



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

FIFTH SECTION

CASE OF KORNEYKOVA v. UKRAINE

(Application no. 39884/05)

JUDGMENT

STRASBOURG

19 January 2012

FINAL

19/04/2012

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

In the case of Korneykova 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 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 39884/05) 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, Ms Viktoriya Yuryevna Korneykova (“the applicant”), on 18 October 2005.

2. The applicant was represented by Mr G. Tokarev, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged that she had been unlawfully and arbitrarily arrested and detained and that she had had no effective opportunity to bring proceedings to challenge her detention or to obtain compensation for the unlawful deprivation of liberty.

4. On 2 December 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1990 and lives in Kharkiv.

6. On an unspecified date the Dzerzhinsky District Police of Kharkiv instituted criminal proceedings against the applicant, who was fourteen

years old at the material time, on suspicion of theft of a mobile telephone and acting as an accomplice in an unsuccessful attempted robbery of earrings, a watch and a mobile telephone, in company with two other minors, in January 2005. The robbery attempt was interrupted when two witnesses to the incident intervened.

7. On 29 March 2005 a bill of indictment was drafted and the investigator ordered the district police to bring the applicant in for questioning. In addition, the investigator imposed an undertaking not to abscond on the applicant as a preventive measure.

8. On the same date the police reported that it was impossible to locate the applicant and placed her on the “wanted list”.

9. On 19 April 2005 the Dzerzhinsky District Police of Kharkiv arrested the applicant at her mother’s home address and drew up an arrest report, the relevant parts of which read as follows:

“Investigator ... L., on 19 April 2005 at 15:00 in accordance with Article 115 of the Criminal Procedure Code of Ukraine detained, on suspicion of the commission of a crime: Korneykova Viktoriya Yuryevna ...

The crime which Korneykova V. Y. was detained on suspicion of having committed falls under Article 15 paragraph 2 [and] Article 186 paragraph 2 of the Criminal Code of Ukraine.

Grounds and motives for detention: commission of a grave offence; may abscond from investigation and court, obstruct establishment of the facts of the case ...”

10. On 21 April 2005 Mr Tokarev, the applicant’s lawyer, lodged a complaint with the Dzerzhinsky District Court of Kharkiv (hereinafter – “the District Court”) alleging, in particular, that the applicant’s arrest and detention were in contravention of Article 29 of the Constitution of Ukraine, which authorised extra-judicial detention only where it was necessary to prevent or stop a crime. He argued that, since the crimes imputed to the applicant had taken place in January 2005, in accordance with Article 165-2 of the Code of Criminal Procedure of Ukraine (hereafter – “the CCP”) the investigating authorities had been under an obligation to seek a judicial order in order to arrest the applicant. In addition, he noted that Article 434 of the CCP allowed the detention of minors only in exceptional circumstances, which were absent in the applicant’s case.

11. On the same day the investigating authorities requested the District Court to authorise the applicant’s remand in custody. Having held a hearing in the presence of the applicant and her advocate, the court authorised the measure requested. In its reasoning the court noted that the applicant had been charged with serious offences and had absconded from the investigating authorities, and that this justified her placement on the wanted list. Furthermore, her mother, who had been deprived of her parental rights, was unlikely to be able to ensure that the applicant would appear before the investigating authorities, as she herself had a criminal record and suffered

from alcoholism. In addition, the court referred to a report from the staff responsible for the applicant's welfare at the boarding school where she was officially residing, which stated that the applicant had behavioural problems, including a proneness to run away from the school. In the light of these findings the court concluded that if not detained the applicant might commit another crime or obstruct the investigation. The court's decision bore no reference to the applicant's advocate's complaint about the unlawfulness of her arrest and detention between 19 and 21 April 2005.

