



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

SECOND SECTION

CASE OF GORSHKOV v. UKRAINE

(Application no. 67531/01)

JUDGMENT

STRASBOURG

8 November 2005

FINAL

08/02/2006

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 Gorshkov v. Ukraine,

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

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

Mr A.B. BAKA,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

M^{me} D. JOČIENĚ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 67531/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Viktor Petrovich Gorshkov (“the applicant”), on 23 September 2000.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Ms Zoryana Bortnovska, succeeded by Ms Valeria Lutkovska.

3. The applicant complains about the unlawfulness of his confinement in a psychiatric hospital and the impossibility to appeal against it effectively. He alleges an infringement of Article 5 § 4 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 15 June 2004, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other’s observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in Orenburg, Russia, in 1954. He currently resides in Simferopol, the Crimea.

A. The applicant's detention before 11 September 1997

9. In 1984 the applicant was convicted of attempted rape. However, he was exempted from serving his sentence on the grounds of diminished responsibility and underwent compulsory medical treatment in a psychiatric hospital from 1984 to 1986.

10. On 9 September 1990 the applicant again attempted to commit rape.

11. On 9 April 1991 the Zheleznodorozhny District Court of Simferopol (the "Zheleznodorozhny Court") ordered the applicant to undergo compulsory medical treatment in a psychiatric hospital under close supervision. This decision was not appealed and became final. He was detained in the Dnepropetrovsk Specialised Psychiatric Hospital.

12. On 24 November 1997 the psychiatric commission recommended that the applicant be transferred to a hospital with strict supervision (a higher level than the previous one).

13. On 2 December 1997 the Krasnogvardejsky District Court of Dnepropetrovsk allowed the petition lodged by the chief psychiatrist of the Dnepropetrovsk Regional Health Department. It quashed the decision of 9 April 1991, but decided that the applicant should continue to undergo compulsory medical treatment under close supervision. This resolution was not appealed and became final.

B. The applicant's detention after 11 September 1997

14. From 11 September to 14 December 1997 the applicant remained in detention in the Dnepropetrovsk Specialised Psychiatric Hospital under close supervision.

15. From 15 December 1997 until 20 January 1999 the applicant was under compulsory medical treatment with close supervision in the Crimean Republican Psychiatric Hospital (the "CRPH").

16. On 17 December 1998 the CRPH lodged a request with the Zheleznodorozhny Court that the applicant's regime be reduced to ordinary supervision.

17. On 6 January 1999 the Zheleznodorozhny Court decided that the applicant should be placed under ordinary supervision in the psychiatric hospital since his behaviour had improved.

18. On 12 July 1999 the Zheleznodorozhny Court refused an application by the Chief Psychiatrist of the Ministry of Health of the Crimea (the “Chief Psychiatrist”), based on a medical report dated 3 June 1999, to terminate the applicant’s compulsory medical treatment since his state of health had improved. In particular, it referred to the gravity of the offence committed by the applicant.

19. On 19 August 1999 the applicant’s lawyer lodged a cassation appeal with the Supreme Court of the Crimea. On 30 August 1999 this court upheld the decision of 12 July 1999. In particular, it ruled that the requests for release were unsubstantiated as the applicant had not fully recovered from his mental illness.

20. On 14 March 2000 the Zheleznodorozhny Court rejected a further application by the Chief Psychiatrist lodged on the basis of the conclusions of the applicant’s medical examination on 13 January 2000, as being unsubstantiated.

21. On 20 March 2000, the applicant’s lawyer lodged an appeal in cassation with the Supreme Court of the Crimea. On 4 April 2000 the court upheld the decision.

22. On 10 July 2000 the Chief Psychiatrist lodged another application with the Central District Court of Simferopol (the “Central Court”) seeking to quash the compulsory medical treatment of the applicant and to transfer him to a regime of ordinary supervision. On 1 September 2000 the Central Court rejected this application for lack of substantiation and, on 31 October 2000, the Supreme Court of the Crimea upheld that decision.

23. On 15 March 2001 the psychiatrist of the CRPH lodged an application with the Zheleznodorozhny Court seeking to quash the compulsory medical treatment imposed on the applicant. He also requested that the court order the applicant’s transfer to an ordinary supervisory regime. On 7 May 2001 the Central Court rejected this application as unsubstantiated. In particular, it noted the gravity of the crime committed by the applicant and the fact that he was a repetitive offender. The court further held that the conclusions of the medical commission were insufficient to quash the compulsory treatment measure.

