



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

FOURTH SECTION

CASE OF MAKARENKO v. UKRAINE

(Application no. 622/11)

JUDGMENT

STRASBOURG

30 January 2018

FINAL

30/04/2018

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

In the case of Makarenko v. Ukraine,

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

Vincent A. De Gaetano, *President*,

Ganna Yudkivska,

Paulo Pinto de Albuquerque,

Egidijus Kūris,

Iulia Motoc,

Carlo Ranzoni,

Georges Ravarani, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 9 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 622/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Anatoliy Viktorovych Makarenko (“the applicant”), on 29 December 2010.

2. The applicant was represented by Mr A.P. Bushchenko, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr I. Lishchyna.

3. The applicant complained, in particular, that his arrest and detention had been unlawful and that the extensions of his pre-trial detention had not been based on sufficient and relevant reasons.

4. On 7 June 2011 the application was communicated to the Government.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1964 and lives in Kyiv.

A. Background to the case

6. The end of 2008 and the beginning of 2009 were marked by a dispute between Ukraine and Russia on the conditions for gas supplies, including

the price paid by Ukraine and the transit price charged by Ukraine to Russia. It culminated in Russia cutting off supplies in early January 2009, affecting not only Ukraine but also European States dependent on Russian gas.

7. On 18 January 2009 the Prime Ministers of Ukraine and Russia, Ms Yulia Tymoshenko and Mr Vladimir Putin, reached an agreement with a view to resolving the dispute.

8. On 19 January 2009 the chairmen of the boards of the respective countries' gas companies, Naftogaz Ukrainy and Gazprom of Russia, formalised the terms of the agreement by signing a 2009-2019 gas supply contract. In particular, it provided for a new approach to gas pricing and for passing to direct contractual relations (Gazprom had previously supplied gas to Ukraine through an intermediary, RosUkrEnergo AG, a Swiss-registered joint venture company, 50% of which was owned by Gazprom itself and 50% by two Ukrainian businessmen through a private company, also registered in Switzerland).

9. On 20 January 2009 the first deputy chairman of the board of Naftogaz Ukrainy, D., and the deputy chairman of the board of Gazprom signed a further contract regarding the terms of natural gas transit through the territory of Ukraine. Under Addendum no. 1, a claim of 11 billion cubic metres of natural gas imported by way of transit to Ukraine by RosUkrEnergo AG was ceded to Naftogaz Ukrayiny.

10. On 28 January 2009 the President of Ukraine Mr Viktor Yushchenko appointed the applicant as chief of the State Customs Service of Ukraine, upon the Prime Minister's nomination.

11. On 26 February 2009 D. sent a letter to the applicant, requesting customs clearance for the 11 billion cubic metres of natural gas referred to in the contract of 20 January 2009 and the annulment of nineteen customs declarations stating that the gas had been imported for transit purposes.

12. Also on 26 February 2009 Mr Oleksandr Turchynov, the First Deputy Prime Minister of Ukraine, instructed the applicant in writing to ensure prompt customs clearance of the gas in question.

13. On 27 February 2009 the applicant countersigned D.'s letter with the statement "To [K.] for execution taking into account the requirements of Article 88 of the Customs Code of Ukraine" (K. was chief of the Regional Customs Office for Power, and the legal provision in question set out the duties and responsibilities of customs applicants). On the same day the applicant also countersigned Mr Turchynov's letter with the statement "To [K.] for execution".

14. On 7 February 2010 Mr Viktor Yanukovich was elected President of Ukraine after defeating Ms Tymoshenko in a run-off.

15. On 22 March 2010 the applicant resigned.

16. On an unspecified date RosUkrEnergo AG instituted proceedings in the Arbitration Institute of the Stockholm Chamber of Commerce, alleging

that the 11 billion cubic metres of gas was its property and had been unlawfully expropriated by Naftogaz Ukrayiny.

17. On 8 June 2010 the Institute found for RosUkrEnergo AG.

B. Criminal proceedings against the applicant and related events

18. On 10 June 2010 the State Security Service of Ukraine (hereinafter “the Security Service”) instituted criminal proceedings against D. on suspicion of large-scale embezzlement on account of his involvement in the gas transactions of January 2009.

19. On 22 June 2010 the police questioned Mr Sh., who had been the deputy chief of the Customs Clearance Unit of the Regional Customs Office for Power in January 2009, as a witness in the proceedings. He replied in the positive to a question about whether he was familiar with D.’s letter to the applicant of 26 February 2009 (see paragraphs 11 and 13 above).

