



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

FIFTH SECTION

CASE OF NOWAK v. UKRAINE

(Application no. 60846/10)

JUDGMENT

*This version was rectified on 10 May 2011
under Rule 81 of the Rules of Court*

STRASBOURG

31 March 2011

FINAL

15/09/2011

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

In the case of Nowak v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 8 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 7337/05) against Poland and Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Piotr Nowak (“the applicant”), on 27 January 2005.

2. The applicant was represented by Mr M. Bogucki, a lawyer practising in Przemyśl. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. On 25 March 2009 the President of the Fourth Section decided to give notice of the application to the Governments of Poland and Ukraine. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. On 11 October 2010 it was decided to separate the applicant’s complaints. The applicant’s complaints against Poland remained in the original application, no. 7337/05, while the complaints against Ukraine were separated into the present application, no. 60846/10. This latter case was transferred for examination to the Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Przemyśl.

6. In 1998 the applicant was charged with assaulting a certain A.B. On an unknown date criminal proceedings against him were instituted.

7. In January 2004 the applicant left Poland for Ukraine. Before leaving, he informed the court that he could be contacted at a correspondence address in Przemyśl. He also telephoned the court several times to ask about progress on his case. He was informed that the proceedings had been stayed.

8. In March 2004 he started working in Lviv, Ukraine. In June 2004 his residence registration was extended until 20 May 2005 and at the same time the applicant was reprimanded by the administrative court for submitting his registration documents late.

9. Meanwhile, on 12 February 2004 Szczecin District Court in Poland remanded the applicant in custody for three months for failure to comply with a summons.

10. At around 11 a.m. on 20 January 2005 the applicant went to a police station in Lviv to report that his friend's car had been stolen. The police checked his passport, verified his personal details and locked him up in a cell. When he asked for the reasons for his arrest he was told that he was an "international thief". He was subsequently questioned by officers. The applicant submits that during the questioning the officers severely beat him and extinguished cigarettes and matches on his wrist and forearm. He further maintains that he was not given any food or drink for four days.

11. On 24 January 2005 a decision of the Ukrainian police of 21 January 2005 to expel him from the country was served on him. The decision stated that the applicant had arrived in Ukraine for private purposes in March 2004 and held a residence permit, valid until 20 May 2005. It further mentioned that on 20 January 2005 the Lviv police received a cable to the effect that the applicant was wanted by the Polish law-enforcement authorities on a charge of theft. On those grounds and in accordance with section 32 of Ukraine Law "on the Legal Status of Foreigners and Stateless Persons", it was decided to expel the applicant from Ukraine with a three-year ban on re-entry.

12. The applicant was kept at the police station until the afternoon of 24 January 2005, when he was transported to the Polish border control post in Medyka, where he arrived at around 7 p.m. He was arrested there by the Polish police on the basis of the detention order of 12 February 2004 and a wanted notice issued by the Szczecin police station on 2 August 2004. He was then transferred to the Przemyśl Detention Centre in Poland.

13. At 8.20 p.m. on 24 January 2005 the applicant was examined by a doctor in an emergency centre for cigarette burns on his left hand and prescribed treatment.

14. On 31 January 2005 the applicant was examined by a prison doctor, who stated that the applicant had two 0.5 cm cigarette burns on his left hand, plus two similar marks on his left wrist and one on his forearm. He also had abrasions on his upper and lower lip and a broken front tooth.

15. On 9 March 2005 the applicant complained to the Przemyśl District Prosecutor that he had been ill-treated in police custody in Lviv on 20 January 2005. He submitted that he had been severely beaten by the Ukrainian police. He further claimed that they had stolen 5,000 euros (EUR), 200 United States dollars (USD) and 100 Ukrainian hryvnias (UAH) from him.

16. On 31 August 2005 the Przemyśl Regional Prosecutor's Office sent the investigation materials relating to the applicant's allegations to the Lviv Regional Prosecutor's Office.

17. On 22 June 2005 the applicant lodged a claim for compensation with the Przemyśl Regional Court against the Ukrainian police. On 28 June 2005 the court rejected his statement of claim as inadmissible in law for lack of jurisdiction.

18. By letter of 5 June 2006, in reply to the applicant's query, the Przemyśl Regional Prosecutor's Office stated that they had received no information from the Lviv Prosecutor's Office.

