



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

FIFTH SECTION

**CASE OF MOLOTCHKO v. UKRAINE**

*(Application no. 12275/10)*

JUDGMENT

STRASBOURG

26 April 2012

**FINAL**

***26/07/2012***

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



**In the case of** Molotchko 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 3 April 2012,

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

## PROCEDURE

1. The case originated in an application (no. 12275/10) 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 German national, Mr Pavel Molotchko (“the applicant”), on 2 March 2010.

2. The applicant was represented by Mr S. J. Schleicher, a lawyer practising in Berlin. The Ukrainian Government (“the Government”) were represented by their Agent, Ms V. Lutkovska, of the Ministry of Justice.

3. On 3 March 2010 the President of the Section decided to indicate to the Government, under Rule 39 of the Rules of Court, that the applicant should not be extradited to Belarus. On 5 January 2011 the President decided to discontinue the application of Rule 39 (see paragraphs 64-68 below).

4. On 1 June 2010 the Chamber decided to give notice of the application to the Government. After consulting the parties, the Chamber decided, pursuant to Rule 54 § 3 and Rule 72 §§ 1 and 2, that no hearing was required in the case and that it was not necessary to relinquish jurisdiction in favour of the Grand Chamber. The Chamber also decided that it was not necessary to adopt any investigative measure to establish the facts of the case (Rule A1, Annex to the Rules of Court).

5. In accordance with Article 36 § 1 of the Convention, the German Government were invited to exercise their right to intervene in the proceedings, but they declined to do so.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1964 in Belarus. In 1991 he left Belarus for Germany. He obtained refugee status in that country on the ground that he was of Jewish origin and, because of this, risked persecution in Belarus. In 2004 the applicant acquired German nationality. The applicant pursued business activities in both countries.

#### **A. Criminal proceedings against the applicant in Belarus**

7. In January 2007 the Belarus authorities instituted criminal proceedings against the applicant and several others, accusing them of organised crime, abuse of power, smuggling and bribery. According to the Belarus investigators, the applicant and his co-accused committed these crimes in 1999 and 2001 when they were engaged in business activities in that State. In particular, they allegedly bribed high-ranking officers of the Belarus Customs Service and Committee for State Security (“the KGB”) to allow them to import goods into Belarus without paying high customs duty. Subsequently, criminal proceedings were brought against a number of former and acting State officials, with the result that some of them were dismissed from office and some were convicted. The investigations were carried out jointly by the General Prosecutor’s Office and the Ministry of the Interior and were led by investigator B. attached to the General Prosecutor’s Office.

8. On 11 October 2007 an arrest warrant was issued against the applicant. It was later revoked, as the applicant was cooperating with the investigators and was living permanently in Germany. In particular, on a number of occasions in 2008 and 2009 the applicant was questioned by investigators at the Belarus consulate in Berlin, and provided witness statements which, according to the applicant, were used in proceedings against others, including several former high-ranking KGB officers and the former Minister of the Interior. The applicant submits that during one of the meetings with the investigators he was questioned in his lawyer’s absence.

9. On 22 February 2010 the General Prosecutor of Belarus issued an arrest warrant against the applicant on the grounds that he had committed serious crimes and was living permanently outside Belarus. In the arrest warrant it was stated that the applicant was to be placed in the KGB Detention Centre.

10. According to the applicant, one of his lawyers contacted investigator B., asking about the reasons for the decision to arrest the applicant. In a telephone conversation between the lawyer and the investigator, the latter

stated that a decision to bring the applicant to Belarus had been taken at a high political level in order to coerce him to change or retract the statements he had made during his questioning, with a view to torpedoing the proceedings against the senior officials accused of involvement in smuggling and bribery.

11. On 3 March 2010 the KGB arrested the investigator on charges of abuse of power. According to the applicant, the investigator was dealing mainly with high-profile corruption cases involving the KGB and the police staff. Her arrest was one of the consequences of a “power struggle” between the KGB, the Ministry of the Interior and the Prosecution Service, the former having the strongest position in the political system of Belarus. Several other investigators dealing with the applicant’s case were also arrested by the KGB.

12. The investigator is being tried in Belarus. The court hearings are being held in camera as the case concerns State secrets.

13. In 2010 some extracts from the video recording of the applicant’s questioning in 2008-09 were broadcast by the Russian television company *NTV*, in a programme which concerned alleged corruption of the highest officials in Belarus, including the President.

## **B. The applicant’s arrest and detention in Ukraine**

14. On 22 February 2010 the applicant went to Ukraine on business.

15. On the same day the General Prosecutor of Belarus requested the General Prosecutor’s Office of Ukraine (“the GPU”) to arrest the applicant pursuant to Article 61 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases (“the Minsk Convention”, see paragraph 89 below).

16. On 23 February 2010 the applicant was arrested by the Ukrainian State Security Service (“the SBU”).

17. According to the applicant, he was taken to the SBU the same day, where he was denied access to a lawyer and forced by unknown SBU officers to sign a waiver of his right to legal assistance. He was questioned by the officers for about six hours.

18. On 24 February 2010 the SBU requested the Babushkinsky District Court, Dnipropetrovsk (“the Babushkinsky Court”) to remand the applicant in custody for forty days, pending submission of an extradition request by the Belarus authorities.

19. On the same day the court, relying on Article 29 of the Constitution of Ukraine, Article 61 of the Minsk Convention, and Articles 148-150, 155, 165-1 and 165-2 of the Code of Criminal Procedure (see paragraph 93 below), ordered that the applicant remain in detention until 5 March 2010. The court held that it was necessary to obtain further information concerning the SBU’s request.

20. The court hearing on 24 February 2010 was attended by a prosecutor, SBU officers and the applicant. During the hearing the applicant's request for a lawyer was refused, as the court considered a lawyer's participation unnecessary.

21. On an unspecified date the applicant hired Ms M., a lawyer practising in Kyiv, to act as his legal representative. Subsequently, the applicant also hired Mr S., a lawyer practising in Kiev.

22. On 5 March 2010 the Babushkinsky Court examined a new request lodged by the SBU on 4 March 2010 for the applicant's continued detention pending a decision on the extradition request of 24 February 2010 (see paragraph 50 below). The applicant and one of his lawyers were present at the court hearing and asked the court to refuse the SBU's request. The lawyer also complained that the applicant's arrest had not been in accordance with the relevant regulations and that his right to legal assistance had been violated.

23. The court held that it was necessary to obtain information concerning the administrative proceedings instituted by one of the applicant's lawyers against the GPU (see paragraph 69 below) and extended the applicant's detention until 10 March 2010.

24. The court further held that the applicant's arrest had been lawful. It found that the arrest had been in accordance with Articles 56 §§ 1 and 2, 57 and 58 of the Minsk Convention and had been based on a request and accompanying documents submitted by the General Prosecutor's Office of Belarus. The court also noted that the applicant had expressly waived his right to a lawyer.

25. On 10 March 2010 the Babushkinsky Court, having examined the SBU's request of 4 March 2010 in the applicant's and one of his lawyers' presence, ordered the applicant's detention pending his extradition. The court found that the extradition request was in compliance with Article 58 of the Minsk Convention and that there were no grounds for refusing extradition under Article 57 of the Minsk Convention.

26. One of the applicant's lawyers appealed, stating in particular that the request for the applicant's extradition had not been made in accordance with the relevant regulations. The lawyer also challenged the lawfulness of the applicant's possible extradition to Belarus.

27. On 15 March 2010 the Dnipropetrovsk Court of Appeal upheld the decision of 10 March 2010, finding that the applicant's detention was based on an extradition request submitted in accordance with the Minsk Convention. Having noted that the applicant was a German national and resident and was wanted by the Belarus authorities for serious crimes, the Court of Appeal concluded that if at liberty the applicant might evade investigation and trial. The court declined jurisdiction to deal with the submissions that the applicant's extradition should be refused.

28. The applicant states that he was not present at the hearing before the Court of Appeal.

29. On an unspecified date one of the applicant's lawyers lodged with the Supreme Court a request for review of the decisions of 10 and 15 March 2010 on the basis of exceptional circumstances. There is no information about its outcome.

30. On 21 June 2010 the Dnipropetrovsk Krasnogvardiyskyy District Prosecutor lodged a request with the Krasnogvardiyskyy District Court, Dnipropetrovsk ("the Krasnogvardiyskyy Court") seeking the applicant's placement under extradition arrest pending a decision on his extradition. The prosecutor relied on Article 60 of the Minsk Convention and Article 463 of the Code of Criminal Procedure (see paragraphs 91 and 93 below). He also submitted that, having regard to the preliminary results of an inquiry concerning the extradition request, there were no circumstances preventing extradition under Article 57 of the Minsk Convention. In particular, the applicant was not wanted for political or war crimes; the prosecution was not time-barred; the charges had not been previously determined in Ukraine; the applicant was not a Ukrainian national, and had been refused refugee status in Ukraine; the applicant confirmed that he was in good health and had full command of the Russian language.

31. On 23 June 2010 the Krasnogvardiyskyy Court examined the prosecutor's request in the applicant's and his lawyers' presence and found that there were grounds for the applicant to remain in detention.

32. The court observed that administrative arrest, introduced into the Ukrainian legal system with changes to the Code of Criminal Procedure on 17 June 2010, had actually been applied in the applicant's case by the Babushkinsky Court on 10 March 2010. On that ground it refused to decide on the question whether the applicant should be placed under extradition arrest. Relying on Article 463 § 8 of the Code of Criminal Procedure, the Krasnogvardiyskyy Court proceeded to examine the grounds for the applicant's continued detention. It noted that the extradition request had been made in accordance with Article 58 of the Minsk Convention; that there were no grounds for refusing the applicant's extradition pursuant to Article 57 of the Minsk Convention; that both Ukrainian and Belarus law envisaged imprisonment for over one year for the crimes for which the applicant was wanted and the charges were not time-barred; that the Belarus authorities had issued a warrant for the applicant's arrest in the framework of the criminal proceedings; that the applicant did not have refugee status, nor did he enjoy immunity from prosecution; and that the eighteen-month period for extradition arrest had not expired. The court further noted that the parties did not indicate any circumstances capable of serving as a basis for the applicant's release.