24. On 21 September 2001 the Head of the Medical Department of the CRPH lodged an application with the Zheleznodorozhny Court, seeking to end the compulsory medical treatment of the applicant and to transfer him to a regime of ordinary supervision.

25. On 23 October 2001 the Zheleznodorozhny Court allowed the application and decided that treatment could be given to the applicant under ordinary supervision, since his state of health had improved. The resolution of 23 October 2001 was not appealed and became final.

26. The applicant was released from the psychiatric hospital on 8 November 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine, 1996

27. The relevant provisions of the Constitution of Ukraine read as follows:

Article 55

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

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

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

B. Criminal Code of 5 April 2001 (entered into force on 1 September 2001)

28. The relevant provisions of the Criminal Code read as follows:

Article 19

Criminal responsibility

“... 2. A person, who, during the commission of an act generally deemed to be dangerous by the present Code, was not criminally responsible, that is, not able to account for himself or his own actions (omissions) as a consequence of chronic mental illness, temporary disturbance of mental activity, feeble-mindedness, or other mental disorder, shall not be liable to criminal sanctions. ...”

Article 20

Diminished responsibility

“1. A person deemed by a court to be of diminished responsibility, so that, at the time of committing an offence, he was not fully capable of accounting for and controlling his own actions (or omissions) as a consequence of a mental disorder ..., shall be subject to criminal sanctions.

2. The fact that a person has been held to be of diminished responsibility shall be taken into account by a court when deciding on the imposition of a penalty and may be a ground for the application of compulsory measures of a medical character.”

Article 44**Legal grounds and the procedure for relief from criminal responsibility**

“1. A person who has committed a crime shall be exempted from criminal responsibility in the instances provided for by the present Code, and also on the basis of an amnesty law ... or a pardon.

2. Exemption from criminal responsibility in the instances provided for by the present Code shall be ordered exclusively by a court. The procedure for exemption from criminal responsibility shall be established by law.”

Section XIV**Compulsory measures of a medical character and compulsory treatment****Article 92****Concept and purpose of compulsory measures of a medical character**

“Compulsory measures of a medical character shall be: the provision of outpatient psychiatric assistance; the placement of a person who has committed a socially dangerous act, falling within the scope of the Special Part of the present Code, in a specialised institution for the purpose of compulsory treatment, and the prevention of the commission of socially dangerous acts by a person.”

Article 93**Persons to whom compulsory measures of a medical character are applied**

“Compulsory measures of a medical character may be applied by a court to persons who have

... (2) committed offences in a state of diminished responsibility; ...”

Article 94**Types of compulsory measures of a medical character**

“1. Depending on the character and gravity of the illness, the gravity of the act committed, and taking into account the degree of danger a mentally ill person presents to himself or to other persons, a court may apply the following measures of a medical character:

- (1) compulsory provision of outpatient psychiatric assistance;
- (2) hospitalisation in a psychiatric institution under ordinary observation;
- (3) hospitalisation in a psychiatric institution under close observation;
- (4) hospitalisation in a psychiatric institution under strict observation.

2. Compulsory provision of outpatient psychiatric assistance may be ordered by a court with respect to a person suffering from a mental disorder who has committed a

socially dangerous act if the person, by reason of his mental state, does not require confinement in a psychiatric institution.

3. Hospitalisation in a psychiatric institution under ordinary observation may be ordered by a court with respect to a mentally ill person who, on account of his mental state and the nature of the socially dangerous act committed, requires confinement and compulsory treatment.

4. Hospitalisation in a psychiatric institution under close observation may be ordered by a court with respect to a mentally ill person who committed a socially dangerous act not connected with an attempt on the life of other persons and who, on account of his mental state, does not represent a threat to society but requires confinement in a psychiatric institution and treatment under conditions of close observation.

5. Hospitalisation in a psychiatric institution under strict observation may be ordered by a court with respect to a mentally ill person who has committed a socially dangerous act connected with an attempt on the life of other persons, and also with respect to a mentally ill person who, on account of his mental state and the nature of the socially dangerous acts committed, represents a special danger to society and requires confinement in a psychiatric institution and treatment under conditions of strict observation.

6. If the application of compulsory measures of a medical character to a mentally ill person is not deemed to be necessary, and, likewise, in the event of the termination of the application of such measures, a court may place him in the care of relatives or guardians under compulsory medical observation.”

