out that the applicant had been able to appeal against his conviction before the Odessa Regional Court of Appeal, that that court had been competent under applicable provisions of the Code of Criminal Procedure to review the case in full and, if necessary, to acquit the applicant, in addition to examining all the materials available to the first-instance court and the applicant's new submissions, and that the Court of Appeal had held an oral hearing, during which the applicant had been able to present his objections to the reformulated charge. The proceedings on the whole had, therefore, been fair.

37. The Court notes that the scope of Article 6 § 3 (a) must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it is to be observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court further notes that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (*Pélissier and Sassi v. France*, cited above, §§ 52-54).

38. In the present case, the Court observes that the applicant was not aware that the Primorskiy District Court of Odessa might reclassify his actions as punishable under Article 165 § 1 of the Criminal Code as in force at the time when they had been committed. This scenario impaired his chance to defend himself before the first-instance court from the charge he was eventually convicted of.

39. However, the Court attributes decisive importance to the subsequent proceedings before the Odessa Regional Court of Appeal, after the contested re-characterisation, which he addressed in his appeal.

40. It is to be noted that the Court of Appeal reviewed the applicant's case in its entirety, both from a procedural and a substantive law point of view. In addition to having studied the lower court's case file and submissions by the applicant and the prosecution, the court held an oral hearing. Moreover, the Court of Appeal could itself have reclassified the applicant's conviction or acquitted him under Article 366 of the Code of Criminal Procedure.

41. The Court observes that the Court of Appeal rejected the applicant's defences led in seeking acquittal of the charges under Article 165 § 1 of the Criminal Code. It held that the applicant's actions contained all constituent elements of abuse of position and that by re-qualifying the charge from "misappropriation of property by way of abuse of position" to "abuse of position" the trial court had not increased the burden on the applicant.

42. This judgment was subject to further review on points of law by the Supreme Court, which found that the lower courts had acted within their competence and applied the law correctly to the applicant's case.

43. In light of the above, the Court considers that the applicant had the opportunity to advance his defence in respect of the reformulated charge before the domestic courts. Assessing the fairness of the proceedings as a whole – and in view of the nature and scope of the proceedings before the Court of Appeal and the Supreme Court – the Court considers that any defects in the first-instance proceedings were cured before the higher courts (see *Dallos v. Hungary*, no. 29082/95, §§ 42-53, ECHR 2001-II).

44. The Court is therefore satisfied that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed.

45. It follows that Article 6 of the Convention was not violated in respect of the fair trial guarantees.

III. 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."

A. Damage

47. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contended that this claim was exorbitant and unsubstantiated.

49. The Court reiterates that it has found a violation of Article 6 § 1 in respect of the length of the proceedings and has rejected the applicant's complaint concerning infringement of the fair trial guarantees. In light of the above, ruling on an equitable basis the Court awards the applicant EUR 1,600 in respect of non-pecuniary damage.

B. Costs and expenses

50. The applicant did not claim any award under this head. The Court therefore gives no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the unreasonable length of the criminal proceedings and alleged deprivation of the possibility for the applicant to prepare his defence in view of the re-characterisation in law of the criminal charge against him by the first-instance court admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention on account of the deprivation of the possibility for the applicant to prepare his defence in view of re-characterisation of the charge against him by the first-instance court;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,600 (one thousand six hundred euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 9 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President