

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

FOURTH SECTION

CASE OF BOYETS v. UKRAINE

(Application no. 20963/08)

JUDGMENT

STRASBOURG

30 January 2018

FINAL

30/04/2018

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



In the case of Boyets v. Ukraine,

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

Vincent A. De Gaetano, *President,*
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Motoc,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 9 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 20963/08) 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, Ms Tatyana Anatolyevna Boyets ("the applicant"), on 18 April 2008.

2. The applicant was represented by Ms Olena Ashchenko and Mr Gennadiy Tokarev, lawyers practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr Ivan Lishchyna, of the Ministry of Justice.

3. The applicant raised a number of complaints regarding two sets of criminal proceedings against her. She complained, in particular, that she had not had a fair trial in the first set of proceedings. The applicant also complained that she had been submitted to an arbitrary and lengthy prohibition on her leaving the town where she resided within the second set of proceedings and that she had had no effective domestic remedies in that regard.

4. On 7 January 2015 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Kharkiv.

6. At the time of the events she worked as a passport registration officer (*паспортист*) in one of the municipal housing and public utilities' offices (*КПЖРЕП*) in Kharkiv.

A. Events of 6 and 7 February 2004

7. On 6 February 2004 a certain M. went to the passport registration office where the applicant worked to apply for a passport for her son, who had reached the age of sixteen. As M. subsequently mentioned to the police (see paragraphs 13 and 17 below), she had already applied to the applicant in the past. According to M., when she was waiting in the queue, she heard people saying that the applicant was known for taking bribes and that her "usual rate" was 100 United States dollars (USD). Given the considerable number of visitors, M. could not get an appointment that day. She waited for the applicant in the corridor after work and explained the situation to her. The applicant allegedly told M. that it might be time-consuming to settle the matter, in particular because of the fact that M.'s son had been born in Russia and his original birth certificate was not available. However, according to M., the applicant agreed to help her to speed up the procedure with the higher authority, where she would need to pay USD 100 to the official in charge.

8. According to the applicant's version of events, she did indeed have a late visitor in the corridor that day, whom she advised to come back during working hours, with no further exchange taking place.

9. On 7 February 2004 M. made a written statement to the Kharkiv Kyivskyy District Police that the applicant had asked for a bribe of USD 100 to speed up the passport issuance procedure. M. confirmed that she was aware of the criminal liability for knowingly making a false report about a crime. According to the police records, the above statement was made at 5 p.m. However, as subsequently established (see paragraph 59 below), that was an error and the actual time of the statement was about 10 a.m.

10. M. provided the police with a banknote of USD 100, two banknotes of USD 20 and one of USD 10. A detective officer put a special luminescent fluid on the banknotes and returned them to M. That act took place in the presence of two attesting witnesses and was documented in a report. It is not known why it was decided to mark the additional banknotes, not only the USD 100 note.

11. At about 1 p.m. on the same day M. entered the applicant's office and emerged a few minutes later, indicating to the investigator and the attesting witnesses that she had given the USD 100 banknote to the applicant. As it was the end of the working day, the applicant locked her office and began to leave. However, the investigator stopped her and suggested she return to her office, which they did together in the presence of the two attesting witnesses. The investigator asked the applicant whether she had received any money from M. She stated that she had and took the banknote from her purse. The police officer then checked the applicant's hands with a special device and found traces of the luminescent liquid. They were wiped off with cotton pads, which were then packed and sealed as material evidence. Such traces were also found on the banknote of USD 100 in the applicant's purse and on the purse itself. Lastly, several passports and other papers with various banknotes inserted, varying from two Ukrainian hryvnias (UAH) (equivalent to about 0.28 euros (EUR) at the time) to UAH 50 (equal to about EUR 7), were found in the applicant's bag and were seized. The investigator drew up an inspection and seizure report. The serial number of the USD 100 banknote seized from the applicant, as indicated in the report, differed by one letter (out of eleven characters) from the one noted in the report on marking the bill with the luminescent fluid drawn up earlier that day (see paragraph 10 above).

12. The applicant wrote an explanation, stating that she had indeed taken USD 100 from M., which she had intended to pay to an unspecified official at the local passport registration authority with a view to speeding up the issuance of the passport for M.'s son. The applicant also stated that she had voluntarily complied with the police's request to give them the banknote in question. She noted that she had studied the inspection and seizure report and that she agreed with its contents. Lastly, she stated that she had no complaints against the police and that she regretted her actions.

13. Also on 7 February 2004, following the police operation, the investigator collected "explanations" from M. and the attesting witnesses. M. supplemented her initial statement to the police with further factual details (see paragraphs 7 and 9 above). Both attesting witnesses described the police operation which they had observed, as summarised in paragraphs 10 and 11 above.

