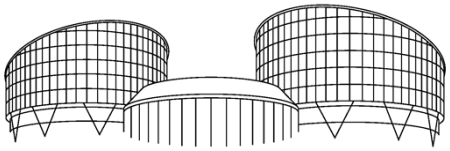

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BONDAR v. UKRAINE

(Application no. 18895/08)

JUDGMENT

STRASBOURG

16 April 2019

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 Bondar v. Ukraine,

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

Jon Fridrik Kjølbro, *President,*
Paulo Pinto de Albuquerque,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak, *judges,*
Sergiy Goncharenko, ad hoc *judge,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 26 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 18895/08) 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 Mykhaylo Vasylyovych Bondar ("the applicant"), on 8 April 2008.

2. The applicant, who had been granted legal aid, was represented by Mr O.V. Levytskyy, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr I. Lishchyna.

3. The applicant alleged, in particular, that the police had ill-treated him in order to extract a confession and that the criminal proceedings against him had been unfair in that the confession given under duress had been admitted into evidence and the courts had refused to recall a witness who had initially given incriminating evidence but had then retracted it.

4. Those allegations were initially made by the applicant's mother in her letter to the Court of 8 April 2008. In that letter, without mentioning any provisions of the Convention she stated that her son had been unjustly convicted for the murder he had not committed. She described the ill-treatment he had allegedly suffered in August 2003 (see paragraph 11 below) and stated that the courts refused to call "many witnesses". According to the version of the Rules of Court then in force (see, for example, *Viktor Nazarenko v. Ukraine*, no. 18656/13, §§ 30-32, 3 October 2017), 8 April 2008 is considered the date of introduction of the application (see paragraph 1 above). An exchange of correspondence followed and the Registry set the deadline to submit a filled in application form and all

accompanying documents to 23 February 2009. The applicant submitted that application form on 9 January 2009 (see paragraph 40 below).

5. On 6 March 2017 the Government were given notice of the applicant's complaints in respect of alleged ill-treatment and the alleged admission of his confession in evidence. On 28 May 2018 further observations were requested from the Government in respect of the applicant's complaint concerning the refusal to recall the above-mentioned witness. At the time of communication the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

6. The applicant died on 3 May 2012. The applicant's mother, Ms Kateryna Mykhailivna Bondar, expressed the wish to pursue the application on his behalf.

7. As Ms Ganna Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court), the Vice-President of the Section decided to appoint Mr Sergiy Goncharenko to sit as an *ad hoc* judge (Rule 29 § 1(a)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1960 and died in 2012.

A. Criminal proceedings against the applicant

9. On 26 July 2003 the body of a man, Mr Z., was discovered in the applicant's village in the Nemyriv district of the Vinnytsya Region.

10. On 27 July 2003 the applicant was arrested, ostensibly for the administrative offence of maliciously disobeying a police officer.

11. According to the applicant, he was arrested on suspicion of Z.'s murder, and on 1 August 2003 the police ill-treated him to make him confess to the murder. In particular, he alleges that he was dunked in a vat of heavily chlorinated water, had electric shocks applied to his genitalia, and was beaten and hung by his elbows from a metal rod for a substantial period of time.

12. On 1 and 8 August 2003 a witness, Mr I., was questioned by the police and stated that on the night of the murder he had seen the applicant in the victim's backyard and that he had then, with blood on his hands, come to his house and told him that he had hit the victim.

13. On 4 August 2003 the applicant, in the absence of a lawyer, confessed to Z.'s murder.

14. On 6 August 2003 he was formally arrested on suspicion of the murder.

15. On 7 August 2003 he was questioned in the presence of a lawyer and retracted his confession as having been given under duress. In view of his allegations the next day the investigator requested a forensic medical opinion concerning his injuries.

16. On 10 August 2003 a forensic medical expert observed a number of injuries on the applicant's body. The expert noted that the applicant was alleging that he had been tortured. He documented a number of haematomas and abrasions and concluded that they could have been inflicted at the time and in the circumstances alleged by the applicant.

17. On 15 August 2003 a district court judge rejected the investigator's request to remand the applicant in custody and released him, holding that there was no evidence in the file to show that there was a reasonable suspicion against him and noting his allegation that his confession had been coerced.

18. On 16 August 2003 the applicant was released. Prior to his release he wrote a statement in the presence of the officer on duty at the police station affirming that he had not been ill-treated and had no complaints against the police.

