



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

FIFTH SECTION

CASE OF TODOROV v. UKRAINE

(Application no. 16717/05)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

12/04/2012

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

In the case of Todorov 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,

Angelika Nußberger, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 16717/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Igor Grigoryevich Todorov (“the applicant”), on 28 April 2005.

2. The applicant, who had been granted legal aid, was represented by Mr A. V. Lesovoy, a lawyer practising in Simferopol. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had been denied sufficient medical assistance in detention; that his pre-trial detention had lasted an unreasonably long time and that the criminal trial against him had been unfair and lengthy.

4. On 24 September 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Mr Mykhaylo Buromenskiy to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966 and lives in Simferopol.

A. The applicant's detention and criminal proceedings against him

7. On 2 August 1999 the applicant, a police officer at the material time, was arrested on suspicion of membership of a criminal association run by S. P., another police officer, and participation in armed robberies. On the same date his house was allegedly searched without a warrant.

8. On 3 August 1999 the applicant signed a waiver of his right to legal representation. On the same date he confessed to having participated in group assaults on families I. and S. in August 1998 upon S. P.'s invitation. He also noted that he believed that the families were visited for collection of unpaid business debts in favour of third parties. According to the applicant, he notified the investigator that he was unable to see the record of his questioning as he had been suffering from eye cataracts.

9. On 5 August 1999 the applicant was indicted. He signed the statement of indictment, having noted that he fully acknowledged his guilt and requested to be released from detention, since he needed in-patient treatment on account of his skin disease and eye cataracts, as well as surgery for the latter.

10. On the same date the applicant obtained access to an advocate. It is unclear, however, whether the advocate was present during the applicant's interrogation and indictment on that date.

11. Also on the same date the applicant was remanded in custody as a preventive measure. On various occasions the applicant appealed against this measure, in particular, referring to an urgent need to have eye surgery and in-patient treatment for other medical conditions. However his requests were rejected.

12. During the pre-trial investigation, the authorities questioned some 120 witnesses concerning over thirty episodes of various crimes, carried out some twenty reconstitutions of the crime scenes and ordered numerous expert assessments.

13. On 20 July 2000 the investigation was completed and the applicant, along with eighteen other individuals charged for being involved in a criminal association membership, was committed for trial to the Supreme Court of the Autonomous Republic of the Crimea (subsequently renamed the Court of Appeal of the Autonomous Republic of the Crimea (hereafter "the Court of the ARC").

14. On 4 May 2001, following familiarisation of the defendants with the case-file materials and completion of other procedural formalities, the Court of the ARC held a preliminary hearing in the case and scheduled the trial for 5 June 2001.

15. On 29 June 2001 the newspaper *Flag Rodiny* published an article entitled “Changelings with police epaulettes”, featuring in particular an interview with Sh., the judge presiding over the applicant’s case. The judge was quoted as saying that she was appalled by the audacious crimes committed by the defendants and their challenging conduct at court hearings.

16. Having held some eighteen hearings between June and December 2001, the Court of the ARC adjourned the proceedings in connection with one of the defendants’ request to ensure recording of the hearings with technical equipment which was unavailable.

17. On 15 May 2002 the Court of the ARC resumed consideration of the case and held some 150 hearings in the period ending 22 May 2004.

18. The applicant alleged that on various occasions he and his co-accused had requested the removal of Judge Sh. from the proceedings on various grounds, including lack of impartiality; however, their requests had been rejected. The applicant did not provide copies of his requests for the removal of Judge Sh. or the decisions taken following their consideration.

19. The Government alleged that the applicant had never lodged any requests for the removal of the judge during the trial. Such requests had been lodged only by one of his co-defendants, A. K., who had also requested on 29 January 2003 that the above newspaper article be added to the case-file. Those requests had been dismissed as unsubstantiated.

20. During the trial, the applicant denied any encounter with the I. family. As regards the S. family, he acknowledged having visited them along with three other defendants to collect the debt owed to a third party at S. P.’s request. He contended that he had been in the kitchen while his companions had spoken with the hosts, that the hostess had given them money voluntarily, and that he had been unaware of any coercion taking place. He further retracted his confessions given during the pre-trial investigation in the advocate’s absence, alleging that at the material time he had been practically blind and unable to read the documents he was signing. He had signed the waiver of his right to be represented by an advocate under pressure from the investigator, who promised that in exchange for his cooperation he would be promptly released from custody to enable him to seek medical treatment.

