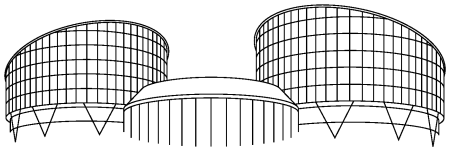

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF A.V. v. UKRAINE

(Application no. 65032/09)

JUDGMENT

STRASBOURG

29 January 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A.V. v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 16 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 65032/09) 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 A.V. ("the applicant"), on 30 November 2009. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Ms I. Boykova, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent at the time, Mr N. Kulchytskyy.

3. The applicant alleged, in particular, that he had been ill-treated by the police (Article 3 of the Convention), that he had not had access to a lawyer at the initial stage of the investigation (Article 6 §§ 1 and 3 (c) of the Convention), and that the courts had used evidence obtained through ill-treatment to secure his conviction (Article 6 § 1 of the Convention).

4. On 22 October 2012 the above complaints were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Kyiv.

A. The applicant's arrest

6. On the evening of 29 December 2006 the applicant was arrested on a street in Kyiv and taken to the Shevchenkivskyy District Police Department of Kyiv ("the police department"), where he was asked to empty his pockets in the presence of two attesting witnesses. The attesting witnesses were two unemployed men. The applicant produced small bags containing cocaine.

7. According to the applicant, during his arrest on the street some police officers struck him down, handcuffed him and escorted him to their car, where they allegedly planted drugs (small bags of cocaine) on him and continued to beat him up. The assault was accompanied by threats of sexual abuse, and continued until he arrived at the police department.

B. The applicant's administrative detention

8. At 10 p.m. on 29 December 2006 the police took the decision to arrest and detain the applicant under Article 263 of the Administrative Offences Code for violating drug circulation rules, an administrative offence pursuant to Article 44 of that Code.

9. The applicant was then interviewed. He wrote a confession admitting that he had unlawfully bought cocaine for personal use. According to him, he was forced to make the confession, which was dictated to him by one of the police officers.

10. After the confession he was placed in a police cell.

11. According to the applicant, during his stay in the police department he was not given enough food or water. He was held in bad sanitary and hygienic conditions. Allegedly, he was locked for one night in a toilet of the police department, which was dirty and stinking. He felt unwell and had acute lower back pain.

C. Criminal proceedings against the applicant and related issues

12. On 2 January 2007 the police received a specialist report stating that the substance seized from the applicant had contained 1.18 grams of cocaine.

13. That day the police investigator instituted criminal proceedings against him for illegally purchasing and storing narcotic drugs in large quantities, an offence pursuant to Article 309 § 2 of the Criminal Code.

14. At 5.25 p.m. the investigator, relying on Articles 106 and 115 of the Code of Criminal Procedure, took a decision to arrest and detain the applicant on suspicion of the above-mentioned offence. The decision authorised the applicant's preliminary detention for another seventy-two hours.

15. The applicant was also questioned that day and gave details of the circumstances surrounding his purchase of the drugs. According to him, his lawyer, who had been hired by his parents, joined him when the interview had gone on for a considerable length of time. In the lawyer's presence he complained of being in a poor state of health, and added that one of his acquaintances had instigated purchasing the drugs.

16. According to the Government, on 2 January 2007 the applicant was given a medical examination and diagnosed with intercostal neuralgia. His state of health was considered satisfactory.

17. On 5 January 2007 the prosecutor refused to approve the investigator's application to have the applicant placed in pre-trial detention. The investigator then decided to release him on a written undertaking not to abscond.

18. On the afternoon of 5 January 2007, following his release, the applicant was examined by an ambulance team, who noted that he was suffering from acute pyelonephritis (a severe kidney infection) and lumbosacral radiculitis (sciatica).

19. On 6 and 8 January 2007 he was examined by ambulance teams again, who diagnosed him with acute radiculitis and possible acute pyelonephritis.

20. Between 9 and 19 January 2007 the applicant was provided with inpatient treatment at the neurological department of Kyiv Hospital no. 1. He was diagnosed with lumbar spinal osteochondrosis (*остеохондроз поперекового відділу хребта*), vertebrogenic lumbodynia (*вертеброгенна ломбаргія*) and pain and muscular tonic syndrome (*больовий та м'язово-тонічний синдром*).

21. On 16 January 2007 he was examined by a psychiatrist, who noted that he was showing signs of post-traumatic stress disorder.

