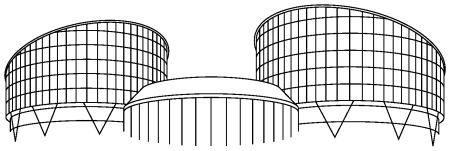

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SHABELNIK v. UKRAINE (No. 2)

(Application no. 15685/11)

JUDGMENT

STRASBOURG

1 June 2017

FINAL

01/09/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Shabelnik v. Ukraine (No. 2),

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

Angelika Nußberger, *President,*
Ganna Yudkivska,
André Potocki,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on on 25 April 2017,

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

PROCEDURE

1. The case originated in an application (no. 15685/11) 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 Dmitriy Grigoryevich Shabelnik ("the applicant"), on 28 February 2011.

2. The applicant was represented by Mr A. Bushchenko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna, of the Ministry of Justice.

3. The applicant complained of the unfairness of the proceedings in which the Supreme Court had upheld his conviction following the Court's judgment in his previous case, *Shabelnik v. Ukraine* (no. 16404/03, 19 February 2009).

4. On 6 April 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and is currently in detention in Zhytomyr, Ukraine.

A. Criminal proceedings against the applicant

6. In October 2001 Ms K. was found murdered in her flat. In December 2001 Ms S., a minor, was kidnapped and murdered.

7. On 10 December 2001 the applicant was arrested on suspicion of kidnapping S. in order to extort money from her parents and of S.'s murder. On 17 December 2001 the applicant was provided with a lawyer in connection with those charges.

8. On 25 December 2001 Mr K., the deceased Ms K.'s son, was questioned as a witness and confessed to the murder of his mother. The next day he retracted his confession.

9. On 15 February 2002, purportedly at his own request, the applicant, was questioned as a witness about the circumstances of K.'s death. During the questioning, which took place without a lawyer, the applicant confessed to K.'s murder. The applicant said that he had read an advertisement in a local newspaper that K. wanted to buy a flat in Zhytomyr. He had decided to rob her, on the assumption that she had savings at home for the purchase of a flat. The victim had allowed him to enter her flat. During their conversation, the victim had told the applicant that she had a conflict with a neighbour about a sausage business the neighbour was running from the building. She also had tense relations with her daughter-in-law. When the applicant had threatened her and demanded money she had told him that she had none because she had placed the advertisement at the request of a friend who lived in another town and wanted to buy a flat in Zhytomyr. To conceal his attempted robbery the applicant had then murdered the victim.

10. The transcript of the applicant's questioning recorded that he was told about his duty to state everything he knew about the case, that he could face criminal liability for refusal to testify and for giving false statements and about the constitutional provision guaranteeing the privilege against self-incrimination.

11. On 16 February 2002 the applicant, still acting as a witness, participated without a lawyer in an on-site reconstruction of the attack on K. On 18 and 22 February 2002 he was again questioned, without a lawyer, about the attack.

12. On 22 February 2002 the investigator in the case requested an opinion from psychiatrists on a number of questions, namely:

(i) whether the applicant was suffering from a psychiatric condition;

(ii) whether the applicant was sane at the time of the commission of the acts he was accused of and at the time of the assessment;

(iii) if the experts established that the applicant had been suffering from a psychiatric condition or a temporary disruption of his mental capacities at the time of commission of the act, whether he had been conscious of the meaning of his actions and whether he could control them; and

(iv) whether the applicant was in need of compulsory psychiatric treatment.

13. On 25 February 2002 the investigating prosecutor instituted criminal proceedings against the applicant for the murder of K. and joined them with the criminal case concerning the kidnapping and murder of S. It appears from the applicant's submissions that on the same day he was given the procedural status of an accused and was allowed for the first time to consult a lawyer in connection with the charges related to the attack on K. Article 142 of the Code of Criminal Procedure required that procedural rights had to be explained to a person who acquired the status of an accused, including the right to remain silent and to have a lawyer.