12. On 24 April 2005 Mr Tokarev appealed against the court decision of 21 April 2005. He alleged, in particular, that the District Court had failed to analyse the applicant's situation from the angle of Article 434 of the Code of Criminal Procedure, which allowed for the placement of a minor in detention pending trial only on condition that there existed "exceptional circumstances". He submitted that in the circumstances of the present case the detention was unwarranted. In particular, the crimes with which the applicant had been charged were not exceptionally serious and the findings that she might abscond, obstruct the investigation or commit another offence were speculative. In particular, no evidence had been presented that during the three months which had passed since the applicant's alleged offences she had attempted to commit another crime or obstruct the investigation. Moreover, by April 2005 the evidence had been largely collected, which made it improbable that the applicant would obstruct the investigation. As regards the allegation that the applicant had already absconded, which justified her placement on the wanted list, the authorities had presented no evidence that the applicant had ever been subpoenaed to appear for questioning either at her school or at her mother's address. She had been placed on the wanted list on the day the order to bring her in for questioning had been issued. Eventually she had been arrested at her mother's address, which was her permanent address and whose location was well known to the police. In the meantime, the applicant's health and well-being was likely to be seriously endangered by detention in an ordinary pre-trial detention facility, as she was suffering from tuberculosis and had a history of in-patient treatment for psychiatric disturbances. Mr Tokarev also noted that he had not been given a copy of the decision of 21 April 2005 and requested that the applicant be invited to participate in the appeal hearing in person.

13. On 25 April 2005 the investigator in the applicant's case informed Mr Tokarev in a letter that he could access the decision of 21 April 2005 at the investigator's office at 'any convenient time'.

14. On 26 April 2005 Mr Tokarev amended his initial appeal against the decision of 21 April 2005. In particular, he noted that his complaint that the applicant's arrest and detention between 19 and 21 April 2005 had been unlawful had not been considered. The applicant submitted to the Court a copy of this amended appeal bearing Mr Tokarev's original signature. There

is no receipt slip or any other evidence that the document was ever submitted for judicial consideration.

15. On 27 April 2005 the Kharkiv Regional Court of Appeal (hereinafter – “the Court of Appeal”) dismissed Mr Tokarev’s appeal following a hearing at which the prosecutor and Mr Tokarev, but not the applicant herself, were present. In its decision the Court of Appeal referred to the same arguments as the first-instance court and additionally mentioned that the applicant’s state of health was irrelevant to the finding that she might abscond, obstruct the investigation or commit another crime.

16. In the meantime, on 26 April 2005 the Dzerzhinsky District Police suspended the criminal proceedings against the applicant on account of her state of health, stating in its decision that all investigative actions necessary at the material time had been completed. Subsequently the investigation was resumed and suspended on several occasions on account of the applicant’s state of health.

17. On 12 May 2005 Mr Tokarev inquired of the District Court in a letter as to the state of consideration of his complaint about the unlawfulness of the applicant’s arrest and detention between 19 and 21 April 2005 and allegedly received no answer.

18. On 18 May 2005 the District Court decided, without a hearing but in presence of the prosecutor, to commit the applicant for an in-patient psychiatric assessment.

19. On 30 May 2005 the Dzerzhinsky District Prosecutor allowed the applicant’s premature release from detention under an obligation not to abscond, referring to her tuberculosis, which required in-patient treatment. On an unspecified date the applicant was committed for in-patient psychiatric assessment.

20. On 24 June 2005 the applicant was released from the psychiatric institution following her psychiatric assessment, according to which she was not suffering from any psychotic disorders.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIAL

A. Relevant domestic law

21. The text of the relevant provision of the Constitution of Ukraine of 1996 (Article 29) can be found in the judgment in the case of *Svershov v. Ukraine* (no. 35231/02, § 39, 27 November 2008).

22. The text of the relevant provisions of Articles 148, 149 and 165-2 of the Code of Criminal Procedure of Ukraine of 1960 (“the CCP”) can be found in the judgment in the case of *Osypenko v. Ukraine*, no. 4634/04, § 33, 9 November 2010).

23. Other relevant provisions of the CCP, as worded at the material time, read as follows:

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

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

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

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

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

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

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

- (1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of the preliminary detention established by law has expired or if the arrest has been effected in violation of the requirements of paragraphs 1 and 2 of the present Article;
- (2) release the detainee and select a non-custodial preventive measure;
- (3) bring the detainee before a judge with a request to impose a custodial preventive measure on him or her.

