



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

FIFTH SECTION

CASE OF OSYPENKO v. UKRAINE

(Application no. 4634/04)

JUDGMENT

STRASBOURG

9 November 2010

FINAL

09/02/2011

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

In the case of Osypenko v. Ukraine,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 5 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 4634/04) 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, Yaroslav Osypenko (“the applicant”), on 13 January 2004.

2. The applicant was represented by Mr Denys Osypenko, a lawyer practising in Kryvyy Rig. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had been unlawfully deprived of liberty between 25 and 28 January 2002, and that the overall length of his pre-trial detention had been excessive.

4. On 31 March 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1983 and lives in Slovyansk.

6. On 1 January 2002 the applicant, with a number of his friends, including K., celebrated a New Year party at the bar 'Tor' in Slovyansk. At around 3 a.m. K. picked a quarrel with P., another visitor to the bar. The

quarrel turned into a big fight in which the applicant took part on the side of K.

7. On 14 January 2002 the Slavyansk town police instituted criminal proceedings for disorderly conduct in relation to the above fight.

8. In the evening of 24 January 2002 the applicant and K. were attacked by unknown persons. As a result of the attack, the applicant was injured and K. died.

9. At 2.30 a.m. on 25 January 2002 the police officers, in the knowledge that the applicant and K. were both attacked that night, visited the applicant's home and took him to the local police station in order to question him as an eyewitness to K.'s death. According to the Government, the applicant agreed to go to the police station voluntarily and there was no coercion on the part of the police officers. However, according to the applicant, the police officers forced him to go to the police station without regard for the injuries he was visibly suffering from.

10. Upon arrival at the police station the applicant was questioned about the circumstances of K.'s death. That questioning, though with some pauses, lasted until 1 p.m. of the same day.

11. As from 11 a.m. on that day the police, knowing that on the night of 1 January 2002 the applicant had been present at the bar 'Tor', decided also to question the applicant as a witness in respect of the fight which had taken place at the bar that night. The applicant was questioned in respect of that incident till 7 p.m.

12. Between 7 p.m. and 9 p.m. the police also questioned P. and other victims of the fight, who, when confronted with the applicant, identified him as one of the persons who had injured them.

13. At 9.30 p.m. on that day the police investigator, pursuant to Articles 106 and 115 of the Code of Criminal Procedure (see paragraph 33 below), drew up an arrest order (*протокол затримання*) authorising the applicant's preliminary detention as a suspect in the crime of disorderly conduct in the bar 'Tor'.

14. On 26 January 2002 the police instituted criminal proceedings on account of K.'s death.

15. On 28 January 2002 the applicant was charged with the crime of disorderly conduct in the bar 'Tor', and brought before the Slavyanskyy Town Court (the "Town Court"). The Town Court, relying on Article 165-2 of the Code of Criminal Procedure, extended the applicant's preliminary detention, as a temporary preventive measure, up to 31 January 2002. It noted that the case file did not contain sufficient information characterising the applicant and, in particular, the evidence that the applicant might intend to abscond.

16. On 31 January 2002 the Town Court ordered the applicant's detention in custody as a preventive measure. It had regard to the "character of the applicant", the circumstances in which the crime had been committed,

the fact that he had been charged with a serious crime, and the necessity to ensure the execution of procedural decisions.

17. On 26 April 2002, after the investigation had been completed, the case file was transferred to the Town Court for committing the applicant for trial.

18. On 11 May 2002 the Town Court committed the applicant for trial. It also upheld the preventive measure, in respect of the applicant, without giving any reasons.

19. On 12 August 2002 the Town Court decided to maintain the preventive measure (the detention in custody) in respect of the applicant. It did not provide any specific reasons for that decision.

20. On 4 April 2003 the applicant lodged an application with the Town Court alleging that, on 25 January 2002, he had been unlawfully taken to the police station and unlawfully held there until 28 January 2002, despite his bodily injuries and the absence of any medical assistance. He further contended that his subsequent pre-trial detention had been unlawful.

21. On 22 May 2003 the Deputy President of the Town Court replied to the applicant and informed him that it was too late to challenge the lawfulness of his preliminary detention between 25 and 28 January 2002 as the case was at the trial stage. He further stated that the application of 4 April 2003 would be qualified as an ordinary request, submitted by a party to the proceedings, and that therefore it could only be considered in the course of the court hearing in his criminal case. He informed the applicant that the application would be considered on 26 June 2003.

