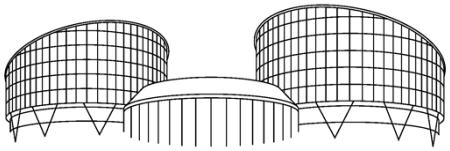

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GARBUZ v. UKRAINE

(Application no. 72681/10)

JUDGMENT

STRASBOURG

19 February 2019

FINAL

19/05/2019

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

In the case of Garbuz v. Ukraine,

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

Paulo Pinto de Albuquerque, *President,*
Ganna Yudkivska,
Vincent A. De Gaetano,
Egidijus Kūris,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 8 January 2019,

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

PROCEDURE

1. The case originated in an application (no. 72681/10) 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 Mykola Andriyovych Garbuz ("the applicant"), on 2 December 2010.

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

3. The applicant alleged, in particular, that he had not been allowed to examine certain witnesses in criminal proceedings against him and that another witness had been examined with a considerable delay, and that those proceedings had been unreasonably lengthy.

4. On 10 October 2017 the application was communicated to the respondent Government.

5. On 3 April 2013 the applicant died. On 12 August 2017 his wife, Ms Valentyna Fedorivna Garbuz, expressed her wish to pursue the application in his stead.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1952 and died in 2013.

7. On 21 February 2002 P., a businessman, contacted the police complaining that the applicant, who was then the director of a municipal housing management agency, was demanding money from him in exchange for permission to use some premises managed by his agency. The applicant had allegedly assured P. that some of the money would be used to bribe representatives of any supervising authorities who might enquire into the use of the premises.

8. On the same day the police, in the presence of two attesting witnesses, gave P. several banknotes marked with a luminescent substance only visible in special lighting to be given to the applicant as the bribe, and an audio recorder.

9. Later that day P. went into the applicant's office and then came out saying that he had delivered the money.

10. The police went in to arrest the applicant. The same attesting witnesses followed. In their presence, the luminescent substance was discovered on the applicant's hand and pocket. The marked banknotes were discovered in one of the rooms adjoining his office. These investigative steps were video recorded.

11. On the same day the applicant wrote and signed a statement confessing to having accepted the money from P. He subsequently retracted the confession, claiming that it had been extracted under "physical and psychological pressure" from the police.

12. The applicant was charged with fraud, apparently because he actually had no statutory authority to let the premises in question.

13. In the course of the pre-trial investigation a certain T.V.S., who was apparently an employee of the applicant's agency, stated that, on an unspecified date, apparently prior to P.'s complaint to the police, the applicant had asked her to show the premises in question to P.

14. The attesting witnesses made formal statements to the investigating authority describing the events of 21 February 2002 which they had observed. They stated, in particular, that they had entered the applicant's office after the police and, when they entered, two police officers were already holding the applicant.

15. In the bill of indictment the victim, the attesting witnesses and T.V.S. were identified as witnesses to be summoned in the course of the trial.

16. In the course of the trial the applicant pleaded not guilty and argued that the banknotes had been planted on the agency premises by the police, who had also smeared his hand and pocket with the luminescent substance to frame him. The traces of the substance on his hand could come from shaking P.'s hand.

17. According to the Government, P. testified in the course of the trial on two occasions in April 2004. It appears that he repeated the substance of his statements to the police (see paragraphs 7 and 9 above).

18. The attesting witnesses were repeatedly summoned to testify at the trial but failed to appear as they could not be found at the home addresses they had given to the authorities. The court records submitted to the Court show that the hearings were adjourned and rescheduled on at least thirty-three occasions due to the "witnesses' failure to appear" (*судовий розгляд відкладено у зв'язку з неявкою свідків*) and that the trial court repeatedly requested the help of police and of the prosecutor's office in locating and escorting the witnesses to the hearings. It appears that those measures concerned both the attesting witnesses and T.V.S. However, despite those efforts, those witnesses failed to appear and their pre-trial statements were read out at the trial.

19. On 5 October 2009 the Kharkiv Kominternivsky District Court convicted the applicant of fraud and sentenced him to two years' detention in a semi-open penal institution, but waived enforcement of the sentence as it had become time-barred (see paragraph 24 below). In convicting the applicant, the court relied on: the statements of P., the attesting witnesses and T.V.S.; audio and video evidence; police reports documenting the delivery of the marked banknotes to P. and their subsequent discovery, as well as the discovery of the luminescent substance on the applicant's hand and pocket; statements of the police officers who had organised the investigative actions in question; the results of expert analysis confirming the discovery of the luminescent substance from the same source on the banknotes, on the applicant's hand and in his pocket; and the applicant's confession. The court dismissed the applicant's allegation that his confession had been extracted under duress as unsubstantiated.