19. From 22 August to 19 September 2003 the applicant underwent a course of rehabilitation treatment in hospital, after being diagnosed with "post-traumatic paresis of the forearm nerves due to compression of both forearms".

20. On 26 September 2003 the prosecutor's office refused to institute criminal proceedings against the police officers for ill-treatment. It was noted that they had denied having ill-treated the applicant, that the applicant had made a statement on 16 August 2003 affirming that he had not been ill-treated and that the police unit in question had not been equipped with an electric shock device.

21. On 5 February 2004 Ms G., Ms K. and Mr N. made videotaped statements to the investigator to the effect that, in October 2003, the applicant had confessed to them all (on the same occasion) that he had committed the murder.

22. On an unspecified date in 2004 the investigation into the murder was suspended because the perpetrator could not be identified.

23. On 1 February 2007 a certain Ms O., who was in prison, informed the prison authorities that in July 2004, when she had lived in the same village as the applicant, he had confessed to her that he had murdered Z. and had described the circumstances of the murder to her.

24. On 8 February 2007 she repeated her statement to Mr S., an investigator of the Nemyriv district prosecutor's office. Her statement was video-recorded.

25. The investigation was resumed.

26. On 20 February 2007, based in part on O.'s new evidence, the applicant was again arrested on suspicion of the murder.

27. The applicant stood trial for murder before the Vinnytsya Regional Court of Appeal, sitting as the trial court.

28. O. was examined and cross-examined by the defence in court on 10 October 2007. She confirmed her testimony incriminating the applicant.

29. At a hearing on 12 November 2007 the trial court examined a letter dated 11 October 2007 which O. had sent to the trial court. In it she asked the court to disregard her statements and stated that she had given them under pressure from S., the investigator (see paragraph 24 above). She also asked to be examined again in court. The defence asked for the same. The trial court ordered the prosecutor's office to investigate O.'s allegations and held that the defence's application to have her re-examined would be considered after the investigation was completed.

30. The investigation was conducted by the Nemyriv district prosecutor. O., who was still in prison at the time, was questioned. She reaffirmed her incriminating statements as having been made of her own free will and stated that she had written to the trial court because one of the applicant's lawyers had said, in the course of the cross-examination, that she might be criminally liable for any false statements. S., the investigator who had questioned O. in February 2007, and the two police officers present on that occasion were also questioned and denied that any pressure had been used to compel O. to make a statement. On 6 December 2007 the prosecutor refused to institute criminal proceedings against S. for lack of constituent elements of a crime in his actions.

31. On 11 January 2008 the trial court received another letter from O., in which she retracted her previous letter. The defence again asked that she be called. The trial court refused to recall her as a witness.

32. On 25 February 2008 the trial court convicted the applicant of murder and sentenced him to thirteen years' imprisonment. It relied on the evidence of the witnesses O., I., G., K. and N. (see paragraphs 29, 12 and 21 above respectively), who had reiterated in court their statements given in the course of the pre-trial investigation. It also relied on the statements of a number of other witnesses who had testified regarding various aspects of the case other than the applicant's guilt. In the trial court's judgment the evidence of I., K., G. and O. was mentioned separately, and in that order, as disproving the applicant's denials of his guilt.

33. As to I.'s statements in particular, the trial court stated that they were detailed and directly pointed to the applicant's guilt. I. had not only made those statements in the course of the pre-trial investigation and in court but had also reiterated them in the course of face-to-face confrontations with the applicant and another witness in the course of the pre-trial investigation. G. and K. had also reiterated their statements in confrontations with the applicant.

34. As to O.'s evidence, the trial court stated that she had reiterated her pre-trial statement in the course of the trial in the applicant's presence and that there had been no reason to distrust that testimony. Certain details she had provided coincided with those provided by I. and discovered in the course of a crime scene investigation. As to the retraction of her testimony, the court considered it appropriate to disregard it since the district prosecutor had checked her allegations that her initial statements had been given under pressure, had found those allegations unfounded and had delivered a reasoned decision refusing to institute criminal proceedings.

35. On 24 March 2008 the applicant appealed in cassation. He argued primarily that the trial court had erred in its assessment of the evidence. He also argued, among other things, that the court had unjustifiably refused to recall O. as a witness despite the retraction of her testimony and that a search conducted in his home in 2003 – which had apparently not returned any incriminating items – had been unlawful for various reasons, including the fact that at the time it had been conducted he had been in detention being tortured.

