10. Fulei T. I. Zastosuvannia praktyky Yevropeiskoho sudu z prav liudyny pry zdiisnenni pravosuddia: Naukovo-metodychnyi posibnyk dlia suddiv. 2-he vyd. vypr., dopov. K.: Koordynator proektiv OBSE v Ukraini, 2015. – 208 p.
11. Pohoretskyi M., Mitskan O. Standart dokazuvannia «obgruntovana pidozra»: nepiznanyi fenomen ukrainskoho kryminalnoho protsesu. Zakon i biznes. 2019. 16-22 bereznia. № 10 (1412). URL: https://zib.com.ua/ua/print/136819-yak_minimum_5_kriteriiv_obruntovanosti_pidozri_mae_vrahovuva.html.

SOROCHYNSKYY M. G.

European Court of Human Rights, Registry, Lawyer,
PhD in Law, J.S.D. (University of Notre Dame)

DEVELOPMENT OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING THE RIGHT TO EXAMINE ATTESTING WITNESSES

Key words: *European Court of Human Rights, case-law, attesting witnesses.*

Late 2018 and early 2019 saw interesting developments in the case-law of the European Court of Human Rights under Article 6 § 3 (d) (right to examine witnesses) of the European Convention on Human Rights. The interest of these developments for Ukraine is that the Court has finally taken a position on the special status of «attesting witnesses», the term which in the Court's terminology translates the Ukrainian term «*поняті*». This special status is a special feature of the Ukrainian legal system and it is interesting to see how this particularity is now reflected in the Court's case-law.

In Ukrainian criminal procedure the function of attesting witnesses is to observe certain investigative actions and to certify that the records of those actions accurately reflect what actually happened. Article 223 of the 2012 Code of Criminal Procedure requires the investigator to invite at least two uninterested people as attesting witnesses to observe such investigative actions as search, identification parade and reconstruction. By contrast, the status of other witnesses, which can be called «material» witnesses, is regulated in separate provisions, in particular Articles 95-96 of the Code.

The old 1964 Code of Criminal Procedure contained analogous provisions. Similar rules also exist in Russian criminal procedure.

The question this presented for the European Court of Human Rights was whether and how to apply the guarantees of Article 6 § 3 (d) to attesting witnesses, taking into account their specific status.

The fact that domestic law used a totally different term, «понятий» as opposed to the literal term for witness, «свідок», is not a problem in itself: the Court has long held that the term «witness» used in Article 6 § 3 (d) has an autonomous meaning which is not necessarily dependent on the domestic legal classification (*Asch v. Austria*, 26 April 1991, § 25, Series A no. 203). For example, the Court has no problem classifying experts as witnesses (for

example, *Matytsina v. Russia*, no. 58428/10, 27 March 2014, or *Constantinides v. Greece*, no. 76438/12, 6 October 2016).

The fact remained, however, that the attesting witnesses had specificities. The Court first confronted them in a case against Russia. In *Shumeyev and Others v. Russia* decision (nos. 29474/07 and 3 others, 22 September 2015) the Court dealt with a group of cases lodged by applicants accused of drug-dealing. The police had organised test purchases from them through undercover agents, documenting those purchases by written reports. The undercover agents and police officers testified during the applicants' trials. The attesting witnesses summoned by the prosecution failed to appear at the trials but the Russian courts read out their pre-trial statements regarding the test purchases and admitted them as evidence against the applicants. The records of test purchases drawn up by the police were also admitted as evidence by the courts. The pre-trial depositions of the attesting witnesses were identical to the relevant police records. The Court held that such circumstances did not disclose a breach of Article 6 § 3 (d) of the Convention because the attesting witnesses' statements duplicated the contents of corresponding police records, contained no new relevant information and were, in essence, redundant evidence which did not require appearance in court.

The *Shumeyev* decision could be interpreted as setting the bar higher for applicants who wished to formulate an arguable complaint concerning failure to examine attesting witnesses at the trial. It was not sufficient merely to state that such witnesses were not examined. The applicant had to show that, in the particular circumstances of his case, the evidence of those witnesses had particular importance and was not merely redundant evidence. Because *Shumeyev* applicants failed to do that, their applications were rejected.

After *Shumeyev* the Court clarified general principles concerning examination of witnesses for the prosecution in the Grand Chamber's *Schatschaschwili v. Germany* judgment (no. 9154/10, ECHR 2015). The *Schatschaschwili* clarified the three-step test to be used in cases where statements of absent witnesses are used against the applicant. This test involves answering three questions: (i) was there a good reason for the non-attendance of the witnesses? (ii) was the evidence of the absent witnesses the sole or a decisive basis for the conviction? and (iii) whether there were sufficient counterbalancing factors to compensate for the handicap for the defence created by the admission of the witness's statements.