22. On 22 January 2007 the Shevchenkivskyy District Court of Kyiv ("the District Court") considered the applicant's complaint concerning the unlawfulness of his arrest and detention under Article 106 of the Code of Criminal Procedure. It found that the investigator's decision of 2 January 2007 to arrest and detain him as a criminal suspect had been unlawful in so far as the grounds for his arrest in such a capacity had existed as from 29 December 2006.

23. On 6 February 2007 the applicant, assisted by a lawyer, denied the charges and refused to answer any of the investigator's questions.

24. On 9 February 2007 the Shevchenkivskyy District prosecutor's office refused to institute criminal proceedings against the police officers in connection with the applicant's allegations of a violation of his rights during his arrest and detention. According to the decision, the officers' actions lacked the elements of an offence. It referred to explanations given by the police investigator in charge of the applicant's criminal case and to the official custody records concerning his detention.

25. On 1 March 2007 the applicant's father complained to the investigator that there had been numerous violations of his son's rights, including an extraction of his confession through pressure and unlawful arrest and detention.

26. On 7 March 2007 the applicant, assisted by his lawyer, denied the charges and refused to answer any of the investigator's questions.

27. On 16 March 2007 he complained to the prosecutor of failure on the part of the investigative authorities to carry out an appropriate examination of the circumstances in which he had been arrested and questioned in the initial period of the investigation.

28. On 4 April 2007 the prosecutor replied that the criminal case against the applicant had been referred to the District Court, and that he could raise the relevant issues during the trial.

29. On 15 June 2007 a linguistic specialist, in reply to a request by the applicant, issued a report stating that the confession of 29 December 2007 had been written by the applicant with the assistance of another person who had dictated the text.

30. During a court hearing on 18 June 2007 the applicant requested that the linguistic specialist report be admitted to the case file. He further requested that the statements he had made on 29 December 2006 and 2 January 2007 be excluded, as they had been obtained in breach of his rights. The court rejected his requests.

31. The applicant denied the charges throughout the trial. He insisted that the drugs had been planted on him, and that he had been psychologically pressured and physically ill-treated by the police officers. The court then questioned the officers and investigators concerned, who denied the applicant's allegations. The court also questioned the two attesting witnesses who had been present when the applicant had taken the drugs from his pocket. They stated that when he had produced the little bags in their presence, he had told them they contained cocaine; they had not noticed any visible injuries on him at the time.

32. On 8 July 2008 the District Court found the applicant guilty of illegally purchasing and storing narcotic drugs in large quantities, and sentenced him to three years' imprisonment. The sentence was suspended conditional upon two years' probation. In reaching its conclusions, the court had regard to the witness statements and material, documentary and expert evidence. It considered that there was no indication that the applicant had been ill-treated or had suffered a violation of his procedural rights at the time of making his initial self-incriminating statements.

33. The applicant appealed, claiming that the key evidence had been obtained during his unlawful detention and ill-treatment, and that he had not been given access to a lawyer after the arrest.

34. On 7 November 2008 the Kyiv Court of Appeal upheld the judgment of the first-instance court. It noted that in the applicant's confession of

29 December 2006 he had explained in detail how he had committed the crime. The Court of Appeal further noted that on 2 January 2007 the applicant had also admitted he was guilty.

35. On 22 May 2009 the Supreme Court, sitting in private, dismissed a cassation appeal by the applicant on the grounds that his guilt had been well established by the evidence in the case file, including the original self-incriminating statements he had made. On 2 June 2009 his lawyer received a copy of that decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code of 5 April 2001

29. Article 309 of the Code provides:

> "1. The unlawful production, fabrication, purchase, storage, transport or dispatch of narcotic drugs, psychotropic substances or their analogues not for the purpose of trafficking is punishable by ... imprisonment ...
>
> 2. The same actions, if ... committed in respect of narcotic drugs ... in large quantities ... are punishable by two to five years' imprisonment ..."

B. Code of Criminal Procedure of 28 December 1960 (in force at the relevant time)

36. The relevant provisions of that Code can be found in the judgment in the case of *Osypenko v. Ukraine* (no. 4634/04, § 33, 9 November 2010).

C. Administrative Offences Code of 7 December 1984 (as worded at the material time)

37. Article 44 prohibits the fabrication, purchase, storage, transport or dispatch of narcotic drugs or psychotropic substances in small quantities not for the purpose of trafficking. A breach of this provision is punishable by a fine of up to forty-three times the gross monthly minimum wage or by administrative detention of up to fifteen days.

