

Ukrainian Helsinki Human Rights Union

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Ukraine

Statement

The Supreme Court of Ukraine overruled the European Court's judgment and encouraged practice human rights violations

The Supreme Court's judgment over the case of Oleksandr Yaremenko could have had a healing effect on Ukrainian criminal justice which has long languished in deep crisis. Unfortunately, the Supreme Court has demonstrated its lack of understanding of binding force of judgments of the European Court of Human Rights and, in fact, overruled the judgement in case of Yaremenko v. Ukraine.¹

In this case, the European Court of Human Rights found that Ukraine's competent bodies had not carried out a proper investigation into Yaremenko's complaints that he had been tortured in order to extract a confessions from him, and instead this confession, obtained under unexplained circumstances, had been used as proof of his guilt.

The Court also found that the confessions had been obtained with infringement of the right to remain silent and the right of defence. The Court noted that "the applicant's conviction for the 1998 crime was based mainly on his confession" (§ 86), which "had not been supported by other materials" (§ 79). It also took into account the fact that "there was no adequate investigation into the allegations by the applicant that the statement had been obtained by illicit means" (§ 80).

The Court also indicated that «that the fact that two other lawyers who represented the applicant saw him only once each, during questioning, and never before the questioning took place seems to indicate the notional nature of their services. It considers that the manner of and reasoning for the lawyer's removal from the case, as well as the alleged lack of legal grounds for it, raise serious questions as to the fairness of the proceedings in their entirety".

And, other important point, underlined by the Court was "the degree of consistency between the testimonies of the applicant and his co-accused raise suspicions that their accounts had been carefully coordinated".

This had been stressed in the lawyer's application for a re-examination of the case.

In result of extraordinary proceedings after motion of Mr Yaremenko the Supreme Court of Ukraine refused to quash decisions held in result the proceedings that "raise serious questions as to [their] fairness in their entirety".

Instead, the Supreme Court of Ukraine limited itself to the following: it removed the confession from the evidence, while retaining the actual sentence.

The Supreme Court relays in its decisions to the confessions of Mr Yaremenko given him in the presence of lawyers who, in the view of the European Court, have shown "the notional nature of their services". The Supreme Court also relayed on statement of Mr Yaremenko's co-accused that, as the European Court recognised, "raise suspicions that their accounts had been carefully coordinated".

And, eventually, the Supreme Court of Ukraine held that the European Court's conclusion as to the inadequacy of investigation in complaint of Mr Yaremenko about his subjecting to torture "do not correspond to the material of the case".

¹<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=836643&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

We believe that the ruling of the Supreme Court of Ukraine in Yaremenko case shows flagrant disregard to the European Court and to the obligation of Ukraine under Article 46 of the European Convention on Human Right to recognise binding force of the European Court's judgements.

Moreover, we believe that the Supreme Court of Ukraine sent clear message to law-enforcement agencies of Ukraine that any violation of human rights, including ineffective investigation of torture and brutal breaches of basic rights of accused will be encouraged by the court system of Ukraine.

Recommendations to the OSCE Human Dimension Implementation Meeting:

- to develop the recommendations for state to increase the role of judiciary in prevention of torture including: training programme for judges, review of the national legislation concerning acceptance of the evidence, dissemination of the best practice cases and etc.

Annex: Ruling of the Supreme Court of Ukraine

**Supreme Court of Ukraine
Judgment
In the name of Ukraine**

At a joint hearing of the Criminal Chamber and Military Court Panel,
Presided over by the President of the Supreme Court Criminal Chamber, M.Y. Korotkevych
with the participation of Deputy Prosecutor General V. V. Kudryavtsev
and defence counsel, bar lawyer A.P. Bushchenko
examined on 31 July 2009 in Kyiv the criminal case at the application of the Deputy Prosecutor General and
defence counsel A. Bushchenko, on the submission of five judges to review in extraordinary proceedings the sentence of
the Kyiv Court of Appeal on 20 November 2001 passed down on O. V. Yaremenko and A.P. Samoilenko.