After the clarification of that test in *Schatschaschwili* the question became how to apply it to attesting witnesses. Should attesting witnesses be seen as witnesses for the prosecution, as they were treated in *Shumeyev*? Or can they sometimes be seen as witnesses for the defence?

The Grand Chamber answered the latter question in *Murtazaliyeva v. Russia* (no. 36658/05, 18 December 2018). It treated attesting witnesses in that case as witnesses for the defence. More generally, it established a new separate three-part test for defence witnesses. According to *Murtazaliyeva* (§ 158), to answer the question of whether a refusal to call a witness for the defence breached Article 6 § 3 (d) the Court would ask: (i) whether the request

to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation? (ii) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial? and (iii) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

Ms Murtazaliyeva was convicted of preparation of a terrorist act after explosives were found in her bag in the presence of attesting witnesses. She argued that the explosives had been planted by the police and tried to call the attesting witnesses at the trial to throw doubt on the results of the search. The trial court refused to call them.

Distinguishing *Shumeyev*, the Court treated these attesting witnesses as «witnesses on behalf» of the applicant because their testimony would have ranged beyond the mere modalities of the search and the information which could be found in the police records (§§ 136 to 138). On the facts, applying the three-pronged test, the Court found no violation of Article 6 § 3 (d). It appears that one of the key factors in this decision was a contradiction in the applicant's own position at the trial: she asked for the attesting witnesses to be called but at the same time argued that the police officers had planted the explosives in her bag *before* the attesting witnesses arrived (§ 169). Therefore, it was logical to conclude that the attesting witnesses could not have helped her case much.

The first Ukrainian case in which the Court confronted the issue of attesting witnesses head-on became *Garbuz v. Ukraine* (no. 72681/10, 19 February 2019), adopted shortly after *Murtazaliyeva*. Mr Garbuz was convicted of bribery. The attesting witnesses 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 luminescent substance on his hand and pocket. They signed the relevant police reports which documented those facts. They also described the same facts in pre-trial statements to the investigator. The reports themselves were introduced as evidence against the applicant, and the officers who had drawn them up were examined at the trial. The events were video recorded and the recordings themselves were introduced as evidence (§ 38). The applicant also confessed but rather withdrew his confession.

Despite repeated summonses, the attesting witnesses failed to appear at the trial and their pre-trial statements were eventually read out. The applicant objected to this and complained under Article 6 § 3 (d). He argued that he had been framed and the marked banknotes had been planted near his office by the police and that it was also the police who contaminated his clothes with the luminescent substance.

The most interesting part of the Court's reasoning was its approach to the attesting witnesses under Ukrainian law. The Court considered that, because the trial court 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, those attesting witnesses were

to be seen as witnesses for the prosecution and the *Schatschaschwili* test had to be applied.

Applying that test, the Court, on the facts, found the applicant's complaint manifestly ill-founded. The essential reason was that the applicant, like the applicants in *Shumeyev*, limited himself to saying that the attesting witnesses were not examined, but remained silent on key points of his own case.

Thus, the Court observed that the domestic trial court had repeatedly summoned those witnesses, asked the police and the prosecutor's office to bring them to court. The applicant did not identify any problem in those efforts. The Court concluded, in answering the first *Schatschaschwili* question, that there was a good reason for the witnesses' absence from the trial and the admission of their statements (§ 41). Likewise, the applicant did not explain what role those statements played in his conviction. The Court, accordingly, saw no reason to see them as «sole» or «decisive» evidence against him (§ 42). Finally, on the third *Schatschaschwili* question, the Court considered that there were sufficient counterbalancing factors to compensate for the admission of the attesting witnesses' statements. First, even though Mr Garbuz had had full opportunity to cast doubt on the credibility of those witnesses, he had failed to mention in his application whether he had actually ever attempted to do so. Second, there was other corroborative evidence of the applicant's guilt, including the victim's and police officers' testimony, physical and expert evidence and the applicant's own confession. In short, the applicant's case was weak and poorly argued.

The judgments in *Murtazaliyeva* and *Garbuz* clarify the approach the European Court of Human Rights takes to the question of attesting witnesses. In principle, the same approach applies to them as to any other witness: they can be seen as either witnesses for the prosecution or for the defence. The determination is to be made in light of the tenor of the applicant's own complaint and the particular circumstances of the case. Accordingly, either the *Schatschaschwili* or *Murtazaliyeva* test would apply.

That said, as the *Garbuz* judgment and the *Shumeyev* decision show, the particular status of the attesting witnesses in domestic law requires the applicants to be more vigilant in formulating and substantiating their complaints under Article 6 § 3 (d) as far as these witnesses are concerned.

The views and judgments expressed in this article are author's own. They do not represent the position of the European Court of Human Rights, its Registry of the Council of Europe.