22. Subsequently, the judge in charge of the applicant's criminal case confirmed to the applicant that his application of 4 April 2003 for review of the lawfulness of his detention would be considered on 26 June 2003 in the course of the court hearing in his criminal case.

23. On 26 June 2003 the Town Court, referring to the seriousness of the charges levelled against the applicant, found, in the presence of his counsel, that the applicant was being detained lawfully and that there had been no grounds to change the preventive measure. In this decision the Town Court did not address the issue of the applicant's preliminary detention.

24. On 4 November 2003 the Town Court considered the applicant's request to change the preventive measure and rejected it, noting that the applicant's further detention had been necessitated by the gravity of the charges levelled against him.

25. On an unspecified date the applicant complained to the Slavyansk Town Prosecutor's Office seeking to institute criminal proceedings against the police officers for his unlawful preliminary detention.

26. On 26 March 2004 the deputy prosecutor refused to institute criminal proceedings against the police officers. He found that on 25 January 2002 the applicant had agreed to go to the police station voluntarily with the purpose of being interviewed concerning the death of

K. The deputy prosecutor further noted that the applicant had later been questioned as a witness to the fight in the bar 'Tor'. In particular, at 3 p.m. of that day the applicant had been transferred to the police officer D. Between 3 p.m. and 7 p.m. the applicant had been questioned by that police officer following which “the applicant's guilt in the fight had been established”. Later on, the applicant had been arrested because there had been enough evidence of his involvement in the latter crime. The deputy prosecutor therefore concluded that there had been no *actus reus* in the acts of the police officers. The applicant did not lodge a formal appeal against the prosecutor's decision of 26 March 2004.

27. Subsequently, the Town Court informed the applicant that the lawfulness of his preliminary detention would be reviewed in the course of the trial in his criminal case.

28. On 24 May 2004 the Town Court considered the applicant's other request for changing the preventive measure and found that the applicant's detention had been justified by the gravity of the charges levelled against him. It therefore held that the preventive measure should be left unchanged.

29. On 7 June 2004 the Town Court found the applicant guilty of disorderly conduct and sentenced him to four years' imprisonment, but on the basis of the Amnesty Act released him from serving the sentence. It also noted that the applicant's preliminary detention had been lawful and no wrongdoing on the part of the police officers could be discerned. The Town Court further ordered that the applicant be released from custody immediately.

30. By letters of 16 July and 4 August 2004 the Town Court informed the applicant that the lawfulness of his preliminary detention had been reviewed in the judgment of 7 June 2004.

31. On 11 February and 27 October 2005 the Donetsk Regional Court of Appeal and the Supreme Court upheld the judgment of 7 June 2004 as substantiated.

II. RELEVANT DOMESTIC LAW

A. Constitution of 28 June 1996

32. The relevant part of Article 29 of the Constitution reads as follows:

“... In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours of the moment of detention, with a reasoned court decision in respect of the holding in custody. ...

Everyone who has been detained has the right to challenge his or her detention in court at any time. ...”

B. Code of Criminal Procedure of 28 December 1960 (as worded at the material time)

33. The relevant provisions of the Code read as follows:

Article 70: Obligations of the witness

“A person, summoned as a witness by a body of inquiry, investigator, prosecutor, or a court, is obliged to appear at the specified time and place and make truthful statements about the circumstances of the event to the best of his or her knowledge.

If the witness fails to appear without a valid reason, the body of inquiry, the investigator, the prosecutor, or the court may order the witness's compulsory appearance which shall be enforced by the bodies of internal affairs, pursuant to the procedure provided for by Articles 135 and 136 of this Code. ...”

Article 97: Obligation to accept statements and notifications of crimes and the way in which they are considered

“... If it is necessary to verify a statement or notification of a crime before instituting criminal proceedings, such verification is made by the prosecutor, investigator, or a body of inquiry within ten days by taking explanations from specific citizens or officials or by requesting necessary documents.

A statement or notification of crime can be verified, prior to instituting criminal proceedings, by means of the search and seizure activities. ...”

Article 106: Arrest of a suspect by the body of inquiry

“The body of inquiry shall be entitled to arrest a person suspected of a criminal offence for which a penalty in the form of deprivation of liberty may be imposed only on one of the following grounds:

1. if the person is discovered whilst or immediately after committing an offence;
2. if eyewitnesses, including victims, directly identify this person as the one who committed the offence;
3. if clear traces of the offence are found either on the body of the suspect, or on his clothing, or with him, or in his home.

