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

SECOND SECTION

CASE OF GUREPKA v. UKRAINE

(Application no. 61406/00)

JUDGMENT

STRASBOURG

6 September 2005

FINAL

06/12/2005

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 Gurepka v. Ukraine,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*
and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 5 July 2005,

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

PROCEDURE

1. The case originated in an application (no. 61406/00) 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 Nikolay Vasilyevich Gurepka ("the applicant"), on 10 May 1999.

2. The Ukrainian Government ("the Government") were represented by their Agents – Mrs V. Lutkovska and Mrs Z. Bortnovska.

3. On 24 November 2004 the Court decided to communicate to the Government the complaint concerning the lack of an appeal against the decision ordering the applicant's administrative arrest and detention. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1956 and lives in the city of Simferopol, the Autonomous Republic of Crimea, Ukraine.

A. The first episode

5. In the course of civil proceedings for defamation brought by a Member of Parliament in which the applicant was a co-defendant, the applicant was summoned to a court hearing in April 1998 (exact date unknown). According to the applicant, the summons was never served on him properly, and the postman later confirmed this.

6. On 18 May 1998 the court imposed a fine of UAH 17[1] on the applicant for his failure to appear. The court also indicated in its decision that the applicant could appeal within ten days. According to the applicant, he received this decision on 28 May 1998.

7. On 3 June 1998 the applicant lodged an appeal against the decision of 18 May 1998. In his appeal the applicant did not indicate the reasons for lodging it outside the time-limit and did not request its extension. On 5 June 1998 the Kievskiy District Court of Simferopol rejected the appeal as having been submitted too late.

8. On 12 July 1998 the applicant lodged with the Highest Court of the Autonomous Republic of Crimea (hereinafter the "HCARC") an appeal against the decision of 5 June 1998 together with a request for the composition of the first instance court to be changed. In January 1999 the applicant was informed that the HCARC had only received the request but not the appeal.

9. Within the framework of the same set of civil proceedings, the applicant was summoned to appear before the court on 9 October 1998. The applicant maintains that he informed the court in advance that he would not be able to attend because of his holiday plans. On 8 October 1998 the applicant requested Mr B. to inform the judge that he could not attend the hearings due to his illness. According to Mr B., he did so on 9 October 1998. The court nevertheless decided to institute administrative proceedings against the applicant for his repeated failure to appear before the court.

10. On 1 December 1998 the court decided in the applicant's presence to impose seven days' administrative detention on him for contempt of court, as manifested by his repeated failure to appear. The court found that the applicant was at his place of work on the day of the hearings, as confirmed by his employer – the Prosecutors' Office of the Autonomous Republic of Crimea (hereinafter the "POARC"). The court found no evidence in the case file indicating that the applicant had officially informed the court of any good reason for his absence. It disregarded the sick leave certificate produced by the applicant for the date in question.

11. The same day the applicant was arrested and placed in a cell, which he described as cold.

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[1] Around 3 euros (EUR)

12. The applicant's arrest was covered by the local press in December 1998.

13. On 2 December 1998 the POARC lodged an extraordinary appeal (*protest*) with the HCARC. This appeal suspended the enforcement of the decision of 1 December 1998 and the applicant was released after spending 16 hours in detention.

14. In its appeal the POARC did not dispute the fact that the applicant had committed an administrative offence, but considered that the applicant had to be sanctioned under the Disciplinary Statute of the Prosecutor's Office rather than under administrative proceedings.

15. On 3 December 1998 the President of the HCARC rejected this appeal.

16. From 7 to 21 December 1998 the applicant was in hospital suffering from an acute form of chronic urological disease. According to the applicant, this illness was caused by his detention in the cold cell on 1 December 1998.

17. On 10 December 1998 the applicant lodged a request with the HCARC for an extraordinary review of the decisions of 18 May, 5 June and 1 December 1998. This request was rejected on 29 January 1999 by the President of the HCARC.

