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

FIFTH SECTION

DECISION

Application no. 34640/05
Aleksandr Vasilyevich LYUBCHENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 31 May 2016 as a Chamber composed of:

Angelika Nußberger, *President,*
Khanlar Hajiyev,
André Potocki,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni, *judges,*
Sergiy Goncharenko, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 6 September 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Aleksandr Vasilyevich Lyubchenko was born in 1973 and lives in Dzhankoy, the Autonomous Republic of Crimea (the "ARC"). At the time of lodging of his application, he indicated of being a Ukrainian national. In May 2014 he informed the Court that he had obtained Russian nationality in April 2014.

2. The Ukrainian Government ("the Government") were represented most recently by their Acting Agent, Ms O. Davydchuk of the Ministry of Justice.

3. Mrs Ganna Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). Accordingly, the

President of the Fifth Section decided to appoint Mr Sergiy Goncharenko to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

A. The circumstances of the case

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. By a judgment of 19 February 2002, a certain K. was sentenced to three and a half years' imprisonment suspended for two years' probation. In June-September 2003 K. failed to appear before the probation officer for his fortnightly registration allegedly for medical reasons, including hospitalisation.

6. On 6 November 2003 the applicant, a probation officer, represented the District Penal Inspection Authority in judicial proceedings against K. concerning replacement of K.'s probation with imprisonment due to the latter's failure to comply with the probation requirements. The court adjourned the proceedings until 19 November 2003, having requested K. to submit documents confirming his hospitalisation.

7. On 13 November 2003 K. gave a statement to the Deputy District Prosecutor of Dzhankoy. He submitted that after the court hearing of 6 November 2003 the applicant had summoned him to his office on 10 November 2003. When he had arrived, the applicant informed him that the judge and the prosecutor were intending to replace his probation with imprisonment but that the applicant could settle the matter in his favour for 200 US dollars (USD). K. signed the aforementioned statement and confirmed that he was aware that knowingly reporting false information about a crime was a criminal offence.

8. On the same day, 13 November 2003, prosecutor M. decided to institute a preliminary inquiry under Article 97 of the Code of Criminal Procedure ("the CCP") and assigned the task to economic crime detectives I. and Sh. from the Crimea Police Department. At 2.30 p.m. the detectives examined two 100 USD notes provided by K. which they had marked with special luminescent fluid (lumiphore) and which K. then put in his pocket. This action was documented in a record of the application of special chemical substances (*Протокол применения специальных химических веществ*) and was signed by the participants and two attesting witnesses. According to later submissions by some of those present, K. also had a dictaphone attached to his clothing.

9. At about 3 p.m. on the same day K. entered the applicant's office and emerged a few minutes later, indicating to the detectives and prosecutor M. that he had given the banknotes to the applicant, whereupon they also entered the applicant's office. According to the crime scene inspection report (*Протокол осмотра места происшествия*) drawn up by the prosecutor, between 3.25 p.m. and 5.05 p.m. the prosecutor and police

officers conducted a search of the applicant's office. They recorded that during the search the applicant was asked by the police officers whether he had received any money. He replied in the negative. The police officers then checked the applicant's hands with a special device and found traces of lumiphore on his right hand. They looked in an open safe situated near the applicant's desk and found the two marked banknotes inside. It was also noted in the report that the search had been audio-recorded.

10. The applicant was arrested that same day.

11. On 15 November 2003 the applicant was charged with soliciting and receiving a bribe.

12. On 16 November 2003 the applicant was released.

13. On 1 April 2004 the applicant was dismissed from his post of probation officer.

14. On 21 January 2004 the Dhzankoy District Court ("the District Court") examined the applicant's case and referred it to the Dzhankoy Prosecutor's Office for further investigation. The court ordered that during the further investigation the banknotes which had been used for the bribe should be located and checked for the applicant's fingerprints, and that the audio-recording of the bribe-taking, and documents proving that that operation had been lawful must be produced.

15. On 26 February 2004 the Court of Appeal of the Autonomous Republic of Crimea ("the Court of Appeal") quashed the ruling of 21 January 2004, finding that the requirements laid down by the first-instance court were irrelevant or unnecessary. It observed in particular that the banknotes had been treated with chemicals and examined by forensic experts, that the probability of finding fingerprints on them was therefore low and that it was for this reason that the corresponding examination had not been conducted. The court also noted that there was no evidence either in the case-file or the bill of indictment that an audio-recording had been made, and the first-instance court judge had failed to indicate on what basis he had concluded that such an audio-recording of the bribe handover had in fact been made.

