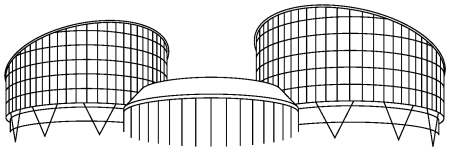

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FIFTH SECTION

CASE OF CHOPENKO v. UKRAINE

(Application no. 17735/06)

JUDGMENT

STRASBOURG

15 January 2015

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 Chopenko v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 17735/06) 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 Valeriy Grigoryevich Chopenko ("the applicant"), on 14 April 2006.

2. The applicant, who had been granted legal aid, was represented by Mr A.N. Dyatlov, a lawyer practising in Nikopol, Ukraine. The Ukrainian Government ("the Government") were represented by their Agent, most recently Ms Nataly Sevostianova, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that the criminal proceedings against him had been unfair on account of a breach of his rights to defence and to personal participation in the appeal hearing.

4. On 17 October 2011 the application was communicated to the Government.

5. On 10 December 2013 the Chamber decided, under Rule 54 § 2 (c) of the Rules of Court, that the parties should be invited to submit further written observations on the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1970. He is currently serving a life sentence in Dnipropetrovsk.

7. On 23 June 2005 O.K., a young woman, was found hanged on a tree in a forested area near a bus station. It was also discovered that her mobile phone, earrings and ring were missing and that she had had sexual intercourse shortly before her death.

8. At about 2 p.m. on 27 June 2005, officers of the Apostolovskiy District Police took the applicant to the police station for questioning in connection with the investigation into O.K.'s death.

9. On the same day, the applicant signed a confession statement according to which on the afternoon of 22 June 2005 he had met O.K. at a bus station and asked her to have sex with him in the nearby forest. O.K. had agreed to his proposal and volunteered her ring and earrings after intercourse. As the applicant was leaving, she had threatened to complain that she had been raped and robbed. In order to get away, the applicant had grabbed her by the neck; O.K., still alive, had lost consciousness and he had taken her mobile phone and left the scene.

10. According to the applicant, between 27 and 28 June 2005 he remained in police custody without any record being drawn up or his relatives being notified.

11. On 28 June 2005 the applicant was questioned by an investigating officer of the Apostolovskiy District Prosecutor's Office and gave further details of his encounter with O.K. He stated that after she had lost consciousness he had taken the cord from her umbrella, tied it round her neck and hung her on the tree. The applicant's statements were recorded on a form headed "Explanation", which did not refer to any criminal proceedings against him, but stated that the applicant had been informed of his right under Article 63 of the Constitution not to incriminate himself.

12. At an unspecified time on the same date an investigating officer of the District Prosecutor's Office instituted criminal proceedings against the applicant on suspicion that he had committed a non-aggravated murder within the meaning of Article 115 § 1 of the Criminal Code of Ukraine and notified the applicant of his right to legal assistance. He further drafted an arrest report according to which the applicant had been arrested as a suspect at 6.15 p.m. on that date at the premises of the prosecutor's office.

13. After the applicant's arrest he was assigned a legal-aid lawyer, M., and was officially questioned as a suspect in her presence from 6.35 p.m. until 8.50 p.m. During the questioning, the applicant largely reiterated his previous statements.

14. On the same date the applicant surrendered a gold ring to the police, which, as subsequently confirmed by her relatives, had belonged to O.K. O.K.'s former phone was also either seized from the applicant's home or surrendered by him.

15. On 1 July 2005 the Dnipropetrovsk Apostolovskiy District Court ordered the applicant's remand in custody as a preventive measure. It

appears from the case-file materials that that decision was not appealed against.

16. On 2 July 2005 the applicant, questioned in M.'s presence, provided further details concerning his sexual encounter with O.K. He also stated that all his confessions had been voluntary and no pressure had been applied by the authorities to make him confess. Feeling remorse for his crimes, he wounded himself with a pen top in an attempt to cut his veins and commit suicide, but his cellmate intervened.

17. On 5 July 2005 M. was replaced by Sh., another legal-aid lawyer.

18. On the same date the applicant was taken to the site of the crime and participated in a reconstruction of the crime scene in Sh.'s presence.