20. The applicant appealed, arguing in particular that P., the attesting witnesses and T.V.S. had not been examined in the course of the trial as they failed to appear at the trial ("*которые уклонились от явки в суд первой инстанции*").

21. On 4 February 2010 the Kharkiv Regional Court of Appeal upheld the conviction, stating that there was sufficient evidence of the applicant's guilt. There was no reason to distrust the statements of the victim and the witnesses which were corroborated by the other evidence in the file, including audio and video evidence. The court perceived no reason for the witnesses to falsely testify against the applicant.

22. In his appeal on points of law to the Supreme Court the applicant stated that the witnesses had ignored summons to appear at the trial and the trial court had failed to ensure their presence. The attesting witnesses had stated that, when they entered the office, the police officers already held the applicant (see paragraph 14 above). This showed that the police were behaving in a violent way towards the applicant and it was comprehensible why he could be intimidated and falsely confess under such pressure.

23. On 9 June 2010 a Supreme Court judge denied the applicant leave to appeal on points of law. The judge noted that matters of fact were not

subject to review by the Supreme Court, that the judicial decisions were based on properly assessed evidence and the conclusions were reasoned and gave no reason to doubt them. The criminal-law characterisation of the applicant's actions was correct and the punishment lawful. There were no grounds to open review proceedings.

II. RELEVANT DOMESTIC LAW

24. According to Articles 49 and 74 § 5 of the Criminal Code a court may, if the offence has become time-barred, either relieve the defendant of criminal liability and discontinue the proceedings, or convict the defendant but waive the enforcement of the sentence. In the instant case, the courts applied the second procedure.

25. Article 127 of the 1960 Code of Criminal Procedure ("the Code"), which was repealed with effect from 19 November 2012, described an attesting witness (*понятий*) as a person disinterested in the outcome of a criminal case who was invited by an investigator to attest to an investigative measure and to the accuracy of a report produced to that effect.

26. Other relevant provisions of the Code can be found in *Karpyuk and Others v. Ukraine* (nos. 30582/04 and 32152/04, §§ 77-80, 6 October 2015).

THE LAW

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

27. The applicant's wife wished to pursue the proceedings in the applicant's stead. The Government pointed out that the delay with which the applicant's wife had manifested her interest in pursuing the application (see paragraph 5 above) indicated that she had lost interest in the case and/or constituted abuse of the right of petition on her part. Moreover, the rights under Article 6 §§ 1 and 3 (d) of the Convention were eminently personal and non-transferrable.

28. The Court notes that the applicant died after he had lodged the application, a situation which, according to its case-law, is viewed differently from those instances where the applicant has died beforehand. Where the applicant has died after the application was lodged, the Court has accepted that the next of kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014, with further references). In such cases, the decisive point is not whether the rights in question are or are not transferable to the heirs wishing to pursue the procedure, but whether the

heirs can in principle claim a legitimate interest in asking the Court to deal with the case on the basis of the applicant's wish to exercise his or her individual and personal right to lodge an application with the Court (see *Singh and Others v. Greece*, no. 60041/13, § 26, 19 January 2017).

29. The Court notes that the applicant's wife expressed her wish to pursue the application. Her delay in doing so cannot be taken to mean that she lost interest in the application or seen as abuse of the right of application. The Court sees no reason to doubt that she has a legitimate interest in doing so, and holds that she has standing to continue the present proceedings in the applicant's stead.

30. However, reference will still be made to the applicant throughout the ensuing text.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

31. The applicant complained of various violations of Article 6 of the Convention, the relevant parts of which provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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 violation of Article 6 §§ 1 and 3 (d)

1. The parties' submissions

32. The applicant submitted that his rights under Article 6 §§ 1 and 3 (d) had been breached on account of the domestic courts' reliance on the witness statements of P. (the victim), the attesting witnesses and T.V.S. In his original submissions he stated that the trial court had failed to ensure the presence of those witnesses at the trial and that, therefore, he had had no opportunity to examine them. In his observations in response to those of the Government, the applicant submitted that "a significant period of time [had] passed until the interrogation of the majority of witnesses [had become] possible, which [had] affected the ability of witnesses to confirm the testimony or to reproduce from memory the events of the investigative

actions in which they [had taken] part." He did not make any other submissions on this point.