14. On 5 March 2002 a panel of psychiatric experts examined the applicant and produced a report on his mental state, concluding that he had been sane at the time of the alleged crimes and was sane at the time of the assessment. According to the report, in the course of the interview with the experts the applicant gave a description of K.'s murder that was identical to the one he had given to the investigator ("*обстоятельства его подготовки и убийства... излагает так, как излагал в ходе следствия*"). The experts added that in doing so the applicant had been speaking as if reciting a text memorised by heart and had remained silent when interrupted and asked for details or clarifications. The experts concluded that the applicant was sane.

15. The applicant stood trial at the Zhytomyr Regional Court of Appeal, which was competent to act as a trial court ("the trial court") because the applicant was accused of aggravated murder, a crime carrying a potential life sentence. In the course of the trial the applicant stated that he was innocent of both murders but pleaded guilty to kidnapping S. He stated that on the day of K.'s murder he had met an old childhood acquaintance, M., in the street. M. had told him that he had killed K. To check M.'s story the applicant had gone to K.'s flat and had seen her dead body there. He had had nothing to do with the robbery and murder.

16. On 11 July 2002 the trial court convicted the applicant of kidnapping, extortion and the murder of S. He was also convicted of the robbery and murder of K. The court sentenced him to life imprisonment. In convicting the applicant of K.'s robbery and murder the trial court relied in particular on:

(i) the applicant's initial confessions;

(ii) the crime scene report, which showed that the layout of the victim's flat, the placement of furniture and the position of her body matched the applicant's confessions;

(iii) medical evidence that the victim's clothing and injuries matched the applicant's confessions;

(iv) the statement of Ms O.K., the victim's friend, who said she had asked the victim to place an advertisement for the purchase of a flat on her behalf;

(v) the testimony of Ms V.S., the victim's neighbour, who stated at the trial that she had run a sausage business from the victim's block of flats and that she had had a conflict with the victim over that matter;

(vi) the testimony of the victim's son and daughter-in-law that relations between the victim and the daughter-in-law had been tense;

(vii) evidence from an expert to the effect that it could not be ruled out that the victim's injuries had been caused by a knife found at the applicant's home.

17. On 10 October 2002 the Supreme Court, sitting as a court of cassation, upheld the applicant's conviction.

B. The applicant's first case before the Court

18. On 2 April 2003 the applicant lodged an application with the Court (no. 16404/03), alleging that his conviction for the murder of K. had been based on incriminating evidence that had been obtained in violation of his right to remain silent and the privilege against self-incrimination and that he had been hindered in the effective exercise of his right to defence when questioned at the pre-trial stage of the proceedings.

19. On 19 February 2009 the Court declared the application partly admissible and found a violation of Article 6 §§ 1 and 3 of the Convention. The Court found in particular that:

> "58. The Court reiterates that in particular where a deprivation of liberty is at stake, the interests of justice in principle call for legal representation (see *Benham v. the United Kingdom*, no. 19380/92, § 61, 10 June 1996). Furthermore, the Court notes that Ukrainian legislation provides for obligatory legal representation of persons who could expect life imprisonment if convicted. This was the applicant's situation, in that he was already charged with a murder and being accused of the second murder made a sentence of life imprisonment a possibility... The Court considers that the legal representation of the applicant during the period in question was required in the interests of justice.
>
> 59. Furthermore, ... the circumstances of the case suggest that his statements were obtained in defiance of his will. Although the applicant failed to substantiate any physical coercion by the investigators, the fact that another person within the same proceedings also confessed to the murder of Mrs K. and retracted his statement, alleging coercion by the same investigator, could raise reasonable doubts as to the practices of the investigator in the present case. In addition, the applicant, having been warned about criminal liability for refusal to testify and at the same time having been informed of his right not to testify against himself, could have been confused, as he alleged, about his liability for refusal to testify, especially in the absence of legal advice during that interview. It should be further noted that although the applicant had retracted his statements during the court hearings the domestic authorities based his conviction for the murder of Mrs K. to a decisive extent, if not solely, on these self-incriminating statements. The statements did not in fact contain any information

which was not already known to the investigators (in contrast to the case of the kidnapping and murder of S., in which the applicant showed the police where the corpse had been hidden) and had been received in unclear circumstances and in clear violation of the applicant's right to defence." *(Shabelnik*, cited above)

20. The *Shabelnik* judgment (cited above) became final on 19 May 2009.

C. Re-examination of the applicant's case following the first *Shabelnik* judgment

1. Stage one: reopening of proceedings

21. The applicant's lawyer (Mr Bushchenko), lodged an application with the Supreme Court for a review of the applicant's criminal case in view of the first *Shabelnik* judgment (cited above). He asked the Supreme Court to quash the trial court's judgment and its own 2002 decision upholding the original conviction. He asked that he and the applicant be present during the examination of the request.