B. First set of criminal proceedings against the applicant

14. On 10 February 2004, during her questioning by the investigator, the applicant changed her account of the events as follows. On 7 February 2004, when she had been about to leave work at 1 p.m., M. had entered the office. She had brought some documents in order to get a passport for her son. The applicant had informed her that certain documents were missing. The applicant had also clarified that she would be working in a different office

from Monday, 9 February 2004. While collecting her papers and belongings before leaving, the applicant had noticed that M. had thrown something on the table and had run out of the office. The applicant had seen that it was a USD 100 banknote. She had taken it and had tried to get an explanation from M. However, she had already left. When the applicant had looked out into the corridor, she had only seen a man waiting there. It was T., one of the attesting witnesses. Given that different people would be working in the office on the following working day and because she knew her manager was away, the applicant had decided to keep the banknote in order to return it to M. later.

15. Furthermore, the applicant explained that her initial statement (see paragraph 12 above) had been made in a state of shock and had not been truthful. Allegedly, the investigator had dictated the statement to her.

16. On 11 February 2004 a criminal case was opened against the applicant on suspicion of incitement to bribery.

17. On the same date M. gave written explanations to the Kyiv District Prosecutor's Office with her account of the events, which was the same as before (see paragraphs 7 and 9 above).

18. On 16 February 2004 the applicant expressed a wish to be represented by the lawyer Zh. and the latter was admitted to the proceedings. When questioned in her lawyer's presence on the same day, the applicant admitted that on 7 February 2004 she had hinted to M. that the examination of her application was likely to take time and that the applicant would be prepared to speed up the procedure before the higher authority, which she had not intended to do in reality. However, she had seen M. putting a USD 100 banknote on the table and had decided to take advantage of the situation given her own financial difficulties. She explained the difference between her latest account and her earlier submissions by shock and stress, and expressed remorse for what had happened.

19. On the same date, 16 February 2004, M. was also questioned. As indicated in the report of the questioning, she was registered as living in Kharkiv.

20. On 26 February 2004 an expert report established that the traces of luminescent liquid on the USD 100 banknote and on the applicant's hands were the same.

21. On 28 February 2004 fraud was added to the charges against the applicant, given that she had promised to M. to act as an intermediary in bribing a higher-level official, whereas in reality she had meant to keep the money for herself.

22. On 28 February 2004 formal charges were brought against the applicant and her status changed from being a suspect to an accused.

23. On the same day the applicant changed her lawyer. When questioned that day in the presence of her new lawyer (K.), she returned to the account of events she had given on 10 February 2004 (see paragraphs 14 and 15

above). She submitted that she had stated differently in the presence of her previous lawyer (see paragraph 18 above) because she had "considered it useless to prove [her] case and feared that nobody would believe [her]".

24. On the same day the investigator returned the USD 100 banknote to M., who wrote a receipt in confirmation. She also undertook to keep the banknote until the end of the proceedings.

25. On 29 February 2004 the Kyivskyy District Prosecutor's Office approved the bill of indictment against the applicant. It contained the following list of persons to be summoned to court: the applicant, the victim (M.) and the two attesting witnesses (G. and T.).

26. On 10 November 2004 the Kyivskyy Court dropped the charge of incitement to bribery. It also ruled to relieve the applicant of criminal liability in respect of the fraud charge and terminated proceedings on that point on the grounds that she was not a danger to society (see paragraph 60 below).

27. The applicant appealed, seeking the termination of the criminal proceedings against her owing to the absence of the constituent elements of a crime in her actions. She denied asking for or receiving any money from M. and maintained that the latter had simply thrown the banknote on her table. Overall, the applicant considered "everything that had happened to [her] as a provocation on the part of the law-enforcement authorities". She also complained that she had not been able to cross-examine M.

28. On 14 April 2005 the Kharkiv Regional Court of Appeal ("the Court of Appeal") quashed the above decision. It held that the first-instance court had not been entitled to terminate the proceedings in the way it had done without the applicant's consent. The appellate court also noted that the applicant's argument about her inability to cross-examine M. had not been examined. The case was remitted to the same first-instance court for fresh examination by a different panel.

29. The Kyivskyy Court adjourned hearings in the case several times owing to the absence of M. and the two attesting witnesses. On 18 July 2005 it decided that it was impossible to complete its judicial investigation in their absence and ordered the police to ensure their attendance.

30. The police found out that M. had sold her house in Kharkiv on an unspecified date in 2004 and had moved to Russia, with her new address being unknown. G. had moved to a different city in Ukraine, but eventually attended one of the hearings. The other attesting witness, T., was always away from home when visited by the police and his neighbours had not seen him for some time. Eventually, the police located him and on 14 October 2005 he made a written statement that he would appear at a hearing scheduled for 17 October 2005 (with no further details available).

31. As stated in a note issued by a clerk of the Kyivskyy Court on 17 October 2005, the hearing scheduled for that day was postponed to 6 December 2005 given the judges' involvement in a different case. It is not

known whether there was a hearing on 6 December 2005. It is an established fact, however, that T. did not attend any of the hearings.

