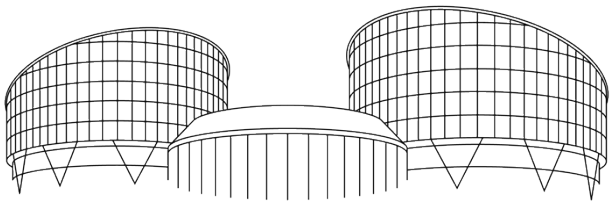

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF CHORNIY v. UKRAINE

(Application no. 35227/06)

JUDGMENT

STRASBOURG

16 May 2013

FINAL

16/08/2013

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

In the case of Chorniy v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges,*
Myroslava Antonovych, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 9 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 35227/06) 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 Igor Mykhaylovych Chorniy ("the applicant"), on 14 August 2006.

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr N. Kulchytskyy, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, under Article 6 § 3 (b) of the Convention, that he did not have adequate time and facilities for the preparation of his defence as he did not receive the judgments given by the lower courts in his criminal case until after his appeals had already been heard.

4. On 13 January 2011 the application was communicated to the Government. Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Ms Myroslava Antonovych to sit as an ad hoc judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1965 and lives in the village of Khodorkivtsi, Ukraine.

6. On 17 December 2004, at a hearing in criminal proceedings against the applicant, the Zhydachivskyy District Court ("the Zhydachivskyy Court") found the applicant guilty of non-payment of wages to employees of his business between November 2001 and January 2004. In court the applicant testified that he was the owner, director and main accountant of the business E. He paid his employees' wages out of his own pocket; however, none of the payments went through the books. The applicant's employees gave evidence that he had been paying their wages, but this was disregarded by the court since they were still employed by him. The court fined the applicant 1,700 Ukrainian hryvnias (UAH) (at the material time worth approximately 236 euros (EUR)).

7. According to the applicant, he was not provided with a copy of the judgment. The Court has been provided with a copy of the judgment. It comprises two pages and bears the annotation: "This judgment was drafted in the deliberation room in one copy only".

8. As part of their submissions the Government lodged a copy of the applicant's request of that day seeking permission to read the court transcript, upon which a court clerk had written that "the applicant received a copy of the judgment on 17 December 2004 (2 pages)".

9. On 27 and 29 December 2004 the applicant and his lawyer respectively lodged appeals against the decision of 17 December 2004. In these appeals they mainly complained that the court had disregarded the evidence given by the employees.

10. On 10 February 2005 the Zhydachivskyy Court informed the applicant and his lawyer that the applicant's case would be considered at an appeal hearing on 15 March 2005. However, on the day the hearing was due to take place the Court of Appeal returned the case file to the first-instance court with a request for the documents to be properly organised.

11. On 29 March 2005 the Zhydachivskyy Court informed the applicant and his lawyer that the applicant's case would be considered at an appeal hearing on 26 April 2005.

12. On 26 April 2005 the Lviv Regional Court of Appeal upheld the lower court's decision of 17 December 2004. The court reiterated the first-instance court's arguments and noted that the applicant had not submitted any documentary evidence in support of his statement that he had paid his employees' wages. According to the applicant, only the operative part of the judgment of 26 April 2005 was read aloud to him.

13. On 11 May 2005 the applicant sought permission from the Zhydachivskyy Court to obtain access to the case file. His request was refused, on the basis that the case file had not yet arrived from the Court of Appeal.

14. On 13 May 2005 the applicant requested a copy of the judgment of 26 April 2005 from the Lviv Regional Court of Appeal but it appears that no response was given.

15. On 19 May 2005 the applicant was again informed by the Zhydachivskyy Court that his case file had not arrived from the Court of Appeal.

16. On 23 May 2005 the applicant lodged an appeal on points of law in which he stated that he still had not received a copy of the appellate court's judgment of 26 April 2005.

17. On 23 June 2005 he received a copy of the judgment of 17 December 2004.

18. On 19 August 2005 the applicant lodged an additional appeal on points of law in which he informed the court that he had received a copy of the judgment of 17 December 2004 but had not yet received a copy of the judgment of 26 April 2005.

19. On 16 February 2006 the Supreme Court of Ukraine, in the applicant's absence, rejected his request for leave to appeal on points of law.

20. On an unspecified date the applicant received a copy of the judgment of 26 April 2005.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure 1960

21. Article 344 of the Code of Criminal Procedure, in force at the material time, required that a copy of a judgment be served on a convicted or acquitted person within three days of judgment being pronounced.

22. Article 349 provided for a fifteen-day time-limit for lodging an appeal against a judgment. During this time the case file was to remain at the court allowing the parties to consult it upon request.