This ruling sentenced:

Oleksandr Volodymyrovych Yaremenko, b. 21 October 1976, with no previous convictions under Article 55 of
the Criminal Code of Ukraine from 1960 (hereafter CCU):

- under items (a), (e), (i), (z) of Article 93 of the CCU to life imprisonment with confiscation of all property owned;
- under Article 142 § 3 of the CCU to 13 years imprisonment with confiscation of all property owned;
- under Article 86 § 2 of the CCU to 13 years imprisonment with confiscation of all property owned;
- under Article 215-3 § 3 of the CCU (as amended on 21 September 2000) to 10 years imprisonment with confiscation of all property owned;
- under Article 194 § 2 of the CCU of 2001 to 10 years imprisonment;
- under Article 145 § 2 of the CCU of 1960 to 10 years imprisonment;
- under Article 101 § 3 of the CCU of 1960 to 10 years imprisonment;
- under Article 185 § 3 of the CCU of 2001 to 4 years imprisonment.

On the basis of Article 42 of the CCU of 1960, O. Yaremenko was for these crimes sentenced cumulatively to life imprisonment with confiscation of all property he owned.

Anatoly Petrovych Samoilenko, b. 6 October 1974, previously convicted on 28 May 1999 under Article 17 § 2 and Article 140 § 2 of the CCU to 3 years imprisonment with deferment for a period of 2 years and payment of a fine amounting to 40 times the minimum wage before tax:

On the basis of Article 42 of the CCU of 1960, A. Samoilenko was for these crimes sentenced cumulatively to life imprisonment with confiscation of all property he owned.

On the basis of Article 43 of the CCU of 1960, A. Samoilenko was for the total of sentences handed down a final sentence of life imprisonment with confiscation of all property he owned.

With this same verdict V.I. Yaremenko, O.P. Kysil and A.V. Oksentyuk were sentenced to periods of imprisonment. The court rulings in their cases are not disputed.

On 18 April 2002 the Criminal Chamber of the Supreme Court of Ukraine upheld the verdict passed against O.V. Yaremenko and A.P. Samoilenko. O.V. Yaremenko and A.P. Samoilenko had been convicted and sentenced for crimes committed by them under the following circumstances.

On the night of 22 August 1998, having conspired in advance, in the village of Bortnychi in Kyiv, for a mercenary purpose, taxi driver V.V. Khaliman was assaulted and murdered. A. Samoilenko stabbed Mr Khaliman in the head and neck, while O. Yaremenko hit him on the torso with a screwdriver.

Seeing that Mr Khaliman gave signs of life, A. Samoilenko took a spanner from the boot and struck at least 5 blows with it to the victim's head. Mr Khaliman died at the scene of the crime from the injuries inflicted. After the murder, the convicted men stole money and a set of spanners in the victim's case, and then set the car alight to conceal the evidence of the crime.

During the night of 26 January 2001, O. Yaremenko, A. Samoilenko and V. Yaremenko committed a theft, stealing an overall amount of 2,081.50 UAH from Mr. H.M. Skhara. They took it by taxi to the Yaremenko home where it was kept until being removed by police officers. Having left a part of a metal item in the taxi, O. Yaremenko and A. Samoilenko asked the taxi driver to take them, for extra payment, to a reception point for coloured metal in the village of Bortnychi. Intending to steal the property of the taxi driver A.V. Matviyenko, O. Yaremenko and A. Samoilenko arranged to carry out an armed attack of Mr Matviyenko and kill him. On 26 January 2001 at approximately 4 o'clock, having arrived at an isolated place in Bortnychi, they attacked the victim. According to the division of roles, Samoilenko pulled a rope around the driver's neck and began to suffocate and beat Mr Matviyenko on the torso, trying in that way to break down his resistance, and then, together with O. Yaremenko, pulled the driver's body from the front to the rear seat. After this, A. Samoilenko sat in the driver's seat and they drove to the area around Berezneva Street in Bortnychi. Having reached the vacant land, they pulled Mr Matviyenko from the car, found 170 UAH on him, and a taximeter "Eltax-01 FT" worth 1,200 UAH, which O. Yaremenko stole.

In order to hide the evidence of the crimes, O. Yaremenko and A. Samoilenko put Mr Matviyenko in the car and burned him together with the car. The destruction of the Kasan-Auto car caused material loss worth 28,897.07 UAH.