38. Article 263 provides, *inter alia*, that anyone who violates drug circulation rules may be arrested and preliminarily detained for up to three hours so that a report may be drawn up for the administrative offence. However, in order to identify the perpetrator, subject him to a medical examination, clarify the circumstances surrounding the purchase of the drugs or psychotropic substances and examine them, the preliminary detention may be extended for up to three days. In such cases, the prosecutor must be informed of the extension in writing within twenty-four hours.

39. Article 268 provides that a person who is brought to responsibility for an administrative offence has a right to legal assistance during consideration of the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

40. The applicant complained under Article 3 of the Convention that on 29 December 2006 he had been pressured and beaten up by police officers.

41. Article 3 of the Convention provides:

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

A. Admissibility

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

B. Merits

1. The parties' submissions

43. The Government submitted that there had been no violation of Article 3 of the Convention. They emphasised that on 29 December 2006 the witnesses at the police department who had attested to the seizure of the drugs had not seen any injuries on the applicant. On 2 January 2007 he had been given a medical examination and his health had been found to be satisfactory. In that regard, they provided an extract from the medical records logbook kept at the police department. They further contended that the applicant had failed to request a medical examination to document the injuries after the alleged beatings. As to the illnesses diagnosed after his release, they submitted that there was no medical evidence to suggest that he had acquired them during his detention.

44. The Government further maintained that the applicant's complaint of ill-treatment had been examined by the domestic authorities, who had dismissed it as unfounded. They referred, in particular, to the decision of 9 February 2007 of the Shevchenkivskyy District prosecutor's office.

45. The applicant insisted that he had been pressured and beaten up by police officers. As to the attesting witnesses mentioned by the Government,

they could not have seen his injuries as he had been fully clothed during the seizure of the drugs. He further contended that he had not undergone a medical examination on 2 January 2007. The extract of the medical records provided by the Government did not contain any reference to the individual examined and diagnosed.

46. The applicant stressed that once he had been released on 5 January 2007 he had been urgently treated by an ambulance team for the pain in his lower back.

2. The Court's assessment

47. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force that has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Labita v. Italy* [GC], no. 26772/95, §§ 119-20, ECHR 2000-IV).

48. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

49. In the present case the applicant alleged that on 29 December 2006 the police officers beat him up to make him give self-incriminating statements. The Government contended that the two witnesses attesting the seizure of the drugs from the applicant on 29 December 2006 had not seen any injuries on the applicant. The Court accepts the applicant's argument that those witnesses might not have seen injuries on the body, as he had been fully clothed during the seizure of the drugs. Furthermore, the attesting witnesses were not medical practitioners, and it was not their task to assess the applicant's medical condition. The Government then contended that the applicant had undergone a medical examination on 2 January 2007, following which no injuries had been documented. The Court notes that the

extract from the medical records provided by the Government in support of their contention does not make any reference to the applicant's name, nor does it otherwise suggest that the medical conclusions on 2 January 2007 written in the logbook related to him. Accordingly, it has not been reliably shown that the applicant was given a medical examination on 2 January 2007.

50. However, the alleged beatings on 29 December 2006 are not supported by any evidence. The applicant's medical treatment on account of kidney infection and radiculitis after his release on 5 January 2007 does not confirm the allegations of beatings. It is notable that from 2 January 2007 onwards the applicant was communicating with his lawyer, and there is no document to show that they requested any medical assessment of the applicant. After his release the applicant freely contacted medical doctors, who made no findings as to the physical injuries sustained by the applicant.

51. The applicant also alleged that he was psychologically attacked by the police officers. In certain circumstances this kind of psychological impact on an individual may amount to ill-treatment prohibited by the Convention (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 91 and 108, ECHR 2010). The Court notes that on 16 January 2007 the psychiatrist found that the applicant showed signs of post-traumatic stress disorder. However, that general finding provided no further detail and cannot give grounds to conclude that the psychological condition was caused by the alleged events of 29 December 2006.

52. The applicant then referred to a linguistic specialist report, which suggested that the text of the confession of 29 December 2007 had been written by the applicant with the assistance of another person. For the Court, this sole piece of evidence is not sufficient to find that the applicant was subjected to psychological influence or that this had been serious enough to reach the threshold of Article 3 of the Convention (compare *Zamferesko v. Ukraine*, no. 30075/06, § 48, 15 November 2012). In the present case this aspect of the complaint comes rather to the issue of availability of a lawyer in that period of time who, among other things, could effectively prevent the alleged psychological influence on the part of police officers. However, the question of access to a lawyer is examined below under Article 6 of the Convention.

