



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

FIFTH SECTION

CASE OF SOLOVEY AND ZOZULYA v. UKRAINE

(Applications nos. 40774/02 and 4048/03)

JUDGMENT

STRASBOURG

27 November 2008

FINAL

27/02/2009

This judgment may be subject to editorial revision.

In the case of Solovey and Zozulya v. Ukraine,

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

Rait Maruste, *President*,

Karel Jungwiert,

Volodymyr Butkevych,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 4 November 2008,

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

PROCEDURE

1. The case originated in two applications (nos. 40774/02 and 4048/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Igor Yevgenyevich Solovey and Mr Anton Valentinovich Zozulya (“the applicants”), on 27 March 2001.

2. The applicants, who had been granted legal aid, were represented by Mr I. Lishnevskiy, a lawyer practising in Kiev. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicants alleged, in particular, that their pre-trial detention had been excessively long and unlawful and the criminal proceedings against them had been lengthy too.

4. On 11 December 2006 the Court declared the applications partly inadmissible and decided to communicate the above complaints to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility.

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

5. The applicants were born in 1981. They are currently detained.

A. Criminal proceedings against the applicants

6. On 18 August 1998 Mr Solovey confessed that he, Mr Zozulya and Mr Kh. had killed Mrs T.

7. On 19 August 1998 Mr Zozulya made a similar confession.

8. On the same day criminal proceedings against both applicants were initiated.

9. On 11 November 1998 the pre-trial investigation was completed and the applicants were given time to study the case file.

10. From 12 November 1998 until 4 May 1999 the applicants and other parties studied the case-file material. Mr Zozulya did so from 16 November 1998 to 15 April 1999, and Mr Solovey from 20 November 1998 to 3 May 1999.

11. On 13 May 1999 the case was referred to the Kyiv City Court (“the Kyiv Court”), acting as a first-instance court.

12. On 19 May 1999 the court committed the applicants for trial.

13. On 1 July 1999 the Kyiv Court convicted both applicants of aggravated murder and robbery; and sentenced each of them to fourteen years’ imprisonment.

14. On 9 December 1999 the Supreme Court of Ukraine quashed the judgment and remitted the case for additional pre-trial investigation.

15. On 17 January 2000 the criminal case against the applicants was sent to the prosecutor’s office for an additional investigation.

16. On 18 February 2000 the Prosecutor General lodged a request for extraordinary review of the decision of the Supreme Court of 9 December 1999 with the Plenary Supreme Court.

17. On 3 March 2000 the Plenary rejected the request for the review and the case was sent back to the investigator.

18. On 15 June 2000 the additional investigation was completed and the applicants were given time to study the case file.

19. On 20 July 2000 the case was referred to the Kyiv Court.

20. On 17 August 2000 the Kyiv Court remitted the case for additional investigation.

21. On 19 October 2000 the Supreme Court upheld that ruling of 17 August 2000.

22. On 30 January 2001, after additional investigation, the case was referred again to the Kyiv Court.

23. On 21 February 2001 the Kyiv Court committed the applicants for trial.

24. On 25 April 2001 the Kyiv Court convicted Mr Zozulya and Mr Solovey of aggravated murder and robbery; and sentenced them, respectively, to fourteen and ten years’ imprisonment.

25. On 25 April 2002 the Supreme Court upheld the judgment of the Kyiv Court.

B. Applicants' detention on remand

26. Mr Solovey and Mr Zozulya were arrested on 18 August and 19 August 1998 respectively .

27. On 20 August 1998 the Kyiv Podolsky District Prosecutor ordered the detention of Mr Zozulya for two months on the ground that he had committed a serious offence and might abscond.

28. On 21 August 1998 the same preventive measure was chosen for Mr Solovey on the same grounds.

29. On 19 October 1998 the Kyiv Podolsky District Prosecutor prolonged the applicants' detention up to three months – until 20 November 1998 for Mr Zozulya and 21 November 1998 for Mr Solovey.

30. On 19 May 1999 the Kyiv Court, in the committal hearing, maintained the applicants' detention without giving any grounds or fixing any time limit.