21. On 17 November 2004 the Court of the ARC pronounced its judgment, the text of which was presented on over two hundred pages and concerned over thirty counts of various crimes, including robberies, a murder and assaults committed by nineteen defendants collectively and individually against numerous victims. By this judgment, the applicant was

convicted of a criminal association membership and two counts of armed robbery (against the families I. and S.). By way of evidence of his participation in the robberies, the court referred, primarily, to the confessional testimonies of his co-defendants, identifying him as their accomplice, and the testimonies of the members of the assaulted families given during pre-trial investigation and trial, in which they alleged to have recognised the applicant. The applicant's confessional statements were not referred to by the court in the text of its judgment. The court sentenced the applicant to seven years' imprisonment, banned him from occupying certain posts for a three-year term and ordered the confiscation of his property.

22. In December 2004 and January 2005 the applicant, his lawyer, and his mother acting as his defence, submitted appeals in cassation against the applicant's conviction. They presented the same version of events as proposed by the applicant during his trial and contended that the court had misinterpreted facts and wrongly applied the law. They challenged the testimonies given by the applicant's co-defendants, alleging they had been given under duress, and testimonies given by the victims as ambiguous and unreliable. They further contended that all the evidence collected from the applicant in violation of his right to be legally represented should be excluded from the body of evidence. The appellants noted that immediately upon his arrest the applicant had informed the investigative authorities that he was almost blind and was unable to read the documents he was signing. The waiver of his right to be legally represented had not been genuine. On the contrary, the video-recording of the applicant's initial questioning showed that he requested the assistance of a lawyer, referring to his poor health and vulnerable state. Lastly, the appellants complained that the sentence imposed on the applicant was disproportionately severe, particular regard being had to his state of health and lengthy pre-trial detention in conditions incompatible with it.

23. On 12 December 2005 the applicant's mother drafted a supplement to the above-mentioned appeals, in which she complained, *inter alia*, that Judge Sh. had not been impartial, since, as it transpires from her interview to the *Flag Rodiny* newspaper in June 2001, she had had a preconceived notion of the applicant's guilt from the very beginning of the trial. The copy of this supplement contained in the case file bears no stamps or other evidence that it was admitted by the court for consideration or at least lodged with it.

24. On 16 March 2006 the Supreme Court of Ukraine dismissed the applicant's and his representatives' appeals in cassation, having found that the trial court had correctly assessed the evidence and applied the law and that there was no appearance of any procedural violations which could have affected the outcome of the case.

B. Deterioration of the applicant's health and the conditions of his detention

25. Prior to his arrest, the applicant had been diagnosed as suffering from immature cataracts in both eyes and neurodermatitis.

26. On 2 August 1999 the applicant was placed in the Saky Temporary Detention Centre ("the ITT"), where, according to him, he was held in inhuman conditions (overcrowding, poor sanitary arrangements and risk of pressure from inmates because he was a policeman).

27. On 9 August 1999 the applicant was transferred to the Simferopol no. 15 Pre-trial Detention Centre ("the SIZO").

28. Upon his arrival, the applicant was examined by the SIZO medical staff and placed under dispensary supervision for immature aggravated cataracts in both eyes, diffused eczema, and chronic gastritis.

29. On 28 February 2000 the applicant informed the Prosecutor of the ARC that he had started a hunger strike in protest against being denied the medical assistance he needed.

30. On 27 March 2000 the applicant was examined by the medical committee of the ARC Semashko Hospital, which concluded that at the material time he was suffering from scabies, eczema, chronic prostatitis, nephroptosis, gastritis and reactive hepatitis. It further found that the applicant needed in-patient treatment in a specialised facility for his skin diseases and that his cataracts were mature and needed to be surgically removed after treatment of inflammatory processes.

31. On 5 July 2001 another medical committee determined that the applicant was still suffering from eczema, gastritis and mature cataracts, for which he needed surgery.

32. On 16 July 2001 the applicant was further examined by the head ophthalmologist of the ARC and it was recommended that eye surgery be performed promptly to prevent potential aggravations such as full loss of eyesight and eruption of the eyeballs. The applicant was further advised that in order for the surgery to be effective he needed first to obtain therapeutic inpatient treatment and be supervised by an ophthalmologist for up to two months after the surgery.