16. By a judgment of 9 March 2005 the District Court acquitted the applicant. The court noted that the applicant denied the accusations, claiming that after the postponement of the hearings in the case of K., the latter had approached him on several occasions to ask about the case. On 13 November 2003 K. had come to his office, they had shaken hands and K. had started asking him again about his probation. After K. had left the office, the police officers had come in and had found the US dollars in his safe. The applicant claimed that he knew nothing about the money and had never solicited or taken any bribe from K. He argued that K. could have put the money in his safe without his knowledge and that the traces of lumiphore on his hand could have been caused by shaking hands with K. The court also examined the evidence presented by the police and found that

the operation had been conducted in breach of criminal procedure. It held, in particular, that the operation had been instigated on the basis of unverified allegations made by K. and without an order to institute criminal proceedings against the applicant, and also that certain investigative techniques (special chemicals and audio-recording) had been used without an operational file having been opened, contrary to section 9 of the Search and Seizure Activities Act. The court further noted that the prosecution had lost the audio-recording of the conversation between K. and the applicant, which constituted an important item of evidence that could have confirmed or refuted K.'s allegations that the applicant had extorted money from him. Although the prosecutor denied the use of audio-recording during the operation, K. and one of the police officers confirmed that a dictaphone had been used during the operation. The court also observed that the expert opinion stated that the marked banknotes could in fact have been checked for the applicant's fingerprints but this had not been done and the banknotes had been lost. The traces of the chemical on the applicant's hand did not in itself constitute conclusive evidence that he had taken money from K. The court also noted that during the trial prosecutor M. had claimed that the operation had been headed by police inspector I., whereas the latter stated that they were merely assisting the prosecutor to verify the notification of a crime. The court also doubted the testimony given by K. in the light of an earlier promise to take revenge, which was confirmed in the court by two of the applicant's colleagues. For all these reasons the court concluded that the evidence presented by the prosecution had either been unlawfully obtained or was too inconclusive to establish that the applicant had solicited or received a bribe from K.

17. The prosecutor appealed. In the applicant's reply to the appeal he stated that the audio-recording made during the operation contained evidence of his innocence and had been withheld from the case file for this reason, and that prosecuting investigator M. had not investigated the real intention behind K.'s complaint, namely to slander the applicant and evade imprisonment.

18. On 6 May 2005 the Court of Appeal quashed the earlier judgment, found the applicant guilty of bribery, sentenced him to three years' imprisonment together with confiscation of all his property and detained him pending appeal. The court considered that the fact that the applicant had solicited a bribe from K. was proved by the consistent and logical statements given by the latter. It noted that the applicant had failed to check the validity of the reasons for K.'s non-compliance with the probation requirements. In the latter aspect, it referred to two decisions of the Dzhankoy District Court of 11 December 2003 and 20 May 2004 in favour of K. The court also relied on the evidence provided by the records of the use of the special chemical, of the discovery of the marked banknotes in the safe, of the discovery of traces of special chemicals on one of the

applicant's hands, of an event reconstruction proving that K. could not have put the money in the safe without the applicant having noticed it, of the finding of traces of the special chemical on the applicant's hand and a forensic examination finding a similarity between the chemical on the applicant's hand and that on the marked banknotes. The court held that the District Court had examined the evidence thoroughly but had assessed it incorrectly. Referring to the statement by police officer I. that no operational file had been opened because this had been a preliminary inquiry within the meaning of Section 97 of the CCP, it concluded that the evidence obtained in the course of the operation had been obtained in compliance with criminal procedure.

19. The applicant lodged an appeal on points of law challenging the admissibility of the evidence against him. Over and above the findings of the trial court he argued that the operation had not been authorised by any court, contrary to Article 97 of the CCP and section 8 of the Search and Seizure Activities Act, and that the operation conducted by the authorities on 13 November 2003 had assisted the provocation of a bribe rather than examining the truthfulness of K.'s allegations and preventing the crime.