31. In its judgment of 1 July 1999 the Kyiv Court, having convicted the applicants, also decided that they should remain in custody until the judgment became final.

32. On 9 December 1999 the Supreme Court of Ukraine, having quashed the judgment of 1 July 1999 in full, made no ruling in respect of the applicants' further detention.

33. On 28 January 2000 the Kyiv Prosecutor's Office ordered the applicants' detention for one month – until 28 February 2000.

34. On 27 March 2000 the Deputy Prosecutor General extended the applicants' detention to eight months without giving any grounds – up to 17 June 2000 for Mr Zozulya and up to 18 June 2000 for Mr Solovey.

35. On 17 August 2000 the Kyiv Court, having remitted the case for additional investigation, maintained the applicants' detention without giving any reason or fixing any time-limits.

36. On 6 December 2000 the Darnitsky Prosecutor's Office ordered the applicants' further detention for one month – until 5 January 2001.

37. On 21 February 2001 the Kyiv Court, in the committal hearings, maintained the applicants' detention without giving any reason or fixing any time-limits.

38. On 25 April 2001 the Kyiv Court convicted the applicants.

C. Applicants' requests for release and complaints about unlawfulness of their detention

39. From April 2000 onwards the applicants and their representatives lodged numerous procedural applications with the Darnitsky Prosecutor's Office, the Kyiv Court and the Supreme Court, requesting the applicants' release. They also submitted several complaints to the prosecutors and the Kyiv Court alleging that their detention had been unlawful between

November 1998 and April-May 1999 when they had been studying the case file and their detention had not been covered by any detention order (see paragraphs 10, 29 and 30 above).

40. The Darnitsky Prosecutor's Office, in reply to the applicants' requests and complaints, informed them that their detention had been in compliance with the law and that there had been no grounds for their release. It did not advance any other reasoning to justify the applicants' detention.

41. The Kyiv Court, in its decisions of 19 May 1999, 17 August 2000 and 21 February 2001, maintained the applicants' detention on remand stating that the preventive measure chosen by the investigation was correct (see paragraphs 30, 35 and 37 above). It did not, however, address the applicants' complaints about the alleged unlawfulness of their detention between November 1998 and April 1999.

42. The Supreme Court, in its decisions of 9 December 1999 and 19 October 2000, did not make any ruling on the applicants' further detention (see paragraphs 21 and 32 above).

II. RELEVANT DOMESTIC LAW

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

Article 148: Grounds for the application of preventive measures

"If there are sufficient grounds to consider that the accused, if at liberty, will abscond from an investigation or the court, or will obstruct the establishment of the truth in a criminal case or will pursue criminal activities, and in order to ensure the execution of the sentence, the investigator and prosecutor shall be entitled to impose on the accused one of the preventive measures envisaged by Article 149 of the Code ..."

Article 149: Preventive measures

"The preventive measures shall be as follows:

- (1) a written undertaking not to abscond;
- (2) a personal surety;
- (3) the surety of a public organisation or labour collective;
- (3-1) bail;
- (4) remand in custody;
- (5) supervision by the command of a military unit."

Article 155 (as worded at the material time): Detention on remand

“Detention on remand as a preventive measure shall be applied in cases concerning offences for which the law envisages a penalty of more than one year’s imprisonment. In exceptional circumstances this preventive measure can be applied also in cases concerning offences for which the law envisages a penalty of up to one year’s imprisonment...”

Article 156 (as worded at the material time): Term for holding a person in custody

“The term for remanding a person in custody during the investigation of criminal offences shall be not more than two months. This term may be extended to four months by district, city or military prosecutors, prosecutors of the fleet or command garrison, or other prosecutors of the same rank, if it is not possible to terminate the criminal investigation, and in the absence of any grounds for changing the preventive measure. A further extension of this term to six months from the time of arrest shall be effected only if the case is exceptionally complex, by the Prosecutor of the Republic of the Crimea, regional prosecutors, Kyiv prosecutors, military prosecutors of the district or fleet, or other prosecutors equal to them in rank.

