



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

SECOND SECTION

**CASE OF MERIT v. UKRAINE**

*(Application no. 66561/01)*

JUDGMENT

STRASBOURG

30 March 2004

**FINAL**

*30/06/2004*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Merit v. Ukraine,**

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

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 9 March 2004,

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

## PROCEDURE

1. The case originated in an application (no. 66561/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Israeli national, Mr Sam Merit (“the applicant”), on 13 November 2000. The applicant was represented by Mrs Andrasoni, a lawyer practising in Romania.

2. The Ukrainian Government (“the Government”) were represented by Mrs Valeria Lutkovska, succeeded by Ms Zoryana Bortnovska, Agents of the Government of Ukraine before the Court.

3. The applicant complained under Articles 6 § 1 and 13 of the Convention about the length of the criminal proceedings in his case.

4. On 22 October 2002 the Court decided to communicate the applicant’s complaint concerning the allegedly unreasonable length of the proceedings to the respondent Government. It also declared the remainder of the applicant’s complaints inadmissible. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the communicated complaints at the same time as their admissibility.

## THE FACTS

5. The applicant was born in 1939 and now lives in Israel. He owns ninety-nine per cent of the shares in Jason Development Enterprises Ltd (hereafter the “JDE”), a company registered in Ukraine.

## I. THE CIRCUMSTANCES OF THE CASE

6. On 27 September 1997 the Vadul-Syretska Customs Service of the State Customs Department of Ukraine conducted a customs check of the coffee-tilling goods supplied by the Jason Industries company (the company owned by the applicant) as a contributory to the statutory fund of the joint-stock company, JDE. The customs check showed that a cargo-customs declaration had been made by the representatives of JDE on the basis of false documents. On 29 September 1997 the Vadul-Syretska Customs Service initiated a criminal investigation into alleged smuggling and fraud offences.

7. On the same date, the case was transferred to the prosecution service of the Chernivtsi Region (hereafter “the prosecution”) for further investigation. On the basis of resolutions of the prosecution of 10 and 20 October 1997, 18 November 1997 and 19 January 1998, the Vadul-Syretska Customs Service seized documents pertaining to the financial and commercial activities of JDE.

8. On 13 October 1997 the prosecution seized the goods supplied to the statutory fund of JDE as evidence and on 16 October 1997 it froze JDE’s accounts. It also seized all of the company’s documentation, including accounting books and copies of contracts, as well as other property belonging to the company and the applicant.

9. On 28 January 1998 the applicant was detained on suspicion of having committed a criminal offence under the Criminal Code of Ukraine (the “CCU”).

10. On 30 January 1998 the prosecution ordered the applicant’s detention on remand in view of the pending criminal investigation against him.

11. On 4 February 1998 the prosecution charged the applicant with smuggling (Article 70 of the CCU), financial fraud (Article 148-5 CCU) and fraud committed by an official (Article 172(2) CCU).

12. On 5 February 1998 the prosecutor extended the deadline for the investigation by four months.

13. On 17 March 1998 the prosecutor extended the applicant’s detention on remand by four months.

14. On 6 April 1998 the prosecutor extended the deadline for investigation by five months and fourteen days.

15. On 9 June 1998 the applicant was additionally charged with tax evasion (Article 148-2(2) CCU) and deliberate use of a forged document (Article 194(2) CCU).

16. On 10 June 1998 the applicant was notified about the completion of the investigation.

17. On 30 January 1999 the deputy prosecutor approved the bill of indictment issued by the investigating officer.

18. On 3 February 1999 the case file was transferred to the Leninsky District Court of Chernivtsi (the “District Court”).

19. On 29 June 1999 the District Court ordered the prosecution to conduct an additional investigation into the circumstances of the case since the investigation was incomplete. In the course of the proceedings the applicant lodged a motion with the District Court, seeking his release. His motion was rejected by the District Court since there was a risk that he might abscond.

20. In July 1999 the prosecution sought the annulment of the remittal decision before the Chernivtsi Regional Court (the “Regional Court”) on the ground that there was already sufficient corroborating evidence.

21. On 10 August 1999 the Regional Court rejected the prosecution’s application, considering that it was necessary to undertake additional investigations in order to reconstruct the crime.

22. On 25 August 1999 the applicant was released from detention on the basis of the resolution of the prosecution’s investigator. The applicant was required not to leave his place of residence.

23. On 22 September 1999 the applicant’s recognisance not to abscond was changed to an undertaking to appear before the investigating authorities and the court. On the same date, the criminal investigation against the applicant was suspended due to the issue of a search warrant against Ms Lodyanova (a suspect in the case).

24. In September 1999 JDE instituted proceedings in the District Court against the Government of Ukraine, the Chernivtsi Regional Administration and the prosecution, seeking the return of its property and documents.

25. On 15 September 1999 the District Court, by a letter addressed to JDE, stated that it would not consider the complaints directed against the legal entities as it had no jurisdiction over them.

