



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

FIFTH SECTION

CASE OF MIKHANIV v. UKRAINE

(Application no. 75522/01)

JUDGMENT

STRASBOURG

6 November 2008

FINAL

06/04/2009

This judgment may be subject to editorial revision.

In the case of Mikhaniv v. Ukraine,

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

Rait Maruste, *President*,
Karel Jungwiert,
Volodymyr Butkevych,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 20 May 2008 and on 7 October 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 75522/01) 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 and a Russian national, Mr Andrey Antonovich Mikhaniv (“the applicant”), on 26 February 2001.

2. The applicant was represented by Mr D.A. Koutakh, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agents, represented by their Agents, Ms V. Lutkovska, Ms Z. Bortnovska and Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had not received the appropriate medical treatment in the Zhytomyr SIZO, that his detention on remand had been unlawful and unreasonably long, and that the length of the criminal proceedings against him was excessive.

4. By a decision of 20 May 2008, the Court declared the application partly admissible.

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

6. The applicant, but not the Government, filed further written observations (Rule 59 § 1). The Chamber have decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in Kyiv.

8. The applicant is a former vice-president of the Khlib Ukrainy Company (*ДАК Хліб України*), a State-owned company trading in grain.

A. Criminal proceedings against the applicant

9. On 11 January 2000 the General Prosecutor's Office (the "GPO") opened a criminal investigation in respect of the applicant and another employee of Khlib Ukrainy on charges of aggravated embezzlement of public funds by means of fraudulent transactions for the amount of approximately 44,000 euros (EUR) via the private company Ukrzovnishtorg ("the Ukrzovnishtorg case"). The applicant was also accused of producing a copy of a forged university degree certificate when applying in 1996 for a position in the civil service.

10. The applicant was arrested on 17 January 2000.

11. On 19 January 2000 the investigator appointed to deal with his case formally charged the applicant with aggravated embezzlement of public funds and forgery.

12. On 20 January 2000 the Deputy Prosecutor General ordered the applicant's detention on remand for two months on the grounds that the charges were serious and that the applicant might abscond and pervert the course of justice. The applicant appealed against his detention to the Pechersky District Court of Kyiv ("the Pechersky Court").

13. On 14 March 2000 the GPO extended the applicant's detention to five months.

14. On 15 March 2000 the GPO opened two more criminal cases against the applicant for aggravated embezzlement of public funds by means of fraudulent transactions via the Internova Trading Company and the Anmikh-Rossiya Company (respectively "the Internova case" and "the Anmikh case"). These cases were joined to the Ukrzovnishtorg case.

15. On 27 March 2000 the Pechersky Court, on the applicant's appeal, revoked the detention order of 20 January 2000. The court found that there was no evidence that the applicant would abscond or pervert the course of justice if released. In particular, the applicant had his permanent residence in Ukraine and financially supported his wife and a child living in Kyiv. He had never failed to respond to a summons or attempted to obstruct the investigation. Moreover, the court found that, when ordering the applicant's detention, the prosecution had not taken into account the fact that the applicant suffered from a number of serious illnesses.

16. On the same day, without releasing him from the Kyiv SIZO, the investigator placed him under arrest again, this time on suspicion of involvement in the Internova case. The Deputy General Prosecutor, on that same date, ordered the applicant's detention on remand for a period of two months on the ground that he was suspected of a serious offence and that he might abscond or pervert the course of justice.

17. On 28 March 2000 the applicant was officially charged with embezzlement of public funds in the Internova case.

18. On 30 March 2000 the Deputy Prosecutor General lodged a request for supervisory review (*protest*) with the Kyiv City Court against the Pechersky Court's decision of 27 March 2000.

19. On 10 April 2000 the Presidium of the Kyiv City Court quashed the Pechersky Court's decision of 27 March 2000 and upheld the detention order of 20 January 2000. It found that the applicant's wife and two children lived in Estonia. In Ukraine the applicant lived with his partner and their son in Kyiv whilst being registered in Dnipropetrovs'k. He had two registered addresses (in Ukraine and Estonia), three international passports (one Russian and two Ukrainian: ordinary and official) and had an account with an Estonian bank, and was therefore likely to abscond if released. Moreover, the Kyiv City Court held that the first-instance court had overlooked the fact that the applicant in his appeal had requested the "replacement of the preventive measure" rather than the "annulment of the detention order" and, therefore, this appeal fell outside the scope of judicial review at the investigation stage.