33. On 17 August 2001 the Court of the ARC adjourned hearings to allow for the applicant's eye treatment.

34. On the same day the SIZO administration requested the Court of the ARC to consider releasing the applicant from custody, because it was impossible to provide the therapeutic treatment he needed in the SIZO. However, this request was not granted.

35. On 3 September 2001 the applicant was taken to the eye clinic for surgery. However, having allegedly been advised by medical professionals that the success of the surgery was at risk because of his untreated skin inflammations, he refused to be operated on and returned to the SIZO.

36. On 2 September 2005 the SIZO administration petitioned for the applicant's release from detention, referring to the lack of necessary facilities in the SIZO for the applicant's proper treatment and risk of permanent loss of eyesight.

37. On 9 September 2005 the applicant was assigned the first (most advanced) category of invalidity on account of complete loss of eyesight.

38. On 2 August 2006 the applicant was released from custody, as he had already served his sentence.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 1996

39. The relevant provisions of Articles 59 and 63 of the Constitution of Ukraine concerning the right to legal assistance and the right not to incriminate oneself can be found in the judgment of 19 February 2009 in the case of *Shabelnik v. Ukraine* (no. 16404/03, § 25).

B. Code of Criminal Procedure of Ukraine of 1960

40. The relevant provisions of the Code of Criminal Procedure of Ukraine, as worded at the material time, read as follows:

Article 23-2. Separate ruling of the court

“The court, in the event there are grounds for it, shall take a separate ruling (*окрема ухвала*), in which it shall draw the attention of the State bodies, public organisations or officials to the breach of the law established in the facts of case ...

A separate ruling may also be taken where the court reveals breaches of rights of citizens and other breaches of the law that took place during inquiry, pre-trial investigation or consideration of the case by a lower court.

...

The separate ruling must be acted upon as necessary and the court which issued the ruling notified of the results within a month.

In the event that an official leaves the separate ruling without consideration, the measures laid down in Articles 254 - 257 of the Code of Administrative Offences of Ukraine shall be applied.

Article 46. Waiver of the right to a defence

“A suspect, an accused and a defendant in court may at any moment waive [their right to be represented] ...

The waiver may not be accepted: ...

2) in cases concerning crimes by persons who, on account of their physical or mental disabilities (muteness, deafness, blindness and other), cannot exercise their right to defence by themselves;

...”

41. Articles 246, 281 and 396 of the Code provided that if the courts revealed such breaches of the law by the investigative authorities during pre-trial investigation, which could not be remedied at the trial stage, they were to remit the case back to the investigative authorities with instruction to address those breaches.

42. The relevant provisions of the Code concerning preventive measures pending trial are quoted in the judgment in the case of *Yeloyev v. Ukraine*, no. 17283/02, § 35, 6 November 2008.

C. Ruling of the Plenary of the Supreme Court of Ukraine no. 9 of 1 November 1996 “On Application of the Constitution of Ukraine in Carrying out Justice”

43. The relevant parts of the above ruling read as follows:

“... 19. Article 59 of the Constitution of Ukraine provides that everyone has the right to defend himself from accusation and to obtain legal assistance. Therefore, examining a criminal case, the court must, in the circumstances provided by law, ensure the defendant’s right to defence.

... It shall be borne in mind that under Article 62 of the Constitution an accusation may not be based on presumptions or on evidence obtained in an unlawful way. Evidence should be considered as having been obtained unlawfully when, for example, it has been collected and recorded in breach of the human and citizens’ rights guaranteed by the Constitution of Ukraine, or of ... the law on criminal procedure ...”