26. On 1 October 1999 the District Court, following JDE’s additional submissions, refused to consider the complaints against the Government of Ukraine and the prosecution service, on the ground that the complaints were outside its jurisdiction. It also held that the State arbitration courts had jurisdiction in the matter.

27. On 27 October 1999 the Regional Court allowed JDE’s cassation appeal, quashed the ruling of 1 October 1999 and remitted the case for reconsideration by the same court.

28. On 3 November 1999 the District Court suspended the proceedings in the case due to JDE’s failure to comply with the formal requirements of the Code of Civil Procedure for the introduction of the complaints (Article 137 of the Code). The court gave JDE until 16 November 1999 to rectify the mistakes.

29. On 17 November 1999 the District Court refused to consider JDE’s claims because of its failure to comply with the ruling of 3 November 1999. On 1 December 1999 the Regional Court upheld this decision.

30. On 14 December 1999 JDE lodged further complaints against the Government of Ukraine, the Chernivtsi Regional State Administration and the Prosecution Service of the Chernivtsi Region.

31. On 6 January 2000 the District Court left JDE's complaints without consideration on account of its failure to comply with the formal requirements of Article 137 of the Code of Civil Procedure for the introduction of complaints. JDE was given until 14 January 2000 to rectify the mistakes.

32. On 17 January 2000 the District Court refused to consider JDE's complaints due to its failure to comply with the ruling of 6 January 2000.

33. On 2 February 2000 the Regional Court quashed the ruling of 17 January 2000 and remitted the case for consideration on the merits to the same court.

34. On 24 April 2000 the District Court rejected JDE's motion concerning compensation for moral and material damage caused to JDE by the Government of Ukraine, the Chernivtsi Regional State Administration and the Prosecution Service of Ukraine. In particular, it found that JDE's complaints amounted to a separate claim, which had to be lodged with the court in compliance with Article 137 of the Code of Civil Procedure.

35. On 25 April 2000 the District Court, in the course of a hearing in the presence of the parties, refused to consider JDE's claims for the return of property and documents as being outside the courts' jurisdiction, in accordance with Articles 227-1 and 248-3 of the Code of Civil Procedure and Article 234 of the Code of Criminal Procedure. It also decided to terminate the proceedings in the case.

36. On 31 May 2000 the Regional Court upheld this decision. In particular, it stated that, for the time-being, JDE's claims could not be determined in civil proceedings. It also noted that a different procedure for their consideration existed in the domestic law.

37. In May 2000 the applicant instituted proceedings in the District Court against the prosecution, demanding termination of the criminal investigation against him. On 2 June 2000 the District Court rejected his claims as being outside the court's jurisdiction under Article 248-3 of the Code of Civil Procedure and Article 234 of the Code of Criminal Procedure. In particular, it specified that the applicant had not availed himself of a special procedure for lodging complaints against acts of the investigator carried out in the course of the pre-trial investigation.

38. On 20 July 2000 the criminal investigation was terminated on account of lack of corroborating evidence.

39. On 19 September 2000 the deputy prosecutor quashed the resolution of 20 July 2000 due to the investigating officer's failure to comply with the District Court's instructions of 29 June 1999 (see paragraph 19 above). The prosecution remitted the case for additional investigations.

40. On 22 November 2001 the District Court passed a resolution authorising the apprehension of Ms Lodyanova.

41. On 7 December 2001 the prosecution informed the applicant that the criminal charges against him were still being investigated.

42. The criminal investigation is currently suspended due to the nationwide search for Ms Lodyanova.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### *1. Constitution of Ukraine of 28 June 1996*

#### **Article 55**

“Human and citizens’ rights and freedoms are protected by the court.

Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies exercising State power, local self-government bodies, officials and officers.

... After exhausting all domestic legal remedies, everyone has the right of appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.”

#### **Chapter VII. Prosecution**

#### **Article 121**

“The Prosecution of Ukraine constitutes a unified system that is entrusted with:

1. prosecuting in court on behalf of the State;
2. representing the interests of a citizen or of the State in court in cases determined by law;
3. supervising compliance with the laws of the bodies which conduct detective and search activities, inquiries and pre-trial investigations;
4. supervising the observance of the laws in the execution of judicial decisions in criminal cases, and also in the application of other coercive measures aimed at the restraint of citizens’ personal liberty.”

#### **Article 122**

“The Prosecution of Ukraine is headed by the Prosecutor General of Ukraine, who is appointed to office with the consent of the Verkhovna Rada of Ukraine, and dismissed from office by the President of Ukraine. The Verkhovna Rada of Ukraine may express

no confidence in the Prosecutor General of Ukraine, which results in his or her resignation from office.

The term of authority of the Prosecutor General of Ukraine is five years.”

#### **Article 123**

“The organisation and operational procedure for the bodies of the Prosecution of Ukraine shall be established by the law.”