20. On 29 May and 29 August 2000 the GPO prolonged the applicant's pre-trial detention respectively to eight months and eleven months.

21. On 27 October 2000 the investigator, with a view to preventing any communication between the applicant and his co-accused, ordered the applicant's transfer from the Kyiv SIZO to the Zhytomyr Regional Pre-trial Detention Centre no. 8 (*Житомирський обласний слідчий ізолятор № 8*—"the Zhytomyr SIZO") for the period from 30 October to 30 November 2000.

22. The applicant was transferred to the Zhytomyr SIZO on 1 November 2000.

23. On 27 November 2000 the GPO prolonged the applicant's detention to twelve months.

24. On 14 December 2000 the investigator ordered the applicant's transfer back to the Kyiv SIZO.

25. Meanwhile, on an undetermined date in December 2000, the applicant's lawyer appealed against the prosecutor's detention orders of 20 January 2000 and 27 March 2000.

26. On 27 December 2000 the appeal was examined by the Pechersky Court in the presence of the prosecutor and the applicant's lawyer. The court held that, although the domestic law allowed the detention of a

defendant charged with aggravated embezzlement of public funds on the sole basis of the gravity of the charges, the other grounds provided for by the law should also be taken into account. The Pechersky Court found, in particular, that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. The applicant had permanent residence in Ukraine and could not lawfully leave it since his international passport had expired. The applicant lived with his wife and two children in Ukraine. He also financially supported his father and mother-in-law, who lived in Ukraine. Moreover, the applicant suffered from serious health problems. The Pechersky Court considered the medical experts' report produced by the prosecution, to the effect that the applicant was fit for detention in the remand facilities, unreliable in the light of the fact that during his detention in the Zhytomyr SIZO the applicant had not been administered any of the drugs prescribed for him. On the basis of the above findings the Pechersky Court quashed the detention orders of 20 January 2000 and 27 March 2000. On the same day the Deputy Prosecutor General lodged a request for supervisory review against this decision.

27. On 28 December 2000 the applicant, while still detained in the Kyiv SIZO, was arrested by the investigator on suspicion of involvement in the Anmikh case. On the same day the applicant was officially charged with the said offence.

28. On 5 January 2001 the GPO extended the applicant's pre-trial detention to fifteen months.

29. On 15 January 2001 the Presidium of the Kyiv City Court, following the prosecution's request for supervisory review, quashed the Pechersky Court's decision of 27 December 2000, citing essentially the same arguments as in its decision of 10 April 2000. The court also stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges, as provided for by Article 155 of the CCP.

30. On 5 April 2001 the GPO extended the applicant's detention up to eighteen months.

31. On 31 May 2001 the GPO instituted another criminal case against the applicant and Mr L. respectively for giving and taking bribes. This case was joined to the criminal case against the applicant.

32. On 18 June 2001 the applicant and his lawyer were granted access to the 120-volume case file. The applicant, however, refused to study the case file, alleging that the relevant formalities had not been completed. On the same day the investigator rejected this complaint as unsubstantiated.

33. On 16 July 2001 the prosecution lodged the bill of indictment with the Kyiv City Court of Appeal (the former Kyiv City Court).

34. On an unknown date the applicant requested and was granted access to the case file, a right which he and his lawyer exercised from 20 July to 26 September 2001.

35. On an unknown date in September 2001 the Kyiv City Court of Appeal referred the applicant's case file to the Radyansky District Court of Kyiv for examination.

36. On 11 October 2001 the Deputy Prosecutor General decided that only the Ukrzovnishtorg case was ready for trial and withdrew the remainder of the charges because they required further pre-trial investigation.

37. On 12 October 2001 an amended bill of indictment was lodged with the Svyatoshynsky District Court¹ ("the Svyatoshynsky Court").

38. On 1 November 2001 a preparatory hearing was held before a judge of the Svyatoshynsky Court. The judge considered that the case was ready for trial and decided that the applicant was to remain in detention on remand. The applicant's request for release was rejected on the ground that, although he had already spent a total of 21 months in detention, the period of his detention during the investigation had not exceeded 18 months and thus was in compliance with Article 156 of the CCP. The judge considered that the applicant's transfer to the Zhytomyr SIZO was necessary for the proper conduct of the investigation and that there was no indication of ill-treatment. He concluded that there were no medical or other special circumstances warranting the applicant's release.