53. On the basis of these reasons the Court finds no violation of Article 3 of the Convention as regards the alleged ill-treatment on 29 December 2006.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

54. The applicant complained that he had not had access to a lawyer at the initial stage of the proceedings. He relied on Article 6 §§ 1 and 3 (c) of the Convention which provide, in so far as relevant, 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:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

A. Admissibility

55. The Court notes that this complaint 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

56. The Government submitted that the applicant's right to a defence counsel had been properly ensured, and that there had been no violation of the Convention in that regard. The fact that the lawyer had not been present at the interview on 29 December 2006 had not affected the further investigation of the case and its determination by the courts. They further submitted that the trial court had not used the applicant's self-incriminating statements to substantiate its findings.

57. The applicant disagreed, and insisted that he had not had access to a lawyer at the right time and that this deficiency had had a bearing on his conviction.

2. The Court's assessment

58. The Court reiterates that Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the

defence will, in principle, be irretrievably prejudiced when incriminating statements made during questioning by police without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (see *Panovits v. Cyprus*, no. 4268/04, § 64, 11 December 2008).

(a) Whether there was a restriction on the right of access to lawyer

59. It follows from the file, and this is not disputed by the parties, that on 29 December 2006 the police took the applicant to the police department because they suspected him of an offence relating to drug circulation. That offence was initially classified as administrative. Regardless of whether that initial domestic classification was justified or not, the Court notes that the administrative proceedings involved a possible sanction of imprisonment of up to fifteen days. Having regard to the nature and severity of the sanction, the Court considers that Article 6 of the Convention covered those proceedings (see *Galstyan v. Armenia*, no. 26986/03, §§ 58-60, 15 November 2007 and *Luchaninova v. Ukraine*, no. 16347/02, § 39, 9 June 2011). Furthermore, nothing suggests that any exception for the specific requirement of Article 6 concerning access to a lawyer as from the first questioning should apply in the circumstances of the present case. The procedural measures taken in the beginning of the administrative offence proceedings produced serious consequences for the applicant, having particular regard to the potential sanction for the administrative offence which involved deprivation of liberty. In addition, the importance of the primary investigating actions cannot be underestimated in view of a particular correlation between the two sets of the domestic proceedings. The distinction between the initial administrative and further criminal charges essentially amounted to the difference in the quantities of narcotic drugs, which might not have been evident from the very beginning, and the applicant's self-incriminating statements, obtained for the purpose of administrative charges, could be and were in fact entirely pertinent for the subsequent criminal prosecution involving even more serious sanction.

60. Accordingly, the applicant was entitled to have access to lawyer when he was questioned on 29 December 2006 concerning the circumstances surrounding his purchase of the drugs. The existence of that Convention right was not dependent on the applicant's actual request to be provided with legal assistance. That right was however subject to the applicant's waiver since Article 6 of the Convention does not prevent a person from waiving of his own free will the entitlement to the guarantee of a fair trial (see *Strzałkowski v. Poland*, no. 31509/02, § 42, 9 June 2009).

However, a waiver must, among other things, be established in an unequivocal manner and must be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II). The requisite safeguards for the right to legal assistance imply, among other things, the obligation of the authorities to establish that the person did not wish to exercise that right in a particular period of time (see *Yerokhina v. Ukraine*, no. 12167/04, § 68, 15 November 2012).

61. It appears from the facts, and it is accepted by the parties, that a lawyer was not available to the applicant on 29 December 2006 when he made his first self-incriminating statements. There is no indication that the applicant had waived his right to have a lawyer at the time and the question of possible waiver was not a subject of argument before the Court.

(b) Justification of the restriction

62. The question, therefore, is whether the absence of a lawyer had been justified. On the facts, the Court does not discern any compelling reason for restricting the applicant's right to a lawyer during that time.

63. Furthermore, the Court considers that that restriction had prejudiced the applicant's defence rights. The trial court refused his request to exclude his initial confession from the evidence in the case (see paragraph 30 above). The fact that the court later did not make express reference to the initial confession when substantiating the applicant's guilt is not decisive (see *Khayrov v. Ukraine*, no. 19157/06, § 78, 15 November 2012). Indeed, the appellate court later explicitly relied on his confession of 29 December 2006 when upholding the judgment of the trial court. The Supreme Court also relied on the original self-incriminating statements when dismissing his cassation appeal.

64. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

65. The applicant further complained under Article 6 § 1 of the Convention that his right to a fair trial had been violated because the courts had convicted him on the basis of self-incriminating statements which had been obtained through ill-treatment.