36. On 10 July 2008, in a final decision, a panel of three judges of the Supreme Court upheld the trial court's judgment. It found that the court had correctly assessed the evidence and that there were no grounds to put in doubt its findings.

37. Following a request by the applicant for the proceedings to be reopened, on 21 May 2009 five judges of the Supreme Court asked the plenary formation of the Supreme Court (consisting of all the judges of the court's criminal and military divisions) to reopen the proceedings in the applicant's case in view of the exceptional circumstances (see paragraph 42 below), to quash his sentence and to order a retrial. The judges argued, in particular: (i) that there was medical evidence in the file which indicated that the applicant had been seriously ill-treated in 2003, in particular by being hung by his elbows, (ii) that the investigation into his allegations in this regard had been superficial, and (iii) that the trial court had failed to comment on this. The judges also pointed out what they believed to be a number of contradictions in the evidence cited by the trial court in the judgment for the applicant's conviction.

38. On 5 June 2009 the plenary formation of the court held that the arguments cited by the five judges could only serve as a basis for reopening the proceedings if they had been first investigated by the prosecutor's office and found to be "newly established circumstances" justifying a reopening (see paragraph 42 below). However, the court observed that the prosecutor's office had not conducted such an investigation and had not made such a finding.

39. The parties did not inform the Court whether the applicant attempted to initiate, before the prosecutor's office, an investigation of the type mentioned by the plenary formation of the Supreme Court.

B. The application to the Court

40. In the application, lodged by his initial representative on his behalf on 9 January 2009, the applicant described, in the "Statement of the facts" section of the form, the ill-treatment he had allegedly suffered in August 2003 (see paragraph 11 above). In the "Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments" part of the form he complained under Article 6 § 2 that his right to be presumed innocent had been breached in that the domestic authorities had relied on evidence obtained unlawfully and under Article 6 § 3 (d) that the domestic courts had failed to re-examine O. after she had retracted her initial testimony.

41. On 1 April 2013 Mr Levytskyy wrote to the Court on behalf of the applicant's mother concerning the applicant's death and expressed the mother's wish to pursue the application in his stead. In his letter Mr Levytskyy provided two arguments concerning the applicant's mother's right to pursue the application. Firstly, he stated that the applicant had been convicted on the basis of statements made under torture. Secondly, Mr Levytskyy stated that:

> "The applicant's former representative... is a journalist by training. However, this is not why she described in the application the acts of torture but limited the application to a violation of Article 6 of the Convention only, leaving the acts of torture outside of the scope of the application... At the time the application was lodged in 2008-2009 the Court was declaring applications under Article 3 inadmissible where applicants failed to appeal to court against the prosecutor's office's decision not to institute criminal proceedings."

Mr Levytskyy went on to describe the Court's approach to the admissibility of such complaints adopted in *Kaverzin v. Ukraine* (no. 23893/03, §§ 97-99, 15 May 2012) and asked the Court to allow the applicant's mother to pursue the application. The change in the Court's approach to the admissibility of complaints concerning alleged ill-treatment by law-enforcement officers, to which Mr Levytskyy referred, is described in paragraphs 59 and 60 below.

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. At the relevant time the Code of Criminal Procedure of 1960 (Articles 400 to 404) laid down two procedures for reopening cases which had ended in final court decisions:

(i) a reopening based on newly established circumstances, such as falsified evidence or abuse of power by an investigator, prosecutor or judge, and

(ii) a reopening based on a serious error of substantive law or breach of procedural rules which led to a wrong decision on the substance of the case.

Under Article 400 to 407, the former could be initiated by prosecutors and the latter by at least five judges of the Supreme Court.

THE LAW

I. *LOCUS STANDI* OF THE APPLICANT'S MOTHER

43. The Court notes that the applicant died after lodging his application under Article 34 of the Convention (see paragraph 6 above). It is not disputed that his mother is entitled to pursue the application on his behalf. In the light of its case-law on the matter (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014, with further references, and *Singh and Others v. Greece*, no. 60041/13, § 26, 19 January 2017), the Court sees no reason to hold otherwise.