20. On 23 June 2010 the applicant appeared for questioning as a witness in the proceedings against D. He was accompanied by his lawyer.

21. The questioning concerned the two letters sent to the applicant on 26 February 2009 and his actions thereupon.

22. After the end of the applicant’s questioning at 3.43 p.m., the investigator informed him about the imminent institution of criminal proceedings against him. The applicant remained at the Security Service, without any immediate procedural steps being taken against him. According to him, he was not allowed to leave. The Government stated that it was the applicant’s own decision to wait until the decision on criminal proceedings was ready.

23. The proceedings were instituted later that day on suspicion of neglect of his official duties entailing grave consequences under Article 367 § 2 of the Criminal Code (“the CC”, see paragraph 52 below). The charge was related to his countersigning the letters for customs clearance for the gas imported by way of transit without verifying the lawfulness of those demands and so causing substantial damage to the prestige of the State and to RosUkrEnergo AG’s interests. The criminal case was joined to that against D. (see paragraph 18 above).

24. At 6.42 p.m. on 23 June 2010 the applicant signed the decision on the institution of criminal proceedings against him with a statement that he had *de facto* been under arrest from 3.43 p.m. that day.

25. According to the Government, the applicant and his lawyer studied the decision from 4.15 p.m. to 6.45 p.m.

26. At 7.02 p.m. the investigator drew up a report on the applicant’s arrest with a general reference to Articles 106 § 2 and 115 of the Code of Criminal Procedure (“the CCP”, see paragraph 50 below). As noted in the report, the investigation had established that the applicant had had no legitimate grounds to endorse the First Deputy Prime Minister’s request of

26 February 2009 (see paragraph 12 above). The investigator further stated that the applicant's rights as a suspect had been explained to him at 6.30 p.m. The applicant wrote on the report that the arrest period had actually started at 3.43 p.m.

27. At 8.05 p.m. on 23 June 2010 the applicant was questioned as a suspect. He emphasised that he was willing to cooperate with the investigation and that his behaviour in the proceedings had been flawless. He also stated that there were no grounds for his arrest and that he was prepared to pay bail as a preventive measure in accordance with the CCP.

28. On 24 June 2010 the Kyiv Pecherskyy District Court ("the Pecherskyy Court") remanded the applicant in custody for two months. By way of reasoning, the court noted that the applicant was suspected of a serious offence potentially entailing imprisonment; that he could interfere with investigative activities, either by absconding or tampering with evidence; and that he was capable of influencing witnesses, regard being had, in particular, to his connections with former colleagues, his prominent social status and his wealth. Moreover, the applicant had no employment or young children under his charge. The court therefore rejected an application by fifty Members of Parliament to release him on their personal surety.

29. The applicant appealed, contending in particular that his arrest had been arbitrary and not based on a reasonable suspicion that he had committed a crime. Moreover, the court's findings as to the probability of his interfering with the investigative activities were arbitrary. He had been a civil servant with an impeccable reputation, no prior criminal record, strong family ties and a permanent residence in Kyiv. Moreover, his conduct in relation to the criminal proceedings concerning the gas dealings had been beyond reproach. Between the date of the initiation of the related proceedings against D. on 10 June and the applicant's arrest on 23 June 2010, he had twice been abroad and had returned to Ukraine of his own free will; he had duly reported for questioning as a witness as soon as he had been summoned; and he was willing to continue his cooperation with the authorities in good faith. Lastly, he referred to the surety offered by the Members of Parliament to ensure his proper conduct in the proceedings.

30. On 2 July 2010 the Kyiv City Court of Appeal (hereinafter "the Court of Appeal") dismissed the applicant's appeal against the custodial measure. The court noted, in particular:

"... the particularly large amount of damage caused to RosUkrEnergo AG and the existence of serious consequences, manifested in the prestige of the State being undermined, indicate a high degree of danger to society from the crime, a primary ground for imposing on A. V. Makarenko a preventive measure entailing his being remanded in custody."

31. The appellate court also concurred with the first-instance court's finding that the applicant might take advantage of his social connections and wealth to influence the investigation if he remained at liberty.

32. On 28 July 2010 the Supreme Court rejected an application by the applicant for leave to appeal in cassation against the decisions as not envisaged by law.

