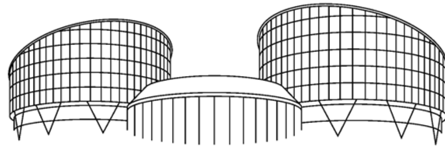

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SLOBODYAN v. UKRAINE

(Application no. 2511/16)

JUDGMENT

STRASBOURG

9 December 2021

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Slobodyan v. Ukraine,

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

Mārtiņš Mits, *President,*
Jovan Ilievski,
Ivana Jelić, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 2511/16) 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 Petro Romanovych Slobodyan (“the applicant”), on 24 December 2015;

the decision to give notice to the Ukrainian Government (“the Government”) of the complaints under Article 6 §§ 1 and 3 (d) of the Convention, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 18 November 2021,

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

INTRODUCTION

1. The applicant was convicted of a violation of traffic rules and failure to undergo an alcohol test. Under Article 6 §§ 1 and 3 (d) he complained that he had been unable to examine the driver of the other car involved in the incident because under the relevant Ukrainian law the courts could not order the police to escort witnesses to the court.

THE FACTS

2. The applicant was born in 1962 and lives in Lutsk. He was represented by Mr V. Krasun, a lawyer practising in Lutsk.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 3 April 2015 the applicant, a judge, was in a car (an SUV) with Mr M. and Mr K. The car collided with a car driven by Mr B., who was in the car with his relative Mr P. B.’s car was damaged. It was not contested that the SUV’s driver had caused the collision by driving too fast and failing to maintain a safe distance between the cars.

6. When the traffic police arrived on the scene, B. identified the applicant as the SUV’s driver. The police requested the applicant to undergo a breathalyser test but he refused, arguing that K., and not him, had been driving. K confirmed this.

7. The police drew up administrative offence reports charging the applicant with the administrative offences of breaching the traffic rules and refusing to undergo an alcohol test. The police also collected statements from B. and P. (see paragraph 10 below).

8. The applicant stood trial before the Lutsk Court. He maintained his position that K. and not him had been driving. K. and M. gave evidence to the same effect.

9. The court summoned B. three times but he failed to appear. He sent a letter to the court informing it that, due to family circumstances, he was constantly out of town but that he wished to reaffirm the statement he had given to the police.

10. On 20 May 2015 the trial court convicted the applicant as charged and suspended his driving licence for two years. The court relied on:

(i) the administrative offence reports;

(ii) P.'s testimony in court to the effect that the incident had been caused by the SUV driver. In court P. was not able to identify the driver with certainty. The court noted, however, that in P.'s statement to the police, which he had reaffirmed in court, he had given a physical description of the driver which corresponded to the applicant and not at all to K., who according to the applicant had supposedly been driving;

(iii) B.'s statement to the police to the effect that the applicant had been the SUV driver and had caused the incident;

(iv) the evidence of the traffic police officer who drew up the relevant reports and a civil activist who observed the drawing-up of the report. They stated that when they had arrived on the scene, B. had identified the applicant as the SUV's driver and the applicant had been showing signs of intoxication; and

(v) a medical report from a substance-abuse institution where the applicant had been examined a couple of hours after the incident according to which the applicant had displayed certain neurological and other signs which, the author of the report had stated in court, could be indicative of intoxication.

11. The court stated that it distrusted the evidence of the applicant and his acquaintances K. and M. as to which of them had been driving, considering that it contained a number of inconsistences. The court considered the applicant's acquaintances' statements to be an attempt to exonerate the applicant.

12. The applicant appealed. He contested the trial court's assessment of the evidence. He argued, in particular, that the trial court could not rely on B.'s evidence because B. had not been examined in court.

13. On 1 July 2015 the Volyn Regional Court of Appeal upheld the applicant's conviction, finding the trial court's assessment of the evidence correct. The court noted in particular B.'s letter to the trial court (see paragraph 9 above) and observed that the trial court could not order the

police to escort B. to court. Therefore, the trial court was justified in relying on his pre-trial statement.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

14. Article 185-3 of the 1984 Code of Administrative Offences provides for fines for contempt of court, including malicious failure of witnesses or victims to appear when summoned.