19. On 6 July 2005 the applicant was examined by a medical expert, who found that he had a wound on the inner side of his left elbow, inflicted on or about 1 July 2005. The expert further recorded that, according to the applicant, the wound was self-inflicted and he had not been ill-treated by the authorities either during his arrest or in detention.

20. On 7 July 2005 the applicant was indicted of non-aggravated murder. On the same date he was questioned as an accused in the presence of Sh. and confirmed his previous statements.

21. On 12 August 2005 the applicant was placed in a psychiatric hospital for an assessment of his mental state, where he stayed until 9 September 2005. According to him, during that period of time he was administered psychotropic drugs.

22. On 23 September 2005 the charges against the applicant were reclassified as aggravated murder, within the meaning of Article 115 paragraph 2, rape, and robbery.

23. On 26 September 2005 a new lawyer, N., hired by the applicant's family, was admitted to the proceedings to replace the legal-aid lawyer Sh. On the same date the applicant, when questioned in presence of N., claimed he was innocent and refused to provide any further explanations.

24. In the autumn of 2005 the applicant was committed for trial at the Dnipropetrovsk Regional Court of Appeal ("the Regional Court"), acting as a first-instance court.

25. During the trial the applicant pleaded not guilty. He maintained that on 27 June 2005 he had confessed to murdering O.K. as a result of psychological and physical ill-treatment by police officers; in fact, he had never met O.K. On 22 June 2005 he had purchased a mobile phone, a ring and earrings from a stranger on the street.

26. On 16 December 2005 the Regional Court found the applicant guilty of rape, theft, robbery and aggravated murder. It referred to various sources of evidence, including the applicant's confession statements given on 27 June 2005 and during the further course of the investigation, witness statements, forensic assessments, and DNA evidence. The court dismissed

the applicant's allegations of ill-treatment as unsubstantiated and sentenced him to life imprisonment.

27. On 21 December 2005 the applicant received a copy of the Regional Court's judgment of 16 December 2005.

28. On 10 January 2006 the applicant submitted a cassation appeal against that judgment. He maintained his innocence and alleged that on 27 June 2005 he had been beaten and given electric shocks by the police officers to break his moral resistance and make him confess to the murder, and that they had also threatened to plant narcotics on his wife if he refused to cooperate.

29. Subsequently (on 8 February, 2, 6 and 9 March 2006), the applicant submitted supplementary pleadings in which he challenged the validity of the various sources of evidence relied on for his conviction. He also complained that he had not been provided with an opportunity to contact his relatives or with access to a lawyer before his first questioning, and that he had been administered psychotropic drugs during his psychiatric assessment. He also maintained that N., the lawyer hired by his family, had performed his duties in bad faith. In particular, he had hardly visited the applicant and had completely failed to participate in the cassation proceedings.

30. On 20 January 2006 the applicant received a rectified copy of the judgment of 16 December 2005, as the previous copy had been found to contain some technical errors.

31. On 17 February 2006 the applicant filed an application with the Supreme Court requesting it to ensure his personal presence at the cassation hearing.

32. On 6, 14 and 28 March 2006 the applicant lodged further requests to be present at the hearing. He also requested the Supreme Court to summon his first lawyer, M., for the hearing and noted that he had never refused her services and did not know why she had been excluded from the proceedings.

33. On 27 March 2006 the Supreme Court rejected the applicant's request to be present at the hearing, finding that it had been lodged outside the one-month statutory time-limit.

34. On 14 April 2006 the applicant re-lodged the request to be present at the hearing, stating that he had obtained the final copy of the judgment only on 20 January 2006 and had lodged his request within one month of that date.

35. On 18 April 2006 the Supreme Court held a hearing in the applicant's case. The hearing was not attended by either the applicant or a lawyer on his behalf.

36. On the same date the Supreme Court dismissed the applicant's cassation appeal and upheld the previous judgment. It noted, in particular, that there was no evidence that the applicant had been subjected to

ill-treatment or that his right to defence had been breached in a way incompatible with his right to a fair trial. It further noted that the case file contained sufficient evidence of the applicant's guilt, including his own confession statements given in the presence of his lawyers. According to the text of the judgment, the prosecutor, who had been present at the hearing, had requested that the applicant's appeal be dismissed and the first-instance court's judgment be upheld.