33. The Government submitted that P. had in fact been examined in the course of the trial. As to the other witnesses, they stated that the applicant's conviction had been based on various other pieces of evidence, and that the assessment of evidence was primarily a matter of regulation by national law and the national courts. Despite numerous summonses having been issued, the attesting witnesses and other witnesses could not be found, as they had been absent from their places of residence.

2. The Court's assessment

34. The Court formulated the general principles to be applied in cases where a prosecution witness did not attend trial and statements previously made by him or her were admitted as evidence in *Al-Khawaja and Tahery* ([GC], nos. 26766/05 and 22228/06, ECHR 2011), and *Schatschaschwili v. Germany* ([GC], no. 9154/10, ECHR 2015). Restatement of those principles can be found in, for example, *Seton v. the United Kingdom*, no. 55287/10, §§ 57-59, 31 March 2016, and *Boyets v. Ukraine*, no. 20963/08, §§ 74-76, 30 January 2018).

35. The Court clarified and restated the general principles concerning the right to obtain attendance and examination of "witnesses on behalf" of the defence in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139, 144-49 and 158-67, 18 December 2018).

(a) The victim

36. The applicant did not dispute the Government's submission that P., the victim, had in fact been examined twice in the course of the trial, approximately two years and two months after the relevant events had occurred (see paragraphs 7 and 17 above). The applicant failed to explain why, under such circumstances, he considered that his right to examine that witness had been breached. In particular, he did not submit that he had faced any difficulties in cross-examining that witness.

(b) The attesting witnesses

37. Ukrainian law contains separate provisions on material witnesses (*свідки*) and attesting witnesses (*поняті*) and uses different terms to distinguish between them. Attesting witnesses are invited by an investigator to act as neutral observers of an investigative measure (see paragraph 25 above). In that respect the situation of attesting witnesses under Ukrainian law is similar to the situation under Russian law (see *Murtazaliyeva*, cited above, § 136).

38. The attesting witnesses in the present case observed how the police had marked the banknotes to be used as a bribe and then discovered the

banknotes near the applicant's office and the traces of the substance with which the banknotes had been marked on the applicant's hand and pocket. They signed the relevant police reports drawn up by police officers which documented those facts. The reports themselves were introduced as evidence against the applicant, and the police officers who had drawn up the reports were examined in the course of the trial. Moreover, the events were video recorded and the recordings themselves were introduced as evidence.

39. In *Shumeyev and Others v. Russia* ((dec.), nos. 29474/07 and 3 others, 22 September 2015) the Court held that a failure to examine attesting witnesses in the course of a trial did not disclose a breach of Article 6 § 3 (d), because their statements duplicated the contents of corresponding police records and contained no new relevant information, so such testimony in court could not influence the outcome of criminal proceedings.

40. The circumstances of the present case are somewhat similar. Like the applicants in *Shumeyev*, the applicant did not explain, either in his submissions to the Court or in his appeals to the domestic courts, specifically why he had needed to examine those witnesses. However, in the present case the domestic trial court specifically referred to the statements of those witnesses in convicting the applicant and listed them as elements of evidence separate from the relevant police reports which those witnesses certified (see paragraph 19 above). Under such circumstances the Court considers it appropriate to examine the matter of non-attendance of those witnesses at the trial and reliance on their pre-trial statements in light of the principles developed in its *Al-Khawaja and Tahery* and *Schatschaschwili* judgments (both cited above).

41. Turning to those principles, the Court first observes that it appears that the trial court repeatedly summoned those witnesses and had recourse to the help of the police and the prosecutor's office to ensure their presence (see paragraph 18 above). The applicant did not point to any deficiency in those efforts. The Court concludes that there was a good reason for their absence from the trial and the admission of their pre-trial statements.

42. As to the specific role those statements played in the applicant's conviction, the domestic courts did not comment on that point. Neither did the applicant make any submissions in that regard (see paragraph 40 above). The Court, for its part, observes that those statements were clearly not the "sole" evidence against the applicant. There is no indication that they were "decisive", that is determinative of the outcome of the case (see *Schatschaschwili*, cited above, § 123).

43. In any event, there were sufficient counterbalancing factors to compensate for any resulting handicap for the defence. Firstly, the proceedings offered the applicant a full opportunity to give his own version of the events, cast doubt on the credibility of those witnesses and point out any incoherence in their statements, even though there is no indication that

he ever attempted to do so. Secondly, there was plentiful corroborative evidence, including P.'s and police officers' evidence, physical and expert evidence and the applicant's own confession.