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

of seventy-two hours of detention, the complaint shall be considered by the judge within five days after receiving it.

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

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

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

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

Article 115. Arrest of a suspect by an investigator

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

Article 205. Committal of an accused for an in-patient assessment

"If a forensic medical or psychiatric examination necessitates long-term monitoring or assessment of the suspect, the court, at the investigator's request and with the prosecutor's authorisation, may order the suspect's committal to the relevant medical institution.

The matter shall be examined according to the procedure established by paragraph five of Article 165-2; the ruling of a judge may be appealed against within three days by the prosecutor, the accused, or his defence counsel or statutory representative ..."

Article 434. Detention and placement in custody of a minor

"Detention and placement in custody as a preventive measure may be applied to a minor only in exceptional circumstances, where this is warranted by the gravity of the crime imputed to him, in the presence of grounds, and according to the procedure established by Articles 106, 148, ... of this Code."

24. Relevant provisions of the Act "on the procedure for the compensation of damage caused to a citizen by the unlawful actions of bodies of inquiry, the pre-trial investigative authorities, prosecutors and courts" of 1 December 1994 (with amendments) can be found in the judgment in the case of *Dubovik v. Ukraine*, nos. 33210/07 and 41866/08, § 34, 15 October 2009.

B. Relevant international material

1. *The recommendation of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency (no. R (87)20), adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies*

25. The above document, in so far as relevant, reads as follows:

“... recommends the Governments of Member States to review, if necessary, their legislation and practice with a view: ...

7. to exclude the remand in custody of minors, apart from exceptional cases of very serious offences committed by older minors; in these cases, restricting the length of remand in custody and keeping minors apart from adults; arranging for decisions of this type to be, in principle, ordered after consultation with a welfare department on alternative proposals ...”

2. *The recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies*

26. The above document, in so far as relevant, reads as follows:

“15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. They should not be detained in police custody for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time further. The detention of juveniles in police custody should be supervised by the competent authorities.

16. When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial. This period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in proceedings are fully justified by exceptional circumstances.

17. Where possible, alternatives to remand in custody should be used for juvenile suspects, such as placements with relatives, foster families or other forms of supported accommodation. Custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures.”

3. *The United Nations Convention on the Rights of the Child of 20 November 1989*

27. Article 37 of the above document, in so far as relevant, reads as follows:

“States Parties shall ensure that ...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION ON ACCOUNT OF THE APPLICANT’S ARREST AND DETENTION BETWEEN 19 AND 21 APRIL 2005

28. The applicant complained that her arrest and detention between 19 and 21 April 2005 had not been based on law and had been arbitrary. She invoked Article 5 § 1 (c) of the Convention, which reads 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:

...

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

...”

A. Admissibility

29. The Government did not comment on the admissibility of this complaint.

30. The Court notes that the 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

31. The applicant submitted that according to Article 29 of the Constitution of Ukraine an individual can be arrested only on the basis of a reasoned court order. The only exception to this rule is where there is an urgent necessity to prevent or suppress an offence. As the offences imputed to the applicant were committed in January 2005, arresting her without a court order in April 2005 had not been in compliance with Article 29 of the Constitution. This arrest had also been arbitrary and unwarranted by the circumstances of the case.

32. The Government disagreed. They submitted that the applicant's arrest and detention had been based on Article 115 of the CCP and had been lawful. They also maintained that the applicant's complaint concerning the lawfulness of the arrest and detention had been examined and dismissed by the District Court at the same time as the investigative authorities' application for her to be remanded in custody, as evidenced by the fact that the applicant had not raised this matter further in her appeal against the court's decision of 21 April 2005.

33. The Court 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). The expression "lawful" in Article 5 § 1 essentially refers back to national law and lays down an obligation to conform to the substantive and procedural rules thereof. The Court may review whether national law has been observed for the purposes of this Convention provision; however, it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 84, 24 June 2010). The Court further reiterates that the "lawfulness" of detention under

domestic law is the primary, but not always the decisive element. The Court must, in addition, be satisfied that the detention, during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner (see *Yeloyev v. Ukraine*, no. 17283/02, §§ 41-42, 6 November 2008).