If there is other information giving ground to suspect a person of a criminal offence, a body of inquiry may arrest such a person if the latter attempted to flee, or does not have a permanent place of residence, or the identity of that person has not been established.

For each case of a suspect's arrest, the body of inquiry shall be required to draw up an arrest order (*протокол затримання*) outlining the grounds, the motives, the day, time, year and month, the place of arrest, the explanations of the person detained and the time when it was recorded that the suspect had been informed of his right to have a meeting with defence counsel as from the moment of his arrest, in accordance with the procedure provided for in paragraph 2 of Article 21 of the present Code. The arrest order shall be signed by the person who drew it up and by the detainee.

A copy of the arrest order with a list of his rights and obligations shall immediately be handed to the detainee and sent to the prosecutor. At the request of the prosecutor, the material which served as a ground for the arrest shall be sent to him as well. ...

Within seventy-two hours of the arrest, the body of inquiry shall:

(1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of the preliminary detention established by law has expired or if the arrest has been effected in violation of the requirements of paragraphs 1 and 2 of the present Article;

(2) release the detainee and select a non-custodial preventive measure;

(3) bring the detainee before a judge with a request to impose a custodial preventive measure on him or her.

If the arrest is appealed against to a court, the detainee's complaint shall be immediately sent by the head of the detention facility to the court. The judge shall consider the complaint together with the request by the investigating body for application of the preventive measure. If the complaint is received after the preventive measure was applied, the judge shall examine it within three days after receiving it. If the request has not been received or if the complaint has been received after the term of seventy-two hours of detention, the complaint shall be considered by the judge within five days after receiving it.

The complaint shall be considered in accordance with the requirements of Article 165-2 of this Code. Following its examination, the judge shall give a ruling, either declaring that the arrest is lawful or allowing the complaint and finding the arrest to be unlawful.

The ruling of the judge may be appealed against within seven days from the date of its adoption by the prosecutor, the person concerned, or his or her defence counsel or legal representative. Lodging such an appeal does not suspend the execution of the court's ruling.

Preliminary detention of a suspect shall not last for more than seventy-two hours.

If, within the terms established by law, the ruling of the judge on the application of a custodial preventive measure or on the release of the detainee has not arrived at the pre-trial detention facility, the head of the pre-trial detention facility shall release the person concerned, drawing up the order to that effect, and shall inform the official or body that carried out the arrest accordingly.”

Article 113: Commencement of the pre-trial investigation

“The pre-trial investigation shall be carried out exclusively after the criminal proceedings have been instituted and in accordance with the procedure provided for by this Code. ...”

Article 115: Arrest of a suspect by an investigator

“An investigator may arrest and question a person suspected of having committed a crime according to procedure envisaged by Articles 106, 106-1, and 107 of the Code.”

Article 135: The obligation of the accused to appear

“... The valid reasons for failure to appear before investigator at the requested time shall be the following: a belated receipt of the summons, illness, and other circumstances preventing the accused from attending the investigator at the requested time.”

Article 136: Compulsory appearance of the accused

“Compulsory appearance of the accused shall be ordered by the investigator's decision. Compulsory appearance of the accused shall be enforced in the daytime except for emergencies.

Compulsory appearance without prior notice may be applied only if the accused evades investigation or does not have a permanent place of residence.

Before its enforcement, the decision on applying the compulsory appearance shall be announced to the accused.”

Article 148: Purpose and grounds for the application of preventive measures

“Preventive measures shall be imposed on a suspect, accused, defendant, or convicted person in order to prevent him from attempting to abscond from an inquiry, investigation or the court, from obstructing the establishment of the truth in a criminal case or to pursue criminal activities, and in order to ensure the execution of procedural decisions.

Preventive measures shall be imposed where there are sufficient grounds to believe that the suspect, accused, defendant or convicted person will attempt to abscond from investigation and the court, or if he fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues criminal activities. ...”

Article 149: Preventive measures

“The preventive measures are as follows:

- (1) a written undertaking not to abscond;
- (2) a personal guarantee;

- (3) the guarantee of a public organisation or labour collective;
- (3-1) bail;
- (4) detention in custody;
- (5) supervision by the command of a military unit.