33. On 30 July 2010 the applicant challenged the lawfulness of his arrest of 23 June 2010 before the Kyiv Shevchenkivskyy District Court (“the Shevchenkivskyy Court”). He alleged, firstly, that his arrest had not fallen within the ambit of Article 106 § 2 of the CCP and so had been arbitrary and unforeseeable. Furthermore, before his official arrest at 7.02 p.m., he had already been held at the Security Service for more than three hours without any legal grounds. On 27 September and 12 October 2010 the Shevchenkivskyy Court and the Court of Appeal, respectively, rejected the applicant’s complaint, finding that the investigator had acted in accordance with the law.

34. On 20 August 2010 the Pecherskyy Court extended the term of the applicant’s pre-trial detention until 10 October 2010. The court noted that a number of investigative measures were still necessary and there were no reasons justifying lifting the custodial measure.

35. On 27 August 2010 the Court of Appeal dismissed an appeal by the appeal against that decision.

36. On 25 October 2010 the Supreme Court rejected a request for leave to appeal in cassation as not envisaged by law.

37. On 30 September 2010 the Security Service re-classified the applicant’s actions as intentional abuse of office under Article 364 § 3 of the CC rather than neglect of his official duties under Article 367 § 2 (see paragraphs 51-52 below).

38. On 6 October 2010 the Pecherskyy Court extended the applicant’s detention until 23 October 2010, referring to essentially the same arguments as before.

39. On 12 October 2010 the Court of Appeal upheld the first-instance court’s decision.

40. On 13 October 2010 the applicant was notified of the completion of the pre-trial investigation and given access to the case file.

41. On 22 October and 9 December 2010 and on 5 January, 7 February and 9 March 2011 the Court of Appeal extended the applicant’s detention by one month (the last extension was until 10 April 2011), given that further time was required for the applicant and his lawyers to study the case file, which consisted of forty-eight volumes. In all those rulings the appellate court noted that it had had regard to “the circumstances of the case, information as a whole about the character of the accused, the gravity of the offence ... and the absence of any grounds for changing the preventive measure [in his respect] to a more lenient one”.

42. On 1 April 2011 the applicant applied to be released under an undertaking not to abscond. He noted that his health had seriously deteriorated in detention and that he required a specialist medical

examination and assistance on account of several heart conditions but that there was no cardiologist in the detention facility.

43. On 13 April 2011 the applicant's lawyer complained to the Prosecutor General's Office that the term of his client's detention ordered by the court had expired on 10 April 2011. He therefore requested the applicant's immediate release. There was no follow up to that complaint.

44. On 14 April 2011 the Pecherskyy Court held a preparatory hearing for the applicant's trial. It decided to keep him in pre-trial detention as it found no grounds to change the measure. The applicant re-submitted his request for release as formulated on 1 April 2011 (see paragraph 42 above), however, the court ruling did not contain any reference to it.

45. On 26 April 2011 the Pecherskyy Court remitted the case to the Prosecutor General's Office for further investigation given that meanwhile, on 11 April 2011, the latter had instituted criminal proceedings against former Prime Minister Tymoshenko on suspicion of abuse of authority for signing the gas contracts in January 2009 (see paragraph 7 above). The court held that the factual circumstances in those proceedings were the same as in the applicant's case.

46. On 5 July 2011 the Court of Appeal released the applicant under an undertaking not to abscond.

47. On 20 July 2012 the Pecherskyy Court found him guilty as charged and gave him a suspended sentence of four years' imprisonment.

48. The parties did not inform the Court of any further developments in the criminal proceedings against the applicant. Publicly available material shows that on 3 March 2014 the Pecherskyy Court absolved him from criminal liability and found him not to have had any criminal record.

II. RELEVANT DOMESTIC LAW

A. Constitution 1996

49. Article 29, which is relevant to the case, reads as follows:

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

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

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

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

B. Code of Criminal Procedure 1960 (“the CCP”, in force at the material time)

50. Relevant provisions of this Code provided:

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

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

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

If there is other information giving rise to grounds for suspecting a person of a criminal offence, a body of inquiry may arrest that person if the latter attempts to flee, or does not have a permanent place of residence, or if the identity of that person has not been established. ...”

Article 115. Arrest of a suspect by an investigator

“An investigator may arrest ... a person suspected of having committed a crime in accordance with the procedure provided for in [Article] 106 ... of the Code. ...”