20. On 30 June 2005 the Supreme Court of Ukraine upheld the decision of the court of appeal but reduced the applicant's sentence to one year's imprisonment. The court noted that the applicant's guilt had been proved by the consistent testimonies of K. who had no reason for making false accusations against the applicant. It concluded that there had been sufficient direct and indirect proof that the applicant had not only taken the bribe but had solicited it too.

21. The applicant was released from prison on 2 May 2006.

B. Relevant domestic law and practice

1. Constitution of Ukraine, 1996

Article 62

"[...] An accusation shall not be based on illegally obtained evidence or on assumptions. All doubts with regard to the proof of a person's guilt are to be interpreted in his or her favour."

2. Criminal Code, 2001

Article 368

Taking a bribe

1. The taking of a bribe of any kind, by an official, in return for taking or refraining from any action for the benefit of the person offering the bribe or for the benefit of any third person by means of the authority or official powers entrusted in this official, shall be punishable by a fine of 750 to 1,500 tax-free minimum incomes, or imprisonment for a term of two to five years, with the deprivation of the right to

occupy certain positions or engage in certain activities for a period of up to three years.

2. The taking of a substantial bribe by an official who occupies a responsible position, or by a group of persons following prior conspiracy, or if repeated or accompanied by solicitations for such a bribe, shall be punishable by imprisonment for a term of five to ten years along with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and confiscation of property...

Article 369

Offering a bribe

1. The offering of a bribe shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term of two to five years.

...

3. A person who offers a bribe shall be discharged from criminal liability if the bribe was solicited from this person and if this person, after offering the bribe and before any criminal prosecution was initiated against him/her, voluntarily reported the act of bribery to the agency competent to undertake criminal prosecution.

Article 370

Provocation of bribery

1. The provocation of bribery, that is to say the intentional creation, by an official, of circumstances and conditions that provoke the offering or taking of a bribe for the purpose of implicating those who offered or took it, shall be punishable by restraint of liberty for a term up to five years, or imprisonment for a term of two to five years.

2. The same act committed by a law enforcement official shall be punishable by imprisonment for a term of three to seven years.

3. Code of Criminal Procedure, 1960, in force at the material time

Article 97

Obligation to accept statements and notifications about crimes and the procedure for their examination

"...If the need arises to check a statement or notification about a crime prior to the opening of a [criminal] case, such check shall be conducted by a prosecutor, an investigator, or a panel of inquiry within a period of ten days by taking explanations from particular individuals or officials or by requesting the necessary documents.

A statement or notification about a crime prior to the opening of a criminal case may be verified by means of search and seizure activities. Certain search and seizure activities, determined by the legislative acts of Ukraine, shall be conducted with the court's authorisation on the basis of a request to be submitted by the head or deputy head of the respective operative unit and approved by a prosecutor..."

4. Search and Seizure Activities Act, 18 February 1992

22. Section 8 of the Act lays down a range of investigative techniques that constitute the search and seizure activities that may be conducted by the law enforcement bodies. It also requires that any covert entering of a home

or other individual property, interception of communications, monitoring of correspondence and telephone conversations and application of other technical means for obtaining information, must be undertaken at the request of the head or deputy of the operative unit and authorised by a court decision. Any application of technical means for obtaining information must be documented and may be used as evidence in criminal proceedings.

23. Section 9 of the Act requires that search and seizure activities be carried out only after an operational file (*оперативно-розшукова справа*) has been opened, and prohibits these activities without the existence of such a file.

5. Resolution of the Plenary Supreme Court of Ukraine no. 9 of 1 November 1996 on the Application of the Constitution in the Administration of Justice

"...19. Evidence shall be deemed to have been obtained illegally if it has been obtained and processed either in breach of individual and citizen's rights guaranteed by the Constitution of Ukraine, or of legislation on criminal procedure, or by persons and bodies or through means not authorised by the relevant procedural norms."

COMPLAINTS

24. The applicant complained under Article 5 §§ 4 and 5 of the Convention and Articles 2 and 3 of Protocol No. 7 that the proceedings against him had been unfair. In particular, he submitted that the evidence in his case had been illegally obtained, that he had been provoked into committing the crime and that the authorities had failed to secure material evidence which had been in their possession and which the applicant had wanted to use in his defence.