33. On 30 June 2010 the Dnipropetrovsk Regional Court of Appeal quashed the decision of 23 June 2010, holding that the first-instance court had failed to decide on the prosecutor's request. The matter was remitted for fresh examination.

34. On 13 July 2010 the Krasnogvardiyskyy Court, relying on the same arguments as in its decision of 23 June 2010, decided to place the applicant under extradition arrest pending a decision on his extradition to Belarus.

35. One of the applicant's lawyers appealed, alleging that the decision of 13 July 2010 was unlawful, that there were no grounds for placing the applicant under extradition arrest, that the prosecutor's request should not have been examined before the Supreme Court had dealt with the lawyer's appeal against the decisions of 10 and 15 March 2010, and that the applicant should have been released from detention within seventy-two hours of the entry into force of the extradition-related amendments to the Code of Criminal Procedure on 17 June 2010.

36. The lawyer also argued that the first-instance court had failed to take into account submissions that the applicant risked treatment contrary to Article 3 of the Convention and that the extradition inquiry had not been completed. The lawyer stated that the applicant had not been duly informed of the Belarus authorities' decision to arrest him and that the decision was invalid on that ground.

37. On 21 July 2010 the Dnipropetrovsk Regional Court of Appeal upheld the decision of 13 July 2010, finding that the first-instance court had duly examined all the relevant circumstances and complied with the procedure envisaged by Article 463 of the Code of Criminal Procedure. The Court of Appeal held that the questions of the applicant's responsibility for the crimes with which he was charged in Belarus and the lawfulness of the procedural decisions taken by the Belarus authorities fell outside the scope of the review. It was also noted that the interim measure indicated by the European Court of Human Rights had expired on 25 March 2010 and that the applicant's appeals to the Supreme Court and the European Court of Human Rights did not prevent him from being placed under extradition arrest.

38. On 8 September 2010 the Krasnogvardiyskyy Prosecutor lodged a request with the Krasnogvardiyskyy Court for the extension of the applicant's detention.

39. On an unspecified date the applicant and his lawyers lodged with the same court requests for the applicant's release. In particular, it was suggested that the applicant could be released on guarantee by the Union of Jewish Religious Communities and Organisations of the Dnipropetrovsk Region. Because of his religious beliefs and state of health the applicant required special kosher food and communication with a representative of a religious organisation, which was allegedly impossible in detention.

40. On 29 September 2010 the Krasnogvardiyskyy Court allowed the prosecutor's request, relying on the same grounds as in its decision of 13 July 2010. The court also refused the requests for the applicant's release.

41. The prosecutor's further requests for the applicant's continued detention, lodged with the Krasnogvardiyskyy Court on 25 November 2010, 2 February and 18 April 2011, were allowed by the court on 2 December 2010 and 15 February and 27 April 2011 respectively, for the same reasons as in its previous decisions. The Krasnogvardiyskyy Court also noted that the applicant was not a Ukrainian national and was not seeking to acquire that nationality. Relying on the preliminary results of the pending extradition inquiry, the Krasnogvardiyskyy Court further noted the applicant was not wanted by Belarus for political or war crimes; that in Ukraine there was no judgment or decision terminating the proceedings against the applicant on the charges in connection with which the applicant's extradition was requested; and that Ukrainian law did not provide for the initiation of proceedings on those charges solely on a victim's complaint.

42. The applicant and his lawyers took part in the court proceedings and were able to raise counter-arguments.

43. The applicant stated that he had appealed against the decision of 29 September 2010 and that the Dnipropetrovsk Regional Court of Appeal had dismissed the appeal as unsubstantiated on 6 October 2010. The applicant did not provide a copy of the appeal or the appeal decision.

44. The decision of 2 December 2010 was not challenged on appeal.

45. One of the applicant's lawyers appealed against the decisions of 15 February and 27 April 2011. On 23 February 2011 the Dnipropetrovsk Regional Court of Appeal, having heard the appeal in the lawyer's and the prosecutor's presence, confirmed the former decision, while on 11 May 2011 it quashed the decision of 27 April 2011 and remitted the matter to the first-instance court for new consideration.

46. In its decision of 23 February 2011 the Court of Appeal noted that at the beginning of the appeal hearing the applicant's lawyer had requested the court to summon the applicant to that hearing. The court of appeal refused the request, stating that the right to be summoned to appeal hearings was given to detainees convicted or acquitted of a crime.

47. Meanwhile, another of the applicant's lawyers submitted several requests to the GPU seeking the applicant's release from detention. Several requests for assistance in this matter were submitted to the German consulate in Kyiv.

48. On 19 May 2011 the prosecutors ordered the applicant's release on bail. Pending a decision on his extradition request, the applicant was allowed to travel within Ukraine, but not to leave the country.

49. After the decision to refuse the request for the applicant's extradition was taken by the Ukrainian authorities (see paragraph 63 below), the restriction on his movements was lifted and he left Ukraine for Germany.

**C. The request for the applicant's extradition and the official inquiry concerning it**

50. On 24 February 2010 the General Prosecutor of Belarus sent a request to the Ukrainian authorities seeking the applicant's extradition to Belarus in connection with the criminal proceedings against him.

51. The extradition request contained the following assurances: that the applicant would not be prosecuted for a crime committed prior to extradition without the consent of the GPU; that he would not be removed to a third country without the consent of the GPU; that he would not be subjected to torture, inhuman or degrading treatment or punishment; that he would be assured the right to a fair trial; that if necessary he would be provided with adequate medical assistance; that after the termination of the criminal proceedings or after serving his sentence, if one was imposed, the applicant would be free to leave Belarus; that the criminal prosecution of the applicant was not related to his political views, race, religion or ethnic origin; and that the death penalty was not envisaged for the crimes of which he was accused.

52. On 26 February 2010 the First Deputy Prosecutor General of Ukraine acknowledged the receipt of the request for the applicant's extradition and requested the Belarus authorities to provide additional assurances in respect of the applicant's prosecution and detention in Belarus.

53. On the same day the Ukrainian Migration Service informed the GPU that the applicant had not requested refugee status in Ukraine.

54. By a letter of 1 March 2010, the Deputy General Prosecutor of Belarus provided additional assurances that the staff of Ukraine's embassy or consulate in Belarus would be allowed to visit the applicant in detention; that their meetings with the applicant would not be monitored by the Belarus authorities; that they would be given the opportunity to obtain information about the state of the proceedings against the applicant and to be present at his trial; and that they would be informed of the outcome of the proceedings.

55. On 26 February 2010 the GPU requested the SBU and the Ministry of Foreign Affairs of Ukraine to provide it with information concerning the applicant's travel from and to Belarus and Ukraine and concerning his possible involvement in the political opposition in Belarus and persecution by the Belarus authorities on this ground.

56. The GPU also requested the German Consulate in Kyiv to provide information concerning the applicant's nationality and his application for refugee status in Germany. On 4 March 2010 the Consulate informed the GPU that the applicant was a German national and that German nationals could not apply for refugee status in that country.

57. On 17 March 2010 the SBU replied that they had no information about the applicant's travel outside the territory of Ukraine or his possible involvement in the political opposition in Belarus. A similar reply was given by the Ministry of Foreign Affairs of Ukraine on 23 March 2010.

58. By a letter of 9 March 2010, the GPU informed the Court that, given the Court's ruling under Rule 39 in the applicant's case, no decision on his extradition request would be taken before the Court had decided on it.

59. On 29 April 2010 the GPU informed one of the applicant's lawyers that a decision concerning the request for the applicant's extradition could not be taken because of the Court's decision to apply Rule 39 in the case. The GPU also noted that the decision did not preclude the applicant's detention and extradition inquiry.

60. On 17 June 2010 the GPU ordered the Dnipropetrovsk Regional Prosecutor's Office to complete, by 17 August 2010, an inquiry concerning the request for the applicant's extradition in accordance with Article 465 of the Code of Criminal Procedure.

61. Acting on a request by the GPU of 2 July 2010, the Consul of Ukraine in Belarus visited two detainees who had previously been extradited to that country, and noted that the conditions of their detention were satisfactory and that there were no complaints in that respect or concerning unlawful methods of investigation, and that their defence rights were observed. The Consul's note was submitted to the GPU on 29 July 2010.

62. On 17 August 2010 the time allowed for the extradition inquiry was extended by the GPU until 17 October 2010. There is no information concerning subsequent actions taken by the authorities in the framework of the inquiry.

63. On 28 July 2011 the Deputy Prosecutor General of Ukraine issued a decision refusing the request for the applicant's extradition. In particular, it was noted that according to the outcome of the extradition inquiry there were no grounds preventing the applicant's extradition under the Minsk Convention. However, the Deputy Prosecutor General further noted that:

“...

According to the conclusions of [the Organisation for Security and Co-operation in Europe], the Council of Europe, the European Union, and of a number of international organisations, the human rights situation in Belarus has significantly worsened since the December 2010 presidential election [in that country].

In these circumstances, it was not possible to exclude a risk of violation of the rights of P. V. Molotchko, as guaranteed by Articles 3 and 6 of [the Convention], in case of his extradition to Belarus.

[The Convention] was binding for Ukraine, though Belarus was not a party to that international treaty and there were no effective mechanisms of control over respect for human rights in that country. Therefore, Ukraine, as a State Party to [the Convention],

would bear the entire responsibility for any violation of the rights of P. V. Molotchko on the territory of Belarus.