34. The Court considers that in the circumstances of the present case it is not in a position to assess *in abstracto* the applicant's argument concerning unconstitutionality of her arrest without a court warrant. It notes, on the other hand, that according to the police report of 19 April 2005, the legal basis for the applicant's arrest was Article 115 of the CCP (see paragraph 23 above). This provision does not enumerate the exhaustive grounds for an arrest and refers, instead, to several other CCP provisions, none of them having been cited by the police in the applicant's case. It is therefore unclear from the report, which of the provisions of the domestic law served as the exact basis for the applicant's arrest. Furthermore, the report presented the reasons for the applicant's arrest in a formalistic and standardised way, without explaining why it was necessary in the particular circumstances. Insofar as the applicant raised a complaint about arbitrariness of her arrest with the domestic judicial authorities, it appears that no reasoned decision on the matter has ever been produced. Absent clear indication of the legal grounds for the applicant's arrest and reasons making application of the relevant legal provisions necessary, the Court considers that the applicant's arrest was not free from arbitrariness.

35. There has therefore been a violation of Article 5 § 1 (c) of the Convention in this regard.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 (C) AND 3 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S REMAND IN CUSTODY ON 21 APRIL 2005

36. The applicant further complained that the court order of 21 April 2005 to remand her in custody had been unfair and not based on sufficient reasons. She referred to Article 5 § 1 (c), cited above, and Article 5 § 3 of the Convention in this connection. Article 5 § 3 of the Convention 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

37. The Government did not comment on the admissibility of this complaint.

38. The Court considers that Article 5 § 1 (c) of the Convention must be read in conjunction with Article 5 § 3, which forms a whole with it (see *Ciulla v. Italy*, 22 February 1989, § 38, Series A no. 148, and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 and 71, ECHR 2003-IX (extracts)), and that the complaint at issue may be considered under both provisions simultaneously.

39. It further observes that the complaint at issue is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds. This complaint must therefore be declared admissible.

B. Merits

1. The submissions of the parties

40. The applicant submitted that according to Article 434 of the CCP, a minor could be placed in custody only in 'exceptional circumstances'. The national law did not define the notion of 'exceptional circumstances', thus applicable provisions were ambiguous. Furthermore, at the time of her remand in custody, the applicant had been only fourteen years old, which was the minimum age for criminal liability. There were no 'exceptional circumstances' in her case justifying the application of such a harsh measure as detention. The courts had arbitrarily refused to consider the applicant's arguments under Article 434 of the CCP, as well as a number of other arguments in favour of her release.

41. Firstly, the judicial authorities had paid no attention to her arguments that the crimes imputed to her (theft of a mobile telephone and attempted robbery of earrings, a watch and a mobile telephone) were not particularly serious or violent. Secondly, these crimes had been committed three months before her arrest. There was no evidence that she had engaged in any other criminal activities within this period; thus the argument that if left at liberty she would re-offend, relied upon by the District Court, was speculative. Thirdly, the argument that the applicant might abscond was also speculative. There was no evidence that she had ever made any attempt to interfere with the investigation or evade questioning. The applicant had been living with her mother at the time and the police were well aware of that fact. They had never attempted to summon the applicant for questioning in an official manner before placing her on the wanted list. Fourthly, the courts had taken no account of the numerous medical certificates concerning the applicant's poor health, in particular, that she suffered from tuberculosis and psychiatric

disturbances, which could be aggravated by detention in an adult detention facility. She had run away from the school because she had been feeling abandoned and ill-treated. The negative character references provided to the court by those responsible for her care at the school (whose role in the proceedings was supposed to be to defend her interests) indicated that they were much more interested in ridding themselves of a disturbed child than in creating the conditions for her adequate supervision. Treating their references as the cornerstone of the reasoning for detaining her was unfair and arbitrary, particularly given that the investigation had been suspended several days after her detention on account of her state of health and that soon afterwards (on 30 May 2005) she had been released on health grounds on an undertaking not to abscond.