39. The proceedings before the trial court started on 26 November 2001.

40. At a hearing on 18 January 2002 the Svyatoshynsky Court dismissed the applicant's request for release, stating that there were no new circumstances warranting a re-evaluation of the preventive measure imposed. The court also granted the prosecution's motion to adjourn the hearing until 1 February 2002 to allow the new prosecutor to familiarise himself with the case file.

41. On 1 February 2002 the Svyatoshynsky Court of its own motion decided that further pre-trial investigation was necessary. The court also ordered the applicant's release on an undertaking not to abscond.

42. On 2 February 2002 the applicant tried to leave Ukraine for Russia by train but was stopped on the border and sent back to Kyiv.

43. On an unspecified date the prosecution appealed against the remittal of the case for further investigation, considering that it was ready for examination on the merits. The applicant also challenged the remittal, stating that it was motivated by the court's reluctance to acquit him. On 18 April 2002 the Kyiv City Court of Appeal granted the appeals, quashed

¹ Following reorganisation of districts in the city of Kyiv, the Radyansky District Court, to which the applicant's case had been allocated, was merged with another district court to become the new Svyatoshynsky District Court in October 2001.

the decision of 1 February 2002 and ordered that the trial proceedings in the applicant's case be resumed.

44. The hearings before the Svyatoshynsky Court resumed on 30 April 2002. On 14 August 2002 the trial court ordered that by 19 September 2002 the GPO was to carry out additional enquiries in order to collect further evidence. However, it was not until 24 December 2002 that the authorities produced the requested evidence in court and the trial could resume.

45. On 11 February 2003 the Svyatoshynsky Court acquitted the applicant of the charges brought against him. The prosecution appealed. On 28 June 2003 the Kyiv City Court of Appeal upheld the applicant's acquittal.

46. On 13 July 2004 the Supreme Court, following the appeal of the GPO, reversed the decisions of the lower courts and remitted the case for further investigation.

47. The case file was received by the GPO on an unknown date in October 2004. On 28 October 2004 the investigator amended the applicant's charges in accordance with the new 2001 Criminal Code. On the same day the applicant was summoned to give evidence but failed to appear. Since then, according to the Government's submissions, the GPO has carried out a number of forensic examinations, questioned witnesses and seized documentary evidence. Further documents have been requested and received from Swiss authorities.

48. On an unknown date the applicant made use of the recent amendments to the CCP by challenging the initial decision of the GPO of 11 January 2000 to institute criminal proceedings against him. On 24 November 2005 the Pechersky Court allowed this application and revoked the impugned decision. The prosecution appealed.

49. On 2 February 2006 the Kyiv City Court of Appeal reversed the Pechersky Court's decision and rejected the applicant's application.

50. On 29 March and 22 June 2007 the applicant requested the investigator for termination of the criminal proceedings as time-barred. In reply the investigator informed the applicant that his requests would be examined and the decision would be adopted in accordance with the relevant law.

51. On 13 May 2008 the applicant was charged with abuse of power and forgery and ordered not to leave his place of residence.

52. The investigation in the applicant's case is still pending.

B. Administrative proceedings concerning lawfulness of detention

53. On 18 July 2001 the applicant's lawyer, referring to Article 29 § 1 of the Constitution, filed an administrative complaint about the inactivity of the administration of the Kyiv SIZO, namely for their failure to release the

applicant after 17 July 2001, when the overall term of his detention had reached eighteen months. On 20 August 2001 the Shevchenkivsky District Court of Kyiv refused to entertain this complaint on the ground that the lawyer's authority to act issued by the applicant was limited to the criminal proceedings before the Kyiv Court of Appeal. This decision was not appealed against by the applicant.

54. The applicant's similar administrative complaint against the GPO was declared inadmissible on 26 October 2001 by the Pechersky Court on the ground that such complaints fell to be examined in the criminal proceedings which at that time were pending before the Radyansky Court.

