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

FIFTH SECTION

DECISION

Application no. 74785/14
Sergiy Mykolayovych VOLKOV
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 7 March 2024 as a Committee composed of:

Carlo Ranzoni*, President*,
Mattias Guyomar,
Mykola Gnatovskyy*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 74785/14) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 20 November 2014 by a Ukrainian national, Mr Sergiy Mykolayovych Volkov ("the applicant"), who was born in 1968 and lives in Korosten;

the decision to give notice of the complaints under Articles 6 and 8 of the Convention to the Ukrainian Government ("the Government"), represented by their Agent, Ms M. Sokorenko, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application mainly concerns the applicant's complaints that his conversations had allegedly been recorded without a court authorisation and that the results had been used as evidence against him, in breach of Articles 6 and 8 of the Convention.

2. At the relevant time the applicant was a district prosecutor in the Kyiv Region. In 2011 he initiated an investigation into a criminal case involving suspicion of embezzlement at Zh., a publicly owned company. Mr R. had been Zh.'s CEO at the time the suspected embezzlement had occurred.

3. According to the findings of the domestic courts, the applicant and Mr R. agreed on 3 February 2012 that Mr R. would give the applicant 10,000 United States dollars (USD) to avoid criminal liability in respect of the above-mentioned investigation.

4. Mr R. and his wife Ms R. complained to the Security Service of Ukraine ("the SBU") that the applicant was extorting a bribe from them. Their complaints were registered on 29 February 2012. The SBU started undercover surveillance measures ("operational-search activities") in respect of the applicant.[1] Within that framework, on 2 March 2012 officers of the SBU gave Ms R. the funds for the simulated bribe and video-recording equipment.

5. On 3 March 2012 the applicant met with Mr and Ms R. According to the transcript of the conversation prepared by the SBU on 13 March 2012, the meeting was recorded under section 8(2) of the Operational-Search Activities Act[2] on the basis of a decision of the president of the Kyiv City Court of Appeal dated 24 February 2012.

6. According to the transcript, the applicant and Mr and Ms R. discussed the results of an audit of company Zh., which had revealed unexplained expenses, and how those expenses could be justified. Ms R. repeatedly asked in vague terms how to resolve the situation. At one point she and the applicant spoke in inaudible whispers. Then the applicant said that "everything would be done in accordance with the law", Mr R. would explain some of the expenses, reimburse what remained unexplained, plead guilty and get a suspended sentence and the applicant would ensure that the sentence would be light. Mr and Ms R. repeatedly asked the applicant whether the matter could be resolved without a trial, notably by paying a "fine", and the applicant replied that it was not possible. At some point he replied to another similar question by asking, in a whisper, whether Ms R. "had fifty grand" and when she replied that she did not, he told her to keep quiet.

7. According to the findings of the domestic courts, during the trial an examination of the video-recording revealed that during the conversation Ms R. had put USD 3,000, part of the agreed bribe of USD 10,000, into a drawer in the applicant's desk, which the applicant had opened for her.

8. The applicant was charged with bribery. From the beginning of the investigation he admitted that he had accepted money from Ms R., arguing only that he had done it after her repeated insistence that he accept money for

[1] Operational-search activities are activities aimed at intelligence-gathering, crime prevention and verification of information about possible criminal activity prior to the institution of criminal proceedings. They are governed mainly by the Operational-Search Activities Act (1992, as amended).

[2] At the relevant time, section 8 of the Act provided that the use of technical means of obtaining information during operational-search activities had to be authorised by a court decision (see *Berlizev v. Ukraine*, no. 43571/12, § 27, 8 July 2021, and *Lysyuk v. Ukraine*, no. 72531/13, § 32, 14 October 2021).

repairs of the prosecutor's office premises. He stated that he had never pressured Mr and Ms R. to pay and had repeatedly told them that nothing could be done for them and that the case would be treated in accordance with the law, regardless of their offers. He eventually did take money to cover previous expenses which he had incurred for repairs carried out at the prosecutor's office: in 2011 he had borrowed money from Mr S. and used it for the repairs and in early March 2012 he used the money he had received from Mr R. to repay that debt.

9. In the court proceedings the applicant also stated that while he had accepted the money as a charitable donation for repairs, Mr and Ms R., instructed by the SBU, had provoked him into a situation where they could present the payment as a bribe. His actions could be categorised as an administrative corruption offence but could not be classified as bribery under criminal law.[3]

10. According to the applicant, in his closing statement he had also argued that the recording of his conversation had not been authorised by a court, in breach of domestic law, as the decision referred to in the transcript had predated the registration of Mr and Ms R.'s complaints by the SBU (see paragraphs 4 and 5 above) and there had been no copy of the court authorisation in the file. In his view, this indicated that the transcript had been forged. He also complained that this information had not been disclosed to him. The applicant therefore concluded that the transcript could not constitute valid evidence against him.