THE LAW

25. The applicant complained under Article 5 §§ 4 and 5 of the Convention and Articles 2 and 3 of Protocol No. 7 that his conviction had been based on illegally obtained evidence and bribery resulting from provocation and that the authorities had disposed of items of evidence which could have proved his innocence prior to trial in his criminal case. The Court, which is master of the characterisation to be given in law to the facts of a case (see, *Drozd v. Ukraine*, no. 12174/03, § 49, 30 July 2009) finds that the complaints at issue fall to be examined under Article 6 § 1 of the Convention, which reads, in so far as relevant:

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

26. The Court notes that the applicant's complaint is threefold and will examine it in turns.

A. Use of special investigation measures and evidence obtained

27. In so far as the applicant claimed that the evidence used in the investigation had been obtained illegally and that the courts should not have used it for his conviction, the Government argued that the applicant had had a fair hearing. In particular, they pointed out that the use of special investigative measures (including undercover techniques) could not in itself infringe the right to a fair trial but accepted that their use must be kept within clear limits. The prosecutor had warned K. that knowingly reporting false information about a crime was a criminal offence, and he had confirmed his awareness of this by signing a statement. The law enforcement bodies, before applying the special investigative measures, had had reasonable grounds for suspecting that the applicant intended to commit a crime. The national courts had thoroughly examined the legal grounds for applying the special investigative measures, the credibility of K.'s statements, and the admissibility of the evidence obtained.

28. The applicant maintained that the law enforcement authorities needed the permission of a court to use chemical substances and to make an audio-recording. He also pointed out that the authorities had lost the audio-recording of his conversation with K. which would have confirmed his innocence and that they had not checked the marked banknotes for fingerprints, despite the expert confirming in court that such an examination would have been technically possible. He concluded that the allegations against him had all been based on statements made by K. and on unlawfully obtained evidence.

29. The Court points out that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence may be admissible or, indeed, whether the applicant was guilty or not (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

30. In the instant case, the domestic courts disagreed as to whether the evidence had been obtained lawfully and whether it was sufficient to secure the applicant's conviction. While the first-instance court came to the conclusion that the items of evidence collected had been unlawfully obtained and were inconclusive and that further investigations needed to be carried out to establish the applicant's guilt, the higher courts disagreed and

overruled the decision of the first-instance court, holding that the use of special chemicals was lawful and that the body of evidence collected was sufficient for the applicant's conviction. It should be noted that the applicant had ample opportunity to contest the admissibility and reliability of the evidence before the appellate and cassation courts, and that his arguments in this regard, which were accepted by the first-instance court, had been properly addressed by the higher courts. The Court recalls that the domestic courts are, in principle, better placed to judge the reliability of witnesses and the accuracy of investigation reports, as well as their formal compliance with domestic law (see *Artemov v. Russia*, no. 14945/03, § 116, 3 April 2014). In these circumstances, the Court sees no reason to challenge the domestic courts' decision to admit in evidence material obtained as a result of the covert operation.

B. "Provocation" of the commission of an offence

31. In so far as the applicant claimed that he had been provoked into taking a bribe, the Government maintained that the actions of the law enforcement bodies had not amounted to incitement and that the use of the evidence obtained as a result of the operation by the national courts had not been in breach of Article 6 § 1 of the Convention. They further contended that the applicant had been afforded adequate procedural safeguards which had enabled him to raise a complaint about the alleged incitement and that he could have used the defence of "entrapment" afforded by national legislation.

32. The applicant argued that the prosecutor and the police officers, rather than preventing a crime, had provoked the bribery themselves.

33. Having regard to all circumstances, the Court is not persuaded that the situation under examination falls within the category of "entrapment cases" (see and complare, *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 62 to 74, ECHR 2008). Although the applicant expressed his complaints using the term "provocation", it appears that in essence he complained of "being framed". Indeed, the applicant never actually admitted to soliciting or accepting the bribe. On the contrary, both at domestic level and before the Court he denied having discussed this subject with K. and consistently maintained that the law enforcement officers and K. had planted the money in the safe and had forged evidence in order to have him convicted of the corruption-related offence. Therefore, the present case differs significantly from cases examined by the Court previously with respect to the alleged entrapment of applicants by authorities who had coerced them into committing offences that would not have been committed otherwise (see, among many other authorities, *Ramanauskas*, cited above). The applicant's reference to the case-law relating to the alleged entrapment is therefore misguided.