C. Medical treatment

55. After the applicant's arrest in January 2000 his health started to deteriorate. According to the Pechersky Court's decision of 27 March 2000 the applicant started to receive medical treatment in the Kyiv SIZO for his illnesses as early as March 2000.

56. On 15 June 2000, in response to the applicant's numerous requests, the investigator dealing with his case ordered that a forensic medical report on the applicant's state of health be obtained. In its report no. 83 of 16 June 2000, a commission of the Kyiv City Bureau of Forensic Medical Examinations (*Київське міське бюро судово-медичних експертиз*) stated that the applicant suffered from a post-traumatic encephalopathy, duodenal ulcer with reflux and heart pathology. The applicant was prescribed a diet and heart drugs. In conclusion the experts suggested that the applicant's encephalopathy be examined in a specialised neurological institution.

57. On 29 August 2000 an expert commission of the Kyiv City Centre of Forensic Psychiatric Examinations (*Київський центр судово-психіатричних експертиз*), with the participation of a neuropathologist from the district hospital, drew up a forensic report (no. 957) at the request of the investigator. The commission found that the applicant suffered from post-traumatic encephalopathy (after a head injury suffered at the age of fifteen). According to the applicant this disease caused him severe headaches and hand tremor. The applicant was prescribed the relevant drugs. He was found fit for detention on remand subject to the prescribed treatment.

58. On 1 November 2000 the applicant was transferred to the Zhytomyr SIZO.

59. On 20 December 2000 the applicant's lawyer asked the Governor of the Zhytomyr SIZO whether they had provided the applicant with the medicines prescribed for him.

60. On 25 December 2000 the Governor of the Zhytomyr SIZO issued a letter, stating that on his admission the applicant had been examined by the prison doctors, who had diagnosed him as suffering from encephalopathy.

Subsequently he had been examined by the cardiologist who confirmed the above heart pathology diagnosis of the Kyiv experts. The Governor stated that, although the content of the above medical experts' reports had been made known to the prison authorities, the drugs prescribed in those reports were not in the possession of the Zhytomyr SIZO and thus could not be administered to the applicant.

61. On 11 January 2001, after the applicant's transfer from the Kyiv ITU, he was examined by a doctor from the medical department of the Kyiv SIZO, who found that he suffered from headaches, heart and stomach pains. The applicant was prescribed fifteen drugs, including those specified in the experts' reports.

II. RELEVANT DOMESTIC LAW

62. The relevant domestic law is summarised in the judgment of *Nevmerzhtsky v. Ukraine* (no. 54825/00, §§ 53-56, ECHR 2005-II).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

63. The applicant complained that the lack of medical assistance in the Zhytomyr SIZO amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, which provides as follows:

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

64. The Government maintained that, although the applicant did suffer from several insignificant illnesses, the very fact that expert examinations of his medical condition had been conducted pointed to the authorities' care for his health. They stated that after 11 January 2001 the applicant had been prescribed and had received the relevant treatment in the Kyiv SIZO. Moreover, the applicant had refused on two occasions to undergo examinations by independent doctors without giving any reason.

65. The applicant stated that the medical treatment he had received during his detention was inadequate. In particular, while he was held in the Zhytomyr SIZO he did not receive any proper care.

66. The Court's case-law in relation to Article 3 of the Convention, as applicable to the instant case, is summarised in the judgments of *Koval* (cited above, § 79) and *Melnik* (cited above, § 93).

67. In view of the applicant's complaints, the Court will concentrate on his medical situation while in detention at the Zhytomyr SIZO during the

period of approximately six weeks from 1 November until 14 December 2000.

68. In the Court's opinion, the issue before it is not whether the pains which the applicant may have endured on account of the various health problems attained the level of inhuman and degrading treatment according to Article 3 of the Convention. Rather, the Court must examine whether, in view of the applicant's health, he was afforded the medical treatment required by Article 3 of the Convention while in detention. Thus, according to this provision, a State becomes responsible for the welfare of persons in detention, and the authorities have a duty to afford such persons the required protection (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Nevmerzhitsky v. Ukraine*, cited above, § 81).

69. The evidence submitted by both parties confirms that during his detention the applicant suffered from previously acquired post-traumatic encephalopathy, a duodenal ulcer with reflux, and a heart pathology.