Accordingly, extradition of P. V. Molotchko [to Belarus] would be contrary to Ukraine's undertakings under the international treaties on human rights [to which it is a party]. This constitutes a ground for refusing extradition of a person under Article 466 § 1 (5) of the Code of Criminal Procedure."

#### **D. The applicant's request under Rule 39 of the Rules of Court**

64. On 2 March 2010 the applicant lodged with the Court a request for an interim measure suspending his extradition to Belarus. On 3 March 2010 the President of the Section decided that Rule 39 should be applied in the applicant's case for a limited period and that the applicant should not be extradited to Belarus until 25 March 2010. The application was granted priority on the same date (Rule 41). On 25 March 2010 the President decided to extend until further notice the interim measure indicated in the case.

65. By a letter of 7 July 2010, the Government informed the Court that the GPU would take a decision on the request for the applicant's extradition under the new regulations on extradition. However, they assured that in any event the applicant would not be extradited, given the interim measure indicated by the Court.

66. On 28 October 2010 the Government requested the Court to lift the interim measure in the light of the developments in the domestic law, namely the introduction of the new regulations on extradition.

67. On the basis of the information provided by the Government and the applicant's comments in reply, on 5 January 2011 the President decided to discontinue the application of Rule 39. In particular, it was noted that the Government had given an assurance that the applicant would have the opportunity to challenge an extradition decision, if any, and that the lodging of a complaint with the courts against such decision would suspend its execution.

68. The parties were informed that the decision lifting the interim measure was taken on the understanding that the applicant would have the opportunity to contact the Court with a Rule 39 request if the extradition decision became final and enforceable. The Government were invited to inform the relevant authorities of their interpretation of the new legislation and to inform the Court of the applicant's removal at least three working days in advance.

### **E. Administrative proceedings against the GPU**

69. On 5 March 2010 one of the applicant's lawyers lodged an administrative claim against the GPU with the Kyiv Administrative Court, challenging the lawfulness of the applicant's possible extradition to Belarus. She also requested the court to apply an interim measure with a view to preventing the applicant's extradition.

70. On the same day the court, holding that the applicant's extradition might hinder the right to challenge it before the courts, decided to apply the requested interim measure and ordered the GPU not to extradite the applicant.

71. On 12 March 2010 the same court decided to return the claim to the lawyer, as she had not submitted documents authorising her to act on behalf of the applicant. By a separate decision on the same day, the court revoked its procedural ruling of 5 March 2010.

72. Neither the applicant nor the lawyer took part in the hearing on 12 March 2010. They learned of the decisions from the Government's submissions in the proceedings before the Court, a copy of which the lawyer received on 26 March 2010.

73. It cannot be established if the decisions of 12 March 2010 were challenged on appeal. No material was provided by the parties in this respect.

### **F. The applicant's request for refugee status in Ukraine**

74. On 23 March 2010 the applicant requested the Ukrainian Migration Service to grant him refugee status, alleging that he was a victim of political persecution in Belarus because he was involved in the organisation and financial support of the political opposition in that country.

75. On 23 April 2010 the request was refused. The parties did not specify the reasons for that decision.

76. The applicant challenged the refusal before the courts.

77. By decisions of 31 August and 13 October 2010 the administrative courts at two levels of jurisdiction upheld the refusal. The courts noted that when the applicant had come to Ukraine he had not had the intention of obtaining refugee status: he had applied for it only after his arrest with a view to extradition; the applicant was not involved in political or civic activities in Belarus; the applicant did not prove that he had been active in the political opposition in that country; before arriving in Ukraine the applicant had been living in Germany, whose protection he had not sought when he had learned of the criminal proceedings against him in July 2008; the applicant was accused of serious crimes of a non-political nature; the applicant had failed to substantiate the alleged threat to his life and health in Belarus; the applicant's submissions in the latter respect were limited to

general information about the political situation in that country. The courts further noted that the migration authorities had duly examined the applicant's written submissions and his statements made at interview. The courts concluded that the applicant's request was a disguised attempt to evade criminal prosecution in Belarus.

78. The applicant did not appeal on points of law.

### **G. The conditions of the applicant's detention in Ukraine**

79. After his arrest on 23 February 2010 the applicant was placed in the SBU Isolation Unit ("the ITT", *ізолятор тимчасового тримання*).

80. On 12 March 2010 the applicant was transferred to the Dnipropetrovsk Temporary Detention Centre ("the SIZO", *слідчий ізолятор*). According to the applicant's submissions of 19 March 2010, in the SIZO his head was shaved against his will and he was placed in a cell where suspects of serious crimes were detained; he did not get enough food and drinking water; he was at risk of contracting tuberculosis; and he did not receive parcels of food and medication sent to him from outside the SIZO.

81. In later submissions the applicant also alleged that during the winter period in 2010 and 2011 he had been escorted to the court hearings in an unheated van.

82. According to the Government's submissions of 30 July 2010, the applicant's head had not been shaved, but his hair had been cut short. The applicant was provided with adequate food in the SIZO. The applicant's lawyers visited him in the SIZO on 15 March, 6 April, 5 and 21 May, 3 June, and 1 and 5 July 2010. The lawyers brought the applicant food and personal hygiene products which the SIZO authorities allowed him to keep. He did not request any medication from the SIZO authorities.

83. The Government also submitted a statement written by the applicant on 20 July 2010, the relevant extracts from which read as follows:

"... I would like to comment on the questions put to me ... I arrived in the SIZO on 12 March 2010 ... during sanitary processing [in the SIZO] I requested the attendant to cut my hair short (not to shave off the hair completely) so that it would not be too hot ... I do not have any complaints about my health ... signed personally, no physical or psychological influence or abuse ..."

84. The applicant maintained that he had given the statement at the request of the SIZO authorities, and without obtaining his lawyer's advice, because he had been afraid that the authorities would punish him if he refused. The applicant denied the statement and insisted that his hair had been cut against his will.

## **H. The applicant's questioning in Ukraine concerning his criminal case**

85. On 4 March and 15 May 2010 the applicant was taken to one of the SBU offices, where he was questioned by Belarus KGB officers, who tried to coerce him into denying the statements he had made in 2008-09 and to make incriminating statements against the Belarus investigators who had previously dealt with his case.

86. On 30 November 2010 an investigator from the SBU, acting on a request of the Deputy Prosecutor General of Belarus, tried to question the applicant concerning his criminal case, in the presence of one of his lawyers and several KGB officers. The applicant refused to answer any questions, stating that the presence of KGB officers was contrary to domestic and international law and that it made him feel under political pressure.

87. On 23 December 2010 the applicant complained to the GPU, alleging that during the questioning the KGB officers had exerted psychological pressure on him in order to extract incriminating statements aimed at former Belarus investigators and to persuade him to pay compensation to Belarus. By a letter of 28 January 2011, the GPU stated to the applicant that these allegations were unfounded.

88. The applicant stated that the KGB had continued contacting him concerning the criminal case, though he provided no details in that respect.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **A. The CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993, amended by the Protocol to that Convention of 28 March 1997 ("the Minsk Convention")**

89. The Convention was ratified by the Ukrainian Parliament on 10 November 1994. It entered into force in respect of Ukraine on 14 April 1995 and in respect of Belarus on 19 May 1994. The relevant extracts from the Convention provide as follows:

#### **Article 56**

##### **Obligation of extradition**

"1. The Contracting Parties shall ... on each other's request extradite persons who find themselves on their territory, for criminal prosecution or to serve a sentence.

2. Extradition for criminal prosecution shall extend to offences which are criminally punishable under the laws of the requesting and requested Contracting Parties, and which entail at least one year's imprisonment or a heavier sentence..."

### **Article 57**

#### **Refusal to extradite**

"1. No extradition shall take place if:

a) the person whose extradition is sought is a national of the requested Contracting Party;

b) at the moment of receipt of the request [for extradition] criminal prosecution may not be initiated or a sentence may not be executed as time-barred or for other reasons envisaged by the legislation of the requested Contracting Party;

c) on the territory of the requested Contracting Party there has been an [enforceable] judgment or decision discontinuing the proceedings against the person whose extradition is sought, concerning the same crime;

d) the legislation of the requesting and requested Contracting Parties envisages that criminal prosecution for [the crimes of which the person is accused] may be initiated [only upon a victim's complaint].

2. Extradition may be refused if the crime in connection with which it is sought was committed on the territory of the requested Contracting Party.

3. In the event of refusal to extradite, the requesting Contracting Party shall be informed of the reasons for the refusal."

### **Article 58**

#### **Request for extradition**

"1. A request for extradition shall include the following information:

(a) the title of the requesting and requested authorities;

(b) a description of the factual circumstances of the offence, the text of the law of the requesting Contracting Party which criminalises the offence, and the punishment sanctioned by that law;

(c) the [name] of the person to be extradited, the year of birth, nationality, place of residence, and, if possible, a description of his appearance, his photograph, fingerprints and other personal information;

(d) information concerning the damage caused by the offence.

2. A request for extradition for the purpose of criminal prosecution shall be accompanied by a certified copy of a detention order...”

### **Article 59**

#### **Additional information**

“1. If a request for extradition does not contain all the necessary data, the requested Contracting Party may ask for additional information, for the submission of which it shall set a time-limit not exceeding one month. This time-limit may be extended for up to a month at the request of the requesting Contracting Party...”

## **B. The Code of Criminal Procedure**

90. On 21 May 2010 the Parliament of Ukraine passed a law introducing a new Chapter (No. 37) to the Code of Criminal Procedure governing extradition procedures, including arrest and detention of persons whose extradition is sought by a third State (law on the introduction of changes to the Code of Criminal Procedure concerning extradition “the Criminal Procedure (Extradition) Act”). The law was officially published on 17 June 2010 and entered into force on the same day. It did not contain transitional provisions.