32. In January 2006 the applicant enquired with the Kharkiv Kyivskyy District Military Enlistment Office as to whether M.'s son was registered there. On 24 January 2006 she received a reply that he had appeared before that office in April and May 2005, and that the army conscription commission had found him unfit for military service in peacetime by a decision of 6 May 2005. The son had not changed the place of his military registration. The applicant brought the above information to the knowledge of the trial court dealing with her case.

33. On 26 January 2006 the Kyivskyy Court once again ordered the police to ensure the presence of M. and the two attesting witnesses at the trial.

34. On 8 February 2006 it decided to continue the examination of the case in the absence of M. as it appeared impossible to establish her whereabouts. In reaching that conclusion, the court referred to the fact that she was no longer registered as being resident in the Kharkiv region and that the police had information that she had emigrated to Russia. By the same ruling, the Kyivskyy Court ordered the prosecution authorities to ensure the mandatory presence of T.

35. On 16 February 2006 the Kyivskyy Court found the applicant guilty of fraud and incitement to bribery and sentenced her to a fine of UAH 5,000 (then equivalent to EUR 830). Although the applicant pleaded innocent, the court considered her guilt to be proved by the totality of the evidence. It relied on the statements of M., the aggrieved party, made during the pre-trial investigation, and those of the attesting witnesses, made by G. before the court and by T. during the pre-trial investigation. The court stated that it had "no grounds for questioning the credibility of the aggrieved party and the witnesses whose statements [were] corroborated by other objective [...] evidence". The trial court also relied on the inspection and seizure report of 7 February 2004 (see paragraph 11 above) and the forensic expert examination report of 26 February 2004 (see paragraph 20 above). The verdict noted that the applicant had initially confessed to the offences, but had later retracted her confession for no apparent reason other than an attempt to escape liability. Her initial statement was considered, however, more plausible.

36. On 3 March 2006 the applicant appealed and on 25 April 2006 she submitted further "written explanations to [her] appeal". She complained, in particular, that her conviction had been based mainly on the statements of M., who had never appeared before the court and whom the applicant had never been able to cross-examine. She argued that the first-instance court had not shown due diligence in finding and summoning M. The applicant also complained that the Kyivskyy Court had wrongly relied on her initial

confession, which had been dictated to her by the police before the institution of criminal proceedings against her.

37. The applicant did not refer in her appeal or in its supplement to her inability to examine T. or to have him examined. At the same time, on 7 April 2006, she lodged a written application to the appellate court to summon T. given that he "was an attesting witness" and that he "had made statements against [the applicant]".

38. On 25 April 2006 the Court of Appeal upheld the judgment of 16 February 2006. It considered that the applicant had initially made a confession of her own free will and that she had failed to give any convincing explanation about her subsequent change in position. Furthermore, the appellate court noted that the whereabouts of M. and T. could not be established. There were no reasons to question the veracity of the statements they had made during the pre-trial investigation. Nor were there any reasons to suspect any intention by them to falsely accuse the applicant. In sum, the appellate court did not discern any procedural flaws which warranted quashing the verdict.

39. The applicant appealed on points of law. She argued that the covert operation of 7 February 2004 had been unlawful because it had not been duly authorised and had taken place in the absence of any criminal proceedings against her, even prior to the formal registration of M.'s statement. The applicant also complained that her rights under Article 6 § 3 (d) of the Convention had been breached on account of her inability to cross-examine M. and T.

40. On 18 October 2007 the Supreme Court dismissed the applicant's appeal on points of law and upheld the lower courts' decisions. Its general conclusion was that no violations of the law of criminal procedure had been established.

C. Second set of criminal proceedings against the applicant

41. On 27 March 2009 the Kyivskyy Prosecutor's Office opened a criminal case against the applicant for a failure to comply with the judgment of 16 February 2006 (see paragraph 35 above and paragraph 61 below).

42. On 10 November 2009 the applicant was placed under an undertaking not to leave her town of residence as a preventive measure pending trial.

43. In the absence of any formal charges against her, the preventive measure ceased to apply ten days later, on 20 November 2009 (see paragraph 62 below), a fact of which the applicant was not aware. It is not known if there was any formal decision lifting the measure in question.

44. On 7 December 2009 the criminal proceedings were terminated for lack of the constituent elements of a crime in the applicant's actions. On 11 December 2009 that decision was quashed and the case was returned for

additional investigation. The case file does not contain any documents regarding the preventive measure then applicable to the applicant, if any.

45. On 12, 15 and 18 June 2012 the applicant, who considered herself still bound by the undertaking not to leave her town of residence of 10 November 2009, requested leave to travel outside the Kharkiv region from the investigator. On 22 June 2012 the investigator sent her a letter stating that her request could not be granted because she had not provided any address or other details about the planned trip.

46. On 5 July 2012 the criminal proceedings against the applicant were discontinued again. However, two days later the investigation was resumed.