#### **Article 124**

“Justice in Ukraine is administered exclusively by the courts.

... The jurisdiction of the courts extends to all legal relations that arise in the State.

... Judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire territory of Ukraine.”

#### *2. Code of Criminal Procedure of 28 December 1960 (as amended on 21 June 2001)<sup>2</sup>*

#### **Article 120**

##### **The terms of the pre-trial investigation**

“The pre-trial investigation in criminal cases shall last no longer than two months. This term shall commence from the moment the criminal proceedings were initiated up to the point of their being sent to the prosecutor with:

an indictment or a resolution concerning the committal of the case to the court in order to decide on applicable measures of compulsory medical treatment or terminating the proceedings in the criminal case. In the event of impossibility to terminate the proceedings this term shall be extended by up to three months by the district, city, military prosecutor of the army, fleet, military districts (commands), garrisons and the prosecutors of equal rank. The time it takes for the accused and his representatives to familiarise themselves with the materials in the criminal case-file shall not be included in the calculation of the period of the pre-trial investigation.

In especially complicated cases the term of the pre-trial investigation, established by part 1 of this Article, can be extended on the basis of the reasoned resolution of the investigator up to six months, to be approved by the prosecutor of the Autonomous Republic of the Crimea, prosecutors of regions, the prosecutor of Kyiv, the military prosecutor of the military district (command), fleet and the prosecutors of equal rank or their deputies.

Further continuation of the term of the pre-trial investigation shall only be approved by the Prosecutor General of Ukraine or by his deputies.

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2. These amendments entered into force on 29 June 2001.

Where the case was remitted for an additional investigation, or if the terminated case was re-opened, the term of additional investigation shall be established by the prosecutor who supervises the investigation, and shall not be more than one month from the moment of the re-initiation of the proceedings in the case. Further continuation of this term shall be enacted on a general basis.

The rules enshrined in this Article, shall not be applicable to criminal proceedings where it has not been established who committed the crime. The running of the term of the investigation in such cases shall commence from the date of identifying the person who committed a crime.”

(On 30 January 2003 the Constitutional Court of Ukraine interpreted this provision and held that the maximum deadline for investigating criminal cases cannot be fixed. It decided that the time allowed for investigation should be reasonable, and referred to Article 6 of the Convention.)

#### **Article 234**

##### **Complaints in respect of the acts of the investigating officer**

“... Complaints in respect of the acts of the investigating officer can be lodged with the court.

The complaints in respect of the actions of the investigating officer shall be considered by the first instance court in the course of the preliminary hearing in the case or in the course of its consideration on the merits, unless otherwise provided by this Code...”

(This provision was declared partly unconstitutional by the Constitutional Court of Ukraine on 30 January 2003).

#### **Article 236**

##### **Complaints in respect of the prosecutor’s actions**

“Complaints in respect of the prosecutor’s actions during the conduct of the pre-trial investigation or other individual investigative actions in the case shall be submitted to the superior prosecutor, who shall consider them in accordance with the procedure and within the terms prescribed by Articles 234 and 235 of this Code.

A complaint about the prosecutor’s actions can be lodged with the court.

Complaints about the prosecutor’s actions shall be considered by the first-instance court in the course of the preliminary consideration of the case or in the course of its consideration on the merits, unless otherwise provided for by this Code.”

### 3. *Code of Civil Procedure, 1966*

#### **Article 137**

##### **The content and form of the claim**

“The claim shall be lodged with the court in writing.

The claim shall contain the following:

1. the full name of the court the claim is lodged with;
2. the exact name of the applicant and respondent, their place of residence and their situation, as well as the name of the representative of the applicant, in the event the claim is lodged by the representative;
3. the content of the claim;
4. the circumstances with which the applicant substantiates his claim;
5. reference to relevant evidence substantiating the claim;
6. reference to the sum claimed;
7. the signature of the applicant and his representative, mentioning the date the claim was lodged.

... Written evidence shall be appended to the claim and, in the event the claim is lodged by the representative of the applicant, a letter of authority or another document certifying the powers of the representative.”

#### **Article 227-1**

##### **The grounds for terminating the proceedings in the case**

“The proceedings in the case shall be terminated by the court:

1. if the claims are outside the courts’ jurisdiction; ...”

#### **Article 248(3)**

##### **Complaints in respect of decisions and actions outside the jurisdiction of the courts**

“The following complaints are outside the courts’ jurisdiction: ...

- ... the actions or acts of an official of a body of inquiry, preliminary investigation, prosecution or court with regard to which a non-judicial procedure for considering complaints is established....”

(This provision was declared partly unconstitutional as to the complaints “against the actions or acts of an official of a body of inquiry, preliminary investigation, prosecution...” by the decision of the Constitutional Court of Ukraine No. 6-пп/2001 of 23 May 2001).