42. The Government submitted that remanding the applicant in custody had been justified on several grounds. Firstly, she had been charged with having committed several crimes for which the punishment could entail deprivation of liberty. Secondly, in view of her personality and life-style there had been a serious risk that if she remained at liberty she would commit further crimes and obstruct the investigation. According to the references from the boarding school, the applicant was prone to truancy, drinking alcohol and smoking and had a negative influence on her schoolmates. Moreover, the applicant had already been placed on the wanted list before her arrest, which evidenced her proneness to abscond. These reasons, on the basis of which the District Court had remanded her in pre-trial custody, were relevant and sufficient for the ordering of the measure.

2. The Court's assessment

43. The Court notes that in order for deprivation of liberty to be considered free from arbitrariness, it does not suffice that this measure is executed in conformity with national law; it must also be necessary in the circumstances (see *Nešřák v. Slovakia*, no. 65559/01, § 74, 27 February 2007). For the Court, detention pursuant to Article 5 § 1 (c) must embody a proportionality requirement, which requires a reasoned decision balancing relevant arguments for and against release (see *Ladent v. Poland*, no. 11036/03, § 55, ECHR 2008-... (extracts) and *Khayredinov v. Ukraine*, no. 38717/04, § 86, 14 October 2010). The arguments for and against release, including the risk that the accused would hinder the proper conduct of the proceedings, must not be taken '*in abstracto*', but must be supported by factual evidence (see *Becciev v. Moldova*, no. 9190/03, §§ 56 and 59, 4 October 2005).

44. Further, a very important factor in the balancing exercise is a defendant's age: thus, pre-trial detention of minors should be used only as a measure of last resort and for the shortest possible period (*Selçuk v. Turkey*,

no. 21768/02, §§ 35-36, 10 January 2006, and *Nart v. Turkey*, no. 20817/04, §§ 31 and 33, 6 May 2008).

45. The Court notes that the District Court's decision of 21 April 2005 to remand the applicant in custody was taken at the close of a hearing in which the applicant, although represented by a lawyer, also participated in person. The District Court advanced detailed reasons for ordering her detention. These reasons included an assessment of the applicant's personality, life-style and living conditions and, in particular, the risk that her supervisors would not be able to prevent the applicant from truancy and failing to appear before the investigative authorities.

46. On the other hand, the Court emphasizes that the applicant in the present case was only fourteen years old. Her detention was an exceptional measure within the meaning of Article 434 of the CCP, according to which a minor may be remanded in custody only in "exceptional circumstances". Notwithstanding that the applicant's lawyer repeatedly referred to this provision in his submissions, the judicial authorities did not elaborate as to why the circumstances of the applicant's case qualified as "exceptional". Moreover, they omitted any reference whatsoever to Article 434 of the CCP in their reasoning, in which circumstances the Court is not called upon to assess the quality of this provision *in abstracto*.

47. Moreover, in assessing the applicant's personality the domestic courts chose to rely primarily on her unfavourable character references from her boarding school (see paragraph 11 above). While relying on the inherent risk that she might abscond or engage in further criminal activity given her life-style, they failed to give any weight to the applicant's advocate's arguments that there had been no complaints that the applicant had engaged in criminal activity between January and April 2005; that the applicant's placement on the wanted list had been arbitrary, as she had a permanent home at her mother's address; that the investigation was nearing its completion; that the collection of evidence was unlikely to be obstructed; and that there had been no instances of the applicant obstructing or evading the investigation in any way prior to her arrest. Likewise, the judicial authorities did not elaborate on the argument about the likelihood of damage to the applicant's health – she suffered from tuberculosis and psychiatric disturbances – in the event of her detention in a standard pre-trial detention facility for adults.

48. In the light of the foregoing, the Court considers that in the circumstances of the present case the domestic authorities failed to advance comprehensive reasoning for imposing on the fourteen-year-old applicant a custodial measure which, according to both international and domestic standards, should have been used only as a measure of last resort.

49. There has therefore been a violation of Article 5 § 1 (c) in this respect.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PLACEMENT FOR IN-PATIENT PSYCHIATRIC ASSESSMENT

50. The applicant further complained under Article 5 § 1 about her committal for psychiatric assessment on 18 May 2005.

51. The Government submitted that the applicant had not exhausted domestic remedies with respect to the above complaint, as she had never appealed against the committal decision of 18 May 2005.