37. On various dates after his conviction, the applicant unsuccessfully complained to various authorities, including the prosecutor's office and the Advocate Qualification Commission, about his alleged ill-treatment, the poor performance of his lawyer N., and other alleged breaches of his procedural rights.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 1996

38. The relevant provisions of the Constitution read as follows:

Article 59

"Everyone has the right to legal assistance. Such assistance is provided free of charge in the cases provided for by law. Everyone is free to choose the defender of his or her rights.

In Ukraine, advocacy acts to ensure the right to mount a defence against an accusation, and to provide legal assistance during the determination of cases by courts and other State bodies."

Article 63

"A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law.

A suspect, an accused, or a defendant shall have the right to mount a defence.

A convicted person shall enjoy all human and citizens' rights, except for the restrictions determined by law and established in court judgments."

B. Criminal Code of 2001

39. Under paragraph 1 of Article 115, premeditated murder is punishable by imprisonment for a term of seven to fifteen years. Under paragraph 2 of Article 115, premeditated murder in the aggravating circumstances listed in that paragraph is punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

C. Code of Criminal Procedure of 1960 (repealed with effect from 19 November 2012)

40. Article 45 of the Code of Criminal Procedure of 1960, in force at the material time, provided that legal representation during the inquiry, pre-trial investigation and trial before the first-instance court was mandatory if, *inter alia*, the possible penalty was a life sentence. It further specified that in such a case legal representation should be provided from the moment of the arrest or the bringing of charges against the person.

41. The provisions governing the cassation review of criminal cases, as in force before 7 February 2006 and in so far as relevant, read as follows:

Article 383. Court decisions which may be reviewed in cassation proceedings

"Cassation proceedings may be instituted in respect of:

1) judgments, decisions and rulings taken by an appeal court acting as a first-instance court;

..."

Article 386. Time-limits for lodging cassation appeals and introduction of cassation pleadings

"Cassation appeals and pleadings with respect to the court decisions listed in paragraph 1 of Article 383 of the present Code may be lodged within one month of the date of delivery of the judgment or pronouncement of the decision or ruling which is being appealed against; a convicted defendant who is held in custody [may lodge an appeal] ... within the same time-limit from the date of receipt of a copy of the judgment or decision."

Article 391. Persons participating in the cassation review of a case

"...A request by a convicted defendant who is held in custody to be summoned to submit observations in the course of the cassation review of a court decision listed in paragraph 1 of Article 383 of the present Code shall be binding on the cassation court.

Participants in the court proceedings who appear at the court hearing shall have the right to make oral submissions."

Article 395. Scope of review of the case by the cassation court

"The cassation court shall review the lawfulness and reasonableness of the court judgment in the light of the materials on file and additionally submitted materials, within the limits of the appeal. ..."

Article 396. Results of the case review by the cassation court

"Following cassation review of the case the court shall take one of the following decisions:

1) to uphold the judgment, ... and dismiss the cassation appeal or pleadings;

2) to quash the judgment ... and remit the case for a new investigation or trial or an appellate review;

3) to quash the judgment ... and discontinue the proceedings;

4) to amend the judgment...”

Article 398. Grounds for quashing or amending the judgment, decision or ruling

“Grounds for quashing or amending the judgment, decision or ruling shall be as follows:

1) a substantial breach of the law of criminal procedure;

2) incorrect application of the criminal law;

3) incompatibility of the punishment imposed with the gravity of the offence or the character of the convicted defendant.

A judgment given by an appeal court acting as a first-instance court may be quashed or amended on account of bias, an incomplete inquiry, pre-trial or judicial investigation, or where the conclusions of the court stated in the judgment are incompatible with the factual circumstances of the case.

...”