70. It is not the Court's task to substitute its opinion with that of the domestic experts in assessing the seriousness of the applicant's health conditions and their possible risks of aggravation (see, *mutatis mutandis*, *Nevmerzhitsky*, cited above, § 73, and *Adalı v. Turkey*, no. 38187/97, § 213, 31 March 2005). In the present case, it suffices to note that after being remanded in custody, the applicant was examined by various medical authorities which concluded that he was fit for detention on remand subject to the prescribed medication (see paragraph 56 above). In the Court's opinion, this provides a strong indication that the domestic medical experts themselves regarded the applicant's health condition as being sufficiently serious.

71. A further confirmation for the seriousness of the applicant's health condition can be seen in the fact that, after the applicant's return to Kyiv SIZO, he continued to be prescribed a large number of drugs (altogether fifteen), including those specified in the experts' previous reports.

72. Finally, the Court notes that the applicant failed to receive the required medication for what may qualify in these circumstances as a substantial duration, namely a period of six weeks.

73. Without doubt, the prison administration was aware of the medical experts' previous reports which considered that the applicant could only be detained if he was afforded the required medical treatment. The explanations given by the domestic authorities - the applicant was not administered the required drugs on the ground that they were not available in the prison pharmacy - do not appear satisfactory. In fact, the Government have produced no evidence of any medical care at all being provided to the applicant during his detention in the Zhytomyr SIZO.

74. In the Court's opinion, leaving a detained person without essential medical treatment as required by medical experts for his health condition

over a substantial period of time and without satisfactory explanations amounts to inhuman and degrading treatment in breach of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

75. The applicant complained that his detention on remand had been unlawful and excessively long. The Court considers that these complaints are to be considered respectively under Article 5 § 1 (c) and Article 5 § 3 of the Convention., which, in so far as relevant, provides 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:

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

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Alleged violation of Article 5 § 1 (c) of the Convention

76. The Government stated that the applicant was re-arrested in accordance with a procedure established by law. Moreover, the unlawful and unreasonable Pechersky Court decision to release him was quashed by a higher instance.

77. The applicant considered that his detention had been arbitrary and unlawful.

78. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed.

79. However, the “lawfulness” of detention under domestic law is the primary but not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was

compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.

80. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III).

81. On 27 March 2000 the Pechersky Court, upon the applicant’s appeal, revoked the prosecution’s detention order of 20 January 2000, finding that there was no evidence that the applicant would abscond or pervert the course of justice if released. On the same day, without releasing the applicant from prison, the investigator placed him under arrest again, on suspicion of another count of aggravated embezzlement of public funds. On 10 April 2000, upon a request for supervisory review by the Deputy General Prosecutor, the Kyiv City Court quashed the decision of 27 March 2000 and upheld the detention order of 20 January 2000.

82. On 27 December 2000 the Pechersky Court revoked the prosecution’s detention orders of 20 January 2000 and 27 March 2000, finding again that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. On the next day, while still in prison, the applicant was re-arrested and subsequently detained on suspicion of involvement in another count of embezzlement of public funds. On 15 January 2001 the Kyiv City Court, upon the prosecutor’s request for supervisory review, quashed the Pechersky Court’s decision. The applicant complained that his arrest on 28 December 2000 had been unlawful.

83. The Court notes that there is no reason to believe that the applicant’s re-arrests on 27 March and on 28 December 2000 were incompatible with the domestic procedural regulations applicable at the material time. The detention was on both occasions ordered by a competent prosecutor in respect of a person who had been accused of having committed a crime punishable by a term of imprisonment of more than one year. The respective orders were issued on the same day the applicant was arrested, that is to say within the statutory three-day time-limit.

84. The Court further accepts that the relevant provisions of the CCP constituted a clear and foreseeable legal basis for the applicant’s custody. Moreover, the applicant was detained on the basis of a “reasonable

suspicion” that he had committed a crime and for the purpose of bringing him before a court to stand trial.

85. The Court notes that both re-arrests were ordered after decisions by a competent court ordering the applicant’s release. It is true that formally different charges from those that had served as a basis for the previous, annulled detention orders were relied upon, though these charges all formed part of the same complex of investigations on several counts of aggravated embezzlement of public funds. Moreover, the charges that served as a basis for re-arresting him had been joined to the original criminal case as far back as March 2000.