19. The applicant submitted that despite several phone calls and queries from him, the Lviv Prosecutor's Office had not informed him of any progress with the investigation.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

20. The relevant extracts from the Constitution provide as follows:

Article 26

"Foreigners and stateless persons who are lawfully in Ukraine enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties to which Ukraine is a party.

Foreigners and stateless persons may be granted asylum under the procedure established by law."

Article 28

"Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ..."

Article 29

“Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on grounds and in accordance with a procedure established by law.

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 arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of defence counsel.

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

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention.”

B. Code of Civil Procedure of Ukraine 1963 (replaced by a new Code on 1 September 2005)

21. Chapter 31-a of the Code lays down the procedure for considering complaints by citizens about decisions, acts and omissions of State bodies, legal persons and officials in the sphere of administration. In particular, Article 248¹ from the said chapter of the Code provided, in so far as relevant:

“Every citizen has the right to apply to court ... with an application, should he consider that a decision, action or inaction on the part of a public authority, legal person or official during the exercise of their administrative functions has violated his rights or freedoms”

C. Civil Code of Ukraine 2003

22. Relevant provision of the Code provides:

Article 1167**Grounds of Responsibility for Non-Pecuniary Damage**

“1. Non-pecuniary damage caused to an individual or legal person by illegal decisions, activity or inactivity, shall be reimbursed by the person who caused it, if

their guilt can be established ... except in the cases established by the second part of this Article...

2. Non-pecuniary damage shall be indemnified irrespective of guilt:

...

2) if damage to a physical person has resulted from his or her illegal imprisonment ...”

D. Code of Administrative Justice of 6 July 2005 (entered into force on 1 September 2005)

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

Article 2

Role of the administrative justice system

“1. The role of the administrative justice system is the protection of the rights, freedoms and interests of physical persons, and the rights and interests of legal entities in the field of public-law relations, from violations by public authorities ...

2. Any decisions, actions or inaction on the part of public authorities can be appealed against in administrative courts, except for cases in which the Constitution and laws of Ukraine foresee a different procedure of judicial appeal against such decisions, actions or inactivity ...”

Article 17

Competence of the administrative courts in deciding administrative cases

“1. The competence of the administrative courts shall cover:

...

3) disputes between public authorities ...

4) disputes following an application by a public authority in situations set out in the law...

2. The competence of the administrative courts shall not cover public law cases:

...

2. that shall be decided under the criminal justice procedure ...”

E. Code of Criminal Procedure

24. Article 4 of the Code provides that the court, prosecutor or investigator shall, within their competencies, institute criminal proceedings in every case where signs of a crime have been discovered, take all necessary measures prescribed by law to ascertain whether a crime has been committed and identify and punish the offenders.

F. Prosecution Service Act of 1 December 1991 (with amendments)

25. The relevant provisions of the Prosecution Service Act provided:

Section 5. The functions of the prosecutor's office

“The Public Prosecutor's Office of Ukraine is an integral system, which according to the Constitution of Ukraine and the present Law is entrusted with the following functions:

... (4) supervision over the observance of laws in the course of enforcement of judgments in criminal matters, as well as in the course of application of other compulsory measures connected with restriction of personal liberty of citizens.”

Section 12. Examination of applications and complaints

“The public prosecutor examines applications and complaints of violation of rights of individuals and legal entities, except for those complaints which are within the competence of the court.

...

A decision taken by the public prosecutor can be appealed against before a higher public prosecutor or a court.”

Section 44. The matters subject to the public prosecutor's supervision and powers of a public prosecutor

“The matters subject to the public prosecutor's supervision are ... the compliance with the regulations ... on conditions of detention or those for serving prison sentences by persons in such institutions and on the protection of their rights ...

A public prosecutor exercising such supervision shall be empowered:

(1) to visit places of detention, pre-trial detention facilities, institutions in which convicted persons serve their sentences, at any time ...

(2) ... to request the officials to give explanations as regards violations which have occurred...”