#### *4. Constitutional Court of Ukraine*

##### **(a) Decision of 23 May 2001 concerning the constitutionality of Article 248-3 §§ 3, 4 and 5 of the Code of Civil Procedure**

“To declare Article 248-3 § 4 of the Code of Civil Procedure as not in compliance with the Constitution of Ukraine (unconstitutional), concerning the lack of jurisdiction of the courts as regards – ... the actions or acts of an official of a body of inquiry, preliminary investigation, prosecution or court with regard to which a non-judicial procedure for considering complaints has been established...”

##### **(b) Decision of 30 January 2003 concerning the constitutionality of part 3 of Article 120, part 6 of Article 234 and part 3 of Article 236 of the Code of Criminal Procedure**

“To declare that the following provisions do not contravene the Constitution of Ukraine (are constitutional):

... 1.2. Part 6 of Article 234, part 3 of Article 236, in accordance with which the complaints against the resolutions of the investigator or prosecutor concerning the arraignment of the accused shall be considered by the first instance court in the course of the administrative hearing or in the course of the consideration of the case on the merits.

2. To declare the following not to correspond to the Constitution of Ukraine (unconstitutional): the provisions of part 6 of Article 234, part 3 of Article 236 of the Code of Criminal Procedure of Ukraine, that prevent the consideration of complaints against the investigator or prosecutor at the stage of the preliminary investigation concerning the basis, grounds and the procedure for the initiation of criminal proceedings against a particular person.”

## COMPLAINTS

43. The applicant complained under Article 6 § 1 of the Convention about the unreasonable length of the criminal investigation against him. He also complained about the lack of effective remedies in respect of his complaint, as required by Article 13 of the Convention.

44. On 14 March 2003 the applicant lodged an additional complaint with the Court under Article 1 of Protocol No. 1 to the Convention. In his observations in response to those of the Government of 14 March 2003 the applicant further maintained that, notwithstanding the partial inadmissibility decision of 22 November 2002, Articles 1, 4 § 2, 5 §§ 1, 2, 3, 4 and 5, 6 § 1,

2 and 3, 8 § 1 and 13, as well as Article 4 of Protocol No. 7 to the Convention, had also been infringed.

## THE LAW

45. According to the applicant, the length of the proceedings was in breach of the “reasonable time” requirement laid down in Article 6 § 1 of the Convention, which provides as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

46. He further complained that he had no effective remedies in respect of this complaint, in breach of Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

## I. ADMISSIBILITY

### A. Preliminary considerations

47. The Court notes at the outset that the applicant’s complaints under Articles 3, 4, 5 §§ 1 and 3, 6 § 1 (fairness) and 14 of the Convention were rejected for the reasons set out in its partial decision of 22 October 2002. It reaffirms the grounds for dismissing those complaints. Its decision thereon cannot be reopened.

48. The Court next observes that, following communication of the length of proceedings complaints to the Government for observations, the applicant introduced an additional complaint alleging an infringement of Article 1 of Protocol No. 1 to the Convention. It notes in this connection that the criminal proceedings against the applicant are still pending. When those proceedings have terminated, the applicant will have the possibility to submit his restitution claim to the domestic court. The applicant’s complaint under Article 1 of Protocol No. 1 is therefore premature and must be rejected for non-exhaustion of domestic remedies. The Court would point out that, after the final ruling is given on his restitution claim, it will be open to the applicant to re-submit his complaint to the Court if he still considers himself a victim of an alleged violation of Article 1 of Protocol No. 1. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention.

49. The Court finally observes that further new complaints were submitted after communication based on an alleged infringement of Articles 5 §§ 2, 4 and 5, 6 §§ 2 and 3 and Article 4 of Protocol No. 7 to the Convention. Without regard to other grounds of inadmissibility, the Court finds that there is nothing in the case file which discloses any appearance of a breach of these provisions. These complaints must therefore be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

### **B. The parties' submissions on the communicated complaints**

50. The Government argued that the applicant had failed to exhaust domestic remedies in that he had not filed a complaint with a higher prosecutor against the decision to suspend temporarily the investigation in his case (see paragraph 42 above). They referred to Article 234 of the Code of Criminal Procedure (the "CCRP") in this connection. Furthermore, the Government pointed out that Articles 55 and 124 of the Constitution of Ukraine and Article 248-3 of the Code of Civil Procedure (the "CCP") provided the applicant with a further remedy which would have allowed him to complain to the court about the alleged unlawful failure of the investigating officer to act following the resolution of the deputy prosecutor of the Chernivtsi Region of 19 September 2000 (see paragraph 39 above). However, he failed to avail himself of this remedy.