91. The relevant provisions of Chapter 37, which was amended on 2 June 2011, read as follows:

### **Article 450**

#### **Definitions**

“...

Extradition inquiry [shall embrace] activities carried out by bodies determined by law in order to establish and examine circumstances which, as defined by an international treaty of Ukraine or another of its legislative acts, are capable of preventing the extradition of a person who has committed a crime.

Extradition arrest [shall mean] placing a person in detention to ensure his or her extradition.

Provisional arrest [shall mean] placing a person who has been arrested on suspicion of having committing a crime outside Ukraine, in detention for the period determined by this Code or by an international treaty of Ukraine until receipt of an extradition request.

...”

**Article 451****General conditions for extradition**

“An extradition request shall be made if for at least one of the crimes in connection with which the extradition is being sought Ukrainian law envisages imprisonment for a maximum period of not less than one year...

An extradition request from the competent authority of a foreign State may be examined only if the conditions provided for in paragraph one of this Article are met.

...”

**Article 452****Central authorities concerning a person’s extradition**

“The General Prosecutor’s Office and the Ministry of Justice shall be the central authorities concerning a person’s extradition, unless otherwise envisaged by an international treaty of Ukraine.

The General Prosecutor’s Office shall be the central authority concerning extradition of the accused (suspected) where the proceedings [in the foreign State] are at the stage of pre-trial investigations.

...”

**Article 461****Particularities of arrest of a person who has committed a crime outside Ukraine**

“Arrest on the territory of Ukraine of a person who is wanted by a foreign State in connection with the commission of a crime shall be carried out by a body of inquiry.

The body of inquiry that carries out the arrest shall immediately inform the prosecutor who supervises the observance of laws by that body. The notification of the prosecutor, accompanied by the record of the arrest, shall contain detailed information on the reasons for the arrest.

Upon receipt of the notification the prosecutor shall check the legality of the arrest of the person who is wanted by the competent authorities of foreign States, and shall immediately inform the regional prosecutor.

Within seventy-two hours of the arrest, the regional prosecutor’s office shall report the arrest to the central authority, which shall inform the competent authority of the foreign State within three days.

Every case of arrest of a foreign national who has committed a crime outside Ukraine shall also be reported by the regional prosecutor’s office to the Ministry of Foreign Affairs of Ukraine.

The arrested person shall be released immediately if:

- 1) within seventy-two hours of the arrest he or she has not been served with a reasoned decision of a court on the application of provisional or extradition arrest;
- 2) it has been established that there are circumstances under which the extradition may not be carried out.

The procedure of arrest of such persons and of examination of complaints about their arrest shall be governed by Article 106 of this Code, taking into account the particularities envisaged by this Chapter.”

### **Article 463**

#### **Extradition arrest**

“Upon receipt of an extradition request from the competent authority of a foreign State, the prosecutor, on the instruction (request) of the central authority, shall lodge a request for the extradition arrest of the person with the court at the place of the person’s detention.

The request [for the extradition arrest] shall be accompanied by:

- 1) a copy of the extradition request from the competent authority of the foreign State, certified by the central authority;
- 2) documents concerning the person’s nationality;
- 3) available materials from the extradition inquiry.

Materials submitted to the court shall be translated into the official language or another language, as provided by an international treaty of Ukraine.

On receipt of a request [for an extradition arrest], the judge shall check the identity of the person concerned, shall invite him or her to make a statement, shall check the extradition request and the available materials from the extradition inquiry, shall hear the opinion of the prosecutor and of other participants, and shall deliver a decision:

- 1) ordering the extradition arrest;
- 2) refusing the extradition arrest if there are no grounds for its application.

When considering a request [for extradition arrest], the judge shall not examine the question of guilt and shall not review the lawfulness of procedural decisions taken by the competent authorities of the foreign State in the proceedings against the person whose extradition is requested.

The judge’s decision may be appealed against to the court of appeal by the prosecutor, the person placed under the extradition arrest, or his or her defence counsel or legal representative, within three days of the date of delivery of the decision. The lodging of an appeal against the judge’s decision shall not suspend its

entry into force or its execution. A decision of the court of appeal shall not be subject to [further] appeal.

Extradition arrest shall be applied until a decision on the extradition of the person concerned and his actual surrender (extradition), but shall not last more than eighteen months.

Within this period, and not less than once every two months, the judge at the place of the person's detention shall check, upon the prosecutor's request, if there are grounds for further detention of the person or for his or her release.

Upon a complaint by the person placed under the extradition arrest, or by his or her defence counsel or legal representative, the judge at the place of the person's detention shall check, but not more often than once a month, if there are grounds for the person's release.

If the maximum period of extradition arrest, provided in paragraph 7 of this article, has expired, and the question of the person's extradition and actual surrender has not been resolved by the central authority, the person shall be released immediately.

The fact that the person has been released from extradition arrest by the court does not preclude its repeated application for the purpose of the person's actual surrendering to a foreign State in execution of a decision on extradition, unless otherwise stipulated by an international treaty of Ukraine.

If the person has been released from detention by the court, the regional prosecutor or his deputy, with the agreement of the competent central authority, shall order the application of other necessary measures to prevent the person from absconding and to ensure he or she is surrendered later.

Such measures shall be sufficient to ensure that the decision to extradite can be put into effect, and may, in particular, include bail, restrictions on the person's movement and control over his or her place of residence. The application of bail and of restrictions on the person's movement shall be carried out in accordance with the procedure envisaged by Articles 98-1, 151 and 154-1 of this Code, taking into account the particularities of this Chapter.

The regional prosecutor or his deputy shall notify the person concerned and his or her defence counsel or legal representative of the order issued in respect of the person.

The regional prosecutor or his deputy may entrust the body of inquiry with the execution of the order."

## **Article 464**

### **Termination of provisional or extradition arrest**

"Provisional or extradition arrest shall be terminated if:

1) the central authority has not received a request for the person's extradition within the time-limits provided for by an international treaty of Ukraine;

2) the extradition inquiry reveals circumstances which preclude the person's extradition;

3) the competent authority of a foreign State has refused to seek the person's extradition;

4) the central authority decides to refuse the person's extradition.

The person's release shall be [ordered] by the regional prosecutor or his deputy on the instruction (request) of the central authority; in the circumstances provided for in paragraph 2 of this Article it shall be carried out with the agreement of the relevant central authority. A copy of the release decision shall be sent to the head of the preliminary detention institution and to the court which decided on the application of provisional or extradition arrest."

### **Article 465**

#### **Extradition inquiry**

"The extradition inquiry concerning circumstances capable of preventing the person's extradition shall be carried out by the central authority or, upon its instructions (request), by the regional prosecutor's office.

The extradition inquiry shall be [completed] within thirty days. This period may be extended by the relevant central authority.

Materials of the extradition inquiry together with the conclusion [as to its outcome] shall be sent to the relevant central authority."

### **Article 466**

#### **Refusal of extradition**

"A person's extradition to a foreign State shall be refused if:

1) on the day of the decision on extradition the person ... is, according to Ukrainian laws, a Ukrainian national or a stateless person permanently residing in Ukraine;

2) Ukrainian law does not provide the punishment of imprisonment for the crime for which extradition is being sought;

3) the charges concerning the crimes for which extradition is being sought are time-barred according to Ukrainian law ...

4) the competent authority of the foreign State has not provided, upon the central authority's request, additional materials or data, without which a decision on the extradition request may not be taken;

5) the person's extradition is incompatible with Ukraine's undertakings under its international treaties;

6) there are other circumstances envisaged by an international treaty of Ukraine.

The person who has been granted refugee status may not be extradited to a foreign State where his or her health, life, or freedom is endangered for reasons of race, faith (religion), ethnicity, nationality, membership of a particular social group, or political opinion, unless otherwise provided by an international treaty of Ukraine.

In the event of refusal of extradition on the grounds of nationality, refugee status or other grounds that do not exclude [the possibility of pursuing] proceedings in a [criminal] case, the General Prosecutor's Office of Ukraine instructs, at the request of the competent authority of a foreign State, the pre-trial investigation body to investigate the criminal case against that person in accordance with the procedure prescribed by this Code."

#### **Article 467**

##### **Decision on an extradition request**

"Having examined the materials of the extradition inquiry, the central authority shall take a decision to extradite the person or to refuse [his or her] extradition to the foreign State. The decision shall be taken by the head of the central authority or his or her deputy.

The central authority shall inform the competent authority of the foreign State and the person concerned of its decision.

If a decision to extradite the person is taken, that person shall be given a copy of the decision. If the decision has not been challenged before a court within seven days, actual surrendering to the competent authorities of the foreign State shall be organised."

#### **Article 467**

##### **Procedure for appeal against a decision to extradite a person**

"A decision to extradite a person may be appealed against by the person concerned, his or her defence counsel or legal representative to a local court at the place of the person's detention.

...

The appeal shall be examined in a single-judge formation within ten days of the date of its receipt by the court. The hearing shall be held in the presence of the prosecutor, the person concerned, his or her defence counsel or legal representative, if the latter participates in the proceedings.

When considering the appeal, the judge shall not examine the question of guilt and shall not review the lawfulness of procedural decisions taken by the competent authorities of the foreign State in the proceedings against the person whose extradition is requested.

Following the examination, the judge shall take a reasoned decision:

- 1) rejecting the appeal;
- 2) allowing the appeal and quashing the decision to extradite.

After the entry into force of the judge's decision quashing the decision to extradite, the person concerned shall be immediately released from detention.

An appeal against the judge's decision may be lodged with a court of appeal by the prosecutor who participated in the hearing before the court of first instance or by the person concerned, his or her defence counsel or legal representative, within seven days of the date of delivery of the impugned decision. The lodging of an appeal against the judge's decision shall suspend its entry into force and its execution."