D. International Materials with Respect to Healthcare Arrangements in Detention Facilities

44. The relevant international materials with respect to healthcare arrangements in detention facilities may be found in the judgment in the case of *Ukhan v. Ukraine* (no. 30628/02, § 50, 18 December 2008).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE HEALTHCARE ARRANGEMENTS IN DETENTION

45. The applicant complained under Article 3 of the Convention that medical assistance and healthcare arrangements in custody had been incompatible with his state of health. The relevant provision of the Convention reads as follows:

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

A. Admissibility

46. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of the above complaint. In particular, he could have brought it at three levels of domestic jurisdiction (they referred to Article 55 of the Constitution, Article 248-1 of the Code of Civil Procedure and Article 2 of the Code of Administrative Justice) or addressed them to the Prosecutor’s Office. They further submitted that, assuming these remedies were considered by the applicant to be ineffective, his complaints concerning the period of his detention in the ITT had been submitted outside the six-month time-limit, since his stay in that facility had ended in August 1999, while the application had been lodged with the Court in 2005. In any way, the complaint was insufficiently specific and unsubstantiated.

47. The applicant alleged that the authorities had been well aware of his health problems and that he had raised relevant complaints on many occasions orally and in writing, without success. He further noted that he had submitted his application within six months of the pronouncement of the final judgment in his case by the Supreme Court of Ukraine.

48. The Court observes that it has rejected non-exhaustion arguments similar to those raised by the Government in the present case in a number of other cases, where the complaints concerned problems of a structural nature in the domestic penitentiary system in question (see, for example, *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001; *Melnik v. Ukraine*, no. 72286/01, §§ 69-71, 28 March 2006; *Koktysh v. Ukraine*, no. 43707/07, § 86, 10 December 2009; and *Logvinenko v. Ukraine*, no. 13448/07, § 57, 14 October 2010). The Court notes that as appears from the case-file materials, the authorities were well aware of the applicant’s health problems and his need for in-patient treatment and specialised

supervision (see paragraphs 29, 30, 34 and 36 above). It therefore rejects the Government's objection concerning non-exhaustion.

49. As regards the six-month argument, referring to its case-law (see *Logvinenko*, cited above, §§ 59-61), the Court considers that the applicant's complaint about insufficient healthcare arrangements, including medical assistance, concerns a continuous situation that lasted throughout his stay in detention. The Court therefore has jurisdiction to examine the compatibility of the healthcare arrangements with the applicant's state of health starting from the date of his arrest (2 August 1999).

50. The Court notes that the applicant's complaint about the inadequacy of healthcare arrangements throughout his stay in detention 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

51. The applicant alleged that he had lost his eyesight because of the inadequate healthcare arrangements throughout his detention.

52. The Government disagreed. They alleged that the applicant had been regularly and systematically supervised by the medical staff of the detention facilities and had obtained all the necessary treatment and support. He had been afforded an opportunity to have an eye surgery. The Government could not be held responsible for the applicant's deliberate refusal to be operated on.

53. The Court reiterates that the decision to place a person in custody imposes on the Government an obligation to attend to his vital healthcare needs, including, where necessary, by arranging access to treatment aimed at preventing aggravation of the detainees' pre-existing medical conditions (see, for example, *Ukhan v. Ukraine*, no. 30628/02, §§ 72-74, 18 December 2008). The Court next observes that refusing to undergo eye surgery, the applicant referred to his doctors' opinion that its success was at risk on account of his untreated skin diseases. It further notes that the administration of the SIZO expressly petitioned the authorities for the applicant's release, acknowledging its incapacity to arrange medical supervision necessitated by his state of health (see paragraphs 34 and 36 above). However, these petitions were not granted. The Government have provided no information to rebut the evidence that conditions for the applicant's treatment had been inadequate.

54. Regard being had to the above considerations, the Court finds that the authorities have not done what could reasonably be expected of them to address the deterioration of the applicant's health and his loss of eyesight. As a result he was subjected to inhuman and degrading treatment.

55. There has therefore been a violation of Article 3 of the Convention.

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

56. The applicant complained that his pre-trial detention had been unjustifiably long. He relied on Article 5 § 3 of the Convention, which reads as follows:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and 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

57. The Government did not submit any comments on the admissibility of this complaint.

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

B. Merits

59. The applicant contended that his pre-trial detention had lasted an unreasonably long time.

60. The Government contested this view. They contended that the applicant had been charged with very serious crimes. They further noted that the case had been exceptionally complicated. It had involved nineteen defendants implicated in over thirty counts of various crimes. During the pre-trial investigation the authorities had questioned eighteen victims, one hundred and twenty witnesses, carried out twenty reconstructions of the crime scenes and ordered more than fifty various expert assessments. These assessments lasted cumulatively 726 days. At the trial stage seventy-seven witnesses and eight experts had been questioned. Regard being had to the seriousness of the charges against the applicant, a risk that he would abscond or tamper with evidence and the complexity of the proceedings, the length of his detention had not been unreasonable.