51. The applicant contested this view. In particular, he claimed that he had complained about the unlawful acts committed during the investigation to the Leninsky District Court and the Chernivtsi Regional Court under Articles 234 of the CCRP and 248-3 of the CCP. The relevant decisions were given by these courts on 25 April, 31 May and 2 June 2000. The applicant further stressed that the resolution adopted by the deputy prosecutor of the Chernivtsi Region on 19 September 2000 constituted a final decision for the purpose of exhaustion of domestic remedies. The applicant maintained that there were no effective remedies that he was required to exhaust in order to challenge this resolution. In particular, the applicant stated that he had complained on various occasions to the General Prosecution Service (*Генеральна Прокуратура України*) and the Chernivtsi Regional Prosecution Service about the unreasonable length and unlawfulness of the proceedings in his case. The final answer to these complaints was given on 7 December 2001 by the prosecution informing the applicant that the case was still being investigated.

52. The Government pointed out that on 23 May 2001 the Constitutional Court had found Article 248-3 § 4 of the CCP to be partly unconstitutional. They reasoned that on the basis of this decision the applicant had acquired a right, secured in legislation, to complain directly to a court about the acts of investigating officers and to seek redress in respect of those acts. The

Government also drew attention to the amendments introduced to Article 234 of the CCRP on 21 June 2001 (with effect as from 29 June 2001) which provided for the possibility to complain to the courts about acts of an investigating officer/prosecutor which violated the parties' rights.

53. The applicant further argued that the remedies introduced on 23 May and 21 June 2001 (with effect from 29 June 2001) did not exist when he introduced the application. He stated that, at that time, the courts and law enforcement bodies acted on the basis of the laws then in force. He concluded, therefore, that domestic remedies had been exhausted.

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

#### *1. Remedies available under Ukrainian law*

54. The Court notes that, according to the Government, the remedies introduced in Ukraine on 23 May and 21 June 2001 have empowered the domestic courts to examine complaints under Article 248-3 of the CCP and 234 of the CCRP concerning unlawful acts of the investigating authorities which interfered with the rights of the parties to criminal proceedings. The courts were thereby vested with the power to award redress for violations found, including the power to quash impugned decisions. As to the applicant's complaints about the length of proceedings and the complaints about the suspension of the criminal proceedings and their re-initiation, the Government have suggested that these could have been lodged with the domestic courts in accordance with the formalities provided by the law. In particular, the complaints about the protracted length of the proceedings could have been submitted to the courts under Article 248-3 of the CCP as from 23 May 2001. Regarding the complaints about the suspension of the proceedings and the resolution of 19 September 2000, these could have been filed with the courts under Article 234 of the CCRP from 29 June 2001.

55. The Court takes note of the Government's submission that the prosecution's decisions could have been impugned at the preparatory (administrative) hearing in the case or at the hearing on the merits before the court. By a decision of 30 January 2003 of the Constitutional Court of Ukraine, the domestic courts were given power to consider these complaints while the pre-trial investigation was still pending. On that date, the Constitutional Court held that the basis, the grounds and the procedure for initiating criminal proceedings against a person, but not the merits of the criminal accusations as such, were subject to appeal.

56. The Court finds, therefore, that the domestic law provides for judicial control of the acts of the investigating authorities. However, it remains to be decided whether this control could have been exercised effectively in the case at hand and was accessible and not merely theoretical or illusory at the time of the introduction of the application. In particular, it

must be ascertained whether these remedies offered reasonable prospects of success in respect of the applicant's Convention complaint about the unreasonable length of the proceedings.

## 2. Principles enshrined in Article 35 § 1 of the Convention

57. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. However, the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

58. The Court emphasises that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. The Court has recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant (see, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 69). It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected in order to exhaust domestic remedies.

59. The Court further recalls that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether the applicant can raise this complaint before domestic courts by claiming specific redress; in other words, whether a remedy exists that could answer his complaints by providing direct and speedy redress, and not merely indirect protection of the rights guaranteed in Article 6 of the Convention (see *Deweert v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 16, § 29). The Court has also held that a remedy is "effective" if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress

for delays that have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII).

60. The Court also notes that in so far as the matter concerns a remedy introduced after the application was lodged with the Court, it has held that applicants in cases against Italy which concern the length of proceedings should have recourse to the remedy introduced by the “Pinto Act” notwithstanding that it was enacted after their applications had been filed with the Court (see, for example, *Giacometti and Others v. Italy* (dec.), no. 34939/97, 8 November 2001). A similar decision was taken in respect of cases introduced against Croatia and Slovakia following the entry into force of a constitutional amendment permitting the Constitutional Court to provide redress of both a preventive and a compensatory nature to persons complaining about undue delays in judicial proceedings (see *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002; *Andrasik, Cerman, Bedac, Lachmann, Kocur, Dubravicky and Brazda v. Slovakia* (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, 22 October 2002).

### 3. Assessment by the Court as to the exhaustion of domestic remedies

61. Applying the aforementioned considerations to the instant case, the Court finds that the applicant had an opportunity to complain to the relevant court as from 23 May 2001 and 29 June 2001 against the resolution of 19 September 2000 of the prosecutor of the Chernivtsi Region by which the criminal investigation against him was resumed. The applicant could have done so either in the course of civil proceedings under Article 248-3 of the CCP or in the course of criminal proceedings under Article 234 of the CCRP. The Court considers therefore that it is necessary to examine whether these remedies satisfied the criteria of Article 35 § 1 of the Convention.