18. From 25 to 31 December 1998 the applicant served the remainder of the administrative detention.

19. On 4 January 1999 the applicant was dismissed from his position as a prosecutor attached to the POARC.

20. On 21 January 1999 the applicant lodged a further request with the Supreme Court of Ukraine for an extraordinary review of the decisions of 18 May, 5 June and 1 December 1998. This request was rejected on 24 March 1999.

21. In October 2001 the applicant was diagnosed with Hepatitis C, which he believed he could have contracted in the prison or in the hospital in December 1998.

B. The second episode

22. In 1996, the former Prosecutor of the Autonomous Republic of Crimea, Mr K., lodged a claim with the Simferopolskiy District Court of the Autonomous Republic of Crimea against the applicant for defamation. On 6 June 2000 the court found against the applicant and ordered him to pay UAH 10,000[1] in compensation for moral damage. The applicant was not present at the final court hearing.

23. On 20 September 2000 the Simferopolskiy District Court rejected the applicant's cassation appeal as having been submitted too late.

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[1] EUR 1,528.78

24. In October 2000 the applicant lodged a request for extraordinary review with the President of the HCARC. The Deputy President of the court allowed this request and lodged an extraordinary appeal with the court.

25. On 2 February 2001 the plenary of the HCARC allowed the appeal. The decision of 6 June 2000 was quashed in part on the ground that some of the matters covered by that decision had been finally decided within the framework of other proceedings. The court also reduced the amount of the fine to be paid by the applicant to UAH 1,000[1].

26. On 6 December 2001 the panel of three judges of the Supreme Court of Ukraine rejected the applicant's request for leave to appeal under the new cassation procedure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure (in the wording of 2 February 1996)

27. Paragraph 4 of Article 172 of the Code foresaw that, in the event of a failure of a party to the proceedings to appear before a court without valid reasons, and if such failure led to the postponement of court hearings, the court could impose on the person a fine of one instalment of the "minimum non-taxable income" (UAH 17[2]).

B. Code on Administrative Offences (in the wording of 7 February 1997)

28. Article 32 of the Code provided that administrative detention could be imposed and applied in exceptional circumstances for certain administrative offences for a maximum period of 15 days.

29. Paragraph 1 of Article 185-3 of the Code foresaw punishment by a fine or administrative detention for up to 15 days for contempt of court, manifested, *inter alia*, by a repeated failure to comply with a summons to appear.

30. Article 287 of the Code provided that the decision imposing an administrative sanction could be appealed, except for the decisions given by the first instance court. The latter were final and were not subject to the ordinary administrative appeal procedure, unless the legislation provided otherwise.

31. Article 290 of the Code provided that the prosecutor could lodge an extraordinary appeal (a "protest") against a decision imposing an administrative sanction.

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1. EUR 152.87
2. Around EUR 3

32. Article 294 of the Code provided that a court decision on an administrative offence could be reviewed by the judge of the same court upon an extraordinary appeal lodged by a prosecutor, or by a judge of a higher court on his or her own motion.

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

A. Alleged violation of Article 3 of the Convention

33. The applicant complained that his detention damaged his health and harmed his reputation, causing him moral and physical suffering in violation of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

34. The Court recalls that Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

35. In so far as the applicant complains of his detention in a cold cell and his ensuing health problems allegedly caused by it, the Court finds that the applicant has failed to demonstrate that the impugned treatment, formulated by the applicant in very general terms, attained the minimum level of severity proscribed by Article 3 of the Convention, particularly in the absence of any medical or other evidence (see, *mutatis mutandis*, *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, 23 January 2002). The sick leave certificate presented by the applicant as to his illness from 7 December 1998, that is 6 days after his release, does not constitute sufficient proof of a casual link with the alleged ill-treatment. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

36. The Court notes that the applicant's complaint about contracting Hepatitis C because of his detention is based solely on the applicant's assumptions without any supporting evidence. The Court considers that the applicant has failed to demonstrate any casual link between this disease and his detention, which took place more than two years prior to the Hepatitis diagnosis. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

37. In so far as the applicant complains of his moral suffering caused by the coverage of his detention by the media, as well as by his dismissal, the

Court notes that the applicant did not raise this issue before the domestic courts and therefore these allegations should be rejected for non-exhaustion of domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Alleged violation of Article 5 of the Convention

38. The applicant complained under Article 5 § 1 of the Convention that his detention was unlawful. The relevant provisions of this Article provide as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court; ..."