61. The Court notes that the period to be taken into account commenced on 2 August 1999 (the date of the applicant's arrest) and ended on 17 November 2004 (the date when the applicant was convicted pursuant to the judgment of the first-instance court). It therefore lasted five years and three months.

62. Having regard to general principles established in its case-law (see *I.A. v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 102; *Labita v. Italy* [GC], no. 26772/95, § 153,

ECHR 2000-IV; and *Howiecki v. Poland*, no. 27504/95, §§ 61-63, 4 October 2001), the Court notes that the applicant's arrest of 2 August 1999 was based on the strong suspicion that he had committed the offences with which he had been charged. It accepts that the fact that the applicant was suspected of serious offences and could obstruct their investigation may have initially warranted his detention. However, after a certain lapse of time the authorities were obliged to give more detailed and updated reasons for depriving him of liberty. Regard being had to the particularly long period of the applicant's detention in the present case and his health deterioration, (which had urged the detention facility's administration to petition for his release), the Court considers that exceptionally compelling reasons were needed to justify keeping him detained.

63. In the meantime, it does not transpire either from the Government's observations or from the other case-file materials that any such exceptional reasons existed. Lacking any specific indications as to how the applicant's release would have been dangerous or detrimental for the resolution of the case, the Court cannot accept that the general complexity of the case and seriousness of charges against the applicant could be regarded as "sufficient" reasons for holding him in custody for over five years.

64. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

III. ALLEGED UNFAIRNESS OF THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

65. The applicant further complained that the criminal proceedings against him had been unfair, since he had not had an advocate at the initial stage of the proceedings. Furthermore, Judge Sh., who had presided in first-instance court, had not been impartial, as she had expressed a preconceived notion of the defendants' guilt in her interview to the *Flag Rodiny* newspaper, after the trial had just begun. The applicant referred to Article 6 §§ 1, 2 and 3 (c) of the Convention in this connection. The relevant provisions read as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...”

A. Admissibility

1. Breach of the right to be represented by a lawyer

66. The Government did not submit any comments concerning the admissibility of this complaint.

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

2. Lack of impartiality and breach of the presumption of innocence

68. The Government contended that the applicant had not exhausted domestic remedies with respect to his complaints about a breach of the presumption of innocence and lack of impartiality of Judge Sh. In particular, he could have requested her removal from the proceedings at the trial stage; raised a relevant complaint in his cassation appeal or instituted separate civil proceedings demanding rectification of the newspaper article and damages.

69. Alternatively, the Government alleged that, assuming the applicant considered there were no effective remedies for him to exhaust, he had lodged the present complaint out of the six-month time-limit. He should have learned about the article no later than on 29 January 2003, when another co-defendant asked for it to be added to the case-file materials. This aspect of the application was therefore submitted out of time.

70. The applicant alleged that he had complained about the situation orally and in writing, but without success.

71. The Court notes that the only document in the case-file, in which the present complaint is flagged before the domestic authorities, is a copy of the supplement to the cassation appeal signed by the applicant's mother on 12 December 2005 (see § 22 above), in which she alleges a lack of impartiality on the part of Judge Sh., referring to her interview in the *Flag Rodiny* newspaper. However, it is unclear why neither the applicant, nor his representatives, raised this issue in their original cassation appeals, drafted about one year before the supplement at issue. Likewise, there is no evidence that this supplement was admitted for consideration by the Supreme Court of Ukraine.

72. In these circumstances the Court cannot conclude that the applicant aired his complaint before the courts within the framework of the criminal

proceedings against him in any way. The applicant likewise failed to substantiate why recourse to the above-mentioned remedies would have been ineffective in his case. In these circumstances the Court considers that by failing to bring this complaint to the attention of the domestic courts, the applicant did not comply with the rule of exhausting domestic remedies (see *Koval v. Ukraine* (dec.), no. 65550/01, 10 December 2002, and *Znaykin v. Ukraine*, no. 37538/05, § 69, 7 October 2010).

73. In the light of the above, the Court does not find it necessary to deal with the Government's remaining arguments and rejects this complaint in accordance with Article 35 § 1 and 4 of the Convention.

