FIFTH SECTION

# CASE OF OLEG KOLESNIK v. UKRAINE

*(Application no. 17551/02)*

JUDGMENT

STRASBOURG

19 November 2009

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Oleg Kolesnik v. Ukraine,**

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
Mykhaylo Buromenskiy, ad hoc *judge*,
and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 20 October 2009,

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

# PROCEDURE

1. The case originated in an application (no. 17551/02) 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 Oleg Rebazovich Kolesnik ("the applicant"), on 2 November 2001.

2. The applicant, who had been granted legal aid, was represented by Mr I. Pogasiy, a lawyer practising in Kirovograd. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged, in particular, that his trial had been unfair, that he had been questioned in the absence of a lawyer and forced to confess and that he had not been able to question important witnesses for the prosecution.

4. On 8 September 2006 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963. He is currently detained in Zhytomyr Prison No. 8 in Ukraine.

6. On 7 November 1998 according to the applicant (on 10 November 1998 according to the documents), the applicant, together with three other persons, was arrested on suspicion of two counts of aggravated murder and robbery. According to the applicant, the police ill-treated him, forcing him to confess and to waive his right to a lawyer.

7. During initial questioning on 10 November 1998 the applicant confessed that on 19 August 1998 he and other suspects had killed Mrs C. (hereinafter "victim C.") whilst under the influence of alcohol. He also confessed that on 2 October 1998 he and other suspects had killed Mr B. (hereinafter "victim B."). He made similar admissions during the reconstruction of the events on 11 November 1998. On 13 November 1998 the applicant was questioned again. During the questioning he maintained his confessions. Similar confessions were made by the suspects T., U. and B. All these investigation measures were conducted without legal assistance.

8. On 18 November 1998 the applicant was assigned a lawyer.

9. On an unknown date the applicant's mother lodged a complaint with the Kirovograd Prosecutor's Office, seeking to institute criminal proceedings against several police officers, alleging that they had subjected the applicant to inhuman treatment. On 24 December 1998 the Prosecutor's Office refused to institute criminal proceedings owing to the lack of *corpus delicti* in the actions of the police officers. Neither the applicant nor his mother appealed against this decision to the court.

10. On 29 March 1999, being questioned as an accused, the applicant denied his original confessions and claimed his innocence, stating that he had been forced to confess to crimes which he had not committed.

11. On 2 June 1999 the preliminary investigation was completed and the case against the applicant and four other suspects – T., U., B. and I. – was referred to the Kirovogradskiy Regional Court (*Кіровоградський обласний суд*, "the Regional Court").

12. On 1 July 1999 the Regional Court remitted the case to the Prosecutor of the Kirovogradskiy Region for additional investigation, as it found that the investigation authorities had violated certain provisions of the Code of Criminal Procedure, breaches which could not be remedied during the trial. In its decision the court noted, *inter alia*, that the investigation authorities had violated the defence rights of the accused. The court found that the criminal charges against the applicant and the co-defendants had required their obligatory legal representation at the initial stage of the proceedings, whereas they had not been provided with any. In particular, the court underlined that the applicant's questioning on 10 and 13 November 1998 and the reconstruction of the events on 11 November 1998 had been conducted without legal assistance. The same considerations applied to the self-incriminating statements made by the co-defendants. The court also noted that the investigating authorities had failed to find the murder weapon

and other physical evidence. By virtue of this decision, the Prosecutor's Office was obliged to repeat all the investigative measures in the presence of the defendants' lawyers.

13. On 10 May 2000 the additional investigation was completed and the case was referred to the Regional Court.

14. The applicant and the co-defendants withdrew their self-incriminating statements both during the additional investigation and during the trial, and pleaded innocent. They also stated that they had been forced to incriminate themselves.

15. On 6 February 2001 the Regional Court, acting as a first-instance court, convicted the applicant of two counts of aggravated murder and robbery and sentenced him to fourteen years' imprisonment. The applicant's conviction was based on his self-incriminating statements obtained on 10, 11 and 13 November 1998, similar self-incriminating statements made by the co-defendants and statements by the witnesses.