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

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

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

Article 149. Preventive measures

“The preventive measures are as follows:

- (1) a written undertaking not to abscond;
- (2) a personal guarantee;
- (3) the guarantee of a public organisation or labour collective;
- (3-1) bail;
- (4) pre-trial detention; ...

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

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

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

If there are grounds for applying a custodial preventive measure, the body of inquiry or the investigator, following the prosecutor’s consent, shall lodge a request with the court. ...

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

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

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

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

(2) applying the custodial preventive measure.

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

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

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

C. Criminal Code 2001 (“the CC”, as worded at the material time)

51. Article 364 § 3 provided for five to ten years’ imprisonment with a prohibition on holding certain offices or carrying out certain activities for a period of up to three years and property confiscation as a penalty for abuse of power by a law-enforcement official which led to grave consequences.

52. Under Article 367 § 2, the sanction for neglect of a person's official duties with grave consequences was imprisonment for two to five years, with a prohibition for up to three years on holding certain posts or carrying out certain activities, and an optional fine of one hundred to two hundred and fifty times the of the non-taxable minimum income.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

53. The applicant complained under Article 5 §§ 1 and 3 of the Convention that he had been deprived of his liberty in an unlawful and arbitrary manner and that the domestic courts had failed to provide relevant and sufficient reasons for his detention. The provisions relied on read as follows in the relevant part:

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

...

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

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

A. Admissibility

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

B. Merits

1. Complaints under Article 5 § 1 of the Convention

(a) The applicant's alleged deprivation of liberty from 3.43 p.m. to 7.02 p.m. on 23 June 2010

(i) The parties' submissions

55. The applicant contended that he had been deprived of his liberty for three hours and twenty minutes, without his detention being documented, let alone justified. He observed that he had not been free to leave the premises of the Security Service given that it was guarded and people could not enter or leave without a special permit. As he had had no such permit any attempt to leave would have been without success.

56. Furthermore, the applicant observed that under Article 106 § 2 of the CCP one of the reasons for a suspect's arrest was "an attempt to flee" (see paragraph 50 above). In the absence of any explanations concerning his procedural status at that stage or the reasons for holding him at the offices of the Security Service, he had not been sure that his attempt to leave the premises would not have been interpreted as "an attempt to flee" in the meaning of the above-mentioned legal provision. The applicant argued that such an interpretation had been highly probable as the investigator had decided to institute criminal proceedings against him after his questioning.

57. The Government argued that the applicant had been free to leave after his questioning as a witness on 23 June 2010 and that no coercion or pressure had been exercised on him to make him stay at the Security Service building. In that connection, the Government attached weight to the fact that the applicant had been accompanied by his lawyer, who must have been aware of the issues associated with the deprivation of liberty. In the absence of any complaints from the lawyer regarding his client's staying in the offices of the Security Service, there was no indication that the applicant had been kept there against his will.

58. Accordingly, the Government maintained that there had been no deprivation of liberty during the period in question and that the applicant's rights under Article 5 of the Convention had not been breached.

(ii) The Court's assessment

(α) General principles

59. The general principles developed by the Court in assessing whether someone has been "deprived of his liberty" within the meaning of Article 5 of the Convention were recently summarised in the Court's judgment in *Kasparov v. Russia* (no. 53659/07, § 36, 11 October 2016) and read as follows (with numerous further case-law references omitted here):

“(i) The starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance.

(ii) The requirement to take account of the “type” and “manner of implementation” of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good.

(iii) It is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation. The characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court’s conclusion as to the existence of a deprivation of liberty.

(iv) The right to liberty is too important in a “democratic society”, within the meaning of the Convention, for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention may violate Article 5 of the Convention even though the person concerned has agreed to it. For the same reason, if person initially attends a place of detention such as a police station of his own free will or agrees to go with the police for questioning, this is not in itself determinative of whether that person has been deprived of his liberty.

(v) The Court will also examine the degree of coercion involved. If, upon an examination of the facts of the case, it is unrealistic to assume that the applicant was free to leave, this will normally indicate that there has been a deprivation of liberty. This may be the case even when there is no direct physical restraint of the applicant, such as by handcuffing or placement in a locked cell.

(vi) Article 5 § 1 of the Convention may apply even to deprivations of liberty of a very short length.”

60. It has been the Court’s constant view that the unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention (see, among many other references, *Čamans and Timofejeva v. Latvia*, no. 42906/12, § 129, 28 April 2016).