23. Article 386 provided that an appeal on points of law could be lodged within one month of the appellate court's judgment being pronounced. During this time the case file was to remain at the court "[in charge of] executing the judgment".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (b) OF THE CONVENTION

24. The applicant complained that he had been unable to appeal effectively against the judgments of 17 December 2004 and 26 April 2005 as he had not been in time provided with copies of them. The applicant relied on Article 6 § 3 (b) of the Convention, which reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

A. Admissibility

25. The Government did not submit any observations as to the admissibility of the applicant's complaint.

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Parties' submissions

a. The Government

27. The Government accepted that in the criminal proceedings there was no evidence to suggest that a copy of the judgment of 17 December 2004 had been served on the applicant within the three-day time-limit following pronouncement of the judgment, as was required under domestic law. However, the applicant had been able to obtain access to the case file and therefore an opportunity to prepare his appeal properly.

28. The Government noted, in particular, that the court clerk had written on the applicant's request of 17 December 2004 seeking permission to read the transcript of the court hearing, that the applicant had been given a copy of the judgment of 17 December 2004 that day. In his appeal the applicant had referred to various pieces of evidence considered by the court at that

hearing. It follows that the applicant must have been acquainted with the terms of the judgment.

29. Furthermore, the applicant had been represented by a lawyer. The Government refused to believe that a professional lawyer would appeal against any judgment without having considered the terms of the judgment in advance and receiving a copy. Therefore, the applicant could have requested a copy of the judgment from his lawyer. The Government also noted that the applicant had not been remanded in custody so he could have attended court and studied the case file there. Both the applicant and his lawyer could also have indicated in their appeals or during the appeal hearing itself that the applicant had received no copy of the judgment against him so additional time was needed to prepare the defence.

30. As for the applicant's complaint that he was not provided with a copy of the judgment of the Court of Appeal, the Government submitted that the case file contained two copies of the judgment – one handwritten copy which had been prepared in the deliberation room and read out in the court hearing – and a typed copy. The judgment, not being lengthy, was read out at the hearing on 26 April 2005. Although current domestic law did not require the judgment of the Court of Appeal to be served on the parties following the hearing, the Government stated that the applicant had still had various opportunities to obtain access to a copy. Although it was accepted that the case file was in the process of being transferred from one court to another, the applicant could have obtained access to it by telephoning the first-instance court to ascertain its whereabouts.

31. The Government, therefore, considered that the applicant and his lawyer had had enough time to prepare the applicant's defence, and that there had been no obstacles preventing them from doing so.

b. The applicant

32. In reply, the applicant submitted that he had not received a copy of the court judgment of 17 December 2004 until 23 June 2005. As for the court clerk's written remark on his request of 17 December 2004, the applicant considered this to be a simple error and that it was probably his intention to write "a copy of the court transcript requested by the applicant". The applicant accepted that he was aware of the terms of the judgment of 17 December 2004 but considered it necessary to have a typed version of the judgment to be fully aware of the court's reasoning and its precise wording.

33. The applicant further stated that the domestic law did not require the court to serve a copy of its judgment on the defendant's lawyer. Moreover, the documents in the case file had not been properly organised before 29 March 2005. At the hearing on 15 March 2005 the applicant had requested a copy of the judgment of 17 December 2004 but to no avail.

34. The applicant highlighted the fact that the proceedings had been marked by numerous irregularities and had been protracted as a result of the transfer of the case file from one court to another taking an unnecessary amount of time. He stated that the Government's suggestion that he should have telephoned the courts was unrealistic given that the courts had failed to respond to any of his written requests.

35. The applicant considered that the impossibility to acquaint himself with the terms of the appellate court's judgment had rendered his defence ineffective.

2. The Court's assessment

36. Since 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 Article 6 § 1 and 3 (b) taken together (see, in particular, *Hadjianastassiou v. Greece*, 16 December 1992, § 31, Series A no. 252, and *G.B. v. France*, no. 44069/98, § 57, ECHR 2001 X).

37. The Court reiterates that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction on the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Mayzit v. Russia*, no. 63378/00, § 78, 20 January 2005).

38. The Court also notes that guarantees of Article 6 § 3 (b) extend to all stages of the court proceedings (see *D.M.T. and D.K.I. v. Bulgaria*, no. 29476/06, § 81, 24 July 2012).

39. The Court further notes that the Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6. The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention (see *Hadjianastassiou v. Greece,* cited above, § 33).