66. The Court has dismissed the applicant's allegations of ill-treatment under Article 3 of the Convention. Accordingly, no issue under Article 6 of the Convention arises in connection with his contention that he was convicted on the basis of evidence obtained through ill-treatment (see *Yerokhina v. Ukraine*, no. 12167/04, § 77, 15 November 2012 and *Nikolayenko v. Ukraine*, no. 39994/06, § 71, 15 November 2012).

67. This complaint is therefore manifestly ill-founded and should be dismissed as inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

68. The applicant complained under Article 3 of the Convention that between 29 December 2006 and 5 January 2007 he had been held in inappropriate conditions which resulted in deterioration of his health.

69. The Court notes that the applicant's complaint concerning the inappropriate conditions of detention concerned a relatively short period of time. The applicant neither applied to the Court within the six-month time-limit after the termination of the situation complained of, nor brought, in the intervening time, any court action to justify the delay (see *Voloshyn v. Ukraine*, no. 15853/08, § 42, 10 October 2013). Furthermore, his allegations in this regard are not sufficiently detailed and substantiated. It follows that this complaint should be dismissed as inadmissible pursuant to Article 35 §§ 1, 3 (a) and 4 of the Convention.

70. The applicant further complained of other violations of his rights under the Convention.

71. The Court has examined these complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. 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

73. The applicant claimed 18,000 euros (EUR) in respect of non-pecuniary damage.

74. The Government contested that claim and submitted that it was unfounded.

75. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of violations in

the present case. Ruling on an equitable basis, the Court awards him EUR 2,400 in respect of non-pecuniary damage.

B. Costs and expenses

76. The applicant also claimed EUR 716.61 for the costs and expenses incurred in connection with the case.

77. The Government argued that the claim was sufficiently substantiated and excessive.

78. 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 allow the claim in full.

C. Default interest

79. 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

1. *Declares*, unanimously, the complaint concerning ill-treatment on 29 December 2006 (Article 3 of the Convention) and the complaint concerning access to a lawyer (Article 6 §§ 1 and 3 (c) of the Convention) admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention as regards the alleged ill-treatment on 29 December 2006;

3. *Holds*, by six votes to one, that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the absence of legal assistance from the time of the first questioning;

4. *Holds*, by six votes to one,
   (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 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 716.61 (seven hundred and sixteen euros and sixty-one cents), 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;

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

Done in English, and notified in writing on 29 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge G. Yudkivska is annexed to this judgment.

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA

I respectfully disagree with my colleagues that Article 6 §§ 1 and 3 (c) of the Convention was violated in the circumstances of the present case. In my view, the majority's approach demonstrates an automatic application of the *Salduz* jurisprudence, which was not the intention of the Grand Chamber in that case.

The *Salduz* case (*Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008) was about *access* to a lawyer. The Court held that, as a rule, *access to a lawyer* should be provided from the first interrogation of a suspect by the police. The rights of the defence "will in principle be irretrievably prejudiced when incriminating statements made during police interrogation *without access to a lawyer* are used for a conviction" (emphasis added).

The intrinsic nature of this key principle of a fair trial was brilliantly explained further in the case of *Dayanan v. Turkey*:

"... the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."

All these aspects are of paramount importance for anyone accused of a serious crime and potentially facing a term of imprisonment. In such situations the interests of justice clearly call for a strict safeguard of the right to legal assistance "by reason of the mere fact that so much [is] at stake"[1]. As the Court noted in *Salduz*, "an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer ..."

It is worth mentioning that this was said in the context of a juvenile offender accused of a terrorism-related offence.

The issue of whether or not an accused *must* be represented from the first interrogation is related to the notion of "interests of justice", developed by the Court in the context of the State's obligation to provide free legal assistance for those who do not have means. The Court has held that where deprivation of liberty is at stake, those interests in principle call for legal representation[2].

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[1] See *Quaranta v. Switzerland*, 24 May 1991, § 33, Series A no. 205

[2] See *Benham v. the United Kingdom*, 10 June 1996, § 61, *Reports of Judgments and Decisions 1996-III*, and, more recently, *Shabelnik v. Ukraine*, no. 16404/03, § 58, 19 February 2009.

A person's young age can also be grounds for considering him or her to be particularly vulnerable (see *Güveç v. Turkey*, no. 70337/01, § 131, ECHR 2009 (extracts)), as can a particular medical condition (see *Borotyuk v. Ukraine*, no. 33579/04, § 82, 16 December 2010).