47. On 12 October 2012 the investigator terminated the criminal proceedings against the applicant for lack of the constituent elements of a crime in her actions. It was concluded that she had not evaded paying the fine, but that it had been impossible for her to do so given her low income. By the same ruling, the preventive measure in respect of the applicant was lifted, without further details.

48. On 20 November 2012 a new Code of Criminal Procedure ("the CCP") entered into force. Instead of opening a criminal case, it provided for the initiation of an investigation by way of making an entry in the Unified Register of Pre-trial Investigations.

49. On 22 March 2013 a criminal investigation into the applicant's failure to comply with the judgment of 16 February 2006 was launched again and was registered in the Unified Register of Pre-trial Investigations. On an unspecified date the proceedings were discontinued. On 8 April 2013 they were, however, resumed.

50. On 5 June 2013 those proceedings were discontinued once again on the grounds that there were no constituent elements of a crime in the applicant's actions. The case file contains no information about any further developments.

D. Claim for damages brought by the applicant

51. On 26 February 2013 the applicant lodged a claim against the State Treasury, seeking compensation for non-pecuniary damage sustained as a result of her allegedly unlawful criminal prosecution from 27 March 2009 to 12 October 2012. She enclosed copies of the two rulings of those dates, by which the investigator had opened and had discontinued the criminal proceedings against her. The applicant also mentioned, in general terms, that she had been unlawfully placed under an undertaking not to leave her town, without further details.

52. The prosecutor submitted objections. He stated that on 20 November 2009 the investigator dealing with the applicant's case had revoked the impugned preventive measure, given that no charges had been brought against her within ten days of 10 November 2009 (see paragraphs 43 above

and 62 below). The prosecutor also noted that the criminal proceedings against the applicant had been reopened on 8 April 2013 (see paragraph 49 above) and remained pending.

53. On 17 May 2013 the Kyivskyy Court rejected the applicant's claim as unsubstantiated. As regards her undertaking not to leave the town, the court concluded that it had only been applicable from 10 to 20 November 2009.

54. The applicant appealed. She submitted, in particular, that "the [first-instance] court had not given any legal assessment to the fact that the criminal proceedings against [her] had been instituted on 27 March 2009 and discontinued on 12 October 2012, and that all that time [she] had been under an undertaking not to abscond, which had been lifted by the ruling on the termination of the criminal proceedings of 12 October 2012, that being confirmed by [the investigator's] letter of 22 June 2012" (see paragraph 45 above). The applicant indicated in brackets the page number of the letter concerned in the case file. She further argued, in general terms, that the court had incorrectly interpreted Article 1176 of the Civil Code (see paragraph 63 below) and that it had not calculated, as prescribed under the Compensation Act (see paragraph 64 below), an amount of compensation in respect of non-pecuniary damage to which she was entitled. The applicant did not enclose any documents with her appeal.

55. On 18 June 2013 the Court of Appeal upheld the decision of the Kyivskyy Court. It noted that the sole fact that the criminal proceedings against the applicant had been discontinued did not imply that she had suffered non-pecuniary damage and she had failed to prove otherwise. The appellate court further observed that the applicant "[had] not proved when exactly she had been placed under the undertaking not to leave the town as a preventive measure. Therefore, her submission that she had been restrained in her liberty of movement for more than three years [could] not be taken into consideration".

56. The applicant lodged an appeal on points of law, in which she indicated, in particular, that the applicability of the undertaking not to leave the town from 10 November 2009 to 12 October 2012 had been established by documents. She reiterated her earlier argument that no assessment had been given to the investigator's refusals of her requests for leave to travel outside the Kharkiv region in June 2012. This time the applicant enclosed a copy of the letter referred to.

57. On 22 July 2013 the Higher Specialised Court for Civil and Criminal Matters rejected the applicant's request for leave to appeal on points of law.

E. Criminal complaints by the applicant

58. On 17 April 2006 the applicant sought the institution of criminal proceedings against the police officers involved in the undercover operation

of 7 February 2004. Her main argument was that M.'s complaint had been registered only at about 5 p.m. that day, which had been after the completion of the police operation and thus had undermined its lawfulness.

59. The prosecution authorities refused to open a criminal case against the police on several occasions. It was established that M.'s complaint had indeed been registered, by mistake, at 5 p.m. instead of 10 a.m. on 7 February 2004, for which the respective officer had been reprimanded. However, there was no indication of a criminal offence.

II. RELEVANT DOMESTIC LAW

60. Under Article 48 of the Criminal Code ("the CC") of 2001, a person who has committed a minor criminal offence or an offence of medium gravity for the first time may be discharged from criminal liability if it is found that at the time of the investigation or trial, due to a change of situation, the act committed by that person has lost its nature of presenting a danger to society or that person has ceased to be dangerous to the public.

61. Article 389 of the CC penalises evading the payment of a fine ordered as a part of a non-custodial sentence by up to two years' correctional works or a restriction of liberty (namely detention in a semi-open prison near the place of residence).