11. On 22 July 2012 the Irpin City Court convicted the applicant as charged, sentencing him to five years' imprisonment, suspended for three years. In imposing the suspended sentence, the court took into account, notably, that the applicant had intended to use the money he had received for office repairs. The court relied, in particular, on the evidence set out below.

The court took into account the testimony of Mr R., who stated that when the police had started the criminal investigation in 2011 the applicant had asked for a bribe and that at the end of 2011 Mr R. had paid it. In February 2012 the applicant had demanded another bribe and Mr R. had informed the SBU of this. During the meeting at the prosecutor's office the applicant had opened his desk drawer and Ms R. had put the money provided by the SBU in it. During a subsequent meeting the applicant had told Mr R. that he had been dismissed from his post and had asked Mr R. to say, if asked, that the money he had given was for repairs at the prosecutor's office.

The City Court considered Ms R.'s testimony to the same effect. Notably, when the applicant had asked for the second bribe Mr and Ms R. had complained to the SBU, which had given them money for the bribe. During the subsequent meeting in the applicant's office she had asked the applicant

[3] Article 368 of the Criminal Code of Ukraine of 2001 (as worded at the relevant time) defined bribery as the receipt of a bribe for the performance or non-performance of any action, using the recipient's power or position in the interests of the bribe-giver or any third party.

where to put the money, he had opened his desk drawer and she had put the money in it.

The court also took into account the testimony of Ms P., Mr and Ms R.'s daughter, who had testified that, at the relevant time they had told her that the applicant had been demanding a bribe from them and that they had sold a car to get money for the bribe.

The court considered the applicant's statement in which he acknowledged that he had taken the money from Mr and Ms R. Lastly, the court relied on the video-recording and transcript of the meeting between the applicant and Mr and Ms R. held on 2 March 2012.

12. The applicant appealed, repeating essentially the same arguments he had raised before the trial court. He pointed out that several witnesses had supported his statements to the effect that Mr and Ms R. had indeed given him money for office repairs. The prosecutor appealed, arguing that the sentence was too lenient.

13. On 20 November 2013 the Kyiv Regional Court of Appeal rejected the appeals and upheld the trial court's judgment. It considered that the trial court had pointed to sufficient evidence of the applicant's guilt. The applicant's allegations of breaches of the law in the course of the surveillance measures were unfounded, as those measures had been conducted pursuant to the Operational-Search Activities Act. There was also no other indication of unlawfulness in the collection of evidence.

14. The applicant lodged a cassation appeal, repeating essentially the same arguments.

15. On 12 June 2012 the Higher Specialised Civil and Criminal Court upheld the lower courts' decisions. The court found that the applicant had admitted to all the essential elements of the charges against him: that he had investigated the case against Mr R., he had discussed with the target of the investigation the exchange of money for help and he had accepted and spent the money. In view of this, the applicant's effort to cast doubt on the results of the covert surveillance had been devoid of purpose, especially considering that those results had also been corroborated by the testimony of Mr and Ms R., that of their daughter and that of S. and Sh. concerning the applicant's repaying his debt to S. and the office repairs. The surveillance measures had been conducted with judicial authorisation and the results had been obtained lawfully and had been lawfully documented, as had been established during the examination of the case. All of the material forming the body of evidence in the case had ruled out any provocation to commit bribery.

THE COURT'S ASSESSMENT

A. The parties' submissions

16. The Government submitted that the applicant's complaint under Article 6 was ill-founded, as it was a "fourth instance" complaint and the reasoning of the domestic courts had not been based on a manifest error resulting in a "denial of justice". The recordings had not been the sole or decisive evidence and had been corroborated by other evidence. In any event, the material had been obtained legally and the conviction had been reviewed and upheld by the appeal and cassation courts.

17. The Government stated that the operational-search activities constituted an interference with the applicant's rights under Article 8 but that the interference had been lawful, as the search activities had been authorised, in line with the requirements of the Operational-Search Activities Act, by the president of the Kyiv Court of Appeal. A copy of that decision, which was kept in the court archives, had been destroyed, together with other secret material stored there, on 18 March 2022 to prevent its possible capture by the enemy. The domestic courts had examined and rejected the applicant's complaints in that connection. The interference pursued a legitimate aim: the prevention of disorder or crime and the protection of the rights and freedoms of others. The procedure and safeguards related to operational-search activities set forth in domestic law had been observed, which ensured that the interference had been "necessary in a democratic society".

18. The applicant insisted that there had been no judicial decision authorising the surveillance measures, in breach of domestic law. The courts took the existence of a decision authorising the surveillance measures on faith, without verifying it and without allowing the applicant to examine it, despite his repeated applications to that effect, which the courts had disregarded. He pointed out that the victims' complaints to the SBU about him had been registered by the SBU on 29 February 2012, that is, after it had supposedly obtained the Court of Appeal's authorisation for surveillance on 24 February 2012. In the applicant's view, this indicated that the decision of 24 February 2012 did not exist.