G. The Legal Status of Foreigners and Stateless Persons Act

26. Section 32 of the Act provides:

Deportation from Ukraine

“Foreigners and stateless persons who have committed a crime or misdemeanour, after serving their sentence or after the administrative sanction imposed on them has been enforced, may be expelled from Ukraine. A decision on expulsion from Ukraine after serving their sentence or the enforcement of the administrative sanction shall be taken by the police department at the person’s place of temporary residence with notification within twenty-four hours by the prosecutor of the reasons for that decision. The decision of the police department on expulsion of foreigners and stateless persons from Ukraine may be accompanied by a prohibition on further entry into Ukraine for up to five years. The time-limit for a ban on further entry into Ukraine is calculated from the date of this decision. The procedure for enforcement of the decision on the ban on further entry into Ukraine shall be set forth in the legislation of Ukraine.

Apart from the situations specified in part one of this article, foreigners and stateless persons may be expelled from Ukraine by a decision of the police, State border guard (relating to persons detained within controlled border areas, during or after an illegal crossing of the border of Ukraine) or the Security Service of Ukraine and further notification within twenty-four hours by the prosecutor of the reasons for that decision, if the actions of foreigners and stateless persons have grossly violated the law on the status of foreigners and stateless persons, or are contrary to the interests of Ukraine’s security or public order, or when necessary for public health considerations or for protection of rights and lawful interests of citizens of Ukraine.

Foreigners and stateless persons must leave the territory of Ukraine within the period stated in the decision on expulsion. If the decision on expulsion of a foreigner or stateless person from Ukraine is taken, the visa in his passport shall immediately be cancelled and the person’s residence permits withdrawn.

Foreigners and stateless persons may be given up to thirty days to leave Ukraine after the adoption of the relevant decision.

With the approval of the prosecutor, foreigners and stateless persons may be arrested and subjected to administrative forced expulsion by the police or the State border guard, if such persons fail to leave after the decision on expulsion, or if there are reasonable grounds to believe that they will not leave.

Foreigners and stateless persons detained for being in Ukraine illegally (in violation of a ban on entry to Ukraine, in the absence of grounds set forth in laws and international treaties of Ukraine on presence in Ukraine (transit through its territory), including stays with a visa (permit) or passport which belongs to another person, which is counterfeit or damaged or which does not meet the established standards) shall be placed in a temporary detention centre for foreigners and stateless persons who are in Ukraine illegally, with internal regulations for the period required for the preparation of their forced deportation from Ukraine, but for no longer than six months.

A standard regulation on temporary detention centre for foreigners and stateless persons who are illegally staying in Ukraine shall be approved by the Cabinet of Ministers of Ukraine.

The decision of the police, the State border guard or the Security Service of Ukraine on deportation of a foreigner or stateless person from Ukraine may be appealed against to the court. The appeal suspends the decision on expulsion, unless immediate expulsion is required in the interests of Ukraine's security or protection of public order.

Expulsion of foreigners and stateless persons who are detained within controlled border areas during or after illegally crossing the border of Ukraine shall be carried out by the State border guard and in other cases by the police. Monitoring of correct and timely execution of decisions on expulsion shall be performed by the body that adopted the decision.

Foreigners and stateless persons that are subject to deportation shall reimburse the costs of their deportation under the procedure established by law. If these foreigners and stateless persons have no means to cover costs associated with their expulsion from Ukraine, expulsion shall be carried out at the State's expense.

Individuals or entities who have invited or received these foreigners and stateless persons, arranged for their illegal entry, residence or employment or assisted them to remain in Ukraine after the expiry of their term of stay, shall reimburse, under the procedure established by law, the costs incurred by the State when deporting the said foreigners and stateless persons."

H. Agreement between the General Prosecutor's Office of Ukraine and the Ministry of Justice of the Republic of Poland on implementation of Article 3 of the Treaty between Ukraine and the Republic of Poland on international legal assistance and legal relations in civil and criminal matters of 24 May 1993, 10 November 1998

27. Article 3 of the Agreement provides:

"Materials for prosecution shall be submitted by the regional prosecutor's offices [of Ukraine] and Voivodeship prosecutor's offices [of the Republic of Poland] to address of those Voivodeship (regional) prosecutor's offices of the requested State, whose jurisdiction covers the territory in which the suspects or accused persons reside permanently."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

28. The applicant complained that he had been ill-treated by the Ukrainian police and that there had been no investigation of this crime. He relied on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