44. The Court observes that, as far as the complaints under Article 3 are concerned, a question can be asked whether those complaints, or at least all of their elements, were duly lodged by the applicant himself while he was alive or whether they were only lodged by his mother after his death (see paragraphs 40 and 41 above respectively). However, given the Court's conclusion below (see paragraphs 56 to 64) that those complaints are, in any event, out of time, the Court does not consider it necessary to address the first issue in detail.

45. Accordingly, and subject to the proviso set out in the preceding paragraph, the Court accepts that Ms Bondar has standing to pursue the application on the applicant's behalf. However, reference will still be made to the applicant throughout the ensuing text.

II. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained that he had been ill-treated by the police and that the investigation conducted into the matter had been ineffective. He invoked Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Admissibility

1. The parties' submissions

47. The Government submitted that neither the applicant nor his lawyer had appealed against the prosecutor's office's decision of 26 September

2003 not to institute criminal proceedings in respect of his allegations of ill-treatment (see paragraph 20 above). The applicant's reference to ill-treatment in his appeal in cassation (see paragraph 35 above) had not constituted a challenge against that decision or a request to conduct a new investigation. It had been merely the applicant's defence against the charges and had been treated by the Supreme Court as such. For the Government, this meant that, in order to fall within the six-month period, the applicant's complaint had to have been lodged by 26 March 2004 at the latest, whereas in fact it had been lodged more than four years later.

48. The applicant's submissions sent before notice of the application was given to the Government are summarised in paragraphs 40 and 41 above. After notice was given the applicant's representative submitted that the applicant had been ill-treated by the police in August 2003 and that the investigation conducted into the matter had been ineffective. He explained that the applicant had not invoked Article 3 in his initial application because, at the time, the Court's approach to the admissibility of such complaints had been different: notably, to comply with the requirement of exhaustion of domestic remedies the applicant had been expected to appeal against the prosecutor's decision refusing to institute criminal proceedings against the police officers for ill-treatment. It had only been in its judgment in *Kaverzin v. Ukraine* (no. 23893/03, §§ 97-99, 15 May 2012) that the Court had clarified that that was not an effective remedy to be exhausted. That was why the applicant had not raised the issue of a violation of Article 3 in the "Statement of alleged violations" section of the application form. Given the state of the Court's case-law at the time, the applicant could not be blamed for such a formal flaw in his application. He could not have known that the Court would later change its approach to the question of effectiveness of the domestic remedy. Accordingly, he submitted that the complaints under Article 3 had been lodged within the six-month period.

2. The Court's assessment

(a) Relevant general principles

(i) The notion of a complaint in the Convention system

49. The Court reiterates that a "claim" or complaint in Convention terms comprises two elements, namely factual allegations (to the effect that the claimant is the "victim" of an act or omission) and the legal arguments underpinning them (that the said act or omission entailed a "violation by [a] Contracting Party of the rights set forth in the Convention or the Protocols thereto"). These two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and vice versa (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 110, ECHR 2018, with further references).

50. The Court is master of the characterisation to be given in law to the facts of the case and does not consider itself bound by the characterisation given by an applicant or a government (ibid., § 114).

51. While it is not possible to state in the abstract the importance of legal arguments, a complaint is always characterised by the alleged facts. The latter emerges for example in the application of the six-month rule (ibid., § 115).

52. While the Court has jurisdiction to review circumstances complained of in the light of the entirety of the Convention or to "view the facts in a different manner", it is nevertheless limited by the facts presented by the applicants in the light of national law (ibid., § 121). However, this does not prevent an applicant from clarifying or elaborating upon his or her initial submissions during the Convention proceedings (ibid., § 122).

(ii) The six-month rule

53. The primary purpose of the six-month rule is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. It reflects the wish of the High Contracting Parties to prevent past judgments being constantly called into question, and also facilitates the establishment of the facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (ibid., § 118).

54. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant, and, where the situation is a continuing one, once that situation ends (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 259, ECHR 2014 (extracts)).

55. In cases concerning an investigation into ill-treatment applicants are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (ibid., § 263). The obligation of diligence incumbent on applicants contains two distinct but closely linked aspects: on the one hand, applicants must contact the domestic authorities promptly concerning progress in the investigation in question – which implies the need to complain to them in a diligent manner, since any delay risks compromising the effectiveness of the investigation; on the other hand, they must lodge their application with the Court promptly as soon as they become aware or should have become aware that the investigation is not effective (ibid., § 264).