62. As to the lodging of complaints with the superior prosecutor, which in accordance with the observations of the Government have to be considered effective remedies, the Court finds that they cannot be considered “effective” and “accessible” since the status of the prosecutor in the domestic law and his participation in the criminal proceedings against the applicant do not offer adequate safeguards for an independent and impartial review of the applicant’s complaints.

63. In particular, the Court observes that the Constitution of Ukraine provides for the separation of legislative, executive and judicial powers. Pursuant to the provisions of the Constitution of Ukraine 1996 governing the administration of justice, judicial powers are entrusted solely to the independent courts. The provisions relating to the structure, functions and organisation of the prosecuting authorities contained in the Chapter VII of the Constitution of Ukraine (Articles 121-123) and the Law on Prosecution

(Chapters I-II of the Law) provide that in criminal proceedings the tasks of prosecution are carried out by prosecutors. In this respect, the Court notes the Government's submission that prosecutors in Ukraine were at the material time, and, indeed, still are, subordinate to the Prosecutor General of Ukraine, who is proposed for appointment by the President of Ukraine and elected by the Parliament of Ukraine. The President of Ukraine can also dismiss the Prosecutor General from his position without the consent of the Parliament. It is therefore indisputable that prosecutors, in the exercise of their functions, are subject to the supervision of an authority belonging to the executive branch of the Government. In the Court's view, the mere fact relied on by the Government that under the applicable laws prosecutors, in addition to exercising a prosecutorial role, also act as guardian of the public interest, cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors. It notes that prosecutors perform investigative and prosecuting functions and, therefore, their position in the criminal proceedings as provided for by the law at the material time, in particular by the provisions of Law on Prosecution (Chapters I-II) and the Code of Criminal Procedure of Ukraine (Articles 22, 25 and 32 of the Code), must be seen as that of a party to these proceedings. The Court notes therefore that recourse to the prosecutor, who was a party to the criminal proceedings in the instant case, did not offer reasonable prospects of success as it was not "effective". The applicant was therefore not under an obligation to avail himself of this remedy.

64. In so far as it is suggested that the applicant should have used the remedy under Article 248-3 of the CCP, the Court finds that by using this remedy the applicant could have complained to the domestic courts about the acts of a particular investigator or prosecutor as State officials. It notes that while it is true that the applicant did not institute civil proceedings to remedy the lengthy investigation in his case, the Government have not shown how recourse to such proceedings could have remedied the delay in the investigation of the case. The Court finds the examples supplied by the Government from the domestic case-law of limited assistance in this connection.

65. In so far as it is suggested that the applicant should have used the remedy under Article 234 of the CCRP, the Court notes that this remedy could have been used as from 29 June 2001 only in the course of the preliminary (administrative) hearing (*попереднє засідання суду*) or in the course of the hearing on the merits of the case. The Court finds therefore that this remedy does not satisfy the criteria of Article 35 § 1 as regards the notion of accessibility, as it suggests that complaints against the length of the investigation of the case can be made after the investigation has finished, but leaves no possibility of appeal in the course of the investigation. As to the introduction of amendments to Article 234 of the CCRP, allowing for complaints to be lodged against the prosecutor or investigator in the course of the investigation, the Court considers that even

though this remedy exists in theory as from 30 January 2003, the Government have not shown what its practical implications are. Furthermore, the law does not specifically state whether Article 234 of the CCRP is a remedy for the length of proceedings in a criminal case and what kind of redress can be provided to an applicant in the event of a finding that the length of the investigation breached the requirement of “reasonableness”.

66. In these circumstances, the Court considers that it has not been sufficiently established that recourse to the remedies suggested by the Government would have been capable of affording redress to the applicant in relation to his complaints concerning the length of the proceedings in his case. Furthermore, it finds that this case differs from the length of proceedings cases against Italy (and similar cases against Slovakia and Croatia) where the applicants could be expected to have recourse to the remedy introduced by the “Pinto Act”, after they had lodged their applications with the Court, since the remedy specified in the Pinto Act satisfied the criteria of Article 35 § 1 of the Convention as to its effectiveness and accessibility (see, for example, *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII, or *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). It also notes that the remedies mentioned in the aforementioned cases were specifically designed to provide redress for complaints about the length of proceedings.

67. The Court considers, in the light of the parties’ submissions, that the remaining application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that it cannot be rejected for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention. No other ground for declaring it inadmissible has been established.

## II. MERITS OF THE APPLICANT’S COMPLAINTS

68. The Government stated that the proceedings have to be divided into four consecutive periods: 28 January 1998 to 3 February 1999; 3 February to 10 August 1999; 10 August to 22 September 1999; and the last period between 22 September 1999 until now. They maintained that each of these periods complied with the “reasonable time” requirement enshrined in Article 6 § 1 of the Convention.