22. The prosecutor's office also applied to the Supreme Court for a review. They asked the court to amend the trial court's judgment and the Supreme Court's 2002 decision by striking out references to the records of the questioning of the applicant as a witness about K.'s murder and the result of the on-site reconstruction of that murder.

23. On 30 April 2010 the Supreme Court, sitting in a formation composed of all the judges of the criminal and military chambers of the court, allowed the above applications in part, quashed its own 2002 decision and remitted the case for fresh examination in cassation proceedings by a panel of three judges of the Supreme Court.

2. Stage two: new cassation proceedings before the Supreme Court

24. Hearings before the Supreme Court panel were scheduled and rescheduled several times and the applicant was informed of this accordingly. The case was finally scheduled for hearing on 9 September 2010 and the applicant and Mr Bushchenko were informed of this by letter on 30 July 2010. Neither the applicant nor Mr Bushchenko requested that the applicant be escorted from his prison to the hearing before the Supreme Court panel.

25. On 9 September 2010 the Supreme Court examined the case in the absence of the applicant but in the presence of his lawyer and a prosecutor. The lawyer made submissions to the court and a written summary of his remarks was submitted to the Supreme Court.

26. According to the summary, after reiterating that the applicant's confessions and the reconstruction reports should be ruled inadmissible, the lawyer presented his analysis of the remaining evidence in the file. He dealt

with the question of the evidence of the applicant's involvement in the attack on K., seeking to show that it was either inadmissible or unreliable. In particular, he made the following arguments:

(i) the psychiatric report, in so far as it provided a record of the applicant's alleged statements about K.'s murder, was unspecific and constituted a judgment by the experts about the applicant's statements which the experts had been unqualified to make, as opposed to an accurate record of those statements. In any case, it was improper to use that report since the psychiatrists had never been examined by the defence. Moreover, the applicant's supposed statements to the experts were inadmissible because they were marred by the same problems as the confessions that had been obtained in breach of his Convention rights;

(ii) as to the other evidence, in particular the crime scene examination report and the witness evidence, it only had evidentiary value as corroboration for the applicant's statements, but as those statements had to be ruled inadmissible to give effect to the first *Shabelnik* judgment (cited above), the other witness evidence could also not be used to support a finding of the applicant's guilt;

(iii) certain circumstances, such as the fact that no traces of the applicant's presence had been found in K.'s flat, pointed to the applicant being innocent of the murder.

27. On the same day the Supreme Court delivered its decision. It excluded the applicant's original confessions from the body of evidence. However, it found that the rest of the evidence in the case file was sufficient to support the trial court's finding that the applicant had murdered K. while trying to cover up an attempted robbery.

28. In particular, the Supreme Court approved of the trial court's reliance on: (i) evidence from the expert that it could not be ruled out that the victim's injuries had been caused by the knife found at the applicant's home, and (ii) the statements of the witnesses O.K., V.S. and "others" concerning the applicant's supposed motive for the murder (see paragraph 16 above).

29. In support of its findings the Supreme Court also referred to material and circumstances on which the trial court had not explicitly relied: (i) the fact that "in the course of psychiatric assessment [the applicant], told the experts about [K.'s murder] under the circumstances established by the [trial] court"; (ii) the applicant's admission in court that he had visited the victim's flat; and (iii) the testimony of Ms G., the victim's neighbour, that she had seen the applicant in the victim's block of flats.

The Supreme Court concluded that, other than the breaches which led to the exclusion of the applicant's original confessions, there had been no other breaches of the rules of criminal procedure which would put in doubt the correctness of the conclusions of the trial court (the Court of Appeal) concerning his guilt or legal qualification of his actions. The investigation

authorities and the trial court examined all the circumstances of the case which could be relevant to correctly decide the case. The trial court's conclusions were based on admissible and sufficient evidence.