(b) Application of the above principles to the present case

56. The Court considers that the issue of compliance with the six-month rule in the present case has two interrelated aspects:

(i) whether the Court can consider that that initial application, lodged on 8 April 2008, already contained the applicant's complaints under Article 3 and the subsequent submissions merely clarified that original complaints, or whether the complaints in that regard were first formulated in those later submissions, for instance in the applicant's lawyer's letter of 1 April 2013 (see paragraph 41 above), and thus outside of the six-month period, and

(ii) whether, if the Court were to accept that the original application contained valid Article 3 complaints, they were in any case already belated by the time the initial application was lodged.

57. Starting with the first aspect, the Court reiterates that it is the facts alleged by the applicant and not their legal characterisation under the Convention proposed by the applicant that are key to the application of the six-month rule (see *Radomilja*, cited above, §§ 115 and 120). In the present case, that means that the mere fact that the applicant did not invoke Article 3 in the "Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments" part of the application form does not mean that he did not lodge a complaint in respect of ill-treatment at that time. What is important, however, is that the applicant, in his application form, merely mentioned the acts of ill-treatment. Nowhere in that document did he refer to any facts concerning the investigation into the matter (see paragraph 40 above).

58. In other words, in his application form the applicant only invoked the facts which had allegedly occurred more than six months before the date the application was lodged (8 April 2008, see paragraph 1 above) and did not invoke any facts to indicate that he was complaining of a situation which might have persisted by the time he applied to the Court: namely the State's persistent failure to investigate the ill-treatment. The latter issue was first invoked, in some manner, in the applicant's lawyer's letter of 1 April 2013 (see paragraph 41 above), that is more than six months after the Supreme Court's final decision in the applicant's criminal case.

59. Turning now to the second aspect of the issue of compliance with the six-month period (see paragraph 56 above), the Court observes that it initially held that an appeal to hierarchically superior prosecutors concerning irregularities in an inquiry into complaints of police torture was in principle an effective remedy to be exhausted (see *Naumenko v. Ukraine*, no. 42023/98, § 138, 10 February 2004). The Court also found that prosecutors' refusals to start criminal investigations into similar complaints could be further appealed to the courts (see *Yakovenko v. Ukraine*, no. 15825/06, §§ 70-71, 25 October 2007).

60. However, in 2012, in *Kaverzin* (cited above, § 97) the Court, having analysed the practice, came to the conclusion that the procedures of appeal

to hierarchically superior prosecutors and the courts had not been proved to be capable of providing adequate redress in respect of complaints of ill-treatment by the police and ineffective investigations. In *Kaverzin* the applicant complained to the prosecutor that he had been ill-treated by the police and obtained a decision refusing to institute criminal proceedings against the police officers. He did not appeal. However, that decision, following which, the Court concluded, there was no effective remedy under domestic law, had been made in 2001, more than two years before Mr Kaverzin's application was lodged with the Court (ibid., §§ 1, 14 and 15). It was only the final decision of the Supreme Court upholding Mr Kaverzin's own conviction that fell within the six-month period (ibid., §§ 1, 39 and 43). In that connection, the Court had to address the issue of whether Mr Kaverzin had complied with the six-month rule. In concluding that he had, the Court stated:

> 99. The Court notes that the applicant took sufficient steps at the domestic level to bring his complaints of police torture to the attention of the national authorities. He therefore complied with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention ...The Court also notes that the fact that the complaints were rejected by the prosecutor on 26 January 2001 did not prevent the domestic courts from examining them on the merits in the course of the applicant's trial ... In these circumstances, the applicant reasonably waited for the completion of the trial to raise the complaints before the Court and accordingly complied with the six-month rule provided for in Article 35 § 1 of the Convention.

61. The *Kaverzin* approach has been followed by the Court in cases against Ukraine ever since. In summary, the Court now considers that where, as in *Kaverzin*, an applicant who was a criminal defendant raised ill-treatment allegations both before the trial court and on appeal, the six-month limit should be counted from the final decision in the applicant's criminal case (see, for example, *Pomilyayko v. Ukraine*, no. 60426/11, § 69, 11 February 2016).