34. In any event, the Court notes that nothing in the case file or the parties' submissions suggests that K. had been working for, or had cooperated with, the law enforcement authorities prior to the covert operation of 13 November 2003, and that according to the domestic court's findings, the crime of soliciting a bribe had already been committed by that date. The police only became involved at the point when K. informed them about the crime. Although K.'s role in the covert operation can be compared to that of a "police agent", the domestic courts established that he became an "agent" only after the applicant had solicited a bribe (see and compare *K.L. v. the United Kingdom* ((dec.), no. 32715/96, 22 October 1997; *Milinienė v. Lithuania*, no. 74355/01, § 38, 24 June 2008).

C. Alleged failure to secure evidence

35. Lastly, the applicant maintained that the authorities failed to secure pieces of evidence, namely the two banknotes and an audio-recording, which he could have used in his defence.

36. The Government maintained, referring to the findings of the appellate court, in particular in its decision of 26 February 2004, that the applicant's allegations had been examined and rejected by the domestic court. They noted that the investigating authorities had not lost the banknotes used during the operation but rather had returned them to K., given that there had been a sufficient body of evidence confirming the applicant's bribe-taking and additional fingerprint identification had therefore not been necessary. They further noted that there was no evidence that the bribe taking had been audio-recorded. They concluded that the applicant's rights under Article 6 had not been violated.

37. The applicant argued that the domestic authorities had returned the banknotes used in the bribe to K. and that those banknotes had been spent. He maintained that if the banknotes had been available, he could have proved that there were no fingerprints of his on those banknotes. Furthermore, he pointed out that several witnesses had stated that K. had been equipped with a dictaphone but the authorities refused to produce the audio-recording of the bribe handover as it would have proved his innocence.

38. The Court reiterates that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have cognisance of and comment on the observations filed and the evidence adduced by the other party. In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or

against the accused. Failure to disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence (see, *mutatis mutandis*, *Leas v. Estonia*, no. 59577/08, §§ 77 and 81, 6 March 2012, with further references).

39. As to the issue of the banknotes, in view of the above-cited case-law, the Court cannot agree with the Government that, given the existence of other items of evidence the investigating authorities had been free to dispose of the banknotes as an unnecessary item of material evidence. In the instant case, however, the domestic courts had examined the issue of the banknotes thoroughly and the key argument, in the Court's opinion, was the low probability of finding fingerprints on the banknotes (see paragraph 15 above) and thus the conclusion that absence of fingerprints could not constitute proof of the fact that the applicant had not touched the banknotes. Therefore, the Court considers that in the particular circumstances of the present case, the failure of the authorities to secure the availability of the banknotes had not upset the fairness of the proceedings in their totality.

40. Turning to the issue of the audio-recording, the Court notes that the material in the case-file and the parties' submissions provide conflicting information as to whether or not K. was equipped with a dictaphone (see paragraphs 8, 15, 16 above). However, there is no information as to whether the dictaphone, if it existed, was actually used during the operation and thus whether an audio-recording ever existed. The investigating authorities consistently denied the existence of any such recording and there was no proof to the contrary. The appellate court also noted that there was no information about the existence of an audio-recording of the operation (see paragraph 15 above). The Court considers that if the existence of such recording were established, it would be legitimate for the applicant to seek to adduce such an item of evidence, regardless of its usefulness for the prosecution. However, this was not the case and in the absence of any indication to the contrary, the Court accepts that no audio-recording of the operation existed (see and compare *Bannikova v. Russia*, no. 18757/06, § 76, 4 November 2010).

D. Overall conclusion

41. The Court observes that the applicant's conviction was based on numerous items of evidence and the domestic courts examined the applicant's arguments and rejected them while giving sufficient reasons for their decisions. Their decisions do not appear to be arbitrary or manifestly unreasonable. The Court does not detect any serious flaw in the courts' decision-making process that might have rendered the applicant's trial

"unfair" (see and compare *Volkov and Adamskiy v. Russia*, nos. 7614/09 and 30863/10, §§ 36 to 46, 26 March 2015).

42. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 23 June 2016.

Claudia Westerdiek
Registrar

Angelika Nußberger
President