### **C. Overview of the courts' practice of the application of extradition regulations, issued by the Kyiv Court of Appeal on 1 September 2011**

92. The overview is based on the analysis of a number of decisions taken during the period from 17 June 2010 to 20 April 2011 by the district courts in Kyiv and by the Kyiv Court of Appeal concerning extradition matters, including detention pending extradition proceedings. The relevant provisions of the overview read as follows:

"...

As follows from the regulations on extradition, the court dealing with a request for the application of extradition arrest must check whether there is an extradition request by the competent authority of the foreign State and whether there are relevant documents concerning the person's nationality; [the court must] examine materials of the extradition inquiry and verify if there are circumstances preventing [the requested] extradition (Articles 2, 3, 6, 10 and 11 of the European Convention and additional protocols thereto [and] Article 57 of [the Minsk Convention]).

...

It must be emphasized that for a full, objective and expeditious examination of requests for the application of provisional or extradition arrest, the participation of the person in whose respect the arrest is being applied and the prosecutor is necessary, because [before adopting] a final decision [on the request] the judge [shall] check the arrested person's identity, invite him to make a statement and hear the prosecutor. No cases were identified in which the requests were examined in the absence of [those parties].

..."

**D. Other relevant domestic law provisions pertinent to the applicant's complaints concerning his detention pending extradition proceedings**

93. Other relevant domestic law provisions pertinent to the case are summarised and cited in the judgment of *Soldatenko v. Ukraine*, no. 2440/07, §§ 21-25, 23 October 2008.

**E. Regulations on Detention in Temporary Detention Centres and Rules of Conduct of Detainees, approved by the State Penitentiary Department on 20 September 2000 (Order No. 192)**

94. Pursuant to Section 3.1.1 of the Regulations, detainees must undergo sanitary treatment upon their arrival in a SIZO. The details of such treatment are not specified. Section 2 of the Rules of Conduct of Detainees provides that male detainees may choose not to shave heads and to keep haircuts of a "short style".

**F. Regulations on Detention in SBU Isolation Units, approved by the SBU on 26 July 2008 (Order No. 589)**

95. The rules governing detention of people in ITTs within the SBU structure provide for medical examination and sanitary treatment of all detainees upon their arrival and subsequently at regular intervals. The sanitary treatment includes washing of detainees and disinfection of their clothing. A detainee's hair may be cut off on the instructions of the authority dealing with the criminal case and with the consent of the detainee (sections 4.4 and 7.7).

**G. Regulations on Detention in Police Isolation Units, approved by the Ministry of the Interior on 2 December 2008 (Order No. 638)**

96. According to Section 9.3 of the Regulations, persons placed in ITTs within the police structure must undergo complex sanitary treatment, which includes, *inter alia*, cutting their hair short, provided that the authority dealing with the relevant case agrees.

### III. 2005 REPORT OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (“THE CPT”)

97. On 20 June 2007 the CPT published a report on its visit to Ukraine from 9 to 21 October 2005, the relevant parts of which read as follows (emphasis added by the CPT):

“...

#### **3. Prisoners sentenced to life imprisonment**

...

116. Further, an end should be put to certain practices that are pointless in terms of security and perceived by life-sentenced prisoners as humiliating, namely: i) indicating the nature of the sentence on the new prison uniform for men and women (on this point, Rule 20.2 of Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules); ii) obliging men to have shaven heads; iii) obliging prisoners to stand facing the wall whenever staff or visitors are present.

**The CPT recommends that the necessary measures be taken in all penal establishments holding prisoners sentenced to life imprisonment, in the light of the above remarks.**

...”

### IV. THE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES OF THE UNITED STATES DEPARTMENT OF STATE FOR 2009

98. In its Country Reports on Human Rights Practices for 2009, released on 11 March 2010, the Department of State noted with respect to Ukraine:

“...

#### **e. Denial of Fair Public Trial**

The constitution and law provide for an independent judiciary; however, in practice the judiciary remained subject to political pressure, suffered from corruption and inefficiency, and lacked public confidence.

... Judges also continued to complain about pressure from high-ranking politicians seeking improper resolution of cases.

...

All courts, except for the Supreme Court, were funded through the SJA, which was also responsible for staffing. The Ministries of Justice and Education were responsible for training judges. The judiciary’s lack of adequate staff and funds contributed to

inefficiency and corruption and increased its dependence on the executive branch. On December 22, the Constitutional Court ruled that the president's right to appoint and dismiss the head of the SJA is unconstitutional. The court stated that because the SJA oversees a state body and is not a cabinet-level agency the responsibility of appointing and dismissing the head of the SJA falls to the prime minister with the concurrence of the cabinet.

...

While the law provides for judicial independence, in some cases it also gives the president considerable power over the judiciary. The president has the authority, with the agreement of the Ministry of Justice and the chair of the Supreme Court or of a corresponding higher specialized court, to establish and abolish courts of general jurisdiction. The president determines the number of judges in the court system, appoints and removes chairpersons and deputy chairpersons of courts, and establishes appellate commercial and appellate administrative courts.

..."

## THE LAW

### I. SCOPE OF THE CASE

99. The Court notes that, after communication of the case to the respondent Government, the applicant submitted a copy of his letter to the Ukrainian Ombudsman dated 11 November 2010 in support of his argument that the Ukrainian authorities had tried to coerce him to leave Ukraine for Belarus voluntarily. In the letter the applicant alleged that while he was in the ITT his cell had been searched daily and he had undergone body searches. During the searches masked officers threw the applicant's personal belongings and bedclothes on to the floor, forced him to undress and to stand facing the wall. The personal searches were humiliating and were accompanied by blows.

100. In the Court's view, the applicant's allegations, although relating to the conditions of his detention in Ukraine, do not constitute an elaboration of his original complaints of ill-treatment in the SIZO, which were lodged earlier and on which the parties have commented. The Court considers, therefore, that it is not appropriate to take these matters in the context of the present case (see, *mutatis mutandis*, *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

## II. INITIAL COMPLAINTS CONCERNING THE APPLICANT'S POSSIBLE EXTRADITION TO BELARUS

101. The applicant initially complained that if extradited to Belarus he would face a real risk of being subjected to torture and inhuman or degrading treatment by the Belarus authorities, intended to coerce him into changing his previous statements in the criminal case. He further alleged that no fair trial guarantees would be available to him in that country. The applicant relied on Articles 3, 6 and 13 of the Convention.

102. By a letter dated 16 November 2011, one of the applicant's lawyers informed the Court of the applicant's wish not to pursue the above complaints in the light of the Ukrainian authorities' decision refusing the applicant's extradition to Belarus.

103. The Court reiterates that it may strike an application out of its list of cases when its examination is no longer justified. In particular, Article 37 of the Convention provides, in so far as relevant, as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

104. In the present case, the applicant has clearly lost interest in pursuing his complaints relating to the risk of his extradition to Belarus, as that risk has ceased to exist. In these circumstances, the Court does not consider that respect for human rights as defined in the Convention and the Protocols thereto requires it to continue the examination of this part of the application.

105. Accordingly, it must be struck out of the list pursuant to Article 37 § 1(a) of the Convention.

## III. THE APPLICANT'S ALLEGED ILL-TREATMENT IN UKRAINE

106. The applicant complained that the conditions of his detention in SIZO had been inhuman and degrading. He relied on Article 3 of the Convention, which reads as follows:

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

### A. The parties' submissions

107. Relying on the Court's decisions in *Vinokurov v. Russia and Ukraine* ((dec.), no. 2937/04, 16 October 2007), and *Aliev v. Ukraine (No.2)*

((dec.), no. 33617/02, 14 October 2008), the Government argued that the applicant had failed to exhaust domestic remedies in respect of his complaints about the conditions of detention. In particular, the applicant could have raised those complaints before the SIZO authorities, the prosecutors, or administrative courts.

108. The Government further contended that the authorities had become aware of the complaints of ill-treatment in the SIZO from the applicant's submissions to the Court, a copy of which the Government had received in June 2010.

109. The Government also argued that the applicant's allegation of risk of reprisals for complaints to the authorities was not supported by relevant evidence. In this regard, the Government relied on the Court's decision in *Plyatsevyi v. Ukraine* ((dec.), no. 8783/04, 25 November 2008).

110. They further stated that the applicant's complaints were of a general nature and lacked a detailed account of the facts. They were not supported by documentary evidence. The Government noted that similar complaints were rejected by the Court in *Ukhan v. Ukraine* (no. 30628/02, §§ 65-66, 18 December 2008), and *Vergelskyy v. Ukraine* (no. 19312/06, §§ 89-91, 12 March 2009).

111. Relying on the Court's judgment in *Kudla v. Poland* ([GC], no. 30210/96, §§ 92-94, ECHR 2000-XI), the Government argued that the cutting of the applicant's hair could not have caused him distress of an intensity exceeding the unavoidable level of suffering inherent in lawful detention. The Government contested the applicant's allegation that he had been held in a cell with suspects of serious crimes. They also noted, relying on the Court's judgment in *Gorea v. Moldova* (no. 21984/05, § 47, 17 July 2007), that the applicant had not complained that his cellmates had abused him.

112. The applicant challenged the availability of a remedy in his situation. In particular, he argued that Ukrainian law did not require prosecutors or prison authorities to reply to or examine complaints of ill-treatment in detention. The applicant therefore could not be reproached for not complaining to these authorities. In this regard, the applicant relied on the Court's judgments in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 37, ECHR 1999-I), and *Civet v. France* ([GC], no. 29340/95, § 41, ECHR 1999-VI), and the Court's decision in *Tomé Mota v. Portugal* ((dec.), no. 32082/96, ECHR 1999-IX)

113. The applicant further submitted that he feared repressive measures if he complained about SIZO staff while in detention. In this respect, he made reference to the situation in which he had been coerced to give a statement denying ill-treatment (see paragraphs 83-84 above).