86. The Court further notes that while on the first occasion the re-arrest and detention were ordered the same day, when the applicant was still detained, the second time the applicant remained in detention for a day without any reasons advanced prior to the decision on his new arrest was made. In this context, the Court reiterates that administrative formalities connected with release could not have justified a delay of more than several hours (see *Kucheruk v. Ukraine*, no. 2570/04, § 191, 6 September 2007, and *Nikolov v. Bulgaria*, no. 38884/97, § 82, 30 January 2003).

87. It is not the task of this Court to assess the strategy chosen by the prosecuting authorities in the criminal proceedings, but the situation described above gives the strong appearance that, on two occasions, the authorities used the largely similar charges, which had already been part of the case against the applicant, as a pretext to secure his continued detention, thereby circumventing the effect of courts’ orders on the applicant’s release. It does not appear that the domestic law clearly regulated such a situation or provided sufficient guarantees against abuse.

88. In the Court’s view, the conduct of the prosecuting authorities in securing the applicant’s continued detention after the decisions of the Pechersky Court ordering his release, in the light of all these elements taken together, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the principle of the rule of law.

89. The Court finds, therefore, that the applicant’s re-arrests, on two occasions, and subsequent detention by the investigating authorities after court decisions revoking the detention orders were in breach of Article 5 § 1 of the Convention.

B. Alleged violation of Article 5 § 3 of the Convention

90. The applicant claimed that that the length of his detention on remand had been unreasonable.

1. Parties’ submissions

91. The Government argued that a period of twenty-four and a half months for the applicant’s detention on remand was reasonable in the

circumstances. They pointed out that in extending the time-limits of the applicant's detention the prosecutors had referred, *inter alia*, to the risk of his absconding or perverting the course of justice. In this connection the Government stated that those submissions were justified by the fact that the applicant had three international passports (one Russian and two Ukrainian, including an official passport), that his family lived in Estonia, that he had several accounts in foreign banks and that he was accused of committing offences in collaboration with certain persons who were at large at the material time.

92. The Government further maintained that the length of the applicant's detention had been justified by the complexity of the case: the applicant was charged with four distinct offences, three of which involved complex economic fraud and international transactions. The authorities had to carry out a number of time-consuming investigations, involving several examinations by accountancy experts and ordering and processing financial documents from foreign law-enforcement agencies. After the case was referred to the court for trial, the applicant requested access to the case file, which was granted. Therefore the State could not bear responsibility for the period between 20 July and 26 September 2001 when the applicant and his lawyers were studying the case file. The trial proceedings lasted for three months, during which period the Svyatoshynsky Court held nine hearings, questioned witnesses, examined five motions from the applicant's lawyers and issued three orders for the compulsory appearance of witnesses.

93. The applicant challenged the authorities' failure to bring him promptly before a judge for examination of the lawfulness of his detention on remand. He further contested the reasonableness of the length of his detention on remand, stating that in the subsequent trial it had become apparent that the eighteen-month pre-trial investigation had not produced any compelling evidence of his guilt.

2. Court's assessment

94. The applicant's detention on remand lasted from 17 January 2000 to 1 February 2002. The period to be taken into consideration is therefore two years and fifteen days.

95. The Court notes that the domestic authorities advanced three principal reasons for continuation of the applicant's detention, namely that the applicant remained under strong suspicion of having committed the serious offences of which he stood accused and that he was likely to abscond or pervert the course of justice if released. The Court recalls in this connection that the existence of strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention (see, *inter alia*, *Scott v. Spain*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 78). It will therefore proceed to ascertain whether the other

grounds given by the judicial authorities continued to justify the deprivation of liberty.

96. The national courts disagreed on the question whether there were reasons to justify the applicant's detention. The Pechersky Court considered that there was no risk that the accused might pervert the course of justice or attempt to abscond, whereas the Kyiv City Court affirmed such a risk. The risk that the applicant would abscond if released was inferred from the fact that he had double citizenship (Russian and Ukrainian) and, consequently, several international passports, lived in Kyiv whilst having a registered address in Dnepropetrovsk and had a family and bank accounts in Estonia.