Article 95

Extension, modification or termination of the application of compulsory measures of a medical character

“1. The extension, modification or termination of the application of compulsory measures of a medical character shall be ordered by a court upon an application by a representative of the institution (or a psychiatrist) providing the treatment, to which application shall be appended the opinion of a commission of psychiatrists substantiating the need to extend, modify or terminate the application of such compulsory measures.

2. Persons subject to compulsory measures of a medical character shall be examined by a commission of psychiatrists not less than once every 6 months in order to decide whether there are grounds for applying to a court to terminate or modify the application of such measures. If there are no grounds for terminating or modifying the application of a compulsory measure of a medical character, the representative of the institution (or the psychiatrist) rendering psychiatric assistance to the person shall send to the court an application, to which shall be appended the opinion of the commission of psychiatrists substantiating the need to extend the compulsory measures. If it is necessary to extend the application of a compulsory measure of a medical character for more than 6 months, the representative of the [competent] institution (or the psychiatrist) ... must apply to the court in the place where the institution is located for that extension. To the application shall be appended the opinion of the commission of psychiatrists substantiating the need to continue the

provision of psychiatric assistance to the person. Thereafter, the application of a compulsory measure of a medical character shall be extended each time for a term which may not exceed 6 months.

3. If the application of compulsory measures of a medical character is terminated because of an improvement in the person's mental state, a court may transfer him to the care of relatives or guardians under compulsory medical observation."

Article 96 Compulsory treatment

"1. Compulsory treatment may be ordered by a court irrespective of the sentence given to persons who have committed crimes and suffer from an illness representing a danger to the health of other persons.

2. If the sentence takes the form of a deprivation or limitation of liberty, compulsory medical treatment shall be provided at the place where the sentence is being served. If other types of penalties are imposed, compulsory treatment shall be provided in specialised institutions."

C. The relevant legislation which regulated the applicant's detention from 11 September 1997 to 4 April 2000

29. The prolongation or termination of the compulsory medical treatment of internees in mental hospitals, in the period from 11 September 1997 to 4 April 2000, were regulated by the Soviet legislation in force at the material time (the Decree of the Verkhovna Rada of Ukraine of 12 September 1991 "on the temporary operation of certain legislative acts of the USSR in the territory of Ukraine").

Under the Decree of 5 January 1988 of the Presidium of the Supreme Council of the USSR that approved the Regulation "on the conditions and procedure for providing psychiatric medical assistance", and the Order of 25 March 1988 No. 225 of the Ministry of Health of the USSR which approved a Temporary Instruction "on the procedure for applying compulsory medical treatment to mentally ill persons who have committed socially dangerous acts", such compulsory patients were, in practice, unable to have any judicial review of the lawfulness of their detention instituted on their own initiative. However, the head of the competent psychiatric hospital was obliged to lodge a request for the prolongation or termination of the compulsory psychiatric treatment within ten days from the date of the examination of the internee by a medical commission recommending that approach (paragraph 31 of the Temporary Instruction). The commission had to review the state of health of the internees every six months (paragraph 33 of the Temporary Instruction).

Since the Psychiatric Medical Assistance Act 2000 (paragraph 30 below), the Ukrainian domestic law provides for frequent judicial review of

the internees' continued detention, at least every six months, on the initiative of the responsible medical officers. Extracts of the relevant legislation are reproduced below.

D. Psychiatric Medical Assistance Act of 22 February 2000 (entered into force on 4 April 2000)

30. The relevant extracts from the provisions of the Psychiatric Medical Assistance Act read as follows:

Section 19
Compulsory measures of medical treatment

“Measures of compulsory medical treatment shall be applied by a court decision in accordance with the procedure laid down in the Criminal Code, the Code of Criminal Procedure, this law and other laws.

In accordance with the decision of the court, the following measures of compulsory medical treatment may be applied:

- (1) compulsory provision of outpatient psychiatric assistance;
- (2) hospitalisation in a psychiatric institution under ordinary supervision;
- (3) hospitalisation in a psychiatric institution under close supervision;
- (4) hospitalisation in a psychiatric hospital under strict supervision.

Continuation, modification or termination of the compulsory medical treatment shall be ordered by the court on the basis of an application by a representative (psychiatrist) of the psychiatric hospital that provides medical treatment to the person.