62. Article 148 § 4 of the CCP of 1960 (in force at the material time) read as follows:

> "Where a preventive measure is applied to the suspect, formal charges against him must be brought within ten days of the application of that preventive measure. If charges are not brought within that time-limit, the preventive measure is cancelled (*скасовується*)."

63. Article 1167 of the Civil Code of 2003 provides for compensation for non-pecuniary damage, irrespective of the guilt of the person or authority which inflicted the damage, in cases of unlawful criminal prosecution and unlawful application of a preventive measure. Furthermore, Article 1176 of the Code provides for the right to compensation for damage sustained as a result of unlawful decisions, actions or inactivity by bodies of inquiry, pre-trial investigation authorities, prosecutor's offices and courts. It further provides that the procedure for claiming compensation for damage inflicted by such bodies "shall be established by law".

64. Under the Law of Ukraine "On the Procedure for the Compensation of Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts" (hereinafter "the Compensation Act"), a person is entitled to compensation for damage on account of, in particular, "procedural actions restricting [his/her] rights" (section 1). The right to compensation for damages under this law arises, in particular, in cases of: (a) acquittal by a court; (b) "a finding in a guilty verdict or other judgment of a court of

unlawfulness of ... procedural actions restricting or infringing [a person's] rights and freedoms"; or (c) the termination of a criminal case on the grounds of an absence of proof of the commission of a crime, the absence of the constituent elements of a crime, or a lack of evidence of the accused's participation in a crime (section 2).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

65. The applicant complained that her rights under Article 6 §§ 1 and 3 (d) of the Convention had been breached in the first set of criminal proceedings against her. The provisions relied on read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. The applicant's complaint about her inability to cross-examine M.

66. The applicant complained that she had been unable to cross-examine M., who had had the procedural status of an aggrieved party in the proceedings.

1. Admissibility

67. The Court notes that this part of the application 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.

2. Merits

(a) The parties' submissions

(i) The applicant

68. The applicant complained that had she not had an opportunity to cross-examine M. during the pre-trial investigation or at any point during her trial.

69. She argued that the testimony of that witness during the pre-trial investigation, which the trial court had admitted in evidence, had played a decisive role in her conviction. That being so, the applicant argued that the domestic courts had had no reason to prefer M.'s version of events to that of the applicant, even though the witness had never appeared at any of the hearings.

70. The applicant further contended that the authorities had not made a sufficient effort to establish M.'s whereabouts. She noted, in particular, that she had transmitted to the court the information received from the local military enlistment office that M.'s son had apparently continued to live at the same address (see paragraph 32 above). However, the applicant maintained, that information had not been followed up.

(ii) The Government

71. The Government argued that the domestic authorities had done everything to locate M. and to ensure her presence in court that could reasonably have been expected of them. However, their efforts had not been successful.

72. Having regard to the totality of the evidence against the applicant, including her own confession, made in the presence of a lawyer of her choice (even though she had eventually decided to retract it), the Government contended that there had been no reason to question the veracity of M.'s testimony during the pre-trial investigation.

73. In sum, the Government considered that the absence of that witness from court had not undermined the fairness of the applicant's trial.

(b) The Court's assessment

(i) General principles

74. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. According to the Court's case-law, the use in evidence of statements obtained at the police inquiry and judicial investigation stages is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected

(see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C). In principle, these rules require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage of proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

75. In *Al-Khawaja and Tahery* (cited above, §§ 119-147), the Grand Chamber clarified the principles to be applied when a witness does not attend a public trial. Those principles may be summarised as follows (see also *Horncastle and Others v. the United Kingdom*, no. 4184/10, §§ 131-135, 16 December 2014, and *Seton v. the United Kingdom*, no. 55287/10, § 58, 31 March 2016):

(i) the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) typical reasons for non-attendance are, as in the case of *Al-Khawaja and Tahery* (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend a trial;

(iii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iv) the admission as evidence of the statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings;

(v) according to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(vi) in this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive;

(vii) however, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(viii) in particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

76. Those principles have been further clarified in the case of *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 110-31, ECHR 2015) in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see also *Seton*, cited above, § 59).

(ii) Application of the above principles to the circumstances of the present case

77. The Court notes from the outset that M., who had the status of an aggrieved party in the criminal proceedings against the applicant and whose statement during the pre-trial investigation was relied on during the trial (see paragraph 35 above), should be regarded as a "witness" for the purposes of Article 6 § 3 (d) (see *Vladimir Romanov v. Russia*, no. 41461/02, § 97, 24 July 2008).

(α) Whether there was a good reason for the non-attendance of M. at the trial

78. The Court notes that the reason for M.'s absence from the applicant's trial was that she could not be located (see paragraph 34 above).