II. RELEVANT DOMESTIC LAW

A. Reopening of proceedings following a judgment by the Court

30. The relevant provisions of domestic law concerning the procedure for reopening criminal proceedings on the basis of judgments by the Court can be found in *Yaremenko v. Ukraine (no. 2)* (no. 66338/09, §§ 34-36, 30 April 2015).

B. Cassation proceedings

31. At the relevant time the Code of Criminal Procedure of 1960 required Courts of Appeal to act as trial courts in cases where possible punishment was life imprisonment, as in the applicant's case. In such cases the Supreme Court served as the court of first and last appeal, both on matters of fact and law. The relevant provisions 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 made 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 proceedings

"... 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, if submitted within the time-limit for lodging a cassation appeal.

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 review of the case in cassation proceedings, the court shall take one of the following decisions:

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

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

3) to quash the judgment, decision or ruling and discontinue the proceedings;

4) to amend the judgment, decision or ruling; ..."

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

A judgment, decision or ruling shall be quashed or amended on the following grounds:

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. ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained that the Supreme Court, in the course of re-examining his case in cassation proceedings, had breached a number of provisions of Article 6 of the Convention, which reads, in so far as relevant, as follows:

"1. In the determination of his civil rights and obligations or 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:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(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..."

33. As the requirements of Article 6 § 3 constitute specific aspects of the right to a fair trial guaranteed under Article 6 § 1, the Court will examine the applicants' complaints under Article 6 § 1 or Article 6 § 3 under those provisions taken together (see, for example, *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010).

A. Admissibility

34. The Court notes that in contrast to the case of *Yaremenko (no. 2)* (cited above, §§ 38-56) the procedure before the Supreme Court followed two stages. In the first stage, a plenary formation of the Supreme Court, on the basis of the Court's first *Shabelnik* judgment (cited above), quashed the Supreme Court's 2002 decision upholding the applicant's conviction and remitted the case for fresh consideration in new cassation review proceedings. At the second stage, a different formation of the Supreme Court examined the applicant's case in cassation review proceedings under the standard rules of criminal procedure.

35. The applicant's complaints concern the second stage of the proceedings only. The parties do not dispute the applicability of Article 6 to that stage. Moreover, as the Court has had occasion to remark, at the relevant time the Supreme Court in such proceedings had jurisdiction to deal with questions of law and fact and was empowered to examine evidence in the file and additional materials submitted by the parties. That meant it could uphold, quash or amend a first-instance judgment, or remit the case for a retrial (see, for example, *Sobko v. Ukraine*, no. 15102/10, § 76, 17 December 2005, and paragraph 31 above).

36. There is no doubt therefore as to the applicability of Article 6 under its criminal limb to the cassation proceedings before the Supreme Court.

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

(i) Alleged violation of Article 6 §§ 1 and 3 (c) and (d) on account of the Supreme Court's reliance on the psychiatrists' report and other remaining evidence in the file

38. The Supreme Court, even though it had ostensibly struck the applicant's confessions from the body of evidence, had in fact implicitly relied on the information contained in those confessions to support its findings. In particular, the Supreme Court had upheld as correct the trial court's factual findings about K.'s murder, which could only have been based on the applicant's statements with respect to which the Court had found a violation of Article 6 §§ 1 and 3 in its first *Shabelnik* judgment (cited above, § 58).

Relying on the Court's judgment in *Allan v. the United Kingdom* (no. 48539/99, ECHR 2002-IX) and the United States Supreme Court's decision in *Estelle v. Smith* (451 U.S. 454 (1981)), the applicant argued that the Supreme Court's reliance on the psychiatrists' report had undermined the very essence of his right to remain silent and to legal representation. In particular, he had only been advised by a lawyer in respect of the charge of murdering K. for the first time on 3 April 2002, after the psychiatric examination had been completed. Therefore, he had had no practical opportunity to obtain legal advice prior to that examination. Moreover, he had not been advised of his right to remain silent in the course of that psychiatric examination.

Accordingly, the applicant maintained that the Supreme Court had breached Article 6 §§ 1 and 3 (c).