52. The applicant submitted that neither she nor her lawyer had been apprised in a timely manner of the prosecution's application to commit her for the psychiatric assessment or of the date on which this application was to be considered. The applicant's lawyer, having learned about the committal order at the end of May 2005 by mere chance, did not attempt to challenge it, as his appeal would have already been out of time in any event.

53. The Court reiterates that Article 35 of the Convention requires that complaints made before the Court should have been made to the appropriate domestic body, at least in substance, and be in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural methods that might prevent a breach of the Convention should have been used (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200). It is incumbent on a Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government has in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Vladimir Fedorov v. Russia*, no. 19223/04, § 39, 30 July 2009).

54. The Court notes that the applicant presented no evidence that it had not been open to her to appeal against the committal decision once she had learned of it (which should have been no later than the end of May 2005, when it was presented for execution) and, if need be, to request renewal of the applicable time-limits on the basis that she had been apprised of this decision with a delay. The Court therefore considers itself enjoined from examining at first instance a matter which should normally be ventilated first through the domestic judicial authorities. It therefore upholds the Government's objection.

55. Accordingly, this part of the application should be rejected for non-exhaustion in accordance with Article 35 §§ 1 and 4 of the Convention.

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

56. The applicant further complained that the courts had failed to consider her advocate's complaint that her arrest and detention on 19 April 2005 had been unlawful; that she had not been summoned to the hearing concerning her appeal against the decision of 21 April 2005; and that her advocate had had restricted access to the case file in preparing his appeal against that decision. The applicant referred to Article 5 § 4 of the Convention in respect of the above complaints, which reads as follows:

“...

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

...”

A. Admissibility

1. Alleged inability to bring proceedings to have the lawfulness of the applicant's arrest and detention between 19 and 21 April 2005 reviewed

57. The Government submitted that the applicant's complaint concerning the unlawfulness of her arrest and detention up to 21 April 2005 had been properly examined in accordance with Article 106 of the CCP on 21 April 2005 within the framework of the remand proceedings. In any case, it had been open to the applicant to raise the matter in her appeal against the remand decision, which she had not done. As the applicant's complaint had been examined within the framework of the remand proceedings and no appeal lay against the District Court's alleged omission in this regard, there were no grounds for the latter to consider the same complaint in separate proceedings at a later date, as requested by the applicant's lawyer.

58. The applicant submitted that her complaint concerning the unlawfulness of her arrest and detention up to 21 April 2005 had never been examined, either within the framework of the remand proceedings or separately, notwithstanding that on 12 May 2005 her advocate had sent the District Court an enquiry in this respect, which remained unanswered.

59. The Court observes that according to the case-file materials, on 21 April 2005, before the court hearing scheduled to examine the investigation's application to remand the applicant in custody, the applicant, represented by Mr Tokarev, submitted to the District Court a complaint concerning the unlawfulness of her arrest and detention between 19 and 21 April 2005. It appears that, regard being had to the provisions of

Article 106 of the CCP (see paragraph 23 above), this complaint should normally have been examined at the hearing of 21 April 2005. However, it appears that no court decision was produced expressly addressing the complaint at issue.

60. Based on the available materials, the applicant had two possible avenues of redress in this situation: (1) to complain about the District Court's failure to rule on her complaint in her appeal against the decision of 21 April 2005 and (2) to demand separate examination of this complaint.

61. As regards the first option, the applicant did not raise a relevant complaint in her initial appeal lodged on 24 April 2005 and did not provide any explanations why she could not have done so. In so far as she appears to have brought the complaint up in her amended appeal of 26 April 2005, she provided no evidence that this version of her appeal was submitted for consideration. As it has neither been shown that the applicant duly availed herself of the opportunity to appeal, nor argued that resorting to this possibility was *prima facie* futile, the Court cannot conclude that the applicant in practice was deprived of her right provided for in domestic law to bring the appeal proceedings.