On 26 January 2001 at around midnight, A. Oksentyuk and O. Kysil, on the basis of personal unfriendly relations which had appeared, inflicted grave bodily injuries on V.V. Kozyr, who following the beating left the place. At around 1 a.m. he was met by O. Yaremenko and A. Samoilenko who assessed his condition and attacked him in order to rob him. O. Yaremenko with considerable force hit the victim with his right elbow on the right side of the face, causing the latter to fall to the ground, and Samoilenko kicked the victim on the head. The combined actions of A. Oksentyuk, O. Kysil, O. Yaremenko and A. Samoilenko caused V.V. Kozyr grave bodily injuries from which he died.

In his application to review the court rulings on the grounds envisaged by Article 400-4 § 1.2 of the Criminal Procedure Code, the Deputy Prosecutor General indicates that according to the judgment of the European Court of Human Rights from 12 September 2008 (hereafter the Judgment) in the case of the prosecution of O. Yaremenko, violations were found of Article 6 § 1 and 3(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the Convention).

The convicted man O. Yaremenko was deprived of the opportunity to defend his rights and legitimate interests with the help of defence counsel whom he could choose at his own discretion in the writing of a confession and when giving evidence on 2 February 2001 as a suspect. He therefore asks that the court rulings be changed, with removal from the reasoning of the court rulings of the references to the evidence of O. Yaremenko's guilt over the murder of V.V. Khaliman – O. Yaremenko's confession from 29 January 2001 and the protocol of his interrogation on 2 February 2001 as a suspect. The Prosecutor considers the rest of the court rulings to be lawful and justified.

Defence counsel – lawyer A. Bushchenko in his application for a review of the court rulings concerning O. Yaremenko in extraordinary proceedings points out that the court, giving justification for its conclusions regarding proof of Yaremenko's guilt in the murder of V. Khaliman, referred to evidence which was obtained with violation of his right to defence, and that O. Yaremenko's statements alleging the use of prohibited methods of criminal investigation against him had not been properly investigated. The defence counsel therefore asks that the court rulings be revoked, and the case sent for new investigation. Mention of violation of criminal procedure legislation is also made in the submission signed by five judges of the Supreme Court Criminal Chamber.

Having heard the report of the Supreme Court Judge H.V. Kanyhina; the explanation of the defence lawyer A. Bushchenko regarding the revoking of the court rulings concerning O. Yaremenko and referral of the case for new examination; the opinion of the Prosecutor V. Kudryavtsev who supported his application to remove from the motivation part of the court rulings reference as evidence of O. Yaremenko's guilt over the murder of V.V. Khaliman of O.

Yaremenko's confession from 29 January 2001, and the protocol of his interrogation on 2 February 2001 as a suspect, since this evidence, according to the judgment of the European Court of Human Rights, had been obtained with violation of O. Yaremenko's right to defence – without a defence counsel. The Prosecutor considers, however, that in the material of the case there is sufficient other evidence confirming Yaremenko's guilt in the murder of Mr Khaliman, and therefore holds that there are no grounds for revoking the court rulings against Yaremenko in full measure with the case being sent for new investigation, as suggested in the application by A. Bushchenko, a judge of the Court Criminal Chamber and the Military Panel of the Supreme Court, having discussed the arguments put forward by the Prosecutor and defence counsel, checked the material of the case, and taking into consideration the Judgment of the European Court of Human Rights in this case with regard to O. Yaremenko, consider that the application of the Deputy Prosecutor General should be allowed, and that of the defence counsel – lawyer A. Bushchenko allowed in part, for the following reasons:

As can be seen from the verdict, the court in confirmation of O. Yaremenko's guilt in the murder of V. Khaliman on 22 August 1998 referred as evidence of his guilt both to his confession and his testimony during his interrogation as suspect on 2 February 2001.

The European Court of Human Rights, having examined O. Yaremenko's application, in its Judgment of 12 September 2008 pointed out that in the case concerning the charges against O. Yaremenko, there had been a violation of Article 6 §§ 1 and 3(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely his right to defence had been violated, with Yaremenko's confession having been written in the absence of a lawyer and his interrogation as a suspect under Article 101 § 3 of the Criminal Code with regard to the murder of V. Khaliman had taken place without the participation of a defence lawyer despite elements of a crime envisaged by Article 93 of the Criminal Code of 1960.