69. The applicant argued that this approach was irrelevant, given that the criminal proceedings in his case have lasted six years and are still continuing.

### A. Period to be taken into consideration

70. The Court finds that the Government's reasoning in assessing the length of the proceedings does not correspond to the Court's constant case-law (see *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI). It recalls that in criminal matters, the "reasonable time" referred to in Article 6 § 1 of the Convention begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court (see, for example the above-mentioned, *Deweert v. Belgium*, judgment, p. 22, § 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, pp. 26-27, § 19; *Neumeister v. Austria*, judgment of the same date, Series A no. 8, p. 41, § 18, and *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 45, § 110). "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see, the above-mentioned *Deweert v. Belgium* judgment, p. 24, § 46; *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, § 52). As regards the end of the "time", in criminal matters the period governed by Article 6 § 1 of the Convention covers the whole of the proceedings in issue, including appeal proceedings (see *König v. Germany*, judgment of 28 June 1978, Series A no. 27, p. 33, § 98).

71. The Court observes that the period to be taken into consideration began on 28 January 1998 when the applicant was detained on suspicion of committing a criminal offence, i.e. when he was substantially affected by the investigation. These proceedings are still pending, more than six years later.

### B. Reasonableness of the length of the proceedings

72. According to the Court's case-law, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the authorities dealing with the case (see, among other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II; and *Philis v. Greece (no. 2)*, judgment of 27 June 1997, ECHR 1997-IV, p. 1083, § 35).

73. The Court notes that the proceedings against the applicant involved two court instances, namely the Leninsky District Court of Chernivtsi and the Chernivtsi Regional Court. The decisions of both courts were delivered in 1999 and concerned the remittal of the case for additional investigation. It

finds that there were considerable delays in the investigation of the case that could not be explained, notwithstanding the Government's submission on this point, by the impossibility of bringing Ms Lodyanova before the domestic courts. It observes that, in accordance with Article 206 of the CCRP referred to by the Government, she was one of the suspects in the case and proceedings against her could have been disjoined from the criminal proceedings against the applicant and the proceedings against her suspended. The Government have not provided any plausible explanation as to why this was not done.

74. The Court notes that the applicant may be considered responsible for some minor delays in the proceedings, such as the periods between 10 and 30 October 1998 and between 29 December 1998 and 28 January 1999, when he familiarised himself with the materials in the case file. However, this delay resulted from the exercise by the applicant of his right under domestic law. As to the delay caused by JDE's failure to lodge its complaints concerning restitution of property and documents with the Leninsky District Court of Chernivtsi between September 1999 and 17 January 2000, the Court finds that this period had no influence on the criminal proceedings against the applicant. In any event, it cannot justify the length of the periods of inactivity between the decisions of the Leninsky District Court of Chernivtsi of 29 June 1999 and the investigative acts of the prosecution (19 September 2000), and the further inactivity from 19 September 2000 to the present moment. It certainly cannot justify the total duration of the proceedings so far in the applicant's case (see, *mutatis mutandis*, *Portington v. Greece*, judgment of 23 September 1998, *Reports*, 1998-VI, p. 2632, § 29, and *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, p. 2552, § 79).

75. It is no answer to the applicant's complaint that the suspension of the criminal proceedings did not have any negative effect on his rights as he could move about freely and choose his place of residence and was only obliged to appear before the court or investigative body when summoned. It is to be noted that the applicant is still living in a state of uncertainty about the fate of the criminal proceedings against him.

76. The Government have not provided any convincing explanation for the delays. In these circumstances, the Court finds that the period taken so far to determine the charges fails to satisfy the "reasonable time" requirement. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

77. Lastly, the applicant complained that in Ukraine there were no effective remedies which could be used to obtain redress for the excessive

length of the criminal proceedings. He relied on Article 13 of the Convention.

78. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). It recalls that a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Kudła v. Poland* judgment cited above, §§ 157-159). It notes that the Government have suggested in their preliminary objections that there were remedies available for his complaints. In so far as they rely on the same reasoning by way of response to the Article 13 complaint, their arguments must, like their objections, be rejected (see §§ 62-66 above).

79. The Court concludes, therefore, that there has been a violation of Article 13 of the Convention on account of the lack of an effective and accessible remedy under domestic law for the applicant’s complaint in respect of the length of his criminal case.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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**

81. The applicant submitted that his claims for just satisfaction referred to the properties of JDE, of which he owns 99% of the shares, and which were confiscated on 13 October 1997. He considered that confiscation of these properties led to a daily loss of profits and gave rise to moral damage. The applicant claimed 70,000 United States dollars (USD) per day by way of compensation for loss of profits and USD 210,000 for non-pecuniary damage. He alleged that these categories of damage were sustained as a direct consequence of the infringement of Articles 9 and 10 of the Law on the Regime of Foreign Investments. He submitted that the total pecuniary damage based on 250 working days per year was USD 107,380,000. He also submitted that his non-pecuniary damage had to be assessed at USD 322,140,000.