(β) Application of the above principles to the present case

61. It is not disputed in the present case that the applicant remained on the premises of the Security Service once his questioning as a witness had been completed at 3.43 p.m. and before the report on his arrest was drawn up at 7.02 p.m. on 23 June 2010. The major point of disagreement

between the parties is whether he did so of his own free will or as a result of coercion.

62. As pointed out by the Government, there were no formal indications of a deprivation of liberty at that stage. Thus, he had not been handcuffed or locked up or had a guard placed next to him. It is noteworthy, however, that the investigator immediately informed the applicant about the decision to institute criminal proceedings against him and started drafting a formal ruling to that effect, without determining the applicant's status in a formal way. Regardless of whether or not it was technically possible for the applicant to leave the Security Service's premises without a special permit, it was, in the Court's opinion, unrealistic to assume that under the circumstances he was free to do so. On the contrary, the Court finds convincing the applicant's argument that, being aware of the upcoming criminal proceedings against him, he had every reason to fear that an attempt by him to leave would have negative consequences for him (see paragraph 56 above).

63. As to the Government's argument that both the applicant and his lawyer had accepted that situation without complaining, it is, firstly, inaccurate (see paragraphs 24, 26 and 33 above) and, secondly, irrelevant for the Court's assessment of whether the applicant was deprived of his liberty (see paragraph 59 above).

64. Looking beyond mere appearances and regardless of the lack of characterisation given by the Ukrainian authorities to the factual situation complained of, the Court concludes, in the circumstances of the present case, that the applicant was deprived of his liberty from 3.43 p.m. to 7.02 p.m. on 23 June 2010.

65. The Court has already found violations in cases where the formal determination of an applicant's status as an arrested suspect was delayed without a reasonable explanation (see, for examples in Ukrainian cases, *Smolik v. Ukraine*, no. 11778/05, §§ 46-48, 19 January 2012; *Grinenko v. Ukraine*, no. 33627/06, §§ 77-78, 15 November 2012; *Belousov v. Ukraine*, no. 4494/07, §§ 86-88, 7 November 2013; and *Kushnir v. Ukraine*, no. 42184/09, §§ 166-168, 11 December 2014).

66. The Court considers that a similar problem has manifested itself in the present case, given that there was no record of the applicant's detention for three hours and twenty minutes and that no explanation was given for that omission.

67. There has therefore been a violation of Article 5 § 1 of the Convention on this account.

(b) The applicant's arrest at 7.02 p.m. on 23 June 2010 and his detention on the basis of the investigator's decision until 24 June 2010

(i) The parties' submissions

68. The applicant argued that his arrest at 7.02 p.m. on 23 June 2010 without a judicial warrant had been contrary to the safeguards of Article 29 of the Constitution and Article 106 of the CCP, which only permitted such detention in specific urgent cases and which had not applicable to his situation (see paragraphs 49-50 above).

69. The applicant observed that the investigator had merely referred to Article 106 § 2 of the CCP without any analysis as to how it was relevant in the circumstances of his case. The applicant further noted that he had never denied countersigning the letters in question and that the investigator had had no grounds to suspect him of a criminal offence. Even if an assumption to the contrary was made, the applicant went on to state, none of the preconditions set out Article 106 § 2 of the CCP had been met in his case (see paragraph 50 above).

70. The Government maintained that the domestic authorities had had legitimate grounds to arrest the applicant. They noted that the witness Mr Sh. had during his questioning on 22 June 2010 directly identified the applicant as an official who had acted in gross neglect of his duties (see paragraph 19 above). Accordingly, the Government contended that Article 106 of the CCP had been applied correctly.

71. The Government pointed out that the lawfulness of the applicant's arrest had been reviewed by the domestic courts at two levels of jurisdiction and they had dismissed his complaint in that regard as unfounded (see paragraph 33 above).

(ii) The Court's assessment

72. It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013).

73. The Court notes that under Ukrainian legislation deprivation of liberty without a reasoned court decision was possible only in a limited number of situations defined with sufficient precision. Thus, Article 29 of the Constitution permitted such a measure for a maximum of three days

only as a response to an urgent need to prevent or stop a crime (see paragraph 49 above). According to Article 106 of the CCP, an investigator could arrest a person if the latter had been caught *in flagrante delicto*, had been pointed out as an offender by eyewitnesses or victims, or had clear traces of a crime on his person or clothing (§ 1). Any other information giving rise to grounds for suspecting a person of a criminal offence would only provide a legitimate basis for arresting that person without a judicial order if: (a) he had attempted to flee; (b) he had no permanent residence; or (c) his identity had not been established (see paragraph 50 above).