42. On 12 January 2006 the Law “On Introduction of Changes to the Criminal Procedure Code” which came into force on 7 February 2006, amended Article 391 by adding the following line to the first paragraph: “if it is submitted within the time-limit for lodging a cassation appeal”.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION ON ACCOUNT OF LACK OF ACCESS TO A LAWYER AT THE BEGINNING OF THE INVESTIGATION AND THE APPLICANT’S INABILITY TO TAKE PART IN THE CASSATION HEARING

43. The applicant complained that he had not been provided with legal assistance during the initial questioning sessions and that he had been unfairly deprived of an opportunity to take part in the cassation hearing. He referred to Article 6 §§ 1 and 3 (c) of the Convention, which, in so far as relevant, reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(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

44. The Government have not submitted any comments concerning the admissibility of the above complaints.

45. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Access to a lawyer

46. The applicant submitted that he had confessed to crimes of which he was innocent, in breach of the basic guarantees of a fair trial. He submitted that on 27 June 2005 the police had placed him in off-the-record detention and had extorted a confession statement by means of torture. On the following day he had been informally questioned by the investigator at the prosecutor's office and his confession statements had been arbitrarily recorded on an "explanation" form. Only after obtaining the "explanation" had the investigative authorities regularised his status as a suspect and a detainee, notified him of his procedural rights and provided a legal-aid lawyer. However, when questioned as a suspect in that lawyer's presence he had been afraid to protest his innocence since he had believed that a lawyer appointed by the police would not be willing to represent his interests in good faith and that unless he cooperated with the investigation he would be subjected to further ill-treatment once he returned to the police detention facility. Moreover, at the material time he was being questioned as a suspect of non-aggravated murder only. He could not foresee that the investigation, which already had substantial information on the details of the crime, would subsequently reclassify the charges as aggravated murder, rape and robbery. Once the charges had been so reclassified and he had obtained access to a privately hired lawyer, he had retracted his confessions and pleaded innocent. However, the confessions had been decisive for his conviction, as there was no other direct evidence of his involvement in the offence. As the initial confessions had been obtained in breach of basic procedural guarantees and had affected his further defence strategy, he considered that the domestic judicial authorities should have excluded them from the body of evidence.

47. The Government contested the applicant's arguments. They noted that the applicant had initially been suspected and accused of non-aggravated murder. This charge did not require legal representation under domestic law. Nevertheless, the applicant had been provided with a lawyer, M., on the day of his arrest and had volunteered confession statements in her presence. Subsequently the applicant had volunteered statements on numerous other occasions in the presence of both lawyer M. and lawyer Sh., who had replaced her. The applicant had not complained about the performance of either of these lawyers at the material time. Moreover, he had requested the Supreme Court to summon his first lawyer, M., to take part in the cassation proceedings. This showed that he had full confidence in her. It could therefore not be said that the applicant's confessions had been made in breach of his privilege against self-incrimination or right to defend himself. In these circumstances there was no basis for the domestic courts to exclude them from the body of evidence. Moreover, the domestic courts had based their judgments on numerous other sources, including witness testimony and forensic and material evidence.

48. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275; *Öcalan v. Turkey* [GC], no. 46221/99, § 131, ECHR 2005-IV; *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008). The Court further recalls that the guarantees in paragraph 3 (c) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings (*Martin v. Estonia*, no. 35985/09, § 94, 30 May 2013). In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, as recent authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, with further references therein; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011; *Martin*, *ibid.*).

49. The Court notes 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). As a rule, access to a lawyer should be provided from the first questioning of a suspect by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there were compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], cited above, § 55). The right to

defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction (*ibid.*).

50. Turning to the facts of the present case, the Court notes that the applicant's first formal questioning as a suspect in the murder of O.K. took place in the evening of 28 June 2005, in the presence of the lawyer M. However, it is clear from the applicant's submissions, and was not rebutted by the Government, that the day before that questioning he had already been placed in unrecorded police custody and questioned concerning his involvement in the murder in issue. As can be seen from the case file, on 27 June 2005 he signed a statement at the police station attesting to his involvement in the crime against O.K. In addition, on 28 June 2005 the applicant was questioned by the investigator at the prosecutor's office, who recorded his detailed self-incriminating submissions as "explanations". The timing of this questioning is unclear. However, absent any clarifications from the Government, the Court accepts the applicant's version, according to which the questioning preceded his formal arrest on that date.