15. The 2004 Code of Civil Procedure and 2012 Code of Criminal Procedure contain rules according to which courts may instruct the police to escort to court witnesses who fail to appear when summoned. The Code of Administrative Offences does not contain any such provision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained of a violation of Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

> "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. Admissibility

17. The Government did not contest the applicability of Article 6 under its criminal limb in the present case. The Court has already held that proceedings leading to the withdrawal of points from a driving licence were "criminal" within the meaning of Article 6 of the Convention (see *Malige v. France*, 23 September 1998, §§ 35-40, *Reports of Judgments and Decisions* 1998-VII, and *Varadinov v. Bulgaria*, no. 15347/08, §§ 39-40, 5 October 2017). It has also made the same findings in respect of administrative offence proceedings under Ukrainian law (see, for example, *Gurepka v. Ukraine*, no. 61406/00, § 55, 6 September 2005, and *Mikhaylova v. Ukraine*, no. 10644/08, § 46, 6 March 2018). The Court does not see any reason to reach a different conclusion in the present case. Accordingly, all the guarantees enshrined in the criminal limb of Article 6

were applicable in the applicant's case (see *Buliga v. Romania*, no. 22003/12, § 44, 16 February 2021).

18. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

19. The applicant submitted that there had been no good reason for B.'s absence. Even though the authorities could not have ordered B. to be escorted to court, they could have summoned him again and verified the reasons for his non-appearance. B.'s evidence had been decisive for the conviction and there had been no sufficient safeguards in place to ensure the fairness of the proceedings.

20. The Government submitted that there had been a good reason for B.'s absence since at the relevant time he had been out of town and the trial court had had no legal basis which would have enabled it to order that B. be escorted to the court by the police. B.'s evidence had not been decisive as there had been other evidence against the applicant. The applicant had had an opportunity to challenge B.'s statements before courts at two levels of jurisdiction, where he had had the opportunity to fully exercise his procedural rights.

2. The Court's assessment

21. The Court formulated the relevant general principles in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011), and *Schatschaschwili v. Germany* ([GC], no. 9154/10, ECHR 2015). A restatement of those principles can be found in, for example, *Boyets v. Ukraine* (no. 20963/08, §§ 74-76, 30 January 2018).

22. The only reason for B.'s absence from the trial was that he was out of town. There is no information in the file on the nature or duration of B.'s absence. The trial court, however, was willing to accept B.'s absence due to the fact it did not dispose of the power to order the police to escort him to the court (see paragraphs 13 and 20 above).

23. It is a matter of serious concern for the Court that Ukrainian law does not provide the domestic courts examining administrative offence cases with the same tools for ensuring the presence of witnesses (including victims), notably the power to order that they be brought to the court by the police, as those available to the courts in civil and criminal proceedings (see paragraph 15 above). That being said, the trial court did apparently dispose of the power to fine B. for his absence (see paragraph 14 above), but failed to do so.

24. Primarily on account of this flaw in the domestic legal framework, the Court concludes that no good reason has been shown for B.'s absence from the trial and the admission of his untested statements as evidence (see *Schatschaschwili*, cited above, § 107; compare *Negulescu v. Romania*, no. 11230/12, § 49, 16 February 2021). However, it is well established in the Court's case-law that the absence of such a good reason cannot of itself be conclusive of the unfairness of a trial (see *Schatschaschwili*, cited above, § 113).

25. As to the role of the evidence in question, B. was the only person who directly identified the applicant as the SUV driver. All the other evidence in that respect derived from B.'s statements. P.'s evidence concerning the identity of the driver was contradictory (see paragraph 10 (ii) to (iv) above). Therefore the Court considers that B.'s evidence was decisive for the applicant's conviction.

26. As far as counterbalancing factors are concerned, the applicant enjoyed unrestricted opportunity to challenge B.'s evidence and oppose its use. However, the Court has held that such an opportunity cannot, of itself, be regarded a sufficient counterbalancing factor (compare *Trampevski v. the former Yugoslav Republic of Macedonia*, no. 4570/07, § 49, 10 July 2012, and *Riahi v. Belgium*, no. 65400/10, § 41, 14 June 2016). The impact of this factor on the overall fairness of proceedings depends on whether other factors sufficiently complemented it.

27. The only other counterbalancing factor was the presence of corroborative evidence showing that the applicant had in fact been driving: P.'s description of the SUV driver which, in the trial court's assessment, corresponded only to the applicant, and the contradictions between the applicant's and his acquaintances' evidence in that respect (see paragraphs 10 (ii) and 11 above).

28. Assessing the trial's overall fairness, the Court notes that the applicant's key defence argument consisted in contesting that he had been driving. The only witness for the prosecution with direct knowledge of that fact was B., whose evidence was therefore decisive for the conviction. The opportunity to examine him was therefore key to the effective exercise of the applicant's defence. The applicant, as admitted by the domestic courts and the Government, had no such opportunity primarily because of a flaw in the domestic legislative framework.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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.”

31. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

32. The Government considered that claim unjustified.

33. Taking into account the effects of the violation and the context of the case, the Court awards the applicant EUR 900 in respect of non-pecuniary damage, plus any tax that may be chargeable.

34. 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 and 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 900 (nine 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;

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

Done in English, and notified in writing on 9 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Martina Keller
Deputy Registrar

Mārtiņš Mits
President