74. There is no indication that any of those conditions was met in the applicant's case and thus bringing it within the scope of the exceptions providing the investigator with the power of arrest without a court decision.

75. It is noteworthy that the applicant was arrested in connection with an event which had taken place almost a year and a half earlier. It could not therefore be claimed that the authorities faced an urgent situation such as, for example, an *in flagrante delicto* situation. Overall, there is nothing to suggest that the general requirement of a preliminary arrest warrant issued by a court could not or should not have been adhered to.

76. Having regard to the above considerations, the Court finds that the applicant's arrest and detention between 23 and 24 June 2010 on the basis of the investigator's decision contravened the domestic legislation and was thus incompatible with the requirements of Article 5 § 1 of the Convention.

77. There has therefore been a violation of Article 5 § 1 in this respect as well.

2. Complaint under Article 5 § 3 of the Convention

(a) The parties' submissions

78. The applicant complained that his detention from 24 June 2010 to 5 July 2011 had been in breach of his rights under Article 5 § 3 of the Convention. He argued that the domestic courts had failed to provide relevant and sufficient reasons in their decision to remand him in custody and in their subsequent extensions of that preventive measure.

79. The applicant criticised the courts for being formalistic and for their failure to give any assessment to the particular circumstances of his case or to consider any alternative, less intrusive, preventive measures. He observed that he had travelled abroad twice after the criminal proceedings against D. had been initiated. He emphasised that he had always demonstrated his readiness to cooperate with the investigation and noted in that connection that he had complied with the very first summons from the investigator to appear for questioning as a witness in those proceedings. Moreover, fifty Members of Parliament had offered their personal surety to ensure his proper conduct in the proceedings. However, the Ukrainian courts had not made any assessment of any the above circumstances.

80. The applicant further submitted that in extending his pre-trial detention on numerous occasions the domestic courts had mainly relied on the absence of any reason for changing the custodial preventive measure to a more lenient one. In other words, he argued that they had not even attempted to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty and that the burden of proof had wrongly been shifted onto him.

81. The Government submitted that the applicant's detention had been based on relevant and sufficient grounds.

82. They maintained that the domestic courts had not only had due regard to the gravity of the criminal offence in question, but had also looked at all the other circumstances of relevance.

83. The Government referred to the fact that the applicant had been released on 5 July 2011 under an undertaking not to abscond as evidence in support of their arguments. They observed that by that time all the investigative steps had been completed and there had no longer been any risk of his hampering the establishment of the truth or influencing witnesses.

(b) The Court's assessment

(i) General principles

84. The Court reiterates that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. The requirement for the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say “promptly” after the arrest (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 87 and 102, ECHR 2016 (extracts)). Furthermore, when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial (see, for example, *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012).

85. Justifications which have been deemed “relevant” and “sufficient” reasons in the Court's case-law have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee (see, for instance, *Ara Harutyunyan v. Armenia*, no. 629/11, § 50, 20 October 2016, with further references).

86. The presumption is always in favour of release. The national judicial authorities must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure

from the rule in Article 5, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, among other authorities, *Buzadji*, cited above, §§ 89 and 91). Arguments for and against release must not be “general and abstract” (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts)). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the specific facts outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84 *in fine*, 26 July 2001).

(ii) *Application of the above principles to the present case*

87. The Court notes that the applicant spent one year and twelve days in pre-trial detention. When ordering and extending that preventive measure, the Ukrainian courts mainly relied on the following considerations: the seriousness of the charges against him and the risk of his absconding or interfering with the investigation, in particular by tampering with the evidence or influencing witnesses.

88. It is noteworthy that the criminal proceedings against the applicant concerned specific facts which were never disputed. Thus, the applicant never denied countersigning the official letters of 26 February 2009 in his capacity as chief of the State Customs Service. The crux of the criminal case against him was the legal classification of that act: initially it was viewed as possible neglect of official duties but was subsequently re-classified to abuse of office (see paragraphs 23, 37, 51 and 52 above). Under the circumstances, it is difficult to imagine how the applicant could have possibly hampered establishing any facts of relevance for the investigation. Likewise, the definition of the nature and scope of his official duties at the time was not dependant on any witness statements or other evidence susceptible of being tampered with. That being so, and in the absence of any further explanations from the domestic courts in that regard, it remains unclear what they actually meant when they referred to the risk of the applicant interfering with the investigation.