Persons subject to measures of compulsory medical treatment shall be examined by a commission of psychiatrists not less than once every 6 months to determine whether there are grounds for applying to the court to terminate or modify the application of such measures. If there are no grounds for [such] termination or modification ..., the representative of the psychiatric institution ... shall send the court an application, to which shall be appended an opinion of the commission of psychiatrists substantiating the need to continue the application of the compulsory measures... If it is necessary to continue the application of the measures of compulsory medical treatment for more than six months, the representative of the psychiatric institution ... shall apply to the court in the place where the psychiatric institution is located to continue the compulsory measures. The application shall be supplemented with the conclusions on the patient's examination by the psychiatrists who consider it necessary to continue the application of such measures. Thereafter, the application of such measures may be extended for a term that may not exceed six months.

A decision whether to modify or terminate the application of compulsory measures of medical treatment shall be given by the court if there is a change in the state of health of the person which necessitates a change in the applicable measures.”

Section 20
Examination of the person's mental state

“An assessment of the person's mental state (including medico-social assessments of any loss of the ability to work, military medical examination, etc.) shall be conducted on the basis of, and in accordance with, the procedure established by legislation and other legal instruments adopted in accordance with legislation.”

Section 21
Court psychiatric examination

“Psychiatric examinations in administrative, criminal and civil cases shall be ordered and conducted on the basis and in the manner prescribed by law.”

E. Code of Criminal Procedure of 21 June 2001 (Chapter 34)

31. The relevant extracts from the provisions of the Code of Criminal Procedure read as follows:

Article 416
Grounds for the application of measures of compulsory medical treatment

“The compulsory measures of medical treatment, laid down in Article 94 of the Criminal Code, shall be applied to those persons specified in Article 93 of that Code.

The compulsory measures of medical treatment shall be applicable only to persons who are socially dangerous.”

Article 422
Termination or modification of the applicable compulsory measures of medical treatment

“Termination or modification of compulsory measures of medical treatment may take place only on the basis of a ruling by the court or a resolution of the judge who applied these measures, or by the court at the place where treatment is provided.

Termination or modification of the applicable compulsory measures of medical treatment may take place [regarding] a person who committed a socially dangerous act ... if, as a result of changes in his state of health, the need to apply the ... measures ... has disappeared.

Consideration of whether to apply the compulsory measures of medical treatment shall be conducted in accordance with Article 419 of this Code on an application by the chief psychiatrist of the health-protection body that is supervising the relevant medical institution where the person concerned is held. The conclusion of the commission of psychiatrists shall be attached to the application.”

Article 424**Appeals against the ruling, resolution of the judge or the court on the application, termination or modification of the compulsory measures of medical treatment or the introduction of a petition by the prosecutor**

“An appeal or cassation appeal or an appellate or cassation petition by the prosecutor (*апеляційне чи касаційне подання прокурора*) against the ruling or resolution adopted by a judge or a court in the manner laid down by this Chapter, shall be introduced in the ordinary manner.”

F. Decree No. 397 of the Ministry of Health of 8 August 2001 on the procedure for applying compulsory measures of medical treatment in psychiatric hospitals to persons who have mental illnesses and who have committed socially dangerous acts (approved by the Supreme Court of Ukraine, the Ministry of Internal Affairs and the General Prosecution Service)

32. The relevant extracts from the provisions of Decree no. 397 of the Ministry of Health read as follows:

“... 14. If there is a substantial improvement in the state of a person’s mental health, or if he recovers, or if the results of a psychiatric examination reveal doubts as to the existence of the mental illness, the commission of psychiatrists of the relevant institution shall issue conclusions to that effect, that shall be sent by the director of the psychiatric hospital, before the end of the six-month term, to the court that delivered a decision in the case, for consideration in its review in accordance with the applicable legislation.

15. The continuation, modification or termination of the applicable compulsory measures of medical treatment shall be ordered by the court on an application by the representative of the psychiatric hospital ... that provides medical treatment to the person. ...

16. ... the application of the psychiatrist shall be sent to the court, together with the record of psychiatric examinations, not later than ten days from the adoption of the relevant court decision....”

G. Instruction of the Ministry of Health Protection on the procedure for applying measures of compulsory medical treatment to persons of unsound mind who have committed socially dangerous acts (adopted by Decree No. 397 of 8 October 2001 of the Ministry of Health)

33. The relevant extracts from the instruction of the Ministry of Health Protection provide as follows:

“1. The compulsory measures of medical treatment, provided for by legislation shall be applied on the basis of a ruling by a court or a resolution of a judge to persons

with mental illnesses who have committed socially dangerous acts (hereinafter – persons), and shall be implemented by the health protection institutions. ...