16. As regards the first count of murder, the Regional Court also took into account the testimony of Mrs V., who stated that she had seen the crime and had been warned by the co-defendant T. to keep silent. The Regional Court further considered that during the pre-trial investigation Mrs V. had identified the co-defendants T. and U. (she was shown their photos); however, she had failed to attend the trial. The Regional Court also relied on the testimony of Mr C., the son of victim C., who had identified three pieces of the handle of a mattock which had been found at the crime scene and could allegedly have been the murder weapon; and the results of the additional forensic medical examination, according to which the death of victim C. could have occurred under the circumstances described by the applicant during the reconstruction of events on 11 November 1998.

17. As regards the second count of murder, the Regional Court considered in particular the results of forensic biological and medical examinations, which concluded that the blood on the jacket seized from the applicant possibly belonged to victim B; statements by Mr P. that in October 1998 the applicant and the accused T. had sold him a cooking appliance belonging to victim B., for one litre of alcohol, and statements by Mrs N., the mother of victim B., who had found that a cooking appliance and money (35 Ukrainian hryvnias – UAH) were missing from her son's flat. Neither Mr P. nor Mrs N. had attended the trial.

18. The Regional Court doubted the credibility of the testimonies of Mr M. and Mr C.V. According to Mr M.'s statements in court, on 19 August 1998 the applicant had helped him to repair the house of his partner from 8 a.m. until 7 p.m. According to Mr C.V.'s statements in court, from 25 September until 6 October 1998 the applicant had been repairing his barn.

19. A request by the lawyer for an examination of Mrs Ma., Mrs Ch.V. and Mrs Ch., who could allegedly confirm the applicant's alibi, was dismissed as irrelevant.

20. In their appeals to the Supreme Court of Ukraine (*Верховний Суд України*), the applicant and his lawyer challenged the judgment on a number of points. First, they contested the admissibility of the evidence obtained in breach of the law – the applicant's and the co-defendants' self-incriminating statements, as well as witness statements made during the first pre-trial investigation. The lawyer mentioned that on 1 July 1999 the Regional Court had referred the case for additional investigation precisely because the applicant's and the co-defendants' statements had been obtained in breach of the law, which rendered them inadmissible. The appeal also stated that the Regional Court had relied on statements of witnesses who had not been questioned at the trial, had ignored the statements of witnesses M. and C.V., who had confirmed the applicant's alibi, and had refused to call other witnesses requested by the defence. The applicant also complained that he had been forced to incriminate himself and had been allowed to see his lawyer for the first time only on 29 March 1999.

21. On 10 May 2001 the Supreme Court of Ukraine upheld the judgment of 6 February 2001. As to the applicant's complaints, it found as follows:

> "... There is no cause to doubt the credibility of witnesses V. and C.
>
> Mrs V.'s depositions were examined by the court in accordance with Article 306 of the Code of Criminal Procedure...
>
> ... There is no cause to doubt the credibility of witness P.
>
> ... The complaints by the convicted persons alleging unlawful methods of investigation are unsubstantiated. During the pre-trial investigation a review was ordered following the convicted persons' complaints and no decision to institute criminal proceedings was taken on account of the lack of *corpus delicti* in the actions of the police officers of the Kirovsky District Department of the Ministry of the Interior...
>
> ... The arguments of the convicted person Kolesnik and his lawyer that the court disregarded the statements of witnesses M. and C.V., who proved his alibi, are unsubstantiated. These witnesses' statements were thoroughly examined and the court reasonably doubted their veracity, because the convicted person Kolesnik did not mention these witnesses during the pre-trial investigation and they could not explain to the court the reason why they had remembered exact dates and factual circumstances after a considerable lapse of time...
>
> ... The submissions of the convicted persons Kolesnik and B. about an alleged violation of their defence rights are unsubstantiated. The convicted persons failed to specify in what way their defence rights were violated. It follows from the case file that during the pre-trial investigation they were represented by lawyers who were present during the most significant investigative measures."

22. The Supreme Court reaffirmed that the applicant's and the co-defendants' guilt was proved by the statements they had made during the first pre-trial investigation, by the statements of Mrs V., Mr C., Mrs N. and Mr P. during the pre-trial investigation and by the physical evidence – three pieces of the handle of the mattock which had been found at the crime scene and belonged to the victim C., the jacket seized from the applicant's house and the cooking appliance seized from Mr P. The court also relied on the results of the forensic biological and medical examinations.