(c) T.V.S., a witness

44. The Court observes that the reasons why the witness T.V.S. could not be examined in the course of the trial are not entirely clear: both parties' submissions on this point are vague (see paragraphs 32 and 33 above). Nevertheless, it appears from the file that the authorities took various measures in order to assure attendance of witnesses, including T.V.S., and that these measures included assistance of the police (see paragraph 18 above). The Court discerns no indication to hold these efforts insufficient.

45. While the evidence of that witness was not the "sole" evidence against the applicant and there is no indication that it was "decisive", the Court is prepared to assume that her evidence carried significant weight and that its admission may have handicapped the applicant's defence.

46. However, there were counterbalancing factors in the proceedings (see *Schatschaschwili*, cited above, §§ 126-30, for a discussion of possible counterbalancing factors). Firstly, the proceedings offered the applicant a full opportunity to give his own version of events, cast doubt on the credibility of the absent witnesses and point out any incoherence in their statements. While the applicant did put forward his own version of events (see paragraph 16 above), there is no evidence that he specifically challenged T.V.S.'s credibility or the veracity of her statements before the domestic courts, in particular in his appeals. Secondly, various pieces of evidence corroborated that witness's statements, notably P.'s evidence and the applicant's own confession.

(d) Conclusion

47. The Court concludes that the applicant has failed to make an arguable case that the admission of the statements of the above-mentioned witnesses as evidence undermined the fairness of the criminal proceedings against him.

48. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 6 § 1 of the Convention on account of the length of the proceedings

49. The applicant complained that the length of the criminal proceedings in his case had been incompatible with the "reasonable time" requirement of Article 6 § 1.

50. The Government contested that argument.

51. In the present case, the proceedings started on 21 February 2002, when the applicant was arrested, and ended on 9 June 2010, when the Supreme Court denied him leave to appeal on points of law. They therefore lasted eight years and three months over three levels of jurisdiction.

52. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

53. In *Merit v. Ukraine* (no. 66561/01, 30 March 2004), the Court found a violation in respect of issues similar to those in the present case.

54. Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion as to the admissibility and merits of this complaint. Having regard to its case-law on the subject, the Court considers that, in the instant case, the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

55. This complaint is therefore admissible and discloses a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

58. The Government contested that claim.

59. The Court, taking into account the specific circumstances of the case and the overall length of the proceedings, awards the applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

60. The applicant also claimed EUR 850 for costs and expenses incurred before the Court.

61. The Government contested that claim.

62. 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 observes that the applicant has incurred certain legal fees in the proceedings before it. However, those were covered by the legal aid paid to the applicant's lawyer. Therefore, the Court makes no further award under this head.

C. Default interest

63. 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 wife, Ms Valentyna Fedorivna Garbuz, has standing to continue the present proceedings in his stead;

2. *Declares* the complaint under Article 6 § 1 of the Convention concerning the length of the criminal proceedings admissible, and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;

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 1,200 (one thousand two 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 19 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Paulo Pinto de Albuquerque
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Pinto de Albuquerque and Kūris are annexed to this judgment.

P.P.A
A.N.T.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

My separate opinion refers exclusively to the inadmissibility decision. There are two points that I wish to make. First, I should like to reaffirm the right of judges to write separately on the issue of inadmissibility when the decision on inadmissibility has been included in a judgment.

The practice of the Court has been open to separate opinions on decisions regarding inadmissibility which are incorporated into merits judgments, as can be witnessed in the separate opinions joined by Judges Keller, Dedov and Serghides in *Navalnyye v. Russia* (no. 101/15, 17 October 2017), by Judges Karakaş, Vučinić and Laffranque in *Tibet Menteş and Others v. Turkey* (nos. 57818/10 and 4 others, 24 October 2017, regarding the complaint under Article 1 of Protocol No. 1 to the Convention), by Judge Lemmens in *Bursa Barosu Başkanlığı and Others v. Turkey* (no. 25680/05, 19 June 2018, concerning the complaint lodged by the Bursa bar), by Judge Sajo and myself in *Somorjai v. Hungary* (no. 60934/13, 28 August 2018), and my own opinion in *De Tommaso v. Italy* ([GC], no. 43395/09, 23 February 2017, regarding the complaints under Articles 5 and 6 (criminal limb)), and *Murtazaliyeva v. Russia* ([GC], no. 36658/05, 18 December 2018, concerning the complaint about the absence of witness A. from the applicant's trial).

Indeed, there is no reason why this practice should not extend to decisions as such. Separate opinions are a major but as yet underestimated tool in guaranteeing the Court's transparency and promoting the development of its case-law. Article 45 of the Convention does not prevent identification of the majority and the minority in decisions. The judges who form the majority and minority in decisions should be identified, in order to clarify the position of each individual judge. It is occasionally frustrating that a minority member of the judicial composition does not have the opportunity to dissociate him or herself from the majority, especially in cases which were lodged from his or her own country of origin.