40. Turning to the present case, the Court notes that it is in dispute between the parties whether the applicant had the judgment of 17 December 2004 at his disposal when preparing his appeal (see paragraphs 28 and 32 above). The Court notes in this connection that neither the applicant nor his lawyer had raised this issue in their respective appeals, which could be interpreted as meaning that they had been acquainted with the judgment's terms to a sufficient extent. The Court therefore concludes

that there is insufficient evidence to find that the applicant was hindered in the preparation of his appeal.

41. As for the accessibility of the Court of Appeal's judgment, the Government did not submit any evidence to suggest that it had ever been served on the applicant or his lawyer. The Court further notes that the applicant took sufficient steps to obtain a copy of the judgment of 26 April 2005. On two occasions he sought permission from the first-instance court to obtain access to the case file and he also requested a copy of the judgment in question from the Court of Appeal but received no response. Moreover, the applicant expressly indicated in his appeal on points of law that he had not received a copy of the judgment of 26 April 2005, but the Supreme Court of Ukraine failed to address this issue.

42. As to the Government's argument that the judgment of 26 April 2005 was read out in full at the court hearing, the Court notes that, even assuming this was indeed the case, not being able to consult a judgment when preparing for an appeal against it could considerably undermine the effectiveness of such an appeal (see, *mutatis mutandis*, *Baucher v. France*, no. 53640/00, 24 July 2007). The Court does not speculate, however, as to how different the outcome of the proceedings would have been had the applicant been given an opportunity to consult the judgment of 26 April 2005 when preparing his appeal to the Supreme Court.

43. Given that the applicant was not, despite his requests, provided with a copy of the Court of Appeal's judgment when he was preparing his appeal on points of law to the Supreme Court, the Court considers that in the present case the rights to a defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of Article 6 § 3 (b) of the Convention taken together with Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. The applicant also complained about the outcome of the proceedings. He further complained that the court had failed to properly transcribe the court hearings and that there had been no wrongdoing on his part as he had paid his employees' wages out of his own pocket. The applicant relied on Article 6 §§ 1 and 2 of the Convention and Article 1 of Protocol No. 1.

45. Having 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 500,000 euros (EUR) in respect of non-pecuniary damage and EUR 23,706 in respect of pecuniary damage. The latter sum included costs and expenses incurred in the criminal proceedings at national level, the amount of the fine imposed on him, and alleged loss of earnings on the part of the applicant's business.

49. The Government submitted that these claims were excessive and unrelated to the alleged violation.

50. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

51. The Court further notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case in accordance with the Convention, if requested, represents in principle an appropriate way of redressing the violation (see, for example, *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 65, 28 October 2010). The Court observes that the possibility of a retrial as requested by the applicant in the present case is envisaged in Ukrainian legislation (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 297, 21 April 2011). It emphasises that such a trial must observe the substantive and procedural safeguards enshrined in Article 6 of the Convention (ibid.).

52. In the light of these considerations and having regard to all the circumstances of the case, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction under Article 41 of the Convention for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

53. The applicant did not claim any costs and expenses. Accordingly, the Court makes no award under this head.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint about the courts' failure to provide the applicant in time with copies of the judgments of 17 December 2004 and 26 April 2005 admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 6 § 3 (b) taken together with Article 6 § 1 of the Convention;

3. *Holds* by five votes to two that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant, and *dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Myroslava Antonovych;
(b) declaration of Judge Boštjan M. Zupančič.

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE ANTONOVYCH

I follow the Chamber's reasoning on all of the substantive points. But I cannot agree that there is no causal link between the violation found and the pecuniary damage alleged (paragraph 50). The violation of Article 6 § 3 (b) which has been found in this case because the applicant, despite his requests, was not provided with a copy of the Court of Appeal's judgment when he was preparing his appeal on points of law to the Supreme Court provides, from our point of view, a clear causal link with the pecuniary damage alleged (paragraph 48). I cannot also agree with the language in paragraph 52 of the judgment and point 3 of the operative provisions, stating that the finding of a violation constitutes in itself sufficient just satisfaction under Article 41 of the Convention.

It has been pointed out (see, as one recent example with a series of further references, the concurring opinion of Judge Ziemele in the case of *Barborski v. Bulgaria*, no. 12811/07, 26 March 2013) that the Court's approach in stating, from time to time, that a judgment declaring a violation is in itself a form of compensation is not compatible with the general principles of international law as regards State responsibility which have been followed in the Court's case-law.

Whilst it is true that the applicant may apply for a re-trial, I do not accept that he should therefore be deprived of any form of pecuniary compensation for the damage caused by the violation in this case.

DECLARATION OF JUDGE ZUPANČIČ

I do not share the majority's conclusions under Article 41 of the Convention.