23. Neither the applicant nor his lawyer was present before the Supreme Court during the hearings.

### II. RELEVANT DOMESTIC LAW

24. The relevant domestic law is summarised in the cases of *Yaremenko v. Ukraine* (no. 32092/02, §§ 45-53, 12 June 2008) and *Zhoglo v. Ukraine* (no. 17988/02, § 21, 24 April 2008).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained that the proceedings against him had been unfair. He submitted that at the initial stage of the investigation he had been forced to incriminate himself and that the main investigative measures had been conducted without a lawyer. He further complained that he had not been able to examine key witnesses against him as they had failed to attend the trial. According to him, the evidence obtained as a result of the above violations had served as a basis for his conviction. He referred to Article 6 §§ 1 and 3 (c) and (d) of the Convention, which provides in its 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;

(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. Admissibility

26. The Government raised a preliminary objection as to the admissibility of the applicant's complaint under Article 6 § 3 (c) of the Convention. They maintained that the applicant's complaints concerning the lack of legal assistance during his questioning and other investigative measures on 10, 11, and 13 November 1998 had been submitted too late, given that from the above dates or even from the date when the applicant raised this issue before the domestic court (29 June 1999) more than six months had passed prior to the date on which the application was lodged (2 November 2001).

27. The applicant maintained that he had submitted his application in time, given that the final decision in the criminal case against him had been given by the Supreme Court of Ukraine on 10 May 2001.

28. The Court reiterates that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 and that its task is to ascertain whether the proceedings in their entirety, including the way in which evidence was permitted, were "fair" within the meaning of Article 6 § 1 (see, among many other authorities, *Shabelnik v. Ukraine*, no. 16404/03, § 51, 19 February 2009, and *Laudon v. Germany*, no. 14635/03, § 56, 26 April 2007). To assess to what extent the alleged violation of the applicant's procedural rights would affect the fairness of the proceedings in their entirety, the applicant had to await the final resolution of his case and could be reasonably expected to raise the impugned complaints in his appeal to the Supreme Court, which is considered an effective remedy for complaints about the unfairness of criminal proceedings (see, *mutatis mutandis*, *Arkhipov v. Ukraine* (dec.), no. 25660/02, 18 May 2004). The Court also notes that the applicant did raise all the complaints in question in his appeal to the Supreme Court (see paragraph 20 above). The Court therefore dismisses the Government's preliminary objection.

29. The Court further notes that the applicant's complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

30. As the requirements of Article 6 § 3, as mentioned above, are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports of Judgments and Decisions* 1997-III).

### *1. Privilege against self-incrimination and right to defence*

#### (a) The parties' submissions

31. The Government maintained that the applicant had been represented during the pre-trial investigation; however, at the initial stage of the investigation, having been informed about his right to a lawyer, the applicant had waived his right to representation and signed the document confirming his wish to represent himself. Furthermore, the applicant's mother, who had been informed about the applicant's arrest, had not made any complaint about the absence of a lawyer. During the investigative steps carried out on 10, 11 and 13 November 1998 the applicant had not made any complaints about the absence of a lawyer either and from 18 November 1998 he had been provided with a lawyer.

32. The Government further submitted that the applicant's privilege against self-incrimination and right of defence were protected by the Constitution and the laws of Ukraine. They further contended that the applicant could challenge any action taken by the investigator under the Code of Criminal Procedure. Therefore, they contended that the applicant's above-mentioned rights had not been violated.

33. The applicant maintained that in view of the crimes of which he was suspected, his legal representation had been obligatory from the outset of the investigation. He further contended that the authorities should first have provided him with a lawyer and only after this should they have considered any waivers of legal representation. He maintained that he had been coerced into such a waiver and that the Regional Court, in its ruling of 1 July 1999, had established a violation of his right to defence.

34. The applicant further submitted that his conviction had been based on self-incriminating statements that had been obtained through coercion and that he had been unable to complain about the matter, being in the hands of the police. He further submitted that his mother had unsuccessfully complained to the prosecutor about his ill-treatment by the police.

#### (b) The Court's assessment

35. The Court reiterates that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer,

assigned officially if need be, is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008-...).

36. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of a fair trial under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Shabelnik*, cited above, § 55 with further references).