As a temporary preventive measure, a suspect may be detained on the grounds and pursuant to the procedure provided for by Articles 106, 115 and 165-2 of this Code.”

Article 165-2: Procedure for selection of a preventive measure

“At the stage of the pre-trial investigation, a non-custodial preventive measure shall be selected by the body of inquiry, the investigator, or the prosecutor.

If there are grounds for applying a custodial preventive measure, the body of inquiry or the investigator, following the prosecutor's consent, shall lodge an application with the court. The prosecutor is entitled to lodge a similar application. In determining this issue, the prosecutor shall familiarise himself with all the material in the case file that would justify placing the person in custody, and verify that the evidence was received in a lawful manner and is sufficient to bring charges against the person.

The request shall be considered within seventy-two hours of the arrest of the suspect or accused.

If the application concerns the detention of a person who is at liberty, the judge shall have the power to issue a warrant for the arrest of such a person and for escorting him to the court. The preliminary detention in such cases shall not exceed seventy-two hours; and if the person concerned is outside the locality in which the court operates, it shall not exceed forty-eight hours from the time the arrested person was brought to the locality.

Upon receiving the application, the judge shall examine the material in the case file submitted by the body of inquiry, the investigator, or the prosecutor. A judge shall question the suspect or the accused and, if necessary, hear evidence from the person who is in charge of the criminal case, obtain the opinion of the prosecutor, the defence counsel, if the latter appeared before the court, and make an order:

- (1) refusing to apply the [custodial] preventive measure if there are no grounds for doing so;
- (2) applying the custodial preventive measure.

Having refused to apply the custodial preventive measure, the court shall have the power to apply a non-custodial preventive measure in respect of the suspect or the accused.

The judge's order may be appealed against to the court of appeal by the prosecutor, the suspect, the accused or his or her defence counsel or the legal representative, within three days of its delivery. The introduction of an appeal shall not suspend the execution of the judge's order.

If in order to select a preventive measure in respect of a detained person it is necessary to examine additional material concerning the personality of the detained person or to clarify the other circumstances that are important for the adoption of the decision on this matter, the judge may extend the applicant's preliminary detention up to ten days or, if requested by the suspect or the accused, up to fifteen days. If it is necessary to examine additional material concerning the person who has not been arrested, the judge may adjourn the consideration of this issue for up to ten days and take measures for ensuring the proper conduct of that person or make an order that that person be arrested and detained for the same period."

Article 166: Summoning of the witness for questioning

"The witness shall be summoned by the investigator with a notice, which shall be given to the witness against receipt. In case of the witness's temporary absence the notice shall be given to any adult member of his family... The witness may also be summoned by a telegram or by a telephone message. ..."

C. The Law "On Search and Seizure Activities" of 18 February 1992 (as worded at the material time)

34. Section 6 of the Law establishes that the grounds for carrying out the search and seizure activities shall be, among other things, sufficient information, which has been lawfully obtained but needs to be verified by means of search and seizure activities, that a crime is being prepared or has been committed.

35. Section 8 of the Law provides, *inter alia*, that in the event of the existence of the grounds to carry out search and seizure activities, the relevant authorities shall have a right to interview the persons upon their consent.

D. The Law "On Police" of 20 December 1990

36. Section 11 of the Law provides that for the purpose of fulfilling its tasks the police have a right, *inter alia*, to summon citizens in connection with the criminal and other cases that the police are dealing with; to carry out inquiry in criminal cases in accordance with the legislation on criminal procedure.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

37. The applicant complained that between 25 and 28 January 2002 he had been unlawfully deprived of his liberty. He relied on Article 5 § 1 of the Convention, which reads, in so far as relevant, as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...”

A. Admissibility

38. The Government submitted that the applicant had failed to exhaust the domestic remedies in respect of his complaint since he had not challenged the decision of 26 March 2004 on the refusal to institute criminal proceedings before the higher prosecutor's office and the courts.

39. The applicant disagreed.

40. The Court notes that the applicant raised the present complaint before the prosecutor's office and, concurrently, before the Town Court. Following the refusal of the prosecutor's office to institute criminal proceedings, the Town Court informed the applicant that it would consider the complaint in the course of trial in the applicant's criminal case. Indeed, this issue was subsequently examined on the merits by the Town Court.