62. As regards the possibility to demand a separate examination of the present complaint, the Court notes that on 12 May 2005 the applicant's advocate sent a letter to the District Court concerning this matter. It further observes that it is usually incumbent on the interested party to display special diligence in the defence of his interests (see, among other authorities, *mutatis mutandis*, *Gurzhyy v. Ukraine* (dec.), no. 326/03, 1 April 2008). The Court considers that, even assuming that by an omission on the part of the court's personnel the above letter was misplaced or otherwise neglected, in the absence of any further action from the applicant insisting that the question be followed up, this fact alone would be insufficient to consider that this avenue of bringing proceedings to decide on the lawfulness of the applicant's arrest and detention up to 21 April 2005 was unavailable to her.

63. In the light of the aforesaid, the Court considers that the applicant's complaint about having been unable to bring proceedings to decide on the lawfulness of her arrest and detention up until 21 April 2005 is manifestly ill-founded and should be rejected in accordance with Article 35 § 3 (a) and 4 of the Convention.

2. Unfairness of the appeal proceedings

64. The Government did not submit any comments concerning the admissibility of the applicant's complaint concerning the unfairness of the appeal proceedings against the decision of 21 April 2005.

65. 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

66. The applicant submitted that it had been very important for her to participate in person in the hearing of 27 April 2005 concerning the examination of her appeal against the District Court's decision to remand her in custody, as the decision at issue had been largely based on an assessment of her character and personality. She further submitted that her lawyer had been unable to prepare to duly defend her interests in the appeal proceedings, as he had been denied a copy of the District Court's decision and not provided with an adequate opportunity to study the case file.

67. The Government contested the applicant's submissions. They considered that the applicant's personal presence at the appeal hearing had not been necessary. In particular, the appeal court was to assess objective facts, which could be done based on the case-file materials, if need be with the applicant's advocate's advice. The applicant's oral submissions in this situation were unlikely to make a tangible contribution, in particular, as she was a minor having a low level of education and suffering from psychiatric disturbances. They further considered that the applicant's complaint that her lawyer had not had the opportunity to study the case file was without merit, since he could have had unrestricted access to the case file at the investigator's office, and he had been duly informed of this (see paragraph 13 above).

68. The Court reiterates that by virtue of Article 5 § 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 65, Series A no. 154-B). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-..., with further references). The proceedings must be adversarial and must always ensure equality of arms between the parties. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client's detention (*Kehayov v. Bulgaria*, no. 41035/98, § 84, 18 January 2005).

69. Furthermore, the detainee should, as a general rule, have a right to participate in a hearing at which his detention is discussed (see *Lebedev*

v. Russia, no. 4493/04, § 113, 25 October 2007). This is particularly so where there is a need to advance new arguments for release or where the arguments are closely connected to the applicant's character and personal situation (see, for example, *Mamedova v. Russia*, no. 7064/05, §§ 91-92, 1 June 2006; *Farhad Aliyev v. Azerbaijan*, no. 37138/06, § 207, 9 November 2010; and *Michalko v. Slovakia*, no. 35377/05, §§ 159-161, 21 December 2010).

70. Turning to the facts of the present case, the Court notes that in so far as the applicant complained about hindrances experienced by her lawyer in accessing the case file, it appears that the lawyer was given an opportunity to study the case file at the office of the investigator. It is not clear from the case file what difficulties were experienced by him (see by contrast *Kehayov*, cited above, § 85). The Court, however, does not need to examine this aspect of the complaint in detail, as it finds that the fact that the applicant was absent from the appeal hearing is sufficient to establish that the guarantees of Article 5 § 4 of the Convention were breached in the present case.

71. The Court notes in this regard that the appeal hearing of 27 April 2005 was attended by a prosecutor and counsel for the applicant but not the applicant herself, despite her advocate's request to that effect.