37. The Court notes that the domestic courts acknowledged the violation of the applicant's procedural rights during the initial stage of the investigation, in particular his right of defence (see paragraph 12 above). Nevertheless, despite the acknowledgment of this violation, the applicant's self-incriminating statements, obtained in the absence of a lawyer and in circumstances that give rise to a suspicion that both the original waiver of the right to legal representation and the applicant's confessions were obtained in defiance of his will, served as a crucial element in his conviction.

38. Accordingly, in this respect there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

*2. Questioning of witnesses*

**(a) The parties' submissions**

39. The Government maintained that the applicant and his lawyer had been able to study the case file prior to the trial and acquaint themselves with the testimonies of all the witnesses. Furthermore, when the issue of the failure to secure the attendance of certain witnesses, including those called by the applicant, had been raised in the court proceedings, the trial judge had asked the parties whether they would agree to hold the hearing in the absence of those witnesses, and neither the applicant nor his lawyer had objected on that account. They had also made no objection to the completion of the hearing, having left the issue to the court's discretion.

40. The applicant contended that neither he nor the court had had an opportunity to hear the witnesses in person and to question them, and that therefore the testimonies of those witnesses could not be used as evidence

against him. He also maintained that he and the other accused had insisted on questioning Mr P. in court.

**(b) The Court's assessment**

41. The Court reiterates that all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. It may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court observes that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him. However, provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution. Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care. The defendant's conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see *Zhoglo*, cited above, §§ 38-40 with further references).

42. The Court notes that in the instant case the key witnesses for the prosecution were not examined by the court and the applicant had no opportunity to confront them either at the investigation stage or during the trial. It does not appear from the evidence and explanations presented by the Government that the domestic authorities took sufficient steps to secure the presence of those witnesses before the court. As to the Government's contentions that the applicant and his lawyer did not object to the continuation of the proceedings without the witnesses in question being examined, it does not appear to the Court that such actions could be interpreted as implicit consent to the use of those witnesses' statements as an important element in the applicant's conviction. Furthermore, it should be noted that the applicant and his lawyer raised the issue of the

impossibility of questioning witnesses in their appeal to the Supreme Court. Despite the above shortcomings, the testimonies of the witnesses Mrs V., Mr P. and Mrs N. (see paragraphs 16 and 17 above) formed an important part of the body of evidence for the applicant's conviction, together with the self-incriminating statements of the accused examined above.

43. The applicant was therefore denied a fair trial in this respect too. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. The applicant complained that his pre-trial detention had been unlawful, and relied on Article 5 §§ 3 and 4 of the Convention. He also referred to Article 13 of the Convention without any further substantiation. He lastly complained of ill-treatment by the police during the initial stage of the investigation.

45. The Court has examined these complaints as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of were 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.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed UAH 98,388 (equivalent to approximately 8,720 euros (EUR)) in respect of pecuniary damage and EUR 55,000 in respect of non-pecuniary damage.

48. The Government considered these claims exorbitant and maintained that there was no causal link between the non-pecuniary damage claimed and the violations alleged. Therefore, they submitted that these claims should be dismissed.

49. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. The Court also 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, if requested, represents in principle an appropriate way of redressing the violation (see *Nadtochiy v. Ukraine*, no. 7460/03, § 55, 15 May 2008). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction.

### B. Costs and expenses

50. The applicant also claimed EUR 4,500 for costs and expenses.

51. The Government contended that this claim was not supported by any documents. Therefore, in their opinion, this claim should be dismissed.

52. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court dismisses the applicant's claim under this head.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the respondent Government's preliminary objection;

2. *Declares* admissible the applicant's complaints under Article 6 §§ 1 and 3 of the Convention that his conviction was based on incriminating evidence obtained in violation of his right to remain silent and the privilege against self-incrimination, that he was prevented from questioning most of the witnesses against him and that he was hindered in the effective exercise of his right of defence when questioned during the initial stage of the investigation and the remainder of the application inadmissible;

3. *Holds* there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention concerning the applicant's right to defence and the privilege against self-incrimination;

4. *Holds* there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention concerning the right to question witnesses;

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

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

Done in English, and notified in writing on 19 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Stephen Phillips<br>Deputy Registrar | Peer Lorenzen<br>President |