41. Accordingly, the Court considers that the applicant reasonably relied on the procedure, which was expressly suggested by the domestic authorities, and that he therefore did not find it necessary to follow other procedures including the one suggested by the Government. In these circumstances the Court rejects the Government's objection.

42. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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 applicant claimed that on 25 January 2002 he was forced to go to the police station where he was detained unlawfully until 28 January 2002. He asserted that the period of his preliminary detention as a suspect should be calculated from 2.30 a.m. on 25 January 2002. Given that the court hearing authorising his preliminary detention was held during the working day of 28 January 2002, his preliminary detention without a court order exceeded seventy-two hours, which was in breach of domestic law and, consequently, of Article 5 § 1 of the Convention.

44. The Government maintained that at 2.30 a.m. on 25 January 2002 the applicant was invited by the police officers to accompany them to the police station in order to give evidence as regards the death of K. The applicant agreed to go to the police station without any coercion from the police officers.

45. The Government further submitted that the applicant was detained as a suspect from 9.30 p.m. on 25 January 2005 as it was only at that time that the police reasonably suspected the applicant of the crime and the arrest order was drawn up. That being so, the applicant's preliminary detention as a suspect without a court order could not exceed seventy-two hours, as required by domestic law.

2. The Court's assessment

a. The period between 2.30 a.m. and 3 p.m. on 25 January 2002

(i) Whether there was a deprivation of liberty

46. According to the Court's case-law, in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 33, § 92). The Court must look beyond the appearances and concentrate on the realities of the situation complained of (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, p. 20, § 38).

47. Even if it is not excluded that Article 5 § 1 may apply to deprivations of liberty of a very short length, the Convention organs' case-law shows that this provision was considered not applicable in cases where the applicants' stay in a police station lasted only a few hours and did not go beyond the

time strictly necessary to accomplish certain formalities (see, *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008 with further references).

48. The right to liberty is too important in a “democratic society” within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention may violate Article 5 even though the person concerned has agreed to it (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12).

49. In the present case it is disputed by the parties whether the applicant went to the police station of his own free will or as a result of police coercion. However, the Court will not speculate on this matter, since the fact remains that during the period under examination the applicant was held in the police station and the police carried out interrogations and other procedural actions related to the incidents involving the applicant. It has not been contended by the Government and it would be unrealistic to assume that during that period the applicant had been free to leave the police station at his will. Having regard to all the circumstances of the case, the Court considers that the applicant's stay in the police station during the period in question amounted to *de facto* deprivation of liberty (see, *mutatis mutandis*, *I.I. v. Bulgaria*, no. 44082/98, § 87, 9 June 2005).

(ii) *Compliance with Article 5 § 1 of the Convention*

50. Article 5 § 1 of the Convention requires in the first place that the detention be “lawful”, which includes the condition of compliance with a procedure prescribed by law. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Benham v. the United Kingdom*, 10 June 1996, § 40, *Reports of Judgments and Decisions 1996-III*). The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports of Judgments and Decisions 1997-IV*).

(α) *Whether the deprivation of the applicant's liberty could be justified under sub-paragraph (c) of Article 5 § 1 of the Convention*

51. The Court will first examine whether the applicant's detention in the abovementioned period could be justified under sub-paragraph (c) of Article 5 § 1 of the Convention.

52. The Court notes that the parties dispute the applicant's status during that period. The applicant contended that he had been treated as a suspect

while the Government maintained that the applicant had not yet obtained that status.

53. The Court notes that the applicant had not had the formal status of a suspect during that period. However, the question remains whether or not the applicant had been treated *de facto* as a suspect.

54. While there is certain indication that the domestic authorities started to treat the applicant as a suspect after 3 p.m. on 25 January 2005 (see paragraph 26 above), there is no evidence to show that they did so earlier. Moreover, the facts that the police officers were aware that the applicant was a friend to K. and that they were both attacked by unknown persons suggest that the applicant was indeed initially regarded as an eyewitness.

55. Accordingly, the Court accepts the Government's contention in this regard and finds that from 2.30 a.m. until at least 3 p.m. on 25 January 2005 the applicant had not been treated as suspect. It follows that the deprivation of the applicant's liberty in that time could not fall under sub-paragraph (c) of Article 5 § 1 of the Convention.

(β) Whether the deprivation of the applicant's liberty could be justified under sub-paragraph (b) of Article 5 § 1 of the Convention

56. The Court next observes that the deprivation of the applicant's liberty might also potentially fall under sub-paragraph (b) of Article 5 § 1 of the Convention (see, for example, *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 74, 22 May 2008).