51. It follows that by virtue of the above-mentioned principles as enshrined in the Court's case-law, the applicant was entitled to have access to a lawyer during his questioning on 27 and 28 June 2005. However, at that time he was questioned without a lawyer and there is no record indicating that before the questioning sessions in issue he was notified of his right to obtain legal assistance. On the facts of the case, the Court does not find any compelling reason justifying such a restriction of the applicant's right of access to a lawyer. It follows that this right was not respected during the period in issue.

52. In so far as the applicant alleges that his confession statements should have been excluded from the body of evidence, the Court notes that the applicant repeatedly gave confession statements in presence of two lawyers and did not retract them until the third lawyer was admitted in the proceedings. There is also no proof that the initial confessions given by the applicant without a lawyer were extracted by ill-treatment or under the threat thereof. On the other hand, the Court notes that at the time when the applicant volunteered his original confessions, he might not have been fully aware of their significance, as the initial charges against him concerned non-aggravated murder only. Once they were reclassified as aggravated murder, rape and robbery he chose, possibly on the advice of his lawyer, to remain silent and subsequently retracted his confessions. What is even more important is that the original confessions which, as noted above, were obtained in breach of the applicant's right to legal assistance, formed part of the case file. Thus, they affected the investigation strategy and set the framework within which the applicant's further defence had to be mounted. It follows that regardless of whether the applicant chose to retract or maintain these confessions, the initial breach of his right to defence could

not be remedied by the mere fact that he was subsequently provided with legal assistance. It necessitated further remedial action on behalf of the authorities involved.

53. Nevertheless, the domestic courts relied on the applicant's confessions as the main basis for his conviction and failed to act upon his complaints about a breach of his right to defend himself. It is true that the confession statements were not the sole basis for the applicant's conviction. However, absent any court ruling as to the role of the initial submissions obtained from the applicant in breach of his right to legal assistance and included in the case file, this breach was not remedied in the judicial proceedings.

54. The above considerations are sufficient for the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the restriction of the applicant's right of access to a lawyer during his initial questionings and the use of his self-incriminating statements as a basis for his conviction.

2. Inability to take part in the hearing before the Supreme Court

55. The applicant maintained that the refusal by the Supreme Court of his request to take part in the cassation hearing had breached his right to defence and violated the principle of equality of arms. He submitted, in particular, that by rejecting the said request as lodged belatedly, the Supreme Court had interpreted the applicable law with excessive formalism and had in any event acted unfairly. In particular, it had not taken account of the fact that the request had been lodged within the one-month time-limit from the date on which the applicant had received the final rectified version of the trial court's judgment, or of the crucial importance of the hearing for him. Finally, the applicant pointed out that he had no longer been legally represented by the time of the cassation proceedings. However, the cassation hearing had been attended by the prosecutor, who had given oral submissions. Therefore, his own absence had seriously undermined the equality of arms between the parties.

56. The Government disagreed. They submitted that the applicant had had ample opportunity to present all his oral arguments in the first-instance proceedings. His personal presence at the cassation hearing had therefore not been crucial. In fact, at that hearing the Supreme Court had simply reviewed the arguments presented by the parties in their written pleadings in the light of the case-file materials. Although the prosecutor had been present at the hearing in question, he had submitted no new material and presented no new arguments. The principle of equality of arms had therefore not been violated. The Government also noted that the applicant had received a copy of the judgment on 21 December 2005. Under the applicable procedural law, he had therefore had until 21 January 2006 to lodge his request to attend the cassation hearing in person. However, although he had lodged his

cassation appeal within the above-mentioned time-limit (on 10 January 2006), he had lodged the request to take part in the hearing only on 17 February 2006, that is, with a significant and unexplained delay. The Supreme Court had therefore acted lawfully and fairly in dismissing that request.

57. In their additional observations the Government reiterated their position that the applicant had submitted his request for participation in the Supreme Court's hearing too late and that such a request was binding on the Supreme Court only if submitted within the time-limit for lodging a cassation appeal. Therefore, the applicant had to submit his request "before 23 January 2006".

58. In reply the applicant insisted that the time limit for lodging his cassation appeal had to be counted starting on 20 January 2006.

59. The Court observes that the Supreme Court of Ukraine rejected the applicant's request for participation in the cassation hearing on the basis of the procedural provision which made it mandatory to summon an imprisoned defendant to a hearing only where he had submitted a request within one month of receipt of his copy of the trial court's judgment (see Articles 386 and 391 of the Code of Criminal Procedure, cited in paragraphs 41 and 42 above).