97. The Court, assuming that the above circumstances were initially relevant and sufficient, notes that the risk of the applicant's absconding diminished over the duration of his detention on remand (see *Calleja v. Malta*, no. 75274/01, § 108, 7 April 2005). Moreover, as the proceedings progressed and the collection of evidence neared completion, the risk of his tampering with evidence would also have become less relevant (see *Nevmerzhitsky*, cited above, § 136).

98. However, after the Kyiv City Court's decision of 15 January 2001 the applicant's detention was extended without any reference to any concrete factual circumstances capable of showing that the risks relied on actually persisted during the relevant period (see *Trzaska v. Poland*, no. 25792/94, § 65, 11 July 2000). The Court further notes that in the above decision the City Court had already stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges against him. This suspicion that the applicant had committed the imputed offences was the only ground on which the Svyatoshynsky Court based its decision of 1 November 2001 to detain the applicant pending trial. In these circumstances the Court finds that the authorities have failed to show that the grounds justifying the applicant's detention persisted throughout the whole period of his deprivation of liberty (compare and contrast *Gevizovic v. Germany*, no. 49746/99, § 40, 29 July 2004).

99. Lastly, the Court notes that no alternative measures were effectively considered by the domestic authorities to ensure the applicant's appearance at trial (see *Nevmerzhitsky*, cited above, § 137). Indeed, on 10 April 2000 the Kyiv City Court found that the fact that the applicant's appeal against the prosecutor's detention order suggested the possibility of its replacement with another preventive measure rendered it inadmissible as falling outside the scope of the courts' jurisdiction at the investigation stage of criminal proceedings (see paragraph 19 above).

100. In sum, the Court finds that the reasons relied on by the authorities to justify the applicant's continued detention for more than two years, although possibly relevant and sufficient initially, lost these qualities as time passed. In these circumstances it is not necessary to examine whether the proceedings were conducted with due diligence.

101. There has accordingly been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

102. The applicant maintained that his right to a “hearing within a reasonable time” had not been respected and that there had accordingly been a violation of Article 6 § 1 of the Convention, the relevant part of which provides:

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

103. There was no dispute over the fact that the proceedings started on 11 January 2000, when the criminal investigation was instituted against the applicant. The proceedings in issue are still pending before the General Prosecutor’s Office. The Court accordingly finds that the proceedings have lasted for over eight years.

104. The Government repeated their submissions with regard to Article 5 § 3. In particular the Government pointed out that the applicant’s case was one of a certain complexity in that it concerned complex financial issues and international transactions, which had led the investigators to order a number of accounting and other expert examinations and to seek assistance from foreign law-enforcement authorities. These circumstances could explain the prolonged pre-trial investigation into the alleged offences. Once the case was set down for trial the courts dealt with it in a timely manner and without undue delay. After the Supreme Court had ordered the re-investigation, the authorities had carried out several expert examinations, questioned witnesses and seized documents. The General Prosecutor’s Office had also requested certain documents from the Swiss authorities.

105. In sum, the Government contended that there had been no significant periods of inactivity in the proceedings for which the judicial authorities could be held responsible and that, accordingly, there had been no violation of Article 6 § 1.

106. The applicant maintained that his right to a hearing within a reasonable time had been infringed.

107. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

108. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for example, *Merit v. Ukraine*, cited above, §§ 72-76).

109. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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

111. The applicant claimed compensation for the pecuniary damage caused by his suspension from the post of Deputy Minister of Agriculture in an amount of 30,000 to 65,000 euros (EUR). He also claimed compensation for the seizure of jewellery and the attachment of his property, including two cars, a flat in Kyiv, five shops in Dnipropetrovsk, shares in the private company Prokholoda and his account with the Crédit Lyonnais bank. The applicant claimed non-pecuniary damage in the amount of EUR 155,520.

112. The Government considered that the pecuniary damage thus claimed was not related to the subject matter of the case. Moreover, the applicant had failed to prove that he had ever occupied the post of Deputy Minister of Agriculture. The jewellery was seized and the account attached in accordance with the law, to ensure the enforcement of a possible civil judgment in the criminal case. The cars and the flat had been attached for the same reason and remained in the possession of the applicant or members of his family. There was no information that the applicant owned any property in Dnipropetrovsk.

The Government considered that the sum claimed by the applicant for non-pecuniary damage was exorbitant.