79. The Court has found in its case-law that the fact that the domestic courts were unable to locate a witness or the fact that a witness was absent from the country in which the proceedings were conducted is not sufficient in itself to satisfy the requirements of Article 6 § 3 (d), which require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States have to exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner. Otherwise, the witness's absence is imputable to the domestic authorities (see *Schatschaschwili*, cited above, § 120, with further references, and *Ben Moumen v. Italy*, no. 3977/13, § 44, 23 June 2016).

80. As the Court has further held, it is not its task to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable. However, it is clear that they must have actively searched for the witness with the help of the domestic authorities including the police and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available (see *Schatschaschwili*, cited above, § 121, with further references).

81. The need for all reasonable efforts on the part of the authorities to secure the witness's attendance at the trial further implies careful scrutiny by the domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness (see *Schatschaschwili*, cited above, § 121, and *Ben Moumen*, cited above, § 48, both with further references).

82. Turning to the present case, the Court notes that the domestic authorities did make some effort to find M., including enlisting the help of the police. It appears, however, that they contented themselves with the information that M. had sold her house to unspecified persons on an unspecified date in 2004, that she was no longer registered as being domiciled in the region and that she had apparently moved to Russia (see paragraphs 30 and 34 above). There is no explanation for the failure of the police to establish further factual details as regards, in particular, the sale by M. of her house or to question the new owner in that regard. It is noteworthy that the applicant brought to the authorities' knowledge some documentary evidence proving that M.'s son continued to be registered at his mother's last known address at the latest in May 2005, that is more than a year after the investigation had its last documented encounter with M. (see paragraphs 24 and 32 above). However, that information was never considered or followed up. Nor did the authorities try to verify whether M. had indeed

moved to Russia and, if so, to establish her whereabouts there with the help of the Russian authorities (see, *mutatis mutandis*, *Ben Moumen*, cited above, §§ 49-51, where the Court observed that the Italian authorities had failed to indicate the reasons why it was impossible to have resort to international legal assistance in order to contact a witness who had presumably moved to Morocco and considered that the absence of a known address for the witness did not amount to an insurmountable obstacle, absolving the Italian judiciary from their obligation to try to contact the witness via their Moroccan counterparts).

83. The Court cannot therefore conclude that the Ukrainian authorities made every reasonable effort to secure M.'s attendance.

84. However, as indicated in paragraph 76 above, although it remains a very important factor to be weighed in the balance when assessing the overall fairness, the absence of good reason for the non-attendance of M. cannot, of itself, be conclusive of the lack of fairness of a trial. The Court will therefore further examine whether her statements were the sole or the decisive basis for the applicant's conviction and whether there existed procedural safeguards capable of counterbalancing the difficulties encountered by the defence (see *Ben Moumen*, cited above, § 52).

(β) Whether the evidence of the absent witness M. was the sole or decisive basis for the applicant's conviction

85. The Court finds that the domestic courts did not consider M.'s witness statements as the sole (that is to say, only) evidence against the applicant. Nor did they consider her testimony as "decisive" evidence as defined by the Court in its judgment in *Al-Khawaja and Tahery* (cited above, § 131), that is, as being of such significance as to be likely to be determinative of the outcome of the case. Thus, M.'s statements were relied on in the verdict along with the other documentary and material evidence (see paragraph 35 above).

86. In making its own assessment of the weight of the witness evidence in the light of the domestic courts' findings, the Court must have regard to the strength of the additional incriminating evidence available (see *Al-Khawaja and Tahery*, cited above, § 131). It observes that the Kyivskyy Court had before it, in particular, the following further evidence concerning the offence: the inspection and seizure report of 7 February 2004; the statements of the attesting witnesses present during the investigative measure; and the expert report confirming that there were traces of the same luminescent liquid on the USD 100 banknote seized and the applicant's hands. Furthermore, the trial court relied on the admission the applicant herself made in the course of the pre-trial investigation, even though she later retracted it (see paragraph 35 above).

87. The Court cannot but note that all those elements of evidence, without M.'s story, were not conclusive as to the fraud and the incitement-to-bribery charges against the applicant.

88. The Court therefore considers that the evidence of the absent witness M. was "decisive", that is determinative of the applicant's conviction.

(γ) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

89. The Court must further determine, in a third step of the *Al-Khawaja* test, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the decisive evidence of the absent witness (see *Al-Khawaja and Tahery*, § 147, and *Schatschaschwili*, §§ 125-31, both cited above).

90. The fact that the domestic courts approached the untested evidence of an absent witness with caution has been considered by the Court to be an important safeguard. The courts must have shown that they were aware that the statements of the absent witness carried less weight. The Court has taken into account, in that context, whether the domestic courts provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available. An additional safeguard may be to show, at the trial hearing, a video recording of the absent witness's questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability. Furthermore, in assessing the counterbalancing factors in place, the Court examines: (a) whether there was corroborative evidence at the trial supporting the untested witness statement; (b) whether the applicant or her defence counsel had been given an opportunity to question the witness during the investigation stage; (c) whether the defence was offered the possibility to put its own questions to the witness indirectly, for instance in writing, in the course of the trial; and (d) whether the defendant was afforded the opportunity to give his/her own version of the events and to cast doubt on the credibility of the absent witness (see *Schatschaschwili*, cited above, §§ 126-31, with further references).