57. The Court recalls that detention is authorised under sub-paragraph (b) of Article 5 § 1 only to “secure the fulfilment” of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned and the detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist. Furthermore, a balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty (see *Nowicka v. Poland*, no. 30218/96, §§ 60 and 61, 3 December 2002). The relevant factors in drawing this balance are the nature and the purpose of the obligation, the detained person, the specific circumstances which led to his or her detention, and the length of the detention (see *Vasileva v. Denmark*, no. 52792/99, §§ 37 and 38, 25 September 2003 and *Epple v. Germany*, no. 77909/01, § 37, 24 March 2005).

58. The Court notes that in the period under examination the applicant was held in the police station exclusively for two purposes: questioning on account of K.'s death and questioning on account of the fight in the bar 'Tor'.

- As to the questioning in respect of K.'s death

59. In as much as the applicant was held in the police station with the purpose of being questioned on account of K.'s death, the Court observes that by virtue of Article 70 of the Code of Criminal Procedure a witness is under obligation to give evidence. However, in accordance with Article 113 of the Code of Criminal Procedure, the investigatory actions, such as questioning of a witness, could be carried out only after the relevant criminal proceedings had been commenced. In this context the Court notes that the criminal proceedings concerning K.'s death were instituted on 26 January 2002 (see paragraph 14 above). It follows that on 25 January 2002 the applicant could not have any obligation to give witness evidence in respect of that incident. It appears that the applicant had a status of an interviewee under section 8 of the Law "On Search and Seizure Activities", which provides for a right, but not an obligation, to make a statement.

60. The Court therefore concludes that there existed no 'obligation prescribed by law' in the meaning of Article 5 § 1 (b) of the Convention.

- As to the questioning in respect of the fight in the bar 'Tor'

61. In as much as the applicant's stay in the police station was determined by the necessity to question him on account of the fight in the bar 'Tor', the Court notes that at that time the relevant criminal proceedings had been already instituted (see paragraph 7 above). The obligation of the applicant to give witness evidence could be therefore derived from Article 70 of the Code of Criminal Procedure. However, according to that Article, such an obligation arises only under the condition that a person has been duly summoned. The procedure for summoning a witness is foreseen by Article 166 of the Code of Criminal Procedure and there is nothing to suggest that it was applied in the present case. Moreover, in accordance with the second paragraph of Article 70 of the Code of Criminal Procedure, the compulsory appearance of the witness was permissible only after the witness had earlier failed to appear for questioning without a valid reason.

62. Accordingly, having regard to these requirements of the domestic law, the Court is not persuaded that the applicant was under the lawful obligation to give witness evidence in respect of the fight in the bar and that his compulsory attendance for that purpose was based on the domestic law.

63. Furthermore, the Court considers that the deprivation of the applicant's liberty in the relevant time had not been proportionate for the purpose of Article 5 § 1 (b) of the Convention. The Court notes that the fight in the bar had taken place some twenty-four days earlier and there is nothing to show that there existed any pressing issue in that case connected with the applicant. At the same time, by 11 a.m. of 25 January 2002 the applicant had been present in the police station for more than eight hours and no attention had been paid to the length of his stay or to his physical condition, which must have been inappropriate in view of the night questioning and his apparent need for medical assistance on account

of his recent injuries. By disregarding those factors the authorities failed to strike a fair balance between the need to ensure the immediate questioning of the applicant and the importance of the right to liberty.

- Conclusion

64. In view of the above considerations, the Court finds that the deprivation of the applicant's liberty in the period in question could not be justified under sub-paragraph (b) of Article 5 § 1 of the Convention.

65. The Court further notes that there is nothing in the case file to suggest that any other sub-paragraph of Article 5 § 1 of the Convention could apply. It follows that there has been a violation of Article 5 § 1 of the Convention with respect to that period.

b. The period after 3 p.m. on 25 January 2002 until the court decision of 28 January 2002

66. In the applicant's opinion he had been detained as a suspect starting from 2.30 a.m. on 25 January 2002. Based on this assumption, he asserted that the overall length of his preliminary detention on a suspicion of a crime without a court order exceeded seventy-two hours, which was in breach of domestic law and, consequently, of Article 5 § 1 of the Convention.