114. The applicant argued that his complaints about the conditions of detention were sufficiently substantiated and that it was the Government's

duty, given that they had access to the relevant information, to look into the allegations and to inform him of the outcome of that inquiry.

115. As to the alleged shaving off of his hair, the applicant submitted that it was a routine hygienic measure applied to all detainees in Ukraine. Because of the treatment he had feelings of fear and inferiority and clearly considered it to be degrading. Furthermore, as he was of Jewish origin, the applicant drew parallels with similar practices in concentration camps during the Nazi regime in Germany. The applicant also stated that even if the Government's submission that his hair had only been cut short could be accepted, that treatment had the same humiliating and degrading effect.

## **B. The Court's assessment**

116. The Court reiterates that the requirement that an applicant must first make use of domestic remedies before applying to the Court is an important aspect of the machinery of protection established by the Convention, which is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV, and, for a recent authority, *A, B and C v. Ireland* [GC], no. 25579/05, § 142, 16 December 2010). To this end, Article 35 § 1 of the Convention affords the national authorities, primarily the courts, the opportunity to prevent or put right alleged violations of the Convention before those allegations are submitted to the Court.

117. However, the only remedies to be used are those which are effective and available in theory and in practice at the relevant time. In particular, the remedies must be capable of providing redress in respect of applicants' complaints and of offering reasonable prospects of success (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 71, 17 September 2009).

118. Even where a remedy is normally available in the domestic system, there may be special circumstances dispensing an applicant from the obligation to avail him or herself of it (see, for instance, *Sejdovic v. Italy* [GC], no. 56581/00, § 55, ECHR 2006-II). Furthermore, the rule is inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see *Aksoy v. Turkey*, 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI).

119. Turning to the circumstances of the present case, the Court notes that the applicant's complaints of ill-treatment in the SIZO concern several issues. Namely, the shaving of the applicant's head, his placement in a cell with suspects of serious crimes, lack of food and drinking water, the applicant's exposure to a risk of contracting tuberculosis, the humiliating

conditions of his transport, and the refusal of the authorities to allow parcels of food and medication to be given to the applicant.

120. The Court notes that the applicant did not argue, at least not in a persuasive and substantiated way, that his complaints about the conditions of detention in the SIZO, excluding the alleged cutting off of his hair, concern problems of a structural nature at the domestic level (compare and contrast with, for instance, *Melnik v. Ukraine*, no. 72286/01, §§ 69-71, 28 March 2006, and *Pokhlebnin v. Ukraine*, no. 35581/06, §§ 41-42, 20 May 2010).

121. The applicant also failed to provide any substantiation for his argument that compulsory shaving of the head or cutting of the hair was a measure routinely applied to all detainees in Ukraine. In this particular context, the Court observes that the relevant regulations did not provide for the compulsory application of such a measure to detainees in SIZOs or ITTs within the SBU structure, in contrast to, for instance, the rules governing detention in ITTs within the structure of the Ministry of the Interior (see paragraphs 94-96 above). Furthermore, the relevant findings of the CPT point to the problem of compulsory and indiscriminate application of the measure to life prisoners in Ukraine (see paragraph 97 above).

122. Thus, given the Court's relevant case-law in respect of Ukraine, the applicant was obliged to address his complaints to any competent authority or official before bringing them before the Court (see *Vinokurov*, cited above, and *Aliiev (No. 2)*, cited above).

123. The Court observes that neither the applicant himself nor his lawyers, who visited him in the SIZO on a number of occasions, submitted any complaints about the conditions of the applicant's detention to the domestic authorities.

124. The Court does not find that the applicant's fear of reprisals by SIZO staff for complaining about the conditions of detention was justified in the circumstances, in particular given that the authorities were informed of his complaints when notice of the application was given to the Government (see paragraph 3 above) and there is no information that the conditions of his detention worsened subsequently.

125. In the light of the foregoing, the Court finds that the applicant did not take sufficient steps at the domestic level to bring his complaints of ill-treatment in the SIZO to the attention of the national authorities, and therefore he has not complied with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention.

126. It follows that this part of the application must be declared inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

#### IV. COMPLAINTS CONCERNING THE APPLICANT'S DETENTION IN UKRAINE

127. The applicant complained under Article 5 § 1 (f) of the Convention that his detention pending extradition had been unlawful and arbitrary. In particular, he argued that Ukrainian regulations concerning extradition matters, including detention pending extradition, were not comprehensible or predictable.

128. Relying on Article 5 § 3 of the Convention, the applicant stated that the authorities had failed to decide expeditiously on the request for his extradition.

129. He further complained that the Ukrainian legal system did not provide for judicial review of the lawfulness of extradition detention satisfying the requirements of Article 5 § 4 of the Convention. The applicant also alleged that in violation of Article 6 of the Convention he had not been given the opportunity to be heard before the Court of Appeal deciding on the lawfulness of his detention.

130. The Court notes that the applicant's complaints fall to be examined under Article 5 §§ 1 (f) and 4 of the Convention, which read 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:

...

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

...

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

131. The Court notes that the above complaints concerning the applicant's detention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicant**

132. The applicant stated that while his detention in Ukraine before 17 June 2010 had not been based on sufficient legal grounds, the new regulations did not bring his detention after that date into compliance with the Convention requirements. In particular, he argued that the domestic court deciding on the lawfulness of his continued detention had applied the regulations formally and had omitted to deal with the applicant's substantial objections to his extradition. The courts also failed to consider his submissions that he might not be prosecuted on charges of abuse of office, as he had never held any office in Belarus. In this connection, the applicant generally stated that allegations of unlawfulness or arbitrariness of restraint measures chosen by the authorities of the requesting State in the context of criminal proceedings and allegations of unsoundness of criminal charges fell outside the scope of the review by the Ukrainian courts.

133. The applicant further argued that the courts did not take into consideration the possibility of releasing him from detention under certain conditions, in spite of the lengthy period of his detention.

134. The applicant noted that under the new regulations there was no obligation to inform the person whose liberty was at question, or his lawyer, of a court hearing on the matter, while under Article 468 of the Code of Criminal Procedure a notice of hearing should be given to the prosecutors.

135. The applicant also stated that the new regulations did not establish effective safeguards against unlawful or arbitrary extradition, which adversely affected the reliability of the regulations on detention pending extradition. According to the applicant, the new regulations did not provide for the participation of the persons concerned in the examination of extradition requests by the GPU; such persons were not given sufficient time to prepare and submit appeals against extradition decisions; the regulations did not require the courts to inform the persons of the scheduled hearing concerning their appeals; criteria according to which courts have to assess the lawfulness of extradition decisions were not specified; the courts were not required to verify the accuracy of the prosecutors' findings or to consider the danger for the persons concerned to be subjected to torture or inhuman treatment in the receiving State or the risk of flagrant denial of justice in case of extradition; such danger might only be relied on as a ground for refusing extradition if the person concerned was granted refugee status. The applicant also submitted that under the new regulations ongoing court proceedings on appeals against extradition decisions did not impede their actual execution.

136. Relying on the observations of the US Department of State in its 2009 Country Reports on Human Rights Practices pertinent to Ukraine (see paragraph 98 above), the applicant argued that Ukrainian courts generally could not provide effective judicial protection, as they were dependent on the Government. The latter systematically put pressure on the courts in politically sensitive cases. According to the applicant, judges dealing with extradition cases were influenced by the SBU.

**(b) The Government**

137. The Government submitted that the regulations concerning detention pending extradition were sufficiently accessible, precise and foreseeable in their application.

138. The applicant's detention was justified by the fact that the GPU was carrying out, with due diligence and without delays, an inquiry concerning the request for the applicant's extradition. The Government argued that there had been sufficient reasons for the GPU's decision to extend the time for completion of the inquiry in August 2010, though they did not specify such reasons.

139. As regards the applicant's complaint under Article 5 § 4 of the Convention, the Government noted that the Code of Criminal Procedure, as amended on 17 June 2010, provided a real opportunity to seek regular judicial review of the lawfulness of detention pending extradition. This procedure was accessible to the applicant and effective. The courts were competent to order the applicant's release if his detention had no legal basis.

140. The fact that the applicant used the available judicial avenues to challenge the lawfulness of his detention pending extradition confirmed that effective domestic remedies were available to him in this respect.

141. The amended regulations also provided for the compulsory judicial review of lawfulness of the applicant's detention every two months.

142. The Government stated that the procedure introduced on 17 June 2010 complied with the requirements of Article 5 § 4 of the Convention.

*2. The Court's assessment*

**(a) The general principles**

*i. Article 5 § 1 (f) of the Convention*

143. The Court reiterates that Article 5 § 1 (f) of the Convention essentially requires that deprivation of liberty of persons against whom action is being taken with a view to deportation or extradition be carried out in accordance with a procedure prescribed by law and in good faith (see, for instance, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164-165, ECHR 2009).

144. The words “in accordance with a procedure prescribed by law” do not merely refer back to domestic law; they also relate to the quality of this law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness (see, for instance, *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III).

145. The notion of arbitrariness in the context of this provision extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, for instance, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67 et seq., ECHR 2008).