72. It appears that both the first-instance and the appeal courts largely founded their reasoning on an assessment of the applicant's "character". The Court of Appeal did so on the basis of written documents, without questioning the applicant in person and affording her an opportunity to describe her personal situation. In addition, the Court notes that it was the appeal court that first examined the facts arguing for her release as presented by her advocate in the written pleadings. Given the importance of the first appeal hearing and the appeal court's reliance on the applicant's character, the Court finds that the failure of the judicial authorities to secure the applicant's presence at the hearing of 27 April 2005 without any plausible explanation prejudiced her ability to take proceedings by which the lawfulness of her detention could be examined.

73. There has therefore been a breach of Article 5 § 4 of the Convention in this respect.

V. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

74. Finally, the applicant complained that domestic law did not entitle her to obtain compensation for her detention in breach of Article 5, as required by Article 5 § 5 of the Convention, which reads as follows:

"...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

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

76. 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

77. The applicant maintained that although the Act “On the procedure for the compensation of damage caused to a citizen by the unlawful actions of bodies of inquiry, pre-trial investigative authorities, prosecutors and courts” (the “Compensation Act”) of 1 December 1994, with amendments, and Article 1166 of the Civil Code of Ukraine provided a theoretical possibility of claiming compensation for unlawful arrest or detention, the outcome of such a claim would have been conditional on a finding by the domestic courts that the arrest or detention was in breach of domestic law. Since the courts did not establish any unlawfulness in the applicant’s arrest and detention, any claim of this type would have been futile.

78. The Government disagreed. They noted that domestic law contained several provisions which the applicant could have relied upon in lodging a claim for compensation. These included the Compensation Act mentioned by the applicant, as well as Articles 1166 and 1167 of the Civil Code of Ukraine, more generally entitling individuals to claim compensation for unlawful actions by the authorities. They agreed that the applicant could have claimed compensation under the provisions at issue should the domestic courts have established that she had been unlawfully arrested or detained. They also noted that the State Budget for 2006 had a line item of 15,000,000 Ukrainian hryvnias for this purpose.

79. The Court notes that in so far as it has found that there have been violations of Article 5 §§ 1, 3 and 4 of the Convention in the applicant’s case, Article 5 § 5 of the Convention is also applicable (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 81, *Reports of Judgments and Decisions* 1998-VII). It further reiterates that Article 5 § 5 of the Convention is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to one of the preceding paragraphs of Article 5 of the Convention, as established either by a domestic authority or by the Court (see *Dubovik v. Ukraine*, nos. 33210/07 and 41866/08, § 71, 15 October 2009).

80. In the applicant’s case, it appears that the domestic courts did not consider that the applicant was deprived of liberty unlawfully. It follows that the aforementioned legal provisions did not provide the applicant with

an enforceable right to claim compensation. It likewise does not appear that such a right was or is secured under any other provision of the Ukrainian legislation, given the absence of any legally envisaged procedure for bringing proceedings to seek compensation for the deprivation of liberty found to be in breach of Article 5 §§ 1, 3 or 4 of the Convention by the Strasbourg Court.

81. The Court therefore concludes that the first applicant did not have an enforceable right to compensation for her unlawful detention, as required by Article 5 § 5 of the Convention.

82. The Court thus concludes that there has been a violation of Article 5 § 5 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed 6,000 euros (EUR) in respect of non-pecuniary damage.

85. The Government submitted that this claim was unsubstantiated.

86. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of violations in the present case which cannot be made good by the mere finding of violations. Ruling on an equitable basis, the Court awards the applicant the amount claimed in full.

B. Costs and expenses

87. The applicant submitted no claim under this head. The Court therefore makes no award.

C. Default interest

88. 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 unlawfulness and arbitrariness in respect of the applicant's arrest and detention between 19 April and 30 May 2005, concerning the inability to take proceedings by which the lawfulness of her detention between 21 April and 30 May 2005 could be decided speedily and to claim compensation for the breach of her right to liberty admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 (c) of the Convention on account of the applicant's arrest and detention between 19 and 21 April 2005;
3. *Holds* that there have been violations of Article 5 §§ 1 (c) and 3 of the Convention on account of the applicant's detention between 21 April and 30 May 2005;
4. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the applicant's absence from the hearing concerning her appeal against the decision to remand her in custody;
5. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
6. *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 6,000 (six 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 on 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.

Done in English, and notified in writing on 19 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President