29. The Government considered that the applicant had not exhausted the remedies available to him under Ukrainian law. They maintained that the applicant had never addressed the Ukrainian prosecution service directly with his complaint that he had been ill-treated in the Lviv Police Station. They further noted that he knew that the Przemyśl Regional Prosecutor's Office had sent the materials relating to his complaint to the Lviv Regional Prosecutor's Office for examination and determination whether criminal proceedings should be instituted in respect of the applicant's complaints. In their opinion, the applicant, having received no answer from the Lviv Regional Prosecutor's Office, had a right to challenge the latter's failure to act with a higher Prosecutor's Office or a court. Prior to 1 September 2005 this challenge could be made before a civil court (Article 248-1 of the Code of Civil Procedure of Ukraine), and after 1 September 2005 before an administrative court (Article 2 of the Code of Administrative Procedure of Ukraine). However, the applicant failed to use those remedies.

30. They also maintained that, following the examination of a complaint about acts or omissions by officials of the State authorities, a court of general jurisdiction (prior 1 September 2005) just like an administrative court (after 1 September 2005) was empowered to take a decision on the lawfulness of such acts or omissions. Such a decision could afterwards serve as a basis for awarding the person concerned compensation for damages resulting from unlawful acts or omissions on the part of State officials. The Government referred to the proceedings for compensation in the case of *Kats and Others v. Ukraine* (no. 29971/04, §§ 68-74, 18 December 2008), in which the relatives of a person who had died in the SIZO received compensation for her inadequate medical treatment. They stressed that the applicant had made an unsuccessful compensation claim to Przemyśl District Court and that the latter had informed the applicant that his claim should be lodged at the place where the unlawful actions had allegedly been taken by the Ukrainian police officers; however the applicant

had not done so, either on his own behalf or through an appointed representative. They considered that the applicant's three-year ban on entry to Ukraine and his lack of confidence in the Ukrainian courts could not be an excuse for failing to do this. Nor did he act even when the ban on his entry to Ukraine had expired.

31. The applicant contended that he could not complain personally, due to the ban on his entry to Ukraine. He lodged his complaint of ill-treatment with the Polish Prosecutor's Office but received no answer from the Ukrainian authorities, despite making numerous queries. The failure to respond and the dismissive attitude of the Ukrainian authorities made it impossible for him to assert his rights before the courts.

32. The Court notes that the Government's objections are closely linked to the merits of the applicant's complaint under procedural aspect of Article 3 of the Convention. It therefore joins them to the merits.

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

B. Merits

1. Alleged ill-treatment by the police

34. The applicant maintained that he had been ill-treated by the Ukrainian police.

35. The Government did not make any submissions on the merits, but did not dispute the facts as submitted by the applicant.

36. The Court reiterates that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention" (see *Tomasi v. France*, 27 August 1992, §§ 108-11, Series A no. 241-A, and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

37. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*,

4 December 1995, § 34, Series A no. 336, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

38. Turning to the circumstances of the present case, the Court reiterates that the Government did not challenge the version of events submitted by the applicant. Moreover, the alleged ill-treatment was supported by medical examinations, one of them, which attested to the cigarette burns on the applicant's hand, having been conducted less than two hours after the applicant was transferred from the Ukrainian police to the Polish police (see paragraphs 13 and 14 above). While the applicant did not present, and indeed was not in a position to present, any direct independent evidence capable of confirming his allegation that his injuries were caused by the Ukrainian police officers, the Court considers that, viewed cumulatively, the medical evidence, the applicant's statements, the undisputed fact of his detention at Lviv police station and the lack of any plausible alternative explanation as to the origin of the applicant's injuries, give rise to a reasonable suspicion that the injuries were caused by the police.

39. The Court reiterates that a State is responsible for the welfare of people in detention and that the authorities have a duty to protect such people. Bearing in mind the authorities' obligation to account for injuries caused to those under their control, the Court considers that failure to find and prosecute those guilty of a crime of violence against a detainee, as in the instant case, cannot absolve the State of its responsibility under the Convention (see, *mutatis mutandis*, *Esen v. Turkey*, no. 29484/95, § 28; *Yaz v. Turkey*, no. 29485/95, § 30; and *Ayşe Tepe v. Turkey*, no. 29422/95, 22 July 2003).