In their review of the case, the judges at the joint hearing reached the conclusion that the confession and testimony of O. Yaremenko during his interrogation as suspect with regard to the murder of V. Khaliman could not be considered admissible evidence confirming O. Yaremenko's guilt in that part of the case since they had been obtained with violation of the requirements of the criminal procedure law. Under these circumstances they should be removed from the list of evidence for the prosecution of O. Yaremenko with regard to these criminal acts.

At the same time, the removal of this evidence from the court rulings does not have significant impact on the correctness of the court's conclusion that O. Yaremenko's guilt had been proved with regard to the murder of V. Khaliman, since in the material of the case there is other evidence confirming that he was guilty of this crime. For example, O. Yaremenko and A. Samoilenko during a reconstruction of the events with the participation of defence lawyers and witnesses at the place of the murder showed and explained how on 22 August 1998 they had together murdered V. Khaliman, and about the role each had played; that O. Yaremenko had inflicted blows with a screwdriver, while A. Samoilenko – with a knife and the theft by them from the boot of Mr Khaliman's car of a case with spanners (v. 3 a. pp. 228-234, 142-145); with evidence during the interrogation of O. Yaremenko and A. Samoilenko as the accused which was carried out in the presence of their defence lawyers, they also admitted to being guilty of the murder of V. Khaliman (v. 3 a. pp. 155-164, 239-242). This evidence of O. Yaremenko and A. Samoilenko is in agreement with the data of the protocol for inspection of the place of the evidence during which the burned out car of V. Khaliman and his body were discovered, and the evidence of witnesses Litvinenko and Kasiyan that the case with the set of spanners belonged to V. Khaliman; of witness P.V. Dybelyak that the case with the set of spanners was left with him by A. Samoilenko; with the protocol for removal of material evidence – the case with the set of spanners; with the data from the forensic analysis which established that the wounds found on V. Khaliman's body had been partly inflicted by a screwdriver, and another part by a knife (v. 2 a. c. 5-14, 15-16, 128, 131, 133, 147-150, 151-162).

Assertions that the inquiry into the complaint that unlawful methods of investigation had been used against O. Yaremenko was carried out in a superficial and inadequate fashion do not correspond to the material of the case. From the case it is clear that the Prosecutor during the inquiry of allegations that unlawful methods of investigation had been used against O. Yaremenko questioned all officers of the detective inquiry and criminal investigation bodies which were involved in procedural actions with regard to O. Yaremenko. Since these allegations were not found to be warranted, there was a refusal to initiate a criminal investigation against the police officers involved in O. Yaremenko's arrest and investigation into the case. This allegation by O. Yaremenko was checked during the court examination of the case where the officers of criminal investigation and the investigators who carried out procedural action with respect to him were questioned, however no confirmation was found that physical or psychological pressure had been brought to bear on O. Yaremenko to get him to confess to the crime. Furthermore, on 8 June 2001 O. Yaremenko, when being interrogated as

accused in the presence of defence counsel O. V. Khivrich, invited at his request, testified that the investigators from the police and Prosecutor's Office had not used physical violence against him.

Under these circumstances the judges of the joint hearing did not find significant violations of criminal procedural law which could serve as grounds for revoking the court rulings with regard to O. Yaremenko, therefore there is no grounds for quashing courts' ruling in accordance with Article 395 of the Criminal Procedure Code with regard to A. Samoilenko, as was suggested in the judges' submission.

On the basis of the above and being governed by Articles 400-4 and 400-10 of the Criminal Procedure Code, the Supreme Court has decided:

to allow the application of the Deputy Prosecutor General, and to partially allow that of the defence counsel – lawyer A. Bushchenko;

to change the ruling of the Kyiv Court of Appeal from 20 November 2001 and the judgment of the panel of judges of the Supreme Court Criminal Chamber from 18 April 2002 with regard to Oleksandr Volodymyrovych Yaremenko, to remove from thereasoning of these rulings reference to O. Yaremenko's confession from 29 January 2001 and his testimony under interrogation protocol as suspect on 2 February 2001 as evidence of his guilt in the murder of V. Khaliman.

President of the Court, M.Y. Korotkevych
Judge-rapporteur, H.V. Kanyhina