62. However, the circumstances in *Kaverzin* were markedly different from the present case. In particular, contrary to *Kaverzin*, where the investigation into the allegation of ill-treatment and in the criminal case against the applicant continued uninterruptedly and in parallel, in the present case there were no proceedings of any nature pending either in respect of the applicant's allegations of ill-treatment or against the applicant himself between 26 September 2003 and 20 February 2007 (see paragraphs 20 and 26 above), for more than three years. There is no material before the Court to show that the matter of ill-treatment was then raised before the authorities which examined the applicant's criminal case until the applicant raised it, in a tangential fashion, in his appeal on 24 March 2008 (see paragraph 35 above). Throughout that period of four years and seven months the applicant was aware that the investigation had ended on 26 September 2003 and that no other investigation was pending or forthcoming.

63. Having regard to the purpose of the six-month rule (see the relevant case-law cited in paragraph 53 above), the applicant cannot be considered to have complied with his duty of diligence by simply raising the matter of ill-treatment again in his appeal years after the prosecutor's office's investigation had been completed.

64. The Court concludes that the complaints under Article 3 of the Convention were lodged outside of the six-month time-limit and should therefore be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

65. The applicant complained that the proceedings against him had been unfair in that the domestic courts had relied on a confession obtained under duress and had failed to recall O. as a witness after she had retracted her initial incriminating testimony. He invoked Article 6 §§ 1 and 3 (d) of the Convention which reads, in so far as relevant:

> "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:
>
> ...
>
> (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. Alleged admission of the applicant's confession in evidence against him

Admissibility

66. The Government submitted that, in his appeal in cassation (see paragraph 35 above), the applicant had made an allegation that he had been ill-treated but had not complained about his confession having been admitted into evidence. They accordingly argued that the applicant's complaint in that regard was inadmissible for failure to exhaust domestic remedies.

67. The applicant submitted that he had exhausted domestic remedies since he had applied for a review of his conviction under the extraordinary review procedure (see paragraph 37 above).

68. The Court agrees with the Government's argument that the applicant failed to raise in his appeal in cassation the matter of admission in evidence

of his confession. He, therefore, failed to exhaust this effective domestic remedy (see, for example, *Shalimov v. Ukraine*, no. 20808/02, §§ 64 and 65, 4 March 2010). As to the applicant's argument that he applied for review of his conviction under the extraordinary review procedure, the Court notes that that procedure involved the request to have criminal proceedings which ended in a final decision reopened (see paragraph 37 above). Such requests cannot usually be considered an effective remedy within the meaning of Article 35 § 1 of the Convention unless it can be established that under domestic law such a request can genuinely be deemed an effective remedy. However, the applicant has submitted no case-law to that effect and has pointed to no circumstances that would lead the Court to such a conclusion in the present case (see, *mutatis mutandis*, *Barać and Others v. Montenegro*, no. 47974/06, § 28, 13 December 2011, with further references therein).

69. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

B. The domestic courts' treatment of O.'s evidence

1. Admissibility

70. This part of the application is not manifestly ill-founded. It is not inadmissible on any other grounds. It must, therefore, be declared admissible.

2. Merits

(a) The parties' submissions

71. Under Article 6 §§ 1 and 3 (d) the applicant complained that he had been unable to cross-examine O. after she had retracted her previous testimony.

72. The applicant stated that only a very limited number of pieces of evidence had pointed to his guilt, the only evidence other than O.'s statements being the statements of the witnesses I., G, K. and N. (see paragraphs 12 and 21 above) which the investigators had already had at their disposal in 2003 and 2004. Despite those statements being available at that time, the applicant had not been charged and the investigation had later been suspended (see paragraph 22 above). It had only been after O.'s statement in prison that he had been rearrested (see paragraphs 24 and 26 above). O.'s evidence, therefore, had played a decisive role in the conviction. Following O.'s initial retraction, an inquiry into her allegations of pressure had been conducted by the Nemyriv district prosecutor, who had been the direct supervisor of the investigator whose actions had been in question and thus responsible for his work. Contrary to *Orhan Çaçan v. Turkey* (no. 26437/04, §§ 21-25 and 39, 23 March 2010), where

the authorities had had difficulty establishing the whereabouts of the key witness who had retracted his testimony, in the present case the authorities had faced no such difficulties: O. had been in custody and had therefore been easily available for further examination.

73. The Government submitted that O.'s evidence had not been the only evidence against the applicant and that the domestic courts had relied on a wide range of evidence to convict him. O. had initially repeated her pre-trial statements incriminating him in the course of the trial. She had then reaffirmed her testimony in a statement to the prosecutor (see paragraph 30 above).