Further periods of remand in custody may be extended for up to one year by the Deputy Prosecutor General of Ukraine, and up to eighteen months by the Prosecutor General.

Subsequent to the above, no further extensions of detention on remand shall be allowed. The accused must then be immediately released.

If it is impossible to terminate the investigation within these remand periods and there are no grounds for changing the preventive measure, the Prosecutor General or his Deputy shall be entitled to refer the case to a court in the part which relates to accusations which can be proved. As regards the incomplete investigation, the case shall be divided into separate proceedings and completed in accordance with the general rules.

The material relating to the completed part of the criminal case shall be provided to the accused and his representative for examination not later than one month before the expiry of the remand period, as established by paragraph 2 of this Article.

The time taken by the accused and his representative to apprise themselves of the material in the case file shall not be taken into account in calculating the overall term of remand in custody.

If the court refers the case back for a fresh investigation, and where the term of remand in custody has ended, and an alternative preventive measure cannot be applied in the circumstances of the case, the prolongation of detention on remand shall be effected by the prosecutor, whose task is to supervise the lawfulness of the pre-trial investigation in the case, within one month from the time he receives the case file. Further prolongation of such detention, before the case is remitted to the court, shall be governed by paragraphs 1, 2 and 6 of this Article.”

Article 241**Terms of examination of the case by a single judge or a court in the committal hearing**

“A criminal case shall be examined by a single judge or a court in the committal hearing within five days or, in complex cases, ten days after its receipt by the court.”

Article 242 (as worded at the material time): Issues considered when committing the accused for trial

“Single judges or a court in a preparatory sitting shall consider the following issues with respect to each of the accused:

...

(7) whether the preventive measure with respect to the accused has been selected correctly...”

Article 244 (as worded at the material time): Decision of a court or of a single judge at the preparatory hearing

“... If it is necessary to change the preventive measure, the court in a ruling and the judge in a resolution shall give reasons for the decision taken to that effect.”

THE LAW**I. JOINDER OF THE APPLICATIONS**

44. Pursuant to Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their common factual and legal background.

II. SCOPE OF THE CASE

45. After a partial inadmissibility decision and communication of his application to the respondent Government, Mr Zozulya complained about a violation of Article 3, Article 6 §§ 1 and 3, Article 8, and Article 13 of the Convention, referring to the same events.

46. The Court observes that the complaints of Mr Zozulya under Article 3, Article 6 § 1 (except the complaint about the length of the proceedings) and Article 13 of the Convention were declared inadmissible in the decision of 11 December 2006 (see *Anton Zozulya v. Ukraine* (dec.), no. 4048/03, 11 December 2006).

47. As to the applicant's new complaints, in the Court's view, these belated complaints are not an elaboration of the applicant's original complaints under Article 5 § 1 and 3 and Article 6 § 1 (length of the proceedings) on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

48. The applicants complained that their detention on remand had been unlawful. They also complained about the length of that detention. They relied on Article 5 § 1 (c) and, in substance, Article 5 § 3 of the Convention, which read, as far as relevant, 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. Admissibility

1. The Government's preliminary objection to compatibility ratione personae

49. The Government maintained that the applicants' only complaint under Article 5 of the Convention concerned the alleged unlawfulness of their detention from November 1998 to May 1999 when they were studying the case-file material.

50. The applicants maintained that they could claim to be victims of a violation of their rights guaranteed by the Convention and that they had complained from the very beginning about the unlawfulness of their detention in its entirety.

51. The Court reiterates that Article 34 requires that individual applicants should claim to be a victim “of a violation of the rights set forth in the Convention”; it does not oblige them to specify which Article, paragraph or sub-paragraph, or even which right, they are praying in aid. Any greater strictness would lead to unjust consequences; for the vast majority of “individual” petitions are received from laymen applying to the Court without the assistance of a lawyer (see, *mutatis mutandis*, *Guzzardi v. Italy*, 6 November 1980, § 61, Series A no. 39).