39. The Supreme Court had relied on the untested statements in the psychiatric report and on the statement of witness G. even though the experts and G. had not been examined by the defence. According to the applicant, the Supreme Court in fact had had no power under domestic procedural law to call and examine witnesses so an examination of those witnesses had required a retrial. For the applicant the Supreme Court's reliance on those statements had amounted to a breach of Article 6 §§ 1 and 3 (d).

(ii) Alleged violation of Article 6 § 1 on account of the applicant's absence from the hearing

40. The applicant submitted that the principle of equality of arms had been breached because he had not been present at the Supreme Court's hearing. He submitted that his representative had asked the Supreme Court to conduct a reopening hearing before its plenary formation (stage one of

the procedure before that court) in the applicant's presence. The Supreme Court had therefore had no reason to assume that the applicant had not wished to participate in the second stage of proceedings before that court.

(iii) Alleged violation of Article 6 § 1 and Article 6 §§ 3 (a) and (b) on account of the Supreme Court allegedly following a procedure not envisaged by domestic law without warning to the applicant

41. The applicant submitted that the Supreme Court not merely assessed the validity of the trial court's judgment in the light of the first *Shabelnik* judgment (cited above) but had also engaged in a re-assessment of the entire body of evidence, and had arrived at it its own, fresh conclusion about the applicant's guilt, which it had had no power to do under domestic law. According to the applicant, in cassation proceedings the Supreme Court could only examine the validity of the trial court's findings. If it had found those findings unreliable in the light of the need to strike the applicant's confessions out of the body of evidence, it had to remit the case for a retrial. It could not substitute its own factual findings for those of the trial court. The applicant had had no prior warning that the Supreme Court would adopt such a procedure rather than remit the case for a retrial. Accordingly, the applicant alleged that the Supreme Court had not been a "tribunal established by law" within the meaning of Article 6 § 1 and that Article 6 §§ 3 (a) and (b) had been breached.

(b) The Government

42. The Government contested the applicant's arguments and maintained that none of the violations of the Convention alleged by the applicant had been committed.

43. In particular, as to the complaints under Article 6 §§ 1 and 3 (d), the Government submitted that the applicant had failed to request the examination of any witnesses at the Supreme Court's hearing even though, contrary to the applicant's submissions, that court had had the power to call and examine them.

44. The Government submitted that the applicant had failed to submit a request to attend the Supreme Court's cassation proceedings hearing in person and, in any event, he had been represented at the hearing by his lawyer. Therefore, the equality of arms between the parties had been respected.

45. As to the complaints under Article 6 §§ 1 and 3 (a) and (b), the Government submitted that the Supreme Court had upheld the applicant's conviction without any change in the charges of which he had been convicted in the original proceedings. The applicant should have been aware that the Supreme Court would examine the case in its totality at the second stage of its procedure. The applicant, therefore, had had sufficient time and

opportunity to prepare and present his case, which he had used, as evidenced by the content of his lawyer's remarks (see paragraph 26 above).

2. The Court's assessment

46. The Court observes that in *Yaremenko (no. 2)* (cited above) it was confronted with a procedure before the Supreme Court following a judgment by the Court in the applicant's favour in a criminal case. In that case it held (cited above, § 66):

> "The Supreme Court... decided that the applicant's initial confession had been the only irregularity of the applicant's criminal case and that the exclusion of that evidence would have no impact on the conclusiveness of the remaining evidence in the case. In the Court's opinion, this latter issue in itself would require a thorough examination of the evidence in the present case in a full retrial instead of the very limited review as carried out by the Supreme Court."

47. The Court observes that in the present case the Supreme Court excluded the applicant's confessions from the body of evidence but came to the conclusion that the remaining evidence was sufficient to find the applicant guilty of the robbery and murder of K.

48. However, the Court is conscious of the fact that in the present case the procedure before the Supreme Court had significant differences with that examined in *Yaremenko (no. 2)* (cited above). In particular, while in the previous case the Supreme Court continued to explicitly rely on confessions by the applicant obtained in violation of his Convention rights (ibid., §§ 32 and 66), in the present case the Supreme Court made no explicit reference to any of the applicant's own statements to law enforcement officers when upholding his conviction. The Supreme Court's reliance on his supposed statements to the psychiatrists (see paragraphs 14 and 29 above) is a separate matter which the Court will examine below.