91. Turning to the present case, the Court notes that the trial court, whose judges had never seen M. in person, chose to trust her account of the events without reservation (see, *a contrario*, *Ben Moumen*, cited above, § 58). The Court observes, in particular, that, while M. indicated that she had already applied to the applicant in the past, she remained silent about that experience in her complaint to the police and in all her subsequent statements to the investigator (see, in particular, paragraph 7 above). That circumstance might have been relevant for the assessment of the credibility of M.'s story. However, the courts did not comment on it.

92. Lastly, the Court observes that the applicant was deprived of the possibility to cross-examine M. both during the trial and in the course of the pre-trial investigation. Nor it was possible for her to put questions to M. in writing. Furthermore, the national courts failed to attach any weight to the fact that at no stage of proceedings M. was heard by judicial or prosecution authorities. Had there been at least a video recording of her questioning, it would have allowed the court, prosecution and defence, at the trial hearing, to observe the witness's demeanour under questioning and to form their own impression of his or her reliability (see paragraph 90 above).

93. Overall, there seem to be insufficient factors in place to compensate for the handicaps suffered by the defence as a result of the admission of M.'s testimony in evidence against the applicant.

(δ) Conclusion

94. The above considerations – namely, the failure of the Ukrainian authorities to make every reasonable effort to secure M.'s attendance, the importance of her statements for the applicant's conviction, and the absence of sufficient counterbalancing measures that would have permitted a fair and proper assessment of the reliability of the untested evidence – lead the Court to conclude that the absence of an opportunity for the applicant to examine or have examined M. at any stage of the proceedings rendered the trial as a whole unfair.

95. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

B. The applicant's other complaints under Article 6 of the Convention in respect of the first set of criminal proceedings against her

96. The applicant further complained that the fairness of the criminal proceedings against her had also been undermined by the absence of T., one of the attesting witnesses, from the trial and her inability to cross-examine him. Lastly, she complained that her criminal prosecution might have been the result of a provocation and that there had been some irregularities with the material evidence (such as the difference in the serial number of the USD 100 banknote indicated in the report on marking the banknote and that in the inspection and seizure report of 7 February 2004 – see paragraph 11 above; as well as the failure of the authorities to secure the material evidence in her case, having returned the banknote in question to M. before the completion of the trial).

97. In the light of its finding in paragraph 95 above, the Court does not consider it necessary to address separately the admissibility and merits of the applicant's remaining complaints under Article 6 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 AND ARTICLE 13 OF THE CONVENTION

98. The applicant complained under Article 2 of Protocol No. 4 that the undertaking not to leave the town that had been imposed on her in the second set of criminal proceedings had been a disproportionate and lengthy restriction on her freedom of movement. She also complained under Article 13 of the Convention that she had not had an effective domestic remedy in respect of that complaint.

99. The provisions relied on read as follows:

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 2 of Protocol No. 4 to the Convention

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

A. The parties' submissions

1. The Government

100. The Government contended that the applicant had failed to exhaust the domestic remedies available to her in respect of her complaint under Article 2 of Protocol No. 4, as required by Article 35 § 1 of the Convention.

101. First of all, the Government argued that, given that the applicant's undertaking not to leave the town had ceased to apply on 20 November 2009, it had been open to her to complain about the investigator's later refusals of her requests for leave to travel outside the region, either before the prosecution authorities or the courts.

102. The Government further contended that the proceedings for damages which the applicant had initiated could have also provided an adequate remedy. However, in the Government's opinion, she had failed to support her claim with evidence. Thus, they argued, she had mentioned the

investigator's letter for the first time in her appeal and even thereafter she had failed to provide a copy of it to the court (see paragraphs 51, 54 and 56 above). The Government therefore argued that the domestic courts had rightly rejected the applicant's claim as being without basis.

2. The applicant

103. The applicant disagreed. She submitted that she had not been aware of the unlawfulness of the investigator's actions. She further observed that the only decision lifting her undertaking not to leave the town had been delivered on 12 October 2012 (see paragraph 47 above), once the criminal proceedings had been terminated. Accordingly, she submitted that it had been possible for her to lodge her claim for damages only at that point.

104. The applicant referred to the Compensation Act, providing for compensation for "procedural actions restricting the citizens' rights" (see paragraph 64 above). In her opinion, the impugned measure of restraint could be regarded as such a procedural action in her case.

105. The applicant further submitted that in substantiation of her claim for damages before the domestic courts, she had referred to the refusals by the investigator of her travel requests. However, that argument had remained without any assessment and the applicant's claim had been rejected as unfounded.

106. She therefore argued that she had exhausted domestic remedies.

107. At the same time, the applicant argued that given the rejection of her compensation claim by the domestic courts, she had been denied an effective domestic remedy in respect of her complaint under Article 2 of Protocol No. 4, contrary to the requirements of Article 13 of the Convention.