39. The Court observes that the applicant was detained following his conviction by a competent court; in other words, his detention fell within the scope of Article 5 § 1 (a) of the Convention. In this respect, the Court reiterates that Article 5 § 1 (a) does not distinguish the legal character of the offence of which a person is found guilty. It applies to any conviction depriving a person of his or her liberty and pronounced by a competent court (see *Kadiķis v. Latvia (no. 2)* (dec.), no. 62393/00, 25 September 2003). The deprivation of liberty applied to the applicant was undeniably "lawful" under Ukrainian law and was imposed in accordance with a procedure prescribed by law.

40. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Alleged violation of Article 6 § 1 of the Convention

41. The applicant complained that the judicial decisions imposing the fine on him and ordering his administrative arrest and detention were arbitrary and in breach of Article 6 § 1 of the Convention. He further complained about an unfair hearing in the second civil proceedings (paragraphs 22-26 above). Article 6 § 1 of the Convention in its relevant part provides as follows:

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

1. Proceedings imposing a fine on the applicant

42. The Court notes that the applicant was fined around 3 euros (EUR) for contempt of court on 18 May 1998 (see paragraphs 6 and 27). However,

he failed to request an extension of the time limit for lodging an appeal against that decision. Furthermore, the applicant did not provide any evidence that his further appeal was lodged in accordance with the formalities prescribed by law (paragraphs 7-8 above).

43. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Proceedings on the applicant's administrative arrest and detention

44. The applicant further complains that the court decision on his administrative arrest and detention was arbitrary, in violation of Article 6 § 1. The applicant maintains in particular that the court disregarded his arguments and gave preference to the arguments against him.

45. The Court recalls that it is not its task to act as a court of appeal or, as sometimes said, as a court of fourth instance, from the decisions of domestic courts. It is the role of the latter to interpret and apply the relevant rules of national procedural and substantive law. Furthermore, the domestic courts are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case (see, amongst many authorities, the *Vidal v. Belgium* judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, § 34).

46. In the light of all the material in its possession, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Defamation proceedings (the second episode)

47. The applicant in later correspondence dated 2 April 2002 also complained under Article 6 § 1 of the Convention about an unfair hearing in other civil proceedings (paragraphs 22-26 above). However, the Court notes that the final decision in those proceedings was given on 2 February 2001, more than six months earlier. The decision of the panel of the Supreme Court of Ukraine on 6 December 2001 refusing to transfer the applicant's appeal to a chamber for consideration on the merits under the new cassation procedure cannot bring the application within the six month time-limit laid down in Article 35 § 1 of the Convention (see *Prystavska v. Ukraine* (dec.), no. 21287/02, *Reports of Judgments and Decisions* 2002-X). Consequently, the Court concludes that this complaint has been introduced out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

D. Alleged violation of Article 14 of the Convention

48. The applicant complained that, despite the fact that he was a public prosecutor, the State failed to protect him, in violation of Article 14 of the Convention. Article 14 of the Convention, which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

49. The Court considers that, in the absence of any substantiation whatsoever, this complaint is manifestly ill-founded (see *Chizhov v. Ukraine* (dec.), no. 6269/02, 6 May 2003) and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

E. Alleged violation of Article 13 of the Convention and Article 2 of Protocol No. 7

50. The applicant complained under Article 13 of the Convention about the lack of an effective remedy against the decision ordering his administrative arrest and detention. Article 13 of the Convention reads as follows:

> "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."

51. The Court reiterates that Article 13 of the Convention does not, as such, guarantee a right of appeal or a right to a second level of jurisdiction (see *Kopczynski v. Poland* (dec.), no. 28863/95, 1 July 1998, and *Csepyová v. Slovakia* (dec.), no. 67199/01, 14 May 2002). Nevertheless, should the impugned proceedings be characterised as "criminal" for Convention purposes (see *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B), the applicant's complaint can be examined under Article 2 of Protocol No. 7, which reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

52. The Government agreed that classification of proceedings as "criminal" for the purposes of Article 6 of the Convention would be equally pertinent to a complaint under Article 2 of Protocol No. 7. Nevertheless, the

Government maintained that the proceedings in the instant case were not "criminal".