B. Merits

1. Submissions of the parties

74. The applicant alleged that his right to be represented by a lawyer had been breached, as he had not been provided with a lawyer before his first questioning on 3 August 1999, although he had explained to the investigator that he was almost blind and unable to read the documents he was signing. In the absence of a lawyer, he had made self-incriminating statements during the questioning at issue. He also contended that the waiver of his right to have an advocate, signed by him on that day, was not genuine, as the investigator had tricked him into signing the papers by promising his release from custody.

75. The Government alleged that the applicant's rights had not been breached. The applicant, being a policeman, should have been well aware of his procedural rights and could not have been ignorant of the relevant procedures. Further, his mother had been present during his questioning on 3 August 1999 and had read all the documents to him before he had signed them. The applicant's waiver of his right to a lawyer had therefore been well-informed and deliberate. The crimes imputed to the applicant did not make participation of a lawyer obligatory under national law. Finally, the courts, being mindful of the applicant's retraction of his initial statements, had not used them in the body of evidence laying the basis for his conviction. There was therefore no basis for considering that the applicant's privilege against self-incrimination had been breached in any way.

2. The Court's assessment

76. Examining the facts of the present case in light of the principles developed in its case-law (see, for example, *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008 and *Leonid Lazarenko v. Ukraine*, no. 22313/04, §§ 49, 28 October 2010), the Court reiterates that access to a lawyer should be provided as from the first interrogation of a suspect by the

police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The Government have provided no evidence that any such compelling reasons existed in the applicant's case. On the contrary, it appears that domestic law expressly enjoined the investigative authorities from accepting waivers of the right to be legally represented from blind defendants (see paragraph 40 above). Regard being had to the applicant's complaints about not being able to see what he was signing, the investigative authorities should have shown special diligence in handling his situation.

77. In the present case, the applicant was arrested on 2 August and first questioned as a suspect on 3 August 1999. On 5 August 1999 he was indicted for robbery and questioned as an accused. According to the applicant, he obtained access to a lawyer on 5 August 1999; however, it is unclear from the available materials whether the lawyer was present on that date during the applicant's questioning and when the applicant signed the indictment.

78. The Court notes that the applicant's self-incriminating statements were not referred to by the domestic courts in substantiating his conviction. They relied, instead, on the testimonies of direct witnesses – his co-defendants and victims of the robberies at issue. It has not been argued that the applicant was unable to question these witnesses and contest their allegations, including with the help of his lawyer during the court hearings (see, by contrast, *Lutsenko v. Ukraine*, no. 30663/04, §§ 52-53), 18 December 2008). It has not therefore been proved "beyond reasonable doubt" that his conviction turned on the statements obtained from him in breach of the privilege against self-incrimination.

79. On the other hand, it is impossible to exclude that the existence of the self-incriminating statements in itself influenced the way the investigation was conducted and the manner in which other evidence was taken and interpreted. This is particularly so since, based on the available materials, the domestic judicial authorities never expressly reacted to the applicant's complaints of a breach of his right to legal assistance. The Court notes that the domestic law contains a number of procedural means to this end, including, in particular, remittal of the case for an additional investigation, issuing of a separate ruling (*окрема ухвала*) pointing to a breach of law by an investigator or a formal pronouncement that the evidence collected in breach of the right to legal assistance was excluded from trial (see paragraphs 40-41 above).

80. It is not for this Court to decide which particular measure should have been taken by the judicial authorities in the context of the present case. However, in the absence of any formal action on their part condemning the breach of the applicant's right to access to a lawyer before his initial questioning, the Court considers that, regardless of whether his self-

incriminating statements laid the basis for his conviction, this breach was not sufficiently redressed.

81. There was, therefore, a violation of Article 6 § 1 of the Convention in taken together with Article 6 § 3 (c) of the Convention in the present case.

IV. ALLEGED VIOLATION OF THE RIGHT TO A TRIAL WITHIN A REASONABLE TIME

82. The applicant further complained under Article 6 § 1 of the Convention that the length of the criminal proceedings against him had been incompatible with the “reasonable time” requirement.