(b) The Court's assessment

74. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that provision; it will therefore consider the applicant's complaint under both provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015).

75. The Court has already held that failure to recall a witness previously cross-examined by the applicant in the event of a retraction of his or her incriminating testimony may raise an issue under Article 6 §§ 1 and 3 (d) of the Convention (see *Orhan Çaçan*, cited above, §§ 39-43, where a violation was found on that account, and contrast *Nevruz Bozkurt v. Turkey*, no. 27335/04, § 55, 1 March 2011, where no violation was found as the retracting witness's evidence was not relevant for the applicant's conviction).

76. In *Orhan Çaçan* the Court found a violation even though the Turkish courts experienced difficulties in establishing the whereabouts of the witness who had retracted his testimony (cited above, §§ 21-25 and 39, and see also *Bykov v. Russia* [GC], no. 4378/02, § 97, 10 March 2009, where a witness could not be found following his retraction and no violation was found). By contrast, in the present case, O. was in custody and could therefore be easily called and examined concerning the retraction of her testimony.

77. The Court is conscious of the fact that the circumstances of the present case are different in another important aspect. Contrary to *Orhan Çaçan* (cited above, § 41) where the retracted testimony was the only element of direct evidence pointing to the applicant's guilt, in the present case there was other evidence of the applicant's guilt independent of O.'s statements: another witness had seen him at the scene of the crime, with his hands covered in blood, around the time of the murder, and he confessed to three other witnesses that he had committed it. All those witnesses were cross-examined at the trial (see paragraphs 12, 21, 32 and 33 above).

78. While the domestic courts did not explain explicitly and in detail the relative weight of various elements of evidence in the applicant's

conviction, the trial court stated that it was the evidence of I., K., G. and O. that disproved the applicant's denials of his guilt (see paragraph 32 above). K.'s and G.'s testified essentially to the same facts, which they observed together (see paragraph 21 above). Therefore, it is reasonable to conclude that there were only three independent elements of evidence directly implicating the applicant in the crime. Of those three, the authorities already possessed two (I.'s and K.'s and G.'s evidence) by the time the investigation into the murder was discontinued because the perpetrator could not be identified (see paragraph 22 above). The proceedings were resumed and the applicant was arrested after O.'s statement (see paragraphs 24 and 26 above), strongly indicating that her evidence was not only one of the three key elements of the evidence but was a decisive element of the case against him in the sense that, judging from the above-mentioned sequence of events, her evidence likely determined the outcome of the case (see *Schatschaschwili*, cited above, § 123).

79. What is more, the procedure adopted by the trial court following O.'s initial retraction had as a result that the prosecution service was able to examine O. once more, producing a retraction of her initial retraction. By contrast, the defence was not given such an opportunity and, therefore, was not given the same chance as the prosecution to attempt to clarify O.'s statements in a way favourable to it.

80. Therefore, the principle of 'equality of arms', which is essential in matters of calling witnesses (see, for example, *Kapustyak v. Ukraine*, no. 26230/11, § 89, 3 March 2016, and *J.M. and Others v. Austria*, nos. 61503/14 and 2 others, §§ 128-29, 1 June 2017), was not respected and, because O.'s evidence was decisive for the applicant's conviction, the fairness of the proceedings was undermined on that account.

81. In the circumstances of the present case this conclusion is valid irrespective of whether O. is considered a witness for the prosecution, because her initial testimony, which she eventually reaffirmed, was important for the prosecution's case (see paragraph 78 above), or a witness for the defence, because, by examining O. following her initial retraction, the defence could hope to undermine her initial incriminating testimony and the prosecution's case as a whole (see *Schatschaschwili*, cited above, §§ 110-31, and *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 139, 144-49 and 158-67, 18 December 2018, respectively, for the relevant principles).

82. There has, accordingly, been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

85. The Government contested that claim.

86. The Court, ruling in an equitable basis, awards the applicant EUR 2,500 in respect of non-pecuniary damage.

B. Costs and expenses

87. The applicant made no claim for costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

88. 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. *Holds* that the applicant's mother, Ms Kateryna Mykhailivna Bondar, has standing to continue the present proceedings in his stead;

2. *Declares* the complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the manner in which the domestic courts approached O.'s evidence admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

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 2,500 (two thousand five hundred 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 16 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Jon Fridrik Kjølbro
President