B. The Court's assessment

108. The Court observes that in order to consider whether the applicant exhausted domestic remedies for the purposes of her complaint under Article 2 of Protocol No. 4 to the Convention, it must first deal with her complaint under Article 13 that no effective remedies were available to her.

109. The Court reiterates that the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be sufficient and accessible (see *Paulino Tomas v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII). However, the Court reiterates that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII) and that the mere fact that an applicant's claim fails

is not in itself sufficient to render the remedy ineffective (see *Amann v. Switzerland* [GC], no. 27798/95, §§ 88-89, ECHR 2000-II).

110. Turning to the present case, the Court notes that the first argument advanced by the Government is that the applicant could have complained about the investigator's refusals of her travel requests (see paragraph 101 above). The Court considers this argument to be misguided. Thus, it is in contradiction with the Government's submission that on 20 November 2009 the impugned preventive measure had ceased to apply. Had that been obvious, there would have been no reason for the applicant to apply to the investigator with such requests in the first place.

111. The Court does, however, agree with the Government's second argument that the applicant could have received an adequate remedy in the framework of compensation proceedings (see paragraph 102 above). More specifically, the Court observes that under the domestic legislation in force, once the criminal proceedings against the applicant had been discontinued owing to the absence of the constituent elements of a crime in her actions, she could claim compensation from the State in respect of any "procedural actions restricting her rights" (see paragraphs 63 and 64 above). The applicant used that opportunity and succeeded in initiating compensation proceedings. She did not allege that any redress would have been insufficient if the courts had found in her favour within those proceedings. The mere fact that the applicant's claim failed cannot raise an issue under Article 13. In so far as she contended that her arguments had not been duly addressed, the Court considers that the Government, in stating that she had failed to duly substantiate her claim, had a point. Thus, there is no evidence in the case file refuting the Government's argument that she only sent the investigator's letter of 22 June 2012 (proving the restrictions on her right to liberty of movement – see paragraph 45 above) to the cassation-level court, but not to the first-instance or appellate court. Furthermore, the applicant only mentioned that issue for the first time in her appeal, without giving any details, and did not raise it before the first-instance court at all. Although the applicant mentioned the page number of the case file where that document could be found (see paragraph 54 above), this fact alone is not sufficient to consider that she was referring to the civil, rather than the criminal, file. Thus, the letter in question was not among the enclosures to her claim or appeal (see paragraphs 51 and 54 above). In any event, the applicant failed to submit any factual details as to how and when exactly her rights had been restricted. Accordingly, the Court cannot reproach the Ukrainian courts for the way they examined the applicant's claim.

112. In the light of the foregoing, the Court considers the applicant's complaint under Article 13 of the Convention to be manifestly ill-founded and declares it inadmissible on those grounds under Article 35 §§ 3 (a) and 4 of the Convention.

113. Turning to the complaint under Article 2 of Protocol No. 4, the Court reiterates that the rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is an indispensable part of the functioning of the Convention system of subsidiary protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014). States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see *Vučković and Others*, cited above, § 70, with further references).

114. In the present case, the Court considers that, by having raised her claim at the domestic level in overly general terms and by having failed to substantiate it in due time (see paragraph 111 above), the applicant cannot be regarded to have provided the domestic courts with an opportunity to put right the alleged violation of her rights under Article 2 of Protocol No. 4 (see, *mutatis mutandis*, *Dimitrova and Others v. Bulgaria* (dec.), no. 39084/10, §§ 66-77, 11 July 2017).

115. It follows that her complaint under Article 2 of Protocol No. 4 should be declared inadmissible for non-exhaustion of domestic remedies (see, for a procedurally similar approach, *Magri v. Malta* (dec.), no. 22515/16, §§ 50-52, 2 May 2017).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

116. 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

117. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

118. The Government contested that claim as unsubstantiated and exorbitant.

119. The Court considers that the applicant suffered non-pecuniary damage, which cannot be compensated for by the mere finding of a violation of her Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, the

Court awards the applicant EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

120. The Court further notes that where an individual, as the applicant 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, 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, with further references).

B. Costs and expenses

121. The applicant also claimed EUR 850 in respect of the costs and expenses incurred before the Court.

122. The Government did not comment on that claim.

123. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to allow the applicant's claim for costs and expenses and to award her the sum of EUR 850.

C. Default interest

124. The Court considers it appropriate that the default interest rate 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 applicant's complaints under Article 2 of Protocol No. 4 and Article 13 of the Convention in conjunction with that provision inadmissible;

2. *Declares* the applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention on account of her inability to cross-examine the witness against her, M., admissible;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the applicant's inability to cross-examine M.;

4. *Holds* that there is no need to examine the admissibility and merits of the applicant's remaining complaints under Article 6 of the Convention;

5. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and
      (ii) EUR 850 (eight hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President