60. The Court notes, however, that the above time-limit for the request to participate in the hearing was introduced on 7 February 2006 while the appealed decision in the applicant's case was adopted on 21 December 2005 when no such time-limit existed.

61. The Court further notes that the parties did not make any observations as for the impact of these changes on the applicant's case. The Court, however, will proceed taking into account the relevant changes in the domestic law.

62. In this respect the Court reiterates that it is not its task to rule on whether the domestic judicial authorities correctly applied the domestic law in the applicant's case. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 190-191, ECHR 2006-V).

63. The Court further reiterates that Article 6 of the Convention does not expressly provide for the right of a defendant in criminal proceedings to attend the hearing in person; rather, it is implicit in the more general notion of a fair trial (see, for example, *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89). The personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial

hearing (see, for example, *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168).

64. However, on several occasions the Court has stated that in the determination of criminal charges, the hearing of the defendant in person should be the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation (see, for example, *Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 22, 29 September 2009, and *Popa and Tănăsescu v. Romania*, no. 19946/04, § 46, 10 April 2012). In order to decide whether the restriction was compatible with the Convention, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see *Hermi v. Italy* [GC], no. 18114/02, § 62, ECHR 2006-XII). The personal participation of the defendant in the appeal hearing takes on particular importance where the appellate review concerns an assessment of their personality and character (see, for example, *Kremzow v. Austria*, 21 September 1993, § 67, Series A no. 268-B), or where they claim that they did not commit the offences imputed to them and an appellate court is called upon to make a full assessment of the question of their guilt or innocence (see, among other authorities, *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004). Further issues of importance are the extent to which the conviction bears social stigma and whether the defendant's personal liberty is at stake (see, among other authorities, *Belziuk v. Poland*, 25 March 1998, § 38, *Reports* 1998-II; *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV; *Suuripää v. Finland*, no. 43151/02, § 45, 12 January 2010; and *Popa and Tănăsescu*, cited above).

65. In any event, it follows from the guarantees secured in Article 6 § 3 (c), and is of crucial importance for the fairness of the criminal justice system in general, that the accused must be adequately defended, both at first instance and on appeal (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A). The appearance of a representative of the prosecution at an appeal hearing not attended by either the defendant or a legal representative on his behalf, has been found to breach the applicant's right to defend himself and to violate the principle of equality of arms inherent in the right to a fair trial (see, for example, Belziuk, cited above, § 38; *Sinichkin v. Russia*, no. 20508/03, §§ 38-45, 8 April 2010; *Pirali Orujov v. Azerbaijan*, no. 8460/07, § 44, 3 February 2011; and *Nefedov v. Russia*, no. 40962/04, § 41-48, 13 March 2012).

66. Turning to the facts of the present case, the Court observes that under the rules of criminal procedure in force at the material time, in reviewing the applicant's case the Supreme Court had jurisdiction to deal with questions of law and fact pertaining to both criminal liability and sentencing. It was empowered to examine the evidence on file and

additional material submitted to it by the parties directly. Following such examination, the Supreme Court could dismiss the cassation appeal and uphold the judgment, quash the judgment and discontinue the criminal proceedings, quash the judgment and remit the case for a fresh investigation or trial, or amend the judgment (see Articles 396 and 398 of the Code of Criminal Procedure of 1960 cited in paragraph 41 above).

67. In his cassation appeal the applicant denied having committed the offence he was accused of and maintained that the first-instance court had attached undue weight to his confession statements, which he claimed had been extracted from him by way of ill-treatment and in breach of his right to defence. He asked the Supreme Court to quash the conviction and remit the case for fresh investigation. Consequently, the issues to be determined by the Supreme Court in deciding the applicant's liability were both factual and legal. It was called on to make a full assessment of the applicant's guilt or innocence of the offences imputed to him.

68. The Court further observes that the proceedings in question were of the utmost importance for the applicant, who had been sentenced to life imprisonment at first instance. It is also relevant to note that, while the applicant was not present at the hearing, nor represented by a lawyer, the prosecutor was present at the hearing. It can be seen from the text of the Supreme Court's judgment of 18 April 2006 that the prosecutor made oral submissions during that hearing and urged the panel to uphold the judgment of the trial court.