146. Article 5 § 1 (f) of the Convention also requires that the place and conditions of detention pending deportation or extradition proceedings be appropriate and that the length of detention does not exceed that reasonably required for completion of such proceedings (see *Chahal v. the United Kingdom*, 15 November 1996, §§ 112-113, *Reports of Judgments and Decisions* 1996-V; *Amuur*, cited above, § 43; *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II; *Saadi*, cited above, §§ 72-74; and *A. and Others v. the United Kingdom*, cited above; and *M. and Others v. Bulgaria*, no. 41416/08, §§ 61-62, 26 July 2011).

ii. *Article 5 § 4 of the Convention*

147. The Court refers to its extensive case-law on Article 5 § 4 of the Convention (see, for instance, *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008; *Khudyakova v. Russia*, no. 13476/04, §§ 89, 92, 93 and 97, 8 January 2009; *A. and Others v. the United Kingdom*, cited above, §§ 202-211; and *Svetlorusov v. Ukraine*, no. 2929/05, § 57, 12 March 2009) and reiterates that it entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions, which are essential for the “lawfulness”, in the sense of the Convention, of his or her deprivation of liberty, and capable of leading, where appropriate, to the person’s release.

148. The opportunity to initiate such proceedings must be provided, both in theory and in practice, soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter.

149. Although it is not always necessary for an Article 5 § 4 procedure to incorporate the same guarantees as required by Article 6 for criminal or civil litigation, it must have a judicial and adversarial character, ensure “equality of arms” between the parties, be conducted with due diligence, and be attended by other guarantees appropriate to the type of deprivation of liberty in question.

**(b) Application of the general principles in the present case**

150. The Court observes that during the applicant's detention pending extradition proceedings there were important changes in Ukrainian law, and in particular that new regulations on such detention were put in place on 17 June 2010.

151. In the applicant's case the new regulations were first applied on 23 June 2010, when the Krasnogvardiyskyy Court ordered the applicant to remain in detention pursuant to Article 463 of the Code of Criminal Procedure.

152. Therefore, the Court will examine the applicant's complaints concerning his detention prior to and after the entry into force of the new regulations and their actual application in his case separately.

*i. The applicant's detention from 23 February to 17 June 2010*

153. The Court has previously found violations of Article 5 §§ 1 and 4 of the Convention in cases against Ukraine concerning the detention pending extradition within the legal framework that existed prior to 17 June 2010 (see, among other authorities, *Svetlorusov*, cited above, §§ 47-49 and 58-59; and *Kamyshev v. Ukraine*, no. 3990/06, §§ 67-68, 20 May 2010). These findings were principally based on the lack of sufficient legal basis for detention pending extradition and for review of lawfulness of such detention.

154. The Court notes that the findings are equally pertinent to the present aspect of the case and that the Government did not put forward any fact or argument capable of persuading the Court to depart from its previous case-law.

155. Accordingly, the Court holds that there has been a violation of Article 5 §§ 1 (f) and 4 of the Convention as regards the applicant's detention from 23 February to 17 June 2010.

*ii. The applicant's detention from 17 to 23 June 2010*

156. The above findings are also pertinent to the assessment of the applicant's complaints in so far as they concern the applicant's detention after the entry into force of the new regulations and prior to their actual application in the applicant's case, that is from 17 to 23 June 2010.

157. In particular, the Court observes that before that period the applicant was detained pursuant to the decision of the Babushkinskyy Court of 10 March 2010, which was not based on the new regulations. Although the Krasnogvardiyskyy Court initially held that the decision was valid after the new regulations entered into force, the soundness of such an approach was not confirmed by the court of appeal (see paragraphs 32-34 above).

158. The Court does not find any reason to disagree with the court of appeal as regards this particular issue. In any event, as the decision of

10 March 2010 was taken in the context of the previous legal framework, which the Court found incompatible with Article 5 § 1 (f) of the Convention (see paragraphs 153-155 above), and there was no decision authorising the applicant's detention from 17 to 23 June 2010 under the new regulations, the Court holds that the applicant was detained during that period not in accordance with the procedure prescribed by law (see *Mokallal v. Ukraine*, no. 19246/10, § 40, 10 November 2011).

159. Turning to the Article 5 § 4 aspect of this part of the case, the Court notes that the law implementing the new regulations contained no transitional arrangements concerning, in particular, their application in respect of persons already in detention on the date of the regulations' entry into force. Thus, it is unclear whether the applicant would have been able to initiate the review procedure provided for in paragraph 9 of Article 463 of the Code of Criminal Procedure before a decision to apply extradition arrest was taken in his case.

160. The Court takes the view that in the circumstances, where the new regulations could have created some uncertainty as to their application in the applicant's situation (see *Mokallal*, cited above), the authorities bore the obligation to ensure, without delay and through the relevant judicial procedure of review, that the applicant's continued detention was in compliance with the new regulations.

161. The Court observes that no such review took place for six days after the new regulations entered into force, and no justification was given for the delay.

162. The foregoing considerations enable the Court to conclude that the requirements of judicial control of the lawfulness of the applicant's detention during the impugned period were not met.

163. Accordingly, the Court finds that there has been a violation of Article 5 §§ 1 (f) and 4 of the Convention as regards the applicant's detention from 17 to 23 June 2010.

*iii. The applicant's detention from 23 June 2010 to 19 May 2011*

164. Turning to the applicant's complaints concerning his detention from 23 June 2010 until his release on 19 May 2011, the Court considers it justified to split their examination under Article 5 § 1 (f) and Article 5 § 4 of the Convention.

*α. Compliance with Article 5 § 1 (f) of the Convention*

165. The Court notes that the new regulations on which the courts relied in their decisions concerning the applicant's detention during the period under consideration provide for specific procedures of arrest and detention of persons who are wanted by third States for criminal prosecution. In particular, the regulations set grounds and time-limits for detention pending

extradition, and determine the authorities responsible for dealing with detention matters (see paragraph 91 above).

166. For the Court, they appear to be sufficiently clear and precise, while their accessibility was not questioned by the applicant.

167. The arguments which the applicant provided in support of his contention that the regulations on extradition detention were not comprehensible or predictable concern, in the first place, the question of consistency of the extradition procedure (see paragraph 135 above), which is not the subject of the present examination. While it is true that serious irregularities in an extradition or deportation procedure may undermine the lawfulness of the related arrest or detention (see, *mutatis mutandis*, *Bozano v. France*, 18 December 1986, §§ 55-60, Series A no. 111, and *Longa Yonkeu v. Latvia*, no. 57229/09, §§ 139-140 and 143, 15 November 2011), the applicant did not demonstrate that the alleged deficiencies in the Ukrainian extradition regulations had actually had an adverse effect on his detention.

168. The Court further observes that throughout the entire period of the applicant's detention it was the authorities' intention to extradite him and no legal or factual impediment to his ultimate extradition was established before he was released. The fact that such an impediment was eventually found to exist and that the applicant's extradition was refused on that ground (see paragraph 63 above) was not capable of retrospectively rendering the applicant's detention unlawful. The Court reiterates that all that is required under Article 5 § 1 (f) of the Convention is that "action is being taken with a view to deportation or extradition", in the context of which any risks and objections linked to the person's possible removal from the territory of the State fall to be examined (see *Čonka*, cited above, § 38, and *Mokallal*, cited above, § 43).

169. Therefore, given the applicant's complaint about the length of the extradition proceedings, the Court must also ascertain whether the applicant's detention remained justified during the period under consideration by the need to take action with a view to his extradition (see paragraph 146 above).

170. The Court observes that it took the authorities approximately one year and five months to complete the extradition inquiry, during which period the applicant was detained for about one year and three months. While the period of four months before 23 June 2010 falls outside the scope of the examination of this part of the case, the Court will take into account the state of the inquiry on that day.

171. Thus, the Court notes that by 23 June 2010 the GPU had collected the applicant's identity, nationality and occupation data. They had been provided with information concerning the criminal proceedings against the applicant in Belarus and his activities in that country. The GPU had also obtained advice from the SBU and the MFA on the applicant's allegations

of political persecution in that country (see paragraphs 55-57 above). There is nothing to suggest that the above information was insufficient for taking a decision on the request for the applicant's extradition.

172. The Court may agree that with the entry into force of the new regulations on extradition on 17 June 2010 additional time was necessary in order to ensure that the inquiry complied with the new requirements. However, the Court notes that the authorities did not provide reasons for keeping the inquiry ongoing for the next twelve months, in spite of the general one-month time-limit set by the new regulations.

173. While it is true that the authorities took specific measures in order to obtain further information concerning the request for the applicant's extradition (see paragraph 61 above), the Court was not informed of any other noteworthy steps taken by the authorities in the framework of the inquiry after the information was received on 29 July 2010. The Court may appreciate that it could have taken the authorities some time after that date to complete the decision-making process. However, the Government did not suggest so. The material available to the Court does not demonstrate that between 29 July 2010 and 19 May 2011 the relevant proceedings were being actively and diligently pursued with a view to determining whether it would be lawful to proceed with the applicant's extradition (compare and contrast with *Chahal*, cited above, §§ 115-117).

174. The Court further notes that it was not suggested by the parties that the authorities had to delay a decision on the applicant's extradition pending the outcome of the proceedings on the applicant's request for refugee status (see paragraphs 74-78 above). The interim measure which the Court indicated in the present case did not constitute a legal impediment to a decision on extradition to Belarus as such, as the measure was aimed at preventing the implementation of such a decision and did not set any limits, either in substance or procedurally, on the authorities' decision-making (see paragraphs 64-68 above). In this latter context, the Court finds it necessary to reiterate that an interim measure, indicated under Rule 39, preventing a person's extradition or deportation does not require or form a basis for the person's detention pending a decision on his or her extradition or deportation (see *Dubovik v. Ukraine*, nos. 33210/07 and 41866/08, § 60, 15 October 2009).

175. In the light of the foregoing, the Court holds that there has been no violation of Article 5 § 1 (f) of the Convention as regards the applicant's detention from 23 June to 29 July 2010.

176. However, as there is no indication that after the latter date the Ukrainian authorities prosecuted the applicant's extradition proceedings with due diligence, the Court finds there has been a violation of Article 5 § 1 (f) of the Convention as regards the applicant's detention from 29 July 2010 to 19 May 2011.