67. However, the Court has concluded above that the applicant was not treated as a suspect until at least 3 p.m. on 25 January 2002.

68. Even assuming that the applicant's preliminary detention as a suspect commenced immediately after 3 p.m. on 25 January 2002, the Court, reviewing that period under sub-paragraph (c) of Article 5 § 1 of the Convention, notes that the applicant failed to specify whether the judicial decision, authorising the applicant's preliminary detention as a suspect, had been taken before or after 3 p.m. on 28 January 2002. The Court therefore cannot determine whether the applicant's detention in that period had been in compliance with the seventy-two hour rule provided by domestic law. The Court further notes that the applicant did not complain as to the lawfulness of his detention after the court decision of 28 January 2002. In these circumstances it dismisses the relevant contention of the applicant as unsubstantiated. In the absence of any other submissions by the applicant, the Court does not find it appropriate to examine other possible issues under this head of its own motion.

69. It follows that there has been no violation of Article 5 § 1 of the Convention in respect of the period after 3 p.m. on 25 January 2002 until the court decision of 28 January 2002.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

70. The applicant complained that the length of his detention before and during the trial had been excessive. He relied on Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

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

B. Merits

72. The applicant insisted that the crime he had been charged with had not been serious enough to justify the length of his detention pending investigation and trial.

73. The Government maintained that the length of the applicant's detention had been reasonable given the seriousness of the crime the applicant had been charged with, the complexity of the case and the large number of investigative measures that had had to be taken. They further insisted that that preventive measure had been necessitated by the risk that the applicant might abscond from justice.

74. The Court will examine the complaint in the light of general principles emerging from its case-law (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, §§ 131 and 132, ECHR 2005-II (extracts) and *Sergey Volosyuk v. Ukraine*, no. 1291/03, § 38, 12 March 2009).

75. The Court first observes that, for the purpose of Article 5 § 3 of the Convention, the applicant's detention began on 25 January 2002, that is when the applicant was arrested as a suspect of the crime, and continued uninterruptedly until his release by the Town Court on 7 June 2004 (see, among other authorities, *Piotr Baranowski v. Poland*, no. 39742/05, § 45, 2 October 2007). Thus, the applicant's detention lasted a total of two years, four months and twelve days.

76. The Court accepts that the applicant's detention may have been primarily warranted by a reasonable suspicion that he was involved in a serious crime and by the necessity to ensure the proper conduct of the investigation. Accordingly, the initial references by the Town Court to the gravity of the charges and the necessity to ensure the execution of procedural decisions could justify keeping the applicant in custody.

77. However, with the passage of time those grounds inevitably became less and less sufficient. Accordingly, the domestic authorities were under an obligation to analyse the applicant's personal situation in greater detail and to give specific reasons for holding him in custody.

78. Meanwhile, in its subsequent decisions the Town Court had either made no reference to any ground for the applicant's detention, or noted that it had been justified by the gravity of the charges levelled against him.

79. The Court considers it unacceptable that the Town Court found it possible to warrant the applicant's detention in custody without giving any reasons for such decisions. It further holds that, by failing to address concrete relevant facts and by relying in some of its decisions exclusively on the gravity of the charges, the Town Court prolonged the applicant's detention several times on grounds which cannot be regarded as 'sufficient'. Furthermore, in no decision did the Town Court refer to any particular circumstances explaining why alternative preventive measures could not be applied instead of detention, as required by Article 5 § 3 of the Convention.

80. The Court therefore finds that there has been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

81. The applicant complained that his application of 4 April 2003, by which he challenged the lawfulness of his preliminary detention between 25 and

28 January 2002 and his subsequent detention, had not been properly and speedily considered by the Town Court. He relied on Article 5 § 4 of the Convention, which reads as follows:

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Admissibility

82. The Government submitted that Article 5 § 4 of the Convention could not cover the proceedings concerning the consideration of the application of 4 April 2003 since, in those proceedings, the applicant had raised the issues of his preliminary detention, whereas, at the relevant time, he had been detained on other grounds, namely pursuant to the court order of 12 August 2002. The application of 4 April 2003 therefore did not raise a question of the lawfulness of the ongoing detention and did not fall within the ambit of Article 5 § 4 of the Convention.

83. The applicant did not put forward any specific arguments.

84. The Court reiterates that Article 5 § 4 of the Convention deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or

her release. The provision does not deal with other remedies which may serve to review the lawfulness of a period of detention which has already ended, including, in particular, a short-term detention (see *Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003-X).

