

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

FIFTH SECTION

CASE OF RADCHENKO v. UKRAINE

(Application no. 39555/07)

JUDGMENT

STRASBOURG

1 February 2018

This judgment is final but it may be subject to editorial revision.



In the case of Radchenko v. Ukraine,

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

Erik Møse, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges,*

and Anne-Marie Dougin, *Acting Deputy 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. 39555/07) 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 Stepan Stepanovich Radchenko ("the applicant"), on 16 August 2007.

2. The applicant, who had been granted legal aid, was represented by Mr M. Tarakhkalo, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna, of the Ministry of Justice.

3. On 24 May 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1976 and is serving a sentence of life imprisonment.

5. In December 2005 violent robberies were committed at two scrap metal collection points in Odesa. One employee was shot dead. In the course of the investigation, the police organised an ambush, which led to the applicant and his acquaintance, Mr D., being arrested. As established by the domestic courts, before his arrest the applicant had pointed a gun at a police officer, who had knocked it out of his hands using a martial arts technique. The gun had been loaded and had had its safety catch released.

6. On an unspecified date the applicant had free legal counsel appointed for him for the pre-trial investigation and the proceedings before the first-instance court.

7. On 4 September 2006 the Odesa Regional Court of Appeal, sitting as a court of first instance, found the applicant guilty of the illegal handling of arms, robbery with violence, intentional murder for profit and an attempt on the life of a law-enforcement officer. It relied, *inter alia*, on the statements of several eyewitnesses who had recognised the applicant. Having regard to the fact that the applicant had previously been convicted of the intentional infliction of fatal injuries and that he had committed the crimes at issue while on probation following release in October 2005, the court sentenced him to life imprisonment.

8. The applicant, who was no longer legally represented, appealed in cassation. He complained, in particular, about the absence of free legal assistance at that stage of the proceedings. The applicant contended that the first-instance court had erred in its assessment of the facts of the case and their legal classification.

9. On 30 January 2007, following a hearing with the participation of Mr D. (the other defendant) and his lawyer, as well as the prosecutor, but without the applicant or any representative from his side, the Supreme Court upheld the judgment of 4 September 2006.

10. On 11 June 2007 the applicant, who was not aware of the above ruling, requested that the Supreme Court ensure his presence at its hearing.

11. On 17 August 2007 a copy of the Supreme Court's ruling of 30 January 2007 was sent to the applicant.

II. RELEVANT DOMESTIC LAW

12. Article 45 § 1 of the Code of Criminal Procedure of 1960 ("the CCP", in force at the material time) provided that legal representation during an inquiry, pre-trial investigation or trial before a court of first instance was obligatory if, *inter alia*, a life sentence was a possible penalty. Under Article 45 § 2, the legal representation envisaged by Article 45 § 1 was obligatory in proceedings before an appellate court if the appeal could potentially worsen the situation of the convicted (or acquitted) person.

13. According to Article 383 § 1 of the CCP, the verdicts of appellate courts delivered at first instance could be reviewed under the cassation appeal procedure.

14. Under Article 398 § 2 of the CCP, a verdict delivered by an appellate court as a court of first instance could be quashed or modified on the grounds of bias or incompleteness of the inquiry, pre-trial investigation or trial, or because the court's conclusions in its verdict were not consistent with the circumstances of the case.

THE LAW

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

15. The applicant complained that his rights under Article 6 §§ 1 and 3 (c) of the Convention had been violated in the proceedings before the Supreme Court. The provisions relied on read as follows in the relevant part:

> "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:
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> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."

A. Admissibility

16. 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.

B. Merits

1. Lack of free legal assistance in the proceedings before the Supreme Court (Article 6 §§ 1 and 3 (c) of the Convention)

17. The applicant maintained that the complexity of his case, the risk of his being sentenced to life imprisonment, the most serious criminal punishment, as well as his lack of any income, had required that he be afforded free legal representation by the State in the proceedings before the Supreme Court. Given that domestic legislation recognised such a need during a pre-trial investigation and in a trial before a first-instance court, the applicant found it incomprehensible and unjustified that free legal assistance had not been provided for him in the subsequent proceedings.

18. The Government submitted that the domestic courts had acted in compliance with criminal procedural legislation, which did not provide for obligatory legal representation in cassation proceedings where, as in the applicant's case, no worsening of the convicted person's situation was possible. The Government noted in that connection that the applicant had been sentenced by the first-instance court to life imprisonment, the heaviest

penalty and one which could not be made more severe. They did not agree that the lack of free legal assistance for him at that stage had run counter to the interests of justice.

19. The Court notes at the outset that according to its case-law the guarantees of Article 6 § 3 (c) of the Convention do not cease to apply after first-instance proceedings (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 40, ECHR 2002-VII, and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 64, ECHR 2017).

20. The right of those charged with criminal offences to free legal assistance, which is one of those guarantees, is subject to two conditions: the person concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that he or she be granted such assistance (see, among other authorities, *Pham Hoang v. France*, 25 September 1992, § 39, Series A no. 243).