53. The Government maintained that the proceedings were administrative and that the domestic law made a clear distinction between a criminal offence and an administrative offence. They also observed that a person found guilty of an administrative offence was not considered to have been "convicted". Relying *mutatis mutandis* on the case of *Brandão Ferreira v. Portugal* ((dec.), no. 41921/98, ECHR 2000-X), they maintained that in the instant case the seven-day detention for an administrative offence, taking into account the fact that the maximum punishment could have been 15 days' detention, could not be considered to have been a criminal penalty.

54. The applicant made no comments.

55. However, in the light of its settled case-law, the Court has no doubt that, by virtue of the severity of the sanction, the present case was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7 (*Engel and others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, §§ 82-83; *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, §§ 48-50; *Escoubet v. Belgium* judgment [GC], no. 26780/95, § 32, ECHR 1999-VII; *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, ECHR 2003-X).

56. The Court therefore declares this complaint admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (paragraph 3 above), the Court will immediately consider the merits of this complaint.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7

57. The Government maintained that Article 297 of the Code of Administrative Offences provided for a review of court decisions in administrative proceedings. According to this procedure, the prosecutor could lodge an extraordinary appeal (*protest*) against the court decision. The applicant successfully used this procedure by lodging a complaint with the Prosecutor's Office, which in turn lodged a protest against the decision of 1 December 1998 which was examined by the HCARC.

58. The applicant repeatedly claimed that he had no effective remedy for his complaint about his administrative arrest and detention.

59. The Court recalls that Contracting States have a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. In certain countries, a defendant wishing to appeal may sometimes be required to seek permission

to do so. However, any restrictions contained in domestic legislation on that right of review must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II). The Court also recalls that, to be effective, a remedy must be independent of any discretionary action by the authorities and must be directly available to those concerned (see *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999).

60. The Court has examined the extraordinary review procedure prescribed by the Code of Administrative Offences. It could only be initiated by a prosecutor or by a motion of the president of the higher court (see paragraphs 30-32 above). Given that this procedure was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments, the Court considers that it was not a sufficiently effective remedy for Convention purposes.

61. As to the Government's argument that the decision ordering the applicant's administrative arrest and detention was actually reviewed by a higher court, the Court finds no evidence that the extraordinary appeal lodged by the Prosecutor's Office was initiated upon the applicant's own motion. Moreover, this appeal reflected the position of the Prosecutor's Office, and not of the applicant. During these proceedings the applicant was not given an opportunity to present any arguments, and the issue under consideration was the dispute between the Prosecutor's Office and the court over the competence to impose a sanction on the applicant. The Court considers that the mere fact that the review initiated by the Prosecutor's Office had some positive, albeit temporary, impact on the applicant's situation, namely the suspension of his sentence, was not in itself sufficient to conclude that the extraordinary appeal was an effective remedy which could have satisfied the requirements of Article 2 of Protocol No. 7.

62. In the light of the foregoing considerations, the Court concludes that there has been a violation of Article 2 of Protocol No. 7 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant maintained that, following his administrative arrest and detention, he was dismissed from his job. He therefore claimed EUR 7,958 in respect of pecuniary damage for loss of earnings from 1999 to 2005, and EUR 25,000 in respect of non-pecuniary damage.

65. The Government commented that there was no causal link between the alleged violation and the pecuniary damage claimed. As to non-pecuniary damage, they considered that the claim was exaggerated.

66. The Court agrees that there is no causal link between the alleged violation and the pecuniary damage claimed. However, the Court, ruling on an equitable basis, considers that an award of EUR 1,000 would be appropriate for the applicant's non-pecuniary damage.

B. Costs and expenses

67. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 2 of Protocol No. 7 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 2 of Protocol No. 7 to the Convention;

3. *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 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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;

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

Done in English, and notified in writing on 6 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President