8. Compulsory measures of medical treatment shall be applied where it is established that a mentally ill person constitutes a danger to society, on the basis of:

(1) legal criteria - the fact of committing a socially dangerous act, specified by the criminal legislation; and

(2) medical criteria - the presence in a person of a mental illness that precludes the person's ability to understand his actions and to control them at the time at which the case is considered on its merits.

In the absence of one of the above criteria, the imposition of compulsory measures of medical treatment shall not be possible. ...

43. Issues pertaining to the continuation, modification or termination of the application of compulsory measures of medical treatment shall be decided by a court on an application by a representative of the relevant psychiatric institution, to which the substantiated conclusions of the commission of doctors shall be attached. ...

48. The termination or modification of compulsory measures of medical treatment may be ordered on the basis of information as to positive changes in a person's mental state or the person's recovery, as reflected in the "Record of Psychiatric Examination", as a result of which the danger of the person to society has decreased or disappeared, and there is no longer any need to keep and treat him in a psychiatric institution. The final decision shall be taken by the court.

The gradual annulment of a compulsory measure by way of a change from a stricter measure to a lighter one shall not be necessary. ..."

THE LAW

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

34. The applicant complains that he had no effective remedies against his compulsory confinement in a psychiatric hospital. In particular, he alleges that he was released almost two years after his health had improved. In his submissions he refers to Article 5 § 4 of the Convention, which in so far as relevant provides as follows:

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

A. Submissions of the parties

35. The Government submitted that compulsory medical treatment could only be ordered by a court resolution. This could be appealed in cassation under Article 424 of the Code of Criminal Procedure, within seven days from the date of the adoption of the resolution. An appeal could be lodged by a defence lawyer, whose participation in such cases was obligatory. The Government pointed out that the applicant had used this possibility regarding his continued detention. Moreover, the rejection of his appeals did not mean that the remedy was ineffective. The issue of the applicant's compulsory medical treatment was examined by the domestic courts on six occasions on the basis of the applications lodged after his medical examinations by competent doctors. Given the frequency of the revision of the lawfulness of the applicant's compulsory medical treatment, the Government considered that Article 5 § 4 had not been breached.

36. The applicant disagreed. In particular, he alleged that the appeal procedure was not effective. He mentioned that it was only the doctor of the psychiatric institution, but not the applicant himself, who could lodge an application with the court seeking annulment of the relevant measures. Furthermore, he maintained that, even though his state of health had improved, the domestic courts unlawfully refused to release him from the psychiatric hospital for almost two years.

B. The case-law of the Court

37. The Court notes in respect of the detention of persons of unsound mind (Article 5 § 1(e) of the Convention) that they "may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds ... [A] predominant reason why the Convention allows the persons mentioned in Article 5 § 1(e) to be deprived of their liberty is not only that they are dangerous for public safety, but also that their own interests may necessitate their detention" (see *Litwa v. Poland*, no. 26629/95, § 60, ECHR 2000-III). The dangerousness factor is of particular relevance to the present case since the applicant, whilst "mentally deranged", committed serious offences against the physical integrity of other persons.

38. The Court reiterates that the object and purpose of Article 5 § 1, which is the *lex generalis* in relation to Article 5 § 4, is to ensure that no one should be deprived of his/her liberty in an arbitrary fashion; consequently, quite apart from conformity with domestic law, "no detention that is arbitrary can ever be regarded as lawful" (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 16 and 18, §§ 37 and 39).

39. The Court observes that, in accordance with its case law, the person subjected to compulsory medical treatment should have access to a court and the opportunity to be heard either in person or through some form of representation (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, §§ 73-76, and the *Winterwerp* judgment, cited above, §§ 60 and 61). The Article 5 § 4 review is not required to be automatic, but should rather be an opportunity for proceedings to be taken by the patient himself or herself (see, *inter alia*, *De Wilde, Ooms and Versyp v. Belgium*, cited above; *Keus v. the Netherlands*, judgment of 25 October 1990, Series A no. 185-C).

40. Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation (see *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In particular, in the proceedings in which an appeal against a detention order is being examined, “equality of arms” between the parties, the prosecutor and the detained person must be ensured (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 59, 25 March 1999).