19. The applicant submitted that he had been the victim of entrapment. By disregarding the applicant's argument to the effect that he was innocent of the charges brought against him, the courts had failed to give sufficient reasons for their decisions and had demonstrated their bias.

B. Alleged violation of Article 8

20. The parties agree that there was an interference with the applicant's "private life" within the meaning of Article 8. The applicant argued that that

interference was in breach of Article 8 because it had been conducted without a prior court authorisation, in breach of domestic law.

21. However, the material in the case file indicates that surveillance had been authorised by the president of the Kyiv Court of Appeal, information which was referred to in the transcript of the relevant surveillance measures and which was affirmed by the Government. They provided a cogent explanation for why a copy of that authorisation could not be provided to the Court. It is regrettable that the domestic courts which examined the applicant's criminal case did not provide a detailed answer to the applicant's allegation, merely stating that the surveillance had complied with the requirements of the Operational-Search Activities Act (one of which would be the existence of an authorisation). However, this failure to comment, while regrettable, was not decisive, given that that argument was secondary to the applicant's defence, and the domestic case file indicated the existence of the authorisation.

22. The Court normally requires cogent reasons to depart from the domestic courts' factual findings (see *Bărbulescu v. Romania* [GC], no. 61496/08, § 129, 5 September 2017).

23. The applicant's only arguments were the alleged mismatch in dates and his allegation that the domestic courts took the existence of an authorisation on faith, without taking the steps to verify it.

24. However, the applicant failed to provide sufficient detail or any evidence to make that grievance arguable. In particular, he failed to explain what steps he had taken to seek to obtain access to the copy of the authorisation. It is apparent from the applicant's appeals that he relied on the absence of a judicial authorisation as a secondary argument in criticising the body of evidence against him. However, he did not explain in a coherent manner, either before this Court or in his domestic submissions, the steps taken to verify those allegations: notably what information the applicant had requested from the authorities, when and on what grounds and what decisions had been taken in response to any such requests.

25. There is equally no indication that the impugned measures did not meet the requirements of Article 8 of the Convention for any other reason.

26. The Court concludes, therefore, that the applicant has failed to put forward and substantiate an arguable complaint that there was a breach of Article 8 of the Convention in his case.

C. Alleged violation of Article 6

27. In view of the Court's conclusion above in respect of the applicant's Article 8 complaint, it has not been established, to the required standard, that there was any breach of domestic law or of the Convention in the collection of evidence against him.

28. In any event, given that he admitted to having accepted money from the person who was the target of a criminal investigation which the applicant had conducted and having used it to repay a personal debt, the evidence collected as a result of the surveillance measures had a limited impact on the applicant's conviction (compare *Lysyuk v. Ukraine*, no. 72531/13, 14 October 2021).

29. As to the applicant's complaint of entrapment, the nature of the applicant's defence did not exclude his case from the category of "entrapment cases" (see *Yakhymovych v. Ukraine*, no. 23476/15, § 48, 16 December 2021; contrast *Lyubchenko v. Ukraine* (dec.), no. 34640/05, § 33, 31 May 2016, and *Berlizev v. Ukraine*, no. 43571/12, § 46, 8 July 2021).

30. However, the domestic courts examined and found credible consistent evidence given by Mr and Ms R. (and further corroborated by their daughter) to the effect that, prior to the bribery incident in respect of which the applicant was convicted, the applicant had not only already solicited, but had also received a bribe from them and then solicited another one. Only then had they complained to the authorities, which launched an undercover investigation (compare *Milinienė v. Lithuania*, no. 74355/01, §§ 37-38, 24 June 2008).

31. There were, accordingly, objective suspicions that the applicant had been involved in criminal activity and was predisposed to commit a criminal offence (see *Bannikova v. Russia*, no. 18757/06, § 38, 4 November 2010). There is no indication of anything abusive in the authorities' mounting and conducting the undercover operation: they merely joined the criminal activity in order to document it. It was the applicant's own conduct and not the actions of the authorities that became the determinative factor in the commission of the offence (see *Volkov and Adamskiy v. Russia*, nos. 7614/09 and 30863/10, 26 March 2015, and *Matanović v. Croatia*, no. 2742/12, §§ 142-43, 4 April 2017).

32. The applicant also complained that the domestic courts had erred in their assessment of the evidence and of the domestic law and had wrongly convicted him. The Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by a domestic court unless and in so far as they may have infringed rights and freedoms protected by the Convention. In the determination of whether the proceedings were fair this Court does not act as a court of fourth instance deciding on whether the evidence has been obtained unlawfully in terms of domestic law, on its admissibility or on the guilt of an applicant (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018).

33. Accordingly, the Court finds that the applicant's complaints under Article 6 are also manifestly ill-founded.

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, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 March 2024.

Martina Keller Deputy Registrar	Carlo Ranzoni President