85. Having regard to this case-law, the Court considers that the part of the application of 4 April 2003 which dealt with the issues of the deprivation of the applicant's liberty between 25 and 28 January 2002 falls outside the scope of Article 5 § 4 of the Convention, since at the time of the application the period in question had already ended.

86. However, the application of 4 April 2003 also raised the question of the lawfulness of the subsequent pre-trial detention of the applicant. Accordingly, in as much as the application referred to the lawfulness of the ongoing detention of the applicant, the Court considers that it falls within the scope of Article 5 § 4 of the Convention.

87. The Court, however, notes that on 26 June 2003 that issue was determined by the Town Court in the presence of the applicant's representative. Given that the applicant submitted his first letter to the Court only on 13 January 2004, the Court finds that he failed to comply with the six-month rule with respect to this complaint (see *Hristov v. Bulgaria* (dec.), no. 35436/97, 19 September 2000 and *Mello v. Slovakia* (dec.), no. 67030/01, 21 June 2005).

88. It follows that the complaint should be rejected as inadmissible in accordance with Article 35 §§ 1, 3 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

89. The applicant complained under Article 6 § 1 of the Convention that the proceedings in his criminal case had been unfair and had lasted too long.

90. The Court has examined those 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 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. The applicant claimed 2,967 euros (EUR) in respect of pecuniary damage and EUR 300,000 in respect of non-pecuniary damage.

93. The Government considered those claims unsubstantiated.

94. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 2,500 in respect of non-pecuniary damage.

B. Costs and expenses

95. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

96. The Court considers it appropriate that the default interest 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 complaints under Article 5 §§ 1 and 3 admissible and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention in respect of the deprivation of the applicant's liberty between 2.30 a.m. and 3 p.m. on 25 January 2002;
3. *Holds* by 6 votes to 1 that there has been no violation of Article 5 § 1 of the Convention in respect of the period after 3 p.m. on 25 January 2002 until the court decision of 28 January 2002;
4. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
5. *Holds* unanimously
 - (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 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-

pecuniary damage, to be converted into Ukrainian hryvnias 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;

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

Done in English, and notified in writing on 9 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

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

P.L.
C.W.

PARTIALLY DISSENTING OPINION OF JUDGE
KALAYDJIEVA

To my regret I am unable to join the majority's conclusions on the overall length of the applicant's detention on a suspicion of a crime without a court order. The applicant was not represented by a lawyer and failed to specify the exact period of such detention and/or its classification under Article 5 of the Convention. The Court considered it as falling under Article 5 § 1 of the Convention – purpose and lawfulness of deprivation of liberty under the national law – and limited its consideration of the length of detention in the absence of a court order to the period which ended on 25 January 2002 with the order of the Town Court. In my view the question whether the applicant substantiated the exact hour (before or after 3 p.m. on 25 January 2002) when the first order was issued appears irrelevant for the actual period of detention without a court's order, since on this date the Town Court did not adopt any such decision.

Pursuant to Art. 165-2 of the Criminal Procedure Code the Town Court found itself unable “*to select a preventive measure in respect of [the applicant]*” and not only considered it *necessary to examine additional material concerning [his] personality... or to clarify the other circumstances that are important for the adoption of the decision on this matter*” (see Relevant Domestic Law), but also “*requested the investigator to provide more evidence that the applicant might abscond*” (see paragraph 15). I would not dwell on the impartiality of this instruction, but only on the fact that on 25 January 2002 the court extended the order issued at “*9.30 p.m. on that day by the police investigator (see paragraph 13)*” for three more days – until 31 January 2002, when it determined the necessity of the applicant's detention for the first time. The extension of the applicant's detention on the order of an investigation officer was permissible by the domestic law provisions and resulted in an overall period of over 6 days of deprivation of personal liberty in the absence of a court's decision *propriu moto*. I have certain misgivings as to the compatibility of this situation both with Article 5 § 1 (c) as concerns the purpose of the detention and with the Article 5 § 3 of the Convention, which deals properly with the question whether the applicant was “*brought promptly before a judge authorised by law to exercise judicial functions*” in regard of the necessity of detention.

I find it important to express this opinion as it seems important for the Court to deal with issues which, in view of the on-going reform of the national system of criminal justice, may result in the necessary steps for harmonisation of the national law with the Convention.