Hence, it is inevitable that in a situation of any particular vulnerability the requirement of access to a lawyer places an obligation on the authorities to provide for legal representation. However, it does not appear that the Court is ready to accept that anyone subject to the criminal justice system is vulnerable *per se*.

Therefore, a distinction should be made between *access to a lawyer*, or, in other words, the right to seek legal assistance on the one hand, and *obligatory legal representation* in any case of police interrogation on the other.

The present case is not about *access to a lawyer*: the applicant was not denied legal representation. Nor, unlike in *Salduz*, did the relevant legal provisions systematically fail to require the presence of a lawyer during the first interrogation. The applicant merely failed to request legal assistance whilst being detained.

In this respect the present case is substantially different from the case of *Pishchalnikov v. Russia*, in which the applicant's explicit request for legal assistance was left without a response. In that case the Court stated: "... the Court is of the opinion that an accused such as the applicant in the present case, who had expressed his desire to participate in investigative steps only through counsel, should not be subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police or prosecution"[3].

In the present case there is no evidence that on 29 December 2006 the applicant was not notified of his defence rights guaranteed by the Code of Administrative Offences, and the applicant does not dispute this. Furthermore, it is not alleged that the police had intentionally hindered access to a lawyer until the applicant had made his confession statements.

Lastly, it does not appear that the applicant made his statements to the police under duress: the Court has found that the applicant's complaint in this respect is not corroborated by any evidence (see paragraphs 48-52).

It cannot be said that the applicant was vulnerable. The maximum possible penalty he faced, as charged under Article 44 of the Code, was fifteen days' imprisonment. In view of the minor character of that offence and the leniency of the envisaged sanction, an arrested person cannot be regarded as helpless or exposed to the other risks described above.

As the CPT stated in their report, "persons suspected of particularly serious offences can be among those most at risk of ill-treatment, and

[3] *Pishchalnikov v. Russia*, no. 7025/04, § 79, 24 September 2009.

therefore most in need of access to a lawyer". However, it has criticized the situation in numerous countries where "persons can be deprived of their liberty for several weeks for so-called "administrative" offences. ... Further, the Committee has frequently encountered the practice of persons who are in reality suspected of a criminal offence being formally detained in relation to an administrative offence, so as to avoid the application of the safeguards that apply to criminal suspects"[4].

This is not the case here. There is no evidence that, contrary to the situation in other cases against Ukraine, the authorities used an administrative offence as a pretext to ensure the applicant's availability for questioning as a criminal suspect[5]. Being unaware, prior to the expert report, of the quantity of the cocaine found, they mistakenly believed that it was small enough not to amount to a criminal offence. As soon as the results of the expert report proved that the seized cocaine was of a large quantity, criminal proceedings were instituted and a lawyer attended the first interrogation of the applicant as a suspect. It is significant that, when interrogated in the presence of a lawyer on 2 January 2007, the applicant repeated the same confession statement as the one he had made on 29 December 2006.

At no stage of the proceedings did the applicant claim that he requested legal assistance but was refused it.

Given the above considerations, I cannot agree that the applicant's case required obligatory legal representation. As the Court held in *Galstyan v. Armenia*, "... noting that the applicant was accused of a minor offence and the maximum possible sentence could not exceed 15 days of detention, the Court does not discern in the present case any interests of justice which would have required a mandatory legal representation"[6].

Likewise, it cannot be said that the onus of proving in each and every case, regardless of its minor character, that an accused did not request legal assistance or waived his right to have a lawyer should be on the authorities. The circumstances of each individual case are to be taken into account and some attention should also be paid to the reality of police work so that the *Salduz* requirements are not deprived of their meaning in practical terms.

In their opinion on the "Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest" the European Economic and Social Committee stated that "excessive formality in criminal proceedings might jeopardise the effectiveness of the investigation, ... it [is] necessary to allow each Member State the option of implementing procedures derogating from certain established principles during both the

[4] see paragraphs 20- 21 of the CPT's 21st General Report, CPT/Inf (2011) 28.
[5] This recurrent practice warranted the Court's special finding in this respect under Article 46 of the Convention in the case of *Balitskiy v. Ukraine*, no 12793/03, 3 November 2011.
[6] *Galstyan v. Armenia*, no. 26986/03, § 91, 15 November 2007.

investigation and the proceedings, particularly when relatively minor acts, relating to commonly-committed offences, are neither questioned nor questionable"[7].

[7] 2012/C 43/11 Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM(2011) 326 final.