21. As regards the first-mentioned condition, the Court observes that free counsel was appointed for the applicant during the pre-trial investigation and the proceedings before the lower court, which indicated an acknowledgement by the authorities that he faced financial hardship. As to whether, secondly, "the interests of justice" required that free legal assistance be provided for him during the proceedings before the Supreme Court, the seriousness of the matter at stake and the nature of those proceedings are the key points for consideration (see *Maksimenko v. Ukraine*, no. 39488/07, § 27, 20 December 2011, with further references). Having regard to the fact that the applicant was facing life imprisonment as the maximum possible penalty, the Court has no doubt that he required legal assistance (ibid., § 28).

22. The Court further notes that under the Ukrainian Code of Criminal Procedure ("the CCP"), where the Supreme Court reviewed in cassation proceedings a judgment which had been delivered by an appellate court acting as a court of first instance – as in the present case – its assessment concerned not only points of law. It also extended to verifying the fairness and completeness of the pre-trial investigation and the trial before the first-instance court, and the consistency of the first-instance court's conclusions with the factual circumstances of the case. Accordingly, the nature of the proceedings before the Supreme Court also warranted legal assistance for the applicant in the interests of justice (ibid., § 29).

23. This leads the Court to conclude that the applicant was unfairly denied free legal assistance in the proceedings before the Supreme Court.

24. As the Court held in *Maksimenko* (cited above, § 31), that limitation of the applicant's defence rights resulted from the absence of any procedures for appointing free legal representation at that stage of the proceedings where it was no longer deemed mandatory under the CCP.

25. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

2. Compliance with the equality-of-arms principles in respect of the applicant's absence from the hearing before the Supreme Court (Article 6 § 1 of the Convention)

26. The applicant submitted that there had been a violation of Article 6 § 1 of the Convention in that the Supreme Court had examined his appeal on points of law in his absence but in the presence of the prosecutor.

27. The Government contested those arguments. They maintained that the applicant had only expressed his wish to be present at the hearing before the Supreme Court after it had already examined his case (see paragraph 10 above). In the absence of any request from the applicant, the Supreme Court had been under no obligation to ensure his presence at its hearing. In any event, the Government maintained, the prosecutor's presence at the hearing had been purely formal and there had been no breach of the principle of the equality of arms.

28. The Court has previously found violations in similar cases against Ukraine (see *Zhuk v. Ukraine*, no. 45783/05, §§ 29-35, 21 October 2010; *Korobov v. Ukraine*, no. 39598/03, § 92, 21 July 2011; *Kuzmina v. Ukraine* [Committee], no. 11984/06, §§ 14-16, 16 June 2016; and *Palchik v. Ukraine*, no. 16980/06, §§ 31-33, 2 March 2017). It considered that prosecutors had the advantage of being present at hearings before the Supreme Court and, unlike the defendant, were able to make oral submissions, which were intended to influence the court's opinion. The Court concluded that procedural fairness required that the applicants in those cases should also have been given an opportunity to make oral submissions in reply.

29. Having regard to the circumstances of the present case, the Court sees no reason to reach a different conclusion and finds that the principle of equality of arms has not been respected.

30. Accordingly, there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of equality of arms in the proceedings before the Supreme Court.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

31. The applicant also raised a number of further complaints under Articles 3, 5, 6 and 34 of the Convention.

32. In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the

application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 6,000,000 euros (EUR) in respect of non-pecuniary damage and requested a retrial in compliance with Article 6 of the Convention.

35. The Government contested this claim.

36. The Court 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 requirements of 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, strictly, the substantive and procedural safeguards enshrined in Article 6 of the Convention (ibid.).

37. In the light of those 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.

B. Costs and expenses

38. The applicant also claimed EUR 2,872 for the costs and expenses incurred before the Court, to be paid to his lawyer's account directly. In support of his claim, he submitted a legal assistance contract signed by him and Mr Tarakhkalo on 2 November 2011. It stipulated an hourly fee of EUR 95. According to the contract, payment was due after completion of the proceedings in Strasbourg and within the limits of the sum awarded by the Court in respect of costs and expenses. The applicant also submitted a report of 26 March 2012 on the work completed under the aforementioned contract. It specified that Mr Tarakhkalo had worked on the case for

twenty-seven hours (EUR 2,565) and that he had incurred administrative and postal costs totalling EUR 205 and EUR 102 respectively.

39. The Government maintained that, given the nature of the applicant's complaints, the claim for legal work expenses was exaggerated. They further noted that the applicant had failed to submit proof that the administrative and postal costs had actually and necessarily been incurred as he had provided no relevant bills or receipts.

40. 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 award the sum of EUR 1,000, covering costs under all heads (which is equal to EUR 1,850 less EUR 850, the sum received by way of legal aid) to be transferred directly to the account of the applicant's lawyer.

C. Default interest

41. 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 complaints under Article 6 §§ 1 and 3 (c) of the Convention in respect of the proceedings before the Supreme Court admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the lack of free legal assistance for the applicant in the proceedings before the Supreme Court;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of equality of arms in the proceedings before the Supreme Court;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 1,000 (one thousand euros), plus any tax that may be

chargeable to the applicant, in respect of costs and expenses, to be transferred directly to the account of the applicant's lawyer, Mr Tarakhkalo;

(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;

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

Done in English, and notified in writing on 1 February 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anne-Marie Dougin	Erik Møse
Acting Deputy Registrar	President