49. Moreover, unlike in *Yaremenko (no. 2)* (ibid., §§ 31 and 32), in the present case the procedure unfolded in two very distinct stages, the second one being cassation proceedings, which were conducted according to the standard rules of criminal procedure in which the Supreme Court in principle had broad authority to examine questions of law and fact (see paragraph 35 above).

50. However, the way in which that procedure was conducted in the present case did not meet the requirements of Article 6 of the Convention for the following reasons.

51. The Court observes that the applicant argued before the Supreme Court that the crime scene examination reports and the statements of witnesses, which tended to corroborate the applicant's account of the attack on K. given in his confessions, could not serve as the basis for upholding his conviction once those confessions were removed from the body of evidence because the only evidentiary value those reports and witness evidence had

had was to corroborate the applicant's account found only in his now-excluded confessions (see paragraph 26 (ii) above).

52. However, the Supreme Court panel still relied on those reports and that witness evidence, without providing any response to the applicant's argument, even though it was specific and, in the circumstances of the case, highly pertinent and important.

53. As to the Supreme Court's reliance on the psychiatric report, the Court observes that the psychiatrists limited themselves to observing that the applicant, speaking as if reciting from a memorised text, repeated to them the description of K.'s murder he had given to the investigator and had remained silent when asked for details or clarifications (see paragraph 14 above). The Supreme Court, without remitting the case for a full retrial, used those statements of the psychiatrists to establish the fact that the applicant had committed the *actus reus*, the objective act, of the offence he was accused of, despite the fact that the scope of the expert examination in question had been limited to his sanity and his state of mind at the relevant time. What is more, the Supreme Court considered it fit to rely on the experts' somewhat vague restatements, made in a different context, to establish the fact that the applicant committed the murder of K. The decision to rely on the psychiatric evidence in this way breached the requirements of a fair trial.

54. The Court considers that the Supreme Court's reasoning and the procedure it followed did not meet the requirements of fairness inherent in Article 6 § 1 of the Convention.

55. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

56. In view of the above conclusions the Court considers that its finding in *Yaremenko (no. 2)* (cited above) (see paragraph 46 above) is also pertinent to the present case in that only a full retrial could have provided, in the particular circumstances of the case, an appropriate forum for an adequate examination of the impact of the exclusion of the applicant's confessions on the conclusiveness of the remaining evidence about the attack on K.

57. In the light of the above conclusions, the Court considers it unnecessary to examine the applicant's other submissions concerning the fairness of the proceedings before the Supreme Court.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed EUR 10,000 in respect of non-pecuniary damage.

60. The Government considered that there was no causal link between the alleged violations and the non-pecuniary damage claimed.

61. The Court notes that where an individual has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, reopening or review of the case in accordance with the Convention, if requested, represents in principle an appropriate way of redressing the violation (see, for example, *Yaremenko (no. 2)*, cited above, § 71). In the instant case the proceedings under examination concerned a review of the applicant's criminal case following a judgment by the Court in the applicant's favour. That review, however, as established above, did not comply with the requirements of Article 6. In those circumstances, the Court considers that the finding of a violation does not constitute sufficient just satisfaction under Article 41 of the Convention for the non-pecuniary damage suffered by the applicant. Ruling on the basis of equity, it awards the applicant EUR 5,000 under this head.

62. Furthermore, the possibility of a retrial, as envisaged under Ukrainian law, is available to the applicant, if requested. Such a retrial must observe the substantive and procedural safeguards enshrined in Article 6 of the Convention and must fully take into account the Court's conclusions in the present case and in the first *Shabelnik* judgment (cited above).

B. Costs and expenses

63. The applicant also claimed EUR 8,064 for the costs and expenses incurred before the domestic courts and EUR 5,376 for those incurred before the Court.

64. The Government stated that the costs incurred in the domestic proceedings were irrelevant as they had concerned enforcement of a previous judgment by the Court and, subsequently, efforts to have the applicant acquitted, as opposed to efforts to prevent or redress a violation. The Government further maintained that the amount claimed for the applicant's representation before the Court was excessive. They argued that the claims under this head must be rejected as well.

65. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 covering costs under all heads.

C. Default interest

66. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President