40. In the light of the above it must be considered that the applicant sustained the injuries as a result of inhuman and degrading treatment, for which the Government must bear Convention responsibility.

41. The Court concludes that there has been a breach of Article 3 of the Convention in this regard.

2. Alleged failure to carry out an effective investigation

42. The applicant maintained that his complaint was transferred to the relevant Ukrainian authorities and he did not receive any information afterwards about any investigation being conducted.

43. The Government did not submit any observations on the merits.

44. The Court reiterates that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports*

1998-VIII, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The minimum standards of effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §§ 208-13, 24 February 2005).

45. In the circumstances of the present case, the Court notes that the applicant, acting through the Przemyśl Prosecutor's Office, lodged a complaint with the prosecuting authorities of Ukraine that he had been ill-treated. His complaint was supported by medical evidence. The Court reiterates that the applicant is required to take sufficient steps to bring his complaints to the attention of the relevant domestic authorities and to challenge the alleged ineffectiveness of the investigation (see, *mutatis mutandis*, *Yaremenko v. Ukraine*, no. 32092/02, §§ 65 and 66, 12 June 2008). In the instant case, however, it does not appear that the applicant's allegations were investigated, although under domestic law the relevant law-enforcement bodies are obliged to institute criminal proceedings in every case where evidence of a crime has been discovered and to take all necessary measures prescribed by law to establish that a crime has been committed and to identify and punish the offenders (see paragraph 24 above). Taking into account the specific circumstances of the present case, the Court considers that as the applicant had lodged his complaint and provided medical documents confirming the ill-treatment, the applicant had unequivocally raised his complaint with the Ukrainian authorities. The Court therefore rejects the Government's contentions that the applicant should make further representations to the relevant prosecutor's office under Article 4 of the Code of Criminal Procedure.

46. As to a compensatory remedy, the Court notes that the applicant's complaint concerned not simply unlawful, but clearly criminal behaviour. In such circumstances a claim must be lodged against a particular person or persons. The remedy becomes futile if the offender is not identified and prosecuted. Therefore the absence of any outcome of the main criminal proceedings also prevented the applicant from having effective recourse to these remedies, since in practice a civil claim for compensation would not be examined prior to a final determination of the facts in criminal proceedings (see *Afanasyev v. Ukraine*, no. 38722/02, § 77, 5 April 2005).

47. The Court therefore rejects the Government's objections and considers that the complete failure of the prosecuting authorities to react to the applicant's arguable complaints, which are supported by medical evidence, is incompatible with the State's positive obligations under Article 3.

It follows that there has also been a violation of Article 3 of the Convention under this head.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

48. The applicant complained that his detention in Ukraine had been unlawful, and that he had not been informed of the reasons for his arrest and thus could not challenge it. He relied on Article 5 §§ 1, 3 and 4 of the Convention, which read, 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;

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

...

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

49. The Government’s objections as to admissibility of the applicant’s complaints under Article 3 of the Convention were equally pertinent to the applicant’s complaints under Article 5.

50. The applicant’s reply to the Government’s objection on non-exhaustion summarised above (paragraph 31) is equally pertinent to this objection.

51. The Court notes that the Government’s objections are closely linked to the merits of the applicant’s complaint under Article 5 of the Convention. It therefore joins them to the merits.

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

B. Merits

1. Alleged violation of Article 5 § 1

53. The applicant considered his detention unlawful.

54. The Government did not submit any observations on the merits.

55. The Court reiterates that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a “democratic society” within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33). The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV, and *Quinn v. France*, 22 March 1995, § 42, Series A no. 311) 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 or her liberty (see *Engel and Others v. the Netherlands*, 8 June 1976, § 58, Series A no. 22, and *Amuur v. France*, 25 June 1996, § 42, *Reports* 1996-III).

56. The Court further reiterates that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention – a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

57. The Court also reiterates that no detention which is arbitrary can be compatible with Article 5 § 1, the notion of “arbitrariness” in this context extending beyond lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention. Furthermore, detention will be “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (compare *Bozano v. France*, 18 December 1986, § 59, Series A no. 111, and *Saadi*, cited above, § 69) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see *Benham v. the United*

Kingdom, 10 June 1996, § 47, *Reports of Judgments and Decisions* 1996-III *Liu v. Russia*, no. 42086/05, § 82, 6 December 2007; and *Marturana v. Italy*, no. 63154/00, § 80, 4 March 2008).