69. Having regard to the criminal proceedings against the applicant in their entirety in the light of the above considerations, the Court considers that the applicant's presence at the cassation hearing was of particular importance in order to enable the Supreme Court to determine the issues before it properly and ensure equality of arms between the parties.

70. The Court further notes that when rejecting the applicant's request to be present at the hearing, the Supreme Court simply referred to the relevant provision of the Criminal Procedure Code, as in force at the date of its decision, without any further reasoning. However, the version of the provision upon which the Supreme Court relied had entered into force while the applicant's appeal was already pending before the Supreme Court. If the newly introduced time-limit was to be calculated from the date of receipt of the first version of the appealed judgment on 21 December 2005, the new provision would have been applied retroactively in the applicant's case, as the new rule which entered into force on 7 February 2006 required him to submit his request to participate in the proceedings by 21 January, that is, before the legislative amendment had come into force. Moreover, under the new law it seems that the Supreme Court, while not bound to allow the applicant to attend the hearing in the case of a request out of time, could still have used its discretion to accede to the applicant's request. If the time-limit was to be calculated from the date of receipt of the final version of the

appealed judgment, on 20 January 2006, it had not yet expired when the applicant lodged his request for attendance. Whichever of the two interpretations has been followed by the Supreme Court, it thus raises issues as to the justification of its decision in the light of the right to a fair trial. No alternative interpretation of the rules has been provided.

71. The Court also notes that the applicant's request to be present at the hearing was submitted on 17 February 2006 and the hearing was held two months later, on 18 April 2006. The Court further notes that the Government did not indicate that acceding to the applicant's request would have resulted in a need to postpone the hearing (compare *Hermi v. Italy*, cited above, § 20).

72. In the light of all the foregoing, the Court concludes that the Supreme Court's rejection of the applicant's request to take part in the cassation hearing resulted in a disproportionate restriction of his right to defence and, with a view to the presence of a representative of the prosecution, in breach of the principle of equality of arms. It was, thus, incompatible with the guarantees of a fair trial secured by Article 6 §§ 1 and 3 (c) of the Convention.

73. There has, accordingly, also been a breach of Article 6 § 1 of the Convention taken together with Article 6 § 3 (c) of the Convention on account of the refusal of the applicant's request to participate in the cassation hearing.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The applicant also complained that he had been ill-treated by the investigative authorities and administered psychotropic drugs which interfered with his power of concentration; that all his lawyers had performed poorly; that the prosecution had coerced witnesses to provide false statements; that the judicial authorities had been neither independent nor impartial as they had convicted him of crimes he had not committed; that his arrest had been unlawful in that he had been belatedly notified of the reasons for it and brought before a judge; that he had had no opportunity to bring proceedings to have the lawfulness of his detention decided speedily; that his mother had suffered immensely on account of his unlawful prosecution and the poor performance of the lawyer N., and that the authorities had ignored various requests and applications lodged by him. The applicant referred to Articles 1, 3, 5, 6, 8, 13, 14, 17 and 34 of the Convention in relation to the above complaints.

75. Having considered these complaints in the light of all the material in its possession, the Court finds that, in so far as they are within its competence, the matters complained of do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

76. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicant claimed 140,000 euros (EUR) in respect of non-pecuniary damage.

79. The Government submitted that the applicant's claims were exorbitant and unsubstantiated.

80. The Court considers that the distress and frustration caused to the applicant cannot be compensated by the mere finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention. At the same time, it finds that the amount claimed by the applicant is excessive. Having regard to the nature of the issues in the present case, and making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

81. The applicant did not submit any claims for costs and expenses within the time-limit fixed. Consequently, the Court does not make any award under this head.

C. Default interest

82. 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 concerning lack of access to a lawyer at the beginning of the investigation and the applicant's inability to take part in

the cassation hearing (Article 6 §§ 1 and 3 (c) of the Convention) admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention on account of lack of access to a lawyer at the beginning of the investigation;

3. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention on account of the applicant's inability to take part in the cassation hearing;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(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;

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

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President