89. The Court notes that the risk of his absconding, also raised as a justification for his detention, was also not based on any specific facts in the case. The domestic courts failed to give any assessment to the applicant’s pertinent argument that his behaviour in the proceedings had shown his readiness to cooperate with the investigation.

90. Furthermore, there seems to be no indication in the domestic courts’ reasoning that they duly examined any alternative, less intrusive, preventive measures in the applicant’s case. In particular, no explanation was given for

their rejection of the release request on a personal surety by fifty Members of Parliament (see, in particular paragraphs 28 and 30 above).

91. The Court next observes that the reasoning given in justification of the applicant's pre-trial detention did not evolve with the passage of time. Even when the investigation had been completed and the applicant was studying the case file, his detention was extended merely because the courts did not discern any reasons for changing the measure (see paragraphs 41 and 44 above). The Court therefore agrees with the applicant's argument that the domestic courts failed to make a fact-specific assessment of the preventive measure applied to him throughout the entire period of his detention. The fact that he was released on 5 July 2011, before his conviction (see paragraph 46 above), does not counterbalance those previous failures.

92. The Court has often found a violation of Article 5 § 3 of the Convention in cases against Ukraine on the basis that even for lengthy periods of detention domestic courts referred to the same set of grounds, if there were any, throughout periods of applicants' detention (see, for example, *Kharchenko v. Ukraine*, no. 40107/02, §§ 80-81 and 99, 10 February 2011).

93. The Court considers that the circumstances of the present case disclose a similar problem.

94. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5

95. The applicant stated in his application that the violations of his rights under the Convention pursued political motives and stemmed from the fact that he had served in the previous government, which was, at the time of his application to the Court, in opposition to the new ruling party. Referring to "numerous publications in Ukrainian and foreign mass media", the applicant maintained that he and other former government officials were being unjustifiably persecuted.

96. The applicant's submission was communicated to the respondent Government under Article 18 of the Convention taken in conjunction with Article 5, which provides as follows:

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

97. The Government argued that the applicant's allegations lacked any substantiation.

98. The applicant responded by making reference to his earlier arguments in the application, without further comments.

99. Having regard to the summary nature of the applicant's submission in support of this complaint, the Court cannot but reject it as manifestly ill-founded under Article 35 §§ 3 (a) and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

100. The applicant further complained under Article 6 § 1 of the Convention that the courts which had examined the issue of his pre-trial detention had lacked impartiality and independence as, in particular, on several occasions the same judges had been involved in considering whether to extend the custodial measure. Additionally, he complained under the above provision that the courts had refused to consider his appeal against the ruling of 30 September 2010 on the institution of criminal proceedings against him under Article 364 § 3 of the CC (see paragraph 37 above). Lastly, the applicant complained under Article 14 of the Convention that the judicial authorities had referred to his prominent social status and wealth as an argument for holding him in custody.

101. In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected too as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

103. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

104. The Government contested the above claim as excessive.

105. The Court, making its assessment on an equitable basis, awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

106. The applicant claimed EUR 7,128 in respect of his legal representation by Mr Bushchenko in the proceedings before the Court, which included: EUR 6,600 for legal work at EUR 150 per hour and EUR 528 for administrative costs. To substantiate that claim, the applicant submitted a legal assistance contract of 21 July 2011, under which he was to pay Mr Bushchenko EUR 4,000 in advance. The remaining amount was to be paid upon the completion of the proceedings in Strasbourg and only within the limits of the Court's award in costs and expenses. The contract further stipulated that the applicant was to reimburse his representative various administrative expenses estimated at 8% of the amount of legal fees. As confirmed by financial receipts, on 2 August and 29 November 2011 the applicant paid an advance equivalent to EUR 4,000 to his representative. The applicant also submitted a time-sheet completed by Mr Bushchenko on 22 November 2011, which showed he had spent forty-four hours working on the case.

107. The Government contested the above claim as unsubstantiated and exorbitant.

108. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

C. Default interest

109. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 1 and 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's deprivation of liberty from 3.43 p.m. to 7.02 p.m. on 23 June 2010;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's arrest without a judicial warrant from 7.02 p.m. on 23 June to 24 June 2010;
4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
5. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President