58. Turning to the circumstances of the present case, the Court notes that the Government did not submit any arguments as to the possible grounds for the applicant's detention. Section 32 of the Legal Status of Foreigners and Stateless Persons Act, which had been the only provision referred to in the police decision of 21 January 2002 on the applicant's voluntary deportation, does not appear to provide for a detention in the situation like that of the applicant. Furthermore, the above-mentioned decision equally noted that one of the reasons for the applicant's deportation was information that he was wanted by the Polish law-enforcement authorities, which suggests that the applicant was in fact extradited to Poland under the pretext of deportation (see paragraph 11 above).

59. As to the remedies suggested by the Government, the Court notes that its findings in respect of Article 3 of the Convention are equally pertinent to this part of the application. Moreover, the Government did not submit any documents concerning the applicant's detention and did not give any details in this respect. It is therefore not apparent that this detention was properly recorded and reported at the domestic level. In the absence of any dispute by the Government as to the applicant's version of events, the Court accepts that the applicant was detained as he described. This finding does not remove the obstacle which the applicant would face in proving the fact of his detention in order to seek compensation.

60. The Court therefore rejects the Government's objections and concludes that the applicant's detention was arbitrary and not based on law (see, *mutatis mutandis*, *Bozano v. France*, cited above, § 60, and *Soldatenko v. Ukraine*, no. 2440/07, §§ 113-114, 23 October 2008).

There has accordingly been a violation of Article 5 § 1 of the Convention.

2. *Alleged violation of Article 5 § 2*

61. The applicant maintained that he did not understand the reasons for his detention.

62. The Government did not make any submissions on the merits

63. The Court reiterates that under Article 5 § 2 of the Convention any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whilst this information must be conveyed promptly, it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. Moreover, when a person is arrested on

suspicion of having committed a crime, Article 5 § 2 neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of the charges held against the arrested person. Furthermore, when a person is arrested with a view to extradition, the information given may be even less complete. However, this information should be provided to the detained in an adequate manner, so that the person knows why he has been deprived of his liberty (see *Kaboulov v. Ukraine*, no. 41015/04, §§ 143-144, 19 November 2009, with further references).

64. Turning to the circumstances of the present case, it appears that when the applicant asked the reasons for his arrest he was told that he was an “international thief”. This statement could hardly correspond to the eventual voluntary deportation order, which was drafted in Ukrainian and made reference to section 32 of the Legal Status of Foreigners and Stateless Persons Act. Apart from the applicant’s complaint that he did not have sufficient knowledge of the language to understand the document, the latter was served on him on the fourth day of his detention and there was no indication that he had been notified before that date that he was detained with a view to deportation.

65. The Court further notes that it was not demonstrated by the Government that the applicant had any effective means of raising his complaint while in detention or of claiming compensation afterwards (see, *mutatis mutandis*, paragraph 61 above).

66. The Court therefore rejects the Government’s objections and concludes that there has been a violation of Article 5 § 2.

3. *Alleged violation of Article 5 § 4*

67. The applicant maintained that there had been no judicial review of the lawfulness of his detention.

68. The Government did not make any submissions on the merits.

69. The Court reiterates that the purpose of Article 5 § 4 is to secure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, cited above, § 76). A remedy must be made available during a person’s detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII (extracts)). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a

realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

70. The Court refers to its findings under Article 5 § 1 of the Convention about the lack of legal provisions governing the procedure for detention in Ukraine pending voluntary deportation. It considers that in the circumstances of the case these findings are equally pertinent to the applicant's complaint under Article 5 § 4 of the Convention, as the Government failed to demonstrate that the applicant had at his disposal any procedure by which the lawfulness of his detention could have been examined by a court. The Court therefore dismisses the Government's objections.

71. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 7

72. The applicant complained under Article 6 that he did not understand the charges against him during his deportation. The Court notes that there were no judicial proceedings concerning the applicant's removal from the territory of Ukraine and that any such proceedings would fall outside the scope of Article 6 of the Convention (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X). Despite its findings that the applicant's expulsion has appearances of extradition in disguise (see paragraph 58 above), the Court considers that this does not preclude it from examining the question of whether the removal of the applicant from the territory of Ukraine, which was formally presented as expulsion, complied with the Convention requirements. Being master of the characterisation to be given in law to the facts of the case, the Court decides to examine the problem raised by the applicant under Article 1 of Protocol No. 7, which reads as follows:

“1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- (a) to submit reasons against his expulsion,
- (b) to have his case reviewed, and
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

A. Admissibility

73. The Government maintained that the applicant did not challenge the lawfulness of the decision on his expulsion before the Ukrainian prosecutors or courts. They referred to the same remedies as those invoked in respect of other complaints of the applicant (see paragraph 29 and 30).

74. The applicant's reply to the Government's objection on non-exhaustion summarised above (paragraph 31) is equally pertinent to this objection.

75. The Court notes that the Government's objections are closely linked to the merits of the applicant's complaint. Therefore, it joins them to the merits.

76. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

77. The applicant maintained that as a foreigner he did not understand the reasons for his deportation.

78. The Government made no observations on the merits.

79. The Court reiterates that the scope of application of Article 1 of Protocol No. 7 extends to aliens "lawfully resident" in the territory of the State in question. It is therefore necessary to ascertain that the applicant was lawfully resident in Ukraine at the time of his exclusion from Ukrainian territory.

80. The Court notes that the Government did not comment on this issue, and from the available materials it appears that at the time of his expulsion on 24 January 2005 the applicant held a residence permit which was valid until 20 May 2005 (see paragraph 8 above). It is satisfied that Article 1 of Protocol No. 7 was applicable in the present case.

81. The High Contracting Parties have the discretionary power to decide whether to expel an alien present on their territory, but this power must be exercised in such a way as not to infringe the rights under the Convention of the person concerned (see *Bolat*, cited above, § 81, and *Agee v. the United Kingdom*, no. 7729/76, Commission decision of 17 December 1976, DR 7). Paragraph 1 of this Article provides that an individual may be expelled only "in pursuance of a decision reached in accordance with law" and subject to the exercise of certain procedural guarantees. Paragraph 2 allows the authorities to carry out an expulsion before the exercise of these guarantees only when that expulsion is necessary in the interests of public order or national security.

82. Turning to the circumstances of the present case, it appears that the decision on the applicant's expulsion was served on him on the date of his

departure, in a language he did not understand and in circumstances which prevented him from being represented or submitting any reasons against his expulsion. Furthermore, the Government did not furnish any explanations or documents to demonstrate that the procedure required by Article 1 of Protocol No. 7 was provided by the domestic law. In the light of this latter finding, the Court is not satisfied that in the applicant's case the remedies suggested by the Government could offer him any prospects of redress for lack of the procedure required by Article 1 of Protocol No. 7 in the domestic law.

83. The Court therefore rejects the Government's objections and concludes that there had been a violation of Article 1 of Protocol No. 7.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

84. Lastly, the applicant complained under Article 14 of the Convention, without providing any reasoning, that he had been discriminated against on ethnic grounds. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

85. 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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

87. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

88. The Government considered this claim excessive and unsubstantiated.

89. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated by the mere finding of a violation of his Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him EUR 16,000 in respect of non-pecuniary damage.

B. Costs and expenses

90. The applicant did not submit any claim under this head. Accordingly, the Court makes no award.

C. Default interest

91. 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 UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection, and rejects it after an examination on the merits;
2. *Declares* the complaints under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 7 admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 3 of the Convention as regards the applicant's ill-treatment;
4. *Holds* that there has been a violation of Article 3 of the Convention as regards the absence of an effective investigation into the applicant's allegations of ill-treatment;
5. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
6. *Holds* that there has been a violation of Article 5 § 2 of the Convention;
7. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
8. *Holds* that there has been a violation of Article 1 of Protocol No. 7 to the Convention;
9. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros),

plus any tax that may be chargeable, in respect of non-pecuniary damage¹;

(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;

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

Done in English, and notified in writing on 31 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

1. Rectified on 10 May 2011: the text “to be converted into Polish zlotys at the rate applicable on the date of settlement” has been deleted.