The omission in Article 45 § 2 of the Convention of a reference to decisions is a mere historical accident, given the original competence of the respective Convention organs, where admissibility was essentially a matter for the Commission. As shown by the Court's practice, that omission did not prevent separate opinions from being joined to "judgments" which dealt exclusively with inadmissibility issues during the Commission period (see *Van Oosterwijck v. Belgium*, 6 November 1980, Series A no. 40, and *Cardot v. France*, no. 11069/84, 19 March 1991).

Furthermore, Rule 74 § 2 of the Rules of Court has already gone praetor-Convention, by including the possibility of a "bare statement of dissent". Most importantly, decisions on inadmissibility occasionally deal

with complex, crucial issues which relate to the Court's jurisdiction and the interpretation of the Convention and the Protocols thereto. It is simply nonsensical that judges cannot express their individual views on issues of this magnitude in decisions concerning applications lodged under Articles 33 and 34 of the Convention (Rule 51 § 1), while decisions rejecting requests for advisory opinions may be accompanied by separate opinions or statements of dissent (Rule 88 § 2).

My second point concerns the issue of the attesting witnesses and witness T.V.S. The present judgment refers to these witnesses as prosecution witnesses whose non-attendance at the trial should be assessed under the *Al-Khawaja and Tahery* and *Schatschaschwili* criteria because "in the present case the domestic trial court specifically referred to the statements of those witnesses in convicting the applicant" (see paragraph 40 of the judgment). Although I agree that these were prosecution witnesses, I disagree with the reasoning provided in reaching that conclusion. To my mind, they were prosecution witnesses purely and simply because they were mentioned in the bill of indictment (see paragraph 15 of the judgment). More importantly, I do not agree with the *Al-Khawaja and Tahery* and *Schatschaschwili* criteria. I would draw attention to the considerations set out in my separate opinion in *Murtazaliyeva v. Russia [GC]*, cited above.

Nonetheless I voted for the non-admissibility of the Article 6 complaint with regard to these witnesses because there was a good reason for not cross-examining them (their disappearance) and for the admission of their pre-trial testimonies. In fact, the trial court ensured that sufficient counterbalancing measures were taken to compensate for the handicaps imposed on the defence. In the case at hand, the applicant was confronted during the pre-trial stage with the prosecution evidence and confessed to the facts imputed to him. There is no evidence in the case file of "physical or psychological pressure" being used to force this confession. In any event, the trial court did not base its judgment, alone or to a decisive extent, on the pre-trial testimony of the absent witnesses. The decisive evidence was clearly the testimony of witness P., who repeated at the trial the incriminatory statements already made during the pre-trial stage. In view of this circumstance, this complaint is indeed manifestly ill-founded.

CONCURRING OPINION OF JUDGE KŪRIS

1. There can be no doubt that the length of the criminal proceedings against the applicant did not meet the requirements of Article 6 § 1 of the Convention. As a rule, in cases where a violation of Article 6 § 1 is found on account of the length of the criminal proceedings, the Court awards the non-pecuniary damage for the distress and anxiety the applicants might have suffered. This judgment follows that long-standing practice, by which I felt bound when voting with the majority on point 4 (a) of the operative part.

2. I wonder, however, whether that practice should not be more nuanced, at least to the extent that due account might be taken of comfort, benefits and other advantages which outweigh the applicant's suffering (whatever it might have been) and render it purely nominal.

3. In the instant case, the applicant clearly benefited from the authorities' inactivity and the protraction of the criminal proceedings. The enforcement of his sentence was waived by the court which convicted him, as it had become time-barred. Had the domestic authorities acted with the requisite celerity, the applicant would have ended up in a penal institution. There, he would have spent two years (unless released earlier). What was formally a violation of the Convention was thus, in fact, a reward. Now, on top of that reward, a bonus of EUR 1,200 has been added.

4. There already is some (albeit sparse) case-law which would allow for some (perhaps moderate) exceptions to the above-mentioned rigid practice. Take, for instance, Gagliano Giorgi v. Italy (no. 23563/07, §§ 56-58, 6 March 2012). More generally, the Court's underlying approach, which I find consistent and justified in principle, calls for a revisit. One size does not necessarily fit all; in real life it hardly ever does. Legalistic purity is often – and unavoidably – a bit at odds with life's reality. Still, it would benefit both if the gap between them were retrenched, whenever possible.