β. Compliance with Article 5 § 4 of the Convention

177. The Court now turns to the question of whether the new regulations provided the applicant with the right to challenge the lawfulness of his detention from 23 June 2010 to 19 May 2011, as required by Article 5 § 4 of the Convention.

178. The Court observes that during the aforementioned period the applicant was placed under extradition arrest, mainly under Article 463 of the Code of Criminal Procedure. According to that provision, the lawfulness of the application of the preventive measure must be reviewed by a court, at the request of prosecutors, every two months. The applicant was also entitled to seek such a review of his own motion, which could be carried out once a month.

179. The applicant did not avail himself of the opportunity of initiating a judicial review of the lawfulness of his detention. Instead, he and his lawyers took part in the court proceedings on the prosecutor's requests for the applicant's continued detention, and provided arguments against the application of the preventive measure in his case. The applicant and his lawyers raised further arguments in the appeals they lodged against some of the court's decisions allowing the prosecutors' requests (see paragraphs 35, 36, 39, 42, 43 and 45 above).

180. In his application to the Court, the applicant complained that the procedure of review of the lawfulness of his detention did not meet the Convention requirements, mainly because it was limited in scope and hindered his effective participation. He also argued that no effective judicial review could be provided in Ukraine, as the courts were dependent on the Government and influenced by the SBU.

181. The Court will address these issues in turn.

182. As regards the applicant's argument concerning the limitations on his participation in the review, the Court observes that throughout the proceedings the applicant, assisted by lawyers, had the opportunity to comment on the prosecutor's requests for his continued detention and to convey and defend his arguments before the courts at the ordinary and appeal levels of jurisdiction. The applicant did not refer to any court hearing concerning his detention of which he or his lawyers had not been duly notified. He was present at all hearings before the first-instance court. Given the particular circumstances of the case, the fact that the applicant was not allowed to take part in the appeal hearings did not upset the "equality of arms" between the parties or otherwise render the proceedings unfair. The appeal hearings were attended by the applicant's lawyers and the applicant did not suggest that he had had additional arguments which could not have been raised by his lawyers at those hearings.

183. Having regard to the general nature and vagueness of the applicant's allegations of the national courts' lack of independence and

impartiality, the Court does not consider that their further examination is justified in the present case.

184. The Court also notes that, while a question may be raised as to whether the review of the lawfulness of the applicant's detention was carried out in accordance with the time-limits envisaged by the regulations, the applicant made no submissions in this respect. The Court does not find it appropriate to take up this matter of its own motion.

185. In so far as the applicant's complaints concern the scope of the judicial review in his case, the Court observes that in the course of such review the national courts examined the applicant's personal information, in particular information concerning his nationality and his request for refugee status; checked whether an extradition request in his respect was submitted and whether it was based on relevant procedural decisions; verified whether the applicant's criminal prosecution in Belarus was genuine, did not concern political or criminal offences and could be pursued in accordance with Ukrainian law; and satisfied themselves that the applicant's extradition was not hindered under Article 57 of the Minsk Convention, and that the maximum period for the applicant's detention under Article 463 of the Code of Criminal Procedure did not expire. The courts based their decisions on the material provided by the parties, and in particular the data collected in the course of the extradition inquiry in the applicant's case (see paragraphs 32, 34, 37 and 41 above).

186. It was not suggested by the applicant that the courts had not acted in accordance with the relevant domestic regulations. He argued that the regulations did not require the courts to consider other information allegedly relevant to a decision on his detention, including his complaints of persecution in Belarus and irregularities in the criminal proceedings against him in that country.

187. In this regard, the Court notes that the examination of any risks and objections linked to the person's possible removal from the territory of the State is intrinsic to actions "taken with a view to deportation or extradition" (see *Mokallal*, cited above, § 43). The Ukrainian regulations provide for a separate procedure – extradition inquiry, with a possibility of further judicial review – in the framework of which the applicant's objections against his extradition fell to be examined and were in fact examined (see paragraph 91 above).

188. Thus, the Court is not of the view that the national courts deciding on the applicant's detention were required to carry out a separate inquiry into the applicant's objections against his extradition or that they failed to adequately consider the material collected in the course of the extradition inquiry.

189. However, the Court considers that the courts should not have omitted to examine whether the length of the applicant's detention exceeded what was reasonably required for the completion of the inquiry. Given its

relevant case-law and the findings under Article 5 § 1 (f) of the Convention in the present case (see paragraphs 146, 174 and 176 above), the authorities' compliance with the "reasonable time" requirement for prosecution of extradition requests is one of the key conditions for the "lawfulness" of extradition detention. The fact that it was not addressed by the national courts in the present case, despite having been raised by the applicant's lawyers (see paragraph 36 above), entails the conclusion that the review of the "lawfulness" of the applicant's detention during the period in question fell short of the requirements of Article 5 § 4 of the Convention.

190. Accordingly, there has been a violation of that provision as regards the applicant's detention from 23 June 2010 to 19 May 2011.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

191. Article 41 of the Convention provides:

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

"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

192. The applicant claimed 250,000 euros (EUR) in respect of pecuniary damage resulting from his alleged inability to pursue business activities because of his detention in Ukraine. The applicant also claimed EUR 38,981.46, representing the net salary which had not been paid to him for the period from 26 February to 31 October 2010 owing to his absence from work. The applicant submitted a certificate, dated 20 October 2010, from his employer, a private company the applicant owned and managed, stating that he had not sought payment of the salary since 1 March 2010 because he had not been able to perform his managerial duties.

193. Under the same head, the applicant claimed EUR 740,250 for loss of income under a commercial contract which that company allegedly failed to put into effect. The applicant submitted copies of the contract and of a letter, by which his company's contractor informed it of its decision to suspend the execution of the contract in view of the absence of the company's "chief representative".

194. Alleging psychological distress caused by his unlawful detention and ill-treatment in Ukraine, the applicant further claimed EUR 150,000.

195. The Government stated that the applicant's claim for just satisfaction must be rejected. In particular, they argued that there was no causal link between the alleged violations and the alleged loss of income.

196. As regards the applicant's claims for loss of income, the Court notes that it cannot speculate whether the applicant would have received the sums claimed had the violation of Article 5 § 1 (f) not occurred in his case. It may not be excluded that the applicant would have been subjected to some restriction of his liberty in Ukraine pending the extradition proceedings against him (see *A. and Others v. the United Kingdom*, cited above, § 252).

197. The Court further notes that the applicant did not provide a relevant calculation in support of his claims for loss of income in business activities and did not demonstrate that he was unable to recover his salary had he wished to do so.

198. In such circumstances, the Court must reject the applicant's claims for compensation for pecuniary damage as unsubstantiated.

199. In so far as the applicant claimed compensation for non-pecuniary damage, the Court, making its assessment on an equitable basis, awards him EUR 15,000.

## **B. Costs and expenses**

200. The applicant claimed EUR 48,861.40, inclusive of value-added tax ("VAT"), for his legal representation before the national authorities and in the proceedings before this Court. In particular, the applicant was required to pay this amount for 204 hours worked by his Berlin lawyer, Mr S. J. Schleicher, at EUR 200 per hour plus VAT. The work included preparing the application, procedural requests, observations, just satisfaction claims before the Court, and various requests to the Ukrainian and German authorities for the applicant's release from detention. The applicant argued that his lawyer's hourly fee was somewhat higher than the usual rate in Germany (EUR 180 plus VAT) because of the complexity of the case and due to the required multilingual communication with foreign authorities and the Court. In support of his claims, the applicant submitted copies of the contract with his lawyer and invoices for legal services.

201. The Government considered the lawyer's hourly rate to be excessive and contested the number of hours he had allegedly spent working on the case. They also argued that the documents submitted by the applicant in support of the claim were not relevant within the meaning of Rule 60 of the Rules of Court. The Government invited the Court to reject the claim.

202. 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.

203. The Court observes that a large part of the material submitted by the applicant concerned his complaints that Articles 3, 5 and 6 of the Convention had been violated in respect of his extradition to Belarus and about the conditions of his detention in Ukraine. While the applicant withdrew the complaints concerning extradition to Belarus, his complaints about the conditions of detention have been declared inadmissible.

204. Furthermore, the Court has found no violation of Article 5 § 1 (f) of the Convention in respect of a part of the period of the applicant's detention.

205. Nevertheless, the Court agrees with the applicant that the case, in so far as it relates to the Court's finding of violation of Article 5 § 1 (f) and Article 5 § 4 of the Convention, is factually and legally complex. Thus, the costs and expenses incurred by the applicant in his attempts to prevent and to put an end to such violations at the national level, and to obtain redress in the proceedings before this Court, may not be considered unjustified.

206. In the light of the foregoing and given the documents in its possession, the Court considers it reasonable to award the sum of EUR 15,000 covering costs and expenses incurred in the domestic and Strasbourg proceedings.

### **C. Default interest**

207. 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. *Decides* to strike the application out of its list of cases in so far as it concerns the applicant's complaints about a violation of Articles 3, 5 and 6 of the Convention in case of his extradition to Belarus;
2. *Declares* the complaints under Article 5 §§ 1 (f) and 4 of the Convention about the applicant's detention in Ukraine admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention as regards the applicant's detention from 23 February to 23 June 2010 and from 29 July 2010 to 19 May 2011;
4. *Holds* that there has been no violation of Article 5 § 1 (f) of the Convention as regards the applicant's detention from 23 June to 29 July 2010;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention as regards the applicant's detention from 23 February 2010 to 19 May 2011;
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 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 15,000 (fifteen thousand euros) for costs and expenses, plus any tax that may be chargeable to the applicant on these amounts;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 26 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Dean Spielmann  
President