A. Admissibility

83. The Government did not comment on admissibility of this complaint.

84. The Court notes that in criminal matters, the “reasonable time” referred to in Article 6 § 1 of the Convention begins to run as soon as a person is “charged”, in other words, given the official notification by the competent authority of an allegation that he has committed a criminal offence. This definition also corresponds to the test whether “the situation of the [suspect] has been substantially affected”. As regards the end of the “time”, in criminal matters the period governed by Article 6 § 1 of the Convention covers the whole of the proceedings in issue, including appeal proceedings (see *Merit v. Ukraine*, no. 66561/01, § 70, 30 March 2004).

85. The period to be taken into account in the present case thus commenced on 2 August 1999 (the date of the applicant’s arrest) and finished on 16 March 2006 (the date of pronouncement of the final judgment by the Supreme Court of Ukraine). It therefore lasted six years and seven months at two levels of jurisdiction.

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

B. Merits

87. The applicant alleged that the proceedings had been unreasonably long.

88. The Government alleged that the length of the proceedings had not been unreasonable, regard being had to the exceptional complexity of the

case. There had been no unreasonable delays for which the authorities could be held responsible.

89. The Court observes that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

90. The Court further notes that for the entire period of the criminal proceedings the applicant in the present case was held in custody – a fact which required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously (see, for example, *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 83, ECHR 2003-IX, and *Yurtayev v. Ukraine*, no. 11336/02, § 37, 31 January 2006).

91. The Court appreciates that the criminal proceedings at issue, which concerned more than thirty counts of criminal activity by nineteen individuals, were of particular complexity. It notes that the trial court held over 160 hearings within a three-year term and produced a judgment some 200 pages long.

92. On the other hand, the Court considers that these circumstances are not sufficient to justify the entire over six-year delay in the resolution of the applicant's case, particularly as he was personally implicated in two counts of robbery only. It is not for the Court to substitute its view for that of the domestic authorities in deciding whether or not it was feasible to disjoin the applicant's case and whether all the investigative actions and hearings that took place were necessary and organized in an efficient manner. At the same time, it notes that there were some delays in the proceedings which remained unexplained by the Government in their observations. These included the nine-month delay between the completion of the investigation on 20 July 2000 and the first preparatory hearing of the case on 4 May 2001; the five-month delay in arranging for technical recording of the hearings (between December 2001 and May 2002); the six-month delay between the last hearing in the first-instance court on 22 May 2004 and the pronouncement of the judgment on 17 November 2004, and a delay of over one year between the pronouncement of the sentence and its review by the Supreme Court of Ukraine.

93. Having examined all the material submitted to it, the Court is unable to conclude that the authorities handled the applicant's case with requisite diligence. The Court considers that in the instant case the length of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement.

94. There has accordingly been a breach of Article 6 § 1.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

95. In addition to the above complaints, the applicant also complained under Article 3 of the Convention about the physical conditions of his detention in the ITT and the SIZO; under Article 6 § 3 (d) of the Convention that the trial court had not questioned an unspecified witness and under Article 8 of the Convention that his house had been unlawfully searched. He also invoked Article 13 as to the facts of the present case without further specification.

96. In the light of all the material before it, 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 provisions relied upon by the applicant.

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. 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

99. The applicant claimed 200,000 euros (EUR) in respect of non-pecuniary damage, referring, primarily, to his suffering on account of the deterioration of his health in detention. He also claimed EUR 20,000 in respect of pecuniary damage, without any specification.

100. The Government alleged that these claims were exorbitant and unsubstantiated.

101. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 18,000 in respect of non-pecuniary damage.

B. Costs and expenses

102. The applicant also claimed EUR 850 in legal fees.

103. The Government alleged that this claim was not substantiated.

104. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case the applicant was granted legal aid. As the only contribution from the lawyer was the preparation of brief observations in response to those of the Government in the Russian language, the amount of the grant was established at EUR 567. The applicant did not provide any evidence that any payments to the lawyer in excess of this sum were actually and necessarily incurred in the circumstances of his case. The Court therefore makes no award.

C. Default interest

105. 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. *Declares* the complaints concerning healthcare arrangements in detention, length of pre-trial custody, lack of access to a lawyer before initial questioning and length of criminal proceedings against the applicant admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
4. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the applicant's initial questioning without a lawyer;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of criminal proceedings against the applicant;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 18,000 (eighteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of Ukraine 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;

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

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President