C. Court’s assessment

1. General considerations as to the lawfulness of the applicant’s confinement in a psychiatric hospital

41. In the instant case, the Court observes that the applicant was subjected to compulsory medical treatment on the order of a competent court, following the court’s findings on two occasions that he had committed attempted rape. There is nothing in the case file to suggest that the domestic authorities did not comply with the requirements of the Convention when imposing this measure on the applicant. Moreover, even when the applicant’s health was deemed to have improved, no longer necessitating close or strict supervision, some lesser form of supervision was still deemed necessary. The Court notes that the initial imposition of compulsory medical treatment on the applicant is not at issue here, having been declared inadmissible by this Court’s final admissibility decision in relation to Article 5 § 1 (a) and (e). However, a problem arises in relation to the procedure for terminating the detention measure under Article 5 § 4 of the Convention (see *Gorshkov v. Ukraine*, no. 67531/01, decision of 15 June 2004; *Rakevich v. Russia*, no. 58973/00, judgment of 28 October 2003).

2. The procedure for terminating measures of compulsory medical treatment

42. Until April 2000, Ukrainian legislation did not foresee regular judicial review of the lawfulness of the continued, compulsory detention of persons of unsound mind (paragraph 29 above). However, since April 2000, the law has provided for frequent reviews of this matter, which are held at least every six months. The statutory provision allows the head doctor of the medical institution concerned, acting within his discretionary powers, to apply to a court, seeking the continuation, termination or modification of the measure. This application by a doctor, in accordance with Article 422 of the Code of Criminal Procedure, must be supported by the opinion of a medical commission made up of qualified psychiatrists (see paragraphs 31 and 33 above). However, the reviews (which are dealt with by the court which originally ordered the compulsory treatment), as required by paragraph 43 of the Rules of the Strict Security Psychiatric Hospitals of the Ministry of Health, approved by Order No. 397 of 8 October 2001 of the Ministry of Health, are conducted only if there are doubts as to the persistence of the patient's mental illness (see paragraph 33 above).

43. In the event that the court has doubts as to the medical opinion on the patient's mental state, it has the power to order another medical examination, but is not bound by the latter's conclusions. In case of necessity or particular doubts, the court can summon the expert-psychiatrist or the patient concerned to participate in the hearing of the case. However, the Court would underline that the participation of the person already undergoing compulsory medical treatment at the hearing is apparently not obligatory. The scope of a patient's competence in such proceedings is limited, since he/she is not a party to them. Furthermore, there appears to be only an implicit right of appeal against a court decision in these matters (Article 424 of the Code of Criminal Procedure, paragraph 31 above; the Government's submission paragraph 35 above).

3. Conclusions of the Court

44. The Court reiterates that a key guarantee under Article 5 § 4 is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion (see, e.g., *Musial v. Poland*, judgment of 25 March 1999, *Reports* 1999-II, § 43; the aforementioned *Rakevich v. Russia* judgment, § 45). Article 5 § 4 therefore requires, in the first place, an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not depend on the good will of the detaining authority, activated at the discretion of the medical corps or the hospital administration.

45. Whilst the legal mechanism contained in sections 19-22 of the Psychiatric Medical Assistance Act and Chapter 34 of the Code of Criminal Procedure, in force at the material time (see paragraphs 30 and 31 above), ensuring that a mental health patient is brought before a judge automatically, constitutes an important safeguard against arbitrary detention, it is insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient.

46. The Court concludes that the applicant was not entitled to take proceedings to test the lawfulness of his continued detention for compulsory medical treatment by a court, as required by Article 5 § 4 of the Convention. There has, accordingly, been a violation of this provision.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

47. The Court recalls that the applicant did not complain under Article 13 of the Convention, but that it was the Court itself who raised the matter *ex officio*. However, in view of the considerations and conclusions above under Article 5 § 4, the Court now finds the Article 13 issue superfluous. Accordingly, it is not necessary to make a separate examination of the applicant's complaint under this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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.”

49. The applicant, notwithstanding the requests of the Registry of 23 June 2003 and 1 December 2004, did not submit any claims for just satisfaction in accordance with Rule 60 of the Rules of Court. The Court therefore makes no award under Article 41.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
2. *Holds* that it is not necessary to make a separate examination of the case under Article 13 of the Convention.

Done in English, and notified in writing on 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President