The applicant stated that the total compensation for pecuniary and non-pecuniary damage amounted to USD 429,520,000<sup>3</sup>.

82. As to the pecuniary damage claimed by the applicant, the Government agreed that the unreasonable length of the criminal proceedings against the applicant may have resulted in a loss of opportunities in relation to the management of his business (see *Georgiadis v. Cyprus*, 14 May 2002, § 53, no. 50516/99). The Government further noted that the JDE company had its own rights and obligations, which were different from those of its owners. They further mentioned that JDE was not a party to the proceedings before the Court. The Government maintained that the amount of compensation for pecuniary damage claimed by the applicant was not supported by any relevant evidence and was both exorbitant and unsubstantiated. They further stressed that there was no causal link between the alleged violation of the applicant's rights under Articles 6 § 1 and 13 of the Convention and the damage claimed by the applicant.

83. As to non-pecuniary damage, the Government acknowledged that the excessive length of criminal proceedings can lead to non-pecuniary damage being sustained by a defendant. However, they noted that the amount claimed by the applicant was excessive. The Government were of the opinion that the amount of compensation claimed required further specification. They asked the Court to determine the amount of compensation on an equitable basis in accordance with its case-law.

84. The Court does not discern any causal link between the violation found and any pecuniary damage alleged by the applicant. It makes no award under that head. Nevertheless, it finds that the applicant may be considered to have suffered some degree of frustration and distress, given the lengthy period of uncertainty which he has endured and continues to endure as a result of the protracted length of his criminal case. It therefore awards him on an equitable basis 2,500 euros (EUR) in respect of non-pecuniary damage.

## **B. Costs and expenses**

85. The applicant also claimed EUR 76,137.61 for costs and expenses incurred before the Court. In support of his claim the applicant provided two invoices issued by his lawyers to the "customer" European Court of Human Rights in relation to the applicant's case.

86. CrPC The Government of Ukraine noted that the applicant failed to comply with Rule 60 § 2 of the Rules of the Court as he did not provide a valid confirmation that the costs of his legal representation were actually incurred. The Government further mentioned that the expenses mentioned by the applicant were incurred only in relation to the proceedings before the Court and not to those before the domestic courts. They further submitted

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3. Approximately EUR 337,858,884.61.

that no agreement had been submitted to the Court confirming the applicant's representation and the arrangements for the payment of legal fees. In particular, the Government considered that the applicant's lawyers unreasonably overestimated the time (more than 400 hours) they allegedly spent in preparing the case. They further noted that the expenditures on the translation of documents into English, the costs of the "preliminary preparation of the case" and "preparation of observations" related to the same actions of the applicant's lawyers and were not supported by relevant vouchers and bills of cost. The Government therefore asked the Court to reject the applicant's claims for costs and expenses for both the domestic and Convention proceedings as he had not furnished any evidence to support these claims (see, *mutatis mutandis*, *Pressos Compania Naviera S.A. and Others v. Belgium* (Article 50), judgment of 3 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1299, § 24; *Öztürk v. Germany* (Article 50), judgment of 23 October 1984, Series A no. 85, p. 9, § 9).

87. The applicant disagreed. He stressed that the time that his lawyers spent on the case had been appropriately assessed as his case was rather complex. He further noted that the claims for costs and expenses were substantiated by relevant documents submitted to the Court.

88. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII). The Court considers that these requirements have not been met in the instant case. It finds that the applicant's lawyers exaggerated the time they spent on the preparation of the case. It is not satisfied that the costs and expenses, allegedly reflecting more than four hundred hours of effective work and amounting to EUR 76,137.61, were all incurred, or reasonably incurred, in connection with the complaints submitted to the Court. However, it is clear that the applicant incurred some legal fees, given the observations submitted by his lawyers to the Court.

Regard being had to the information in its possession and to the above criteria, the Court considers it reasonable to award the applicant EUR 1,500 for costs and expenses.

### **C. Default interest**

89. 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. *Rejects* the Government's objections as to the inadmissibility of the application on grounds of non-exhaustion of domestic remedies;
2. *Declares* the complaints concerning the alleged infringement of Articles 5 §§ 2, 4 and 5, 6 §§ 2 and 3 of the Convention and Article 1 of Protocol No.1 and Article 4 of Protocol No. 7 to the Convention inadmissible;
3. *Declares* the complaints concerning the length of the proceedings and the lack of effective remedies admissible;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds* that there has been a violation of Article 13 of the Convention;
6. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) for costs and expenses, plus any tax that may be chargeable;
  - (b) the aforementioned sums shall be converted into the national currency of Israel, the place of the applicant's current residence, at the rate applicable at the date of settlement;
  - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 March 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President