52. The Court observes that prior to communication of the applications to the respondent Government the applicants had not been represented by a lawyer. At the time the applications were lodged the criminal proceedings against the applicants were still pending and they complained about their unlawful arrest and detention for more than six months without a detention order. They did not, however, indicate any concrete period of time in their complaints under Article 5. Furthermore, despite the fact that the applicants had not formulated a clear complaint about the length of their detention under Article 5, both applicants complained “about unlawful detention for a term of almost 35 months”, which in the Court’s opinion is sufficient to consider that they complained not only about their detention on remand being unlawful but also, in substance, about the length of their detention.

The Court therefore dismisses this preliminary objection of the Government.

2. Government’s preliminary objection as to non-observance of six-month rule

53. The Government maintained that the applicants’ detention on remand had consisted of two separate periods which were interrupted by the applicants’ conviction on 1 July 1999. Given that the applications had been lodged in March 2001, in the Government’s opinion the complaints about the length of the applicants’ detention on remand prior to 1 July 1999 were inadmissible under the six-month rule.

54. The applicants maintained that their detention on remand was still pending when they lodged their applications with the Court and, therefore, they had submitted their complaints within the six-month time-limit.

55. The Court first points out that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV).

56. Furthermore, the Court observes that, in view of the essential link between Article 5 § 3 of the Convention and paragraph 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained “for the purpose of bringing him before the competent legal authority on

reasonable suspicion of having committed an offence”, as specified in the latter provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty “after conviction by a competent court” (see *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI, and *Panchenko v. Russia*, no. 45100/98, § 93, 8 February 2005). Accordingly, the applicants’ detention from 1 July 1999, the date of their original first-instance conviction, to 9 December 1999, the date on which that conviction was quashed and their case remitted, cannot be taken into account for the purposes of Article 5 § 3.

The Court also notes that when there are two separate periods of detention on remand, as in the present case, the question whether or not the Court can look into complaints referring to the first period, if such period taken separately falls outside the six-month time-limit, depends on the nature of the complaints and the type of violation alleged. Given that the detention on remand is a continuous situation and that the Court on many occasions has decided that where an accused person is detained for two or more separate periods pending trial, the reasonable-time guarantee of Article 5 § 3 requires a global assessment of the aggregate period (see *Kemmache v. France (no. 1 and no. 2)*, 27 November 1991, § 44, Series A no. 218; *Vaccaro v. Italy*, no. 41852/98, 16 November 2000, §§ 31-33; *Mitev v. Bulgaria*, no. 40063/98, 22 December 2004, § 102; and *Kolev v. Bulgaria*, no. 50326/99, § 53, 28 April 2005). The Court does not see any reason to depart from the above case-law in the present case.

57. The Court therefore dismisses this objection of the Government.

3. *Government’s preliminary objection as to non-exhaustion of domestic remedies*

58. The Government also contended that the applicants had complained at the domestic level only about the period between November 1998 and April-May 1999 and had not raised before the domestic authorities any issue of unlawfulness concerning the remainder of their detention on remand.

59. The applicants disagreed.

60. The Court finds that the Government’s contentions concerning non-exhaustion are so closely linked to the merits that they should be joined to them and considered together.

61. The Court therefore joins to the merits the Government’s contentions about the availability of effective remedies for the applicants’ complaint under Article 5 § 1. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Lawfulness of the detention under Article 5 § 1 (c)

1. Parties' submissions

62. The applicants complained that their pre-trial detention had been unlawful.

63. The Government analysed the whole period of the applicants' pre-trial detention, arguing that there were periods covered by the prosecutors' decisions ordering and extending the applicants' detention, periods taken by the applicants to study the case-files and periods covered by the judicial decisions to maintain the applicants in detention pending trial. On this last point they contended, in particular, that after the Supreme Court had quashed the judgment of 1 July 1999, the period between the quashing decision (9 December 1999) and the next prosecutor's decision on the applicants' detention (28 January 2000) had been covered by the quashed judgment of 1 July 1999, in which the Kyiv Court had decided that the applicants should remain in custody until the judgment became final. The Government maintained that all these different periods of the applicants' detention were in accordance with