113. The Court, like the Government, does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. As regards the non-pecuniary damage, the Court points to its above findings of violations of Articles 3, 5, and 6 of the Convention

in the present case. Having regard to comparable applications in its case-law, and deciding on an equitable basis, the Court awards the applicant EUR 5,000 in compensation for non-pecuniary damage, plus any tax that may be chargeable on that amount. (cf. *Nevmerzhitsky*, cited above, § 145; *Koval*, cited above, § 130; and *Khokhlich*, cited above, § 228).

B. Costs and expenses

114. The applicant also claimed EUR 130,000 for the costs and expenses incurred in proceedings before the domestic courts and EUR 9,415 for those incurred in the proceedings before the Court.

115. The Government stated that the costs claimed were exaggerated. Moreover, there was no indication that the applicant had actually incurred those costs in the domestic proceedings.

116. 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). In the present case the Court notes that the applicant's complaints were partly declared inadmissible. On the whole it finds excessive the total amount which the applicant claimed in respect of his legal costs and expenses and considers that it has not been demonstrated that they were necessarily and reasonably incurred.

117. In these circumstances, the Court is unable to award the totality of the amount claimed; deciding on an equitable basis, it awards the applicant the sum of EUR 3,000 in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

118. 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

1. *Holds* by five votes to two that there has been a violation of Article 3 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant's right to a "hearing within a reasonable time";
5. *Holds* unanimously
 - (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, the following amounts:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount;
 - (ii) EUR 3,000 (three thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount;
 - (b) that the above amounts shall be converted into the national currency of the respondent State 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Maruste and Berro-Lefèvre is annexed to this judgment.

R.M.
C.W.

JOINT PARTLY DISSENTING OPINION OF JUDGES MARUSTE AND BERRO-LEFÈVRE

We disagree with the majority's finding of a violation of Article 3. In our opinion the facts of the case do not allow us to conclude that the interference reached the threshold required for finding a violation of that Article. We also consider the evidential basis for finding a violation of Article 3 insufficient.

It is not disputed between the parties, and we also agree, that the applicant had some health problems. Whether they were caused by trauma that occurred 20 years ago, when he was fifteen years old, or were a side-effect of the accusations against him, aggravated by the general conditions of being detained, does not matter. The fact is that doctors prescribed some medication to ease the discomfort and possible pain for him.

At the same time we could not but note that the medical disorders pointed out by the doctors and reflected in the facts were rather general in nature and not specified. The applicant started to receive the treatment a couple of months after being arrested. As he was diagnosed in a forensic commission report (see paragraph 56 of the judgment) with a post-traumatic encephalopathy, a duodenal ulcer with reflux and a heart complaint causing headache and hand tremor, he was prescribed a diet and relevant drugs. When transferred to another institution, the prescribed pills were not administered for six weeks, because they were not available at that institution. This situation leads the Chamber to conclude that the failure of the authorities to provide the applicant with the medication prescribed earlier reached a level of severity that attracts protection under Article 3.

We agree that it is not for the Court to substitute its opinion for that of the domestic medical experts in assessing the seriousness of the applicant's health problems and their possible risks of aggravation. At the same time we believe that the *onus probandi* still lies with the applicant to prove that he *de facto* suffered consequences which attract protection under Article 3 and reached the required level of severity.

We do not want to diminish or devalue the possible suffering of the applicant. But we have to point out that his alleged sufferings and discomfort were hypothetical and are not supported by any facts or reports from the relevant period (when he was being held in the Zhytomyr SIZO, from 1 November to 14 1 December 2000). The applicant has not produced any evidence that, during these weeks, he had any serious health failures, needed urgent medical help or even asked for help or drugs or complained of any lack of care. He did so only afterwards, at the earliest on 11 January 2001, when he was examined by a doctor of the Kyiv SIZO. Bearing this in mind, we consider that generally relying on *ex post facto* claims about unspecified suffering and the lack of "any proper care" (see paragraph 64 of the judgment) is not sufficient to find a breach of Article 3.

In conclusion, we do not deny that situations such as the one in the present case involve problems. Our view is that we should be more cautious in finding a violation of Article 3 on vague, general and/or hypothetical grounds. It seems to us that such situations rather fall to be examined under Article 8 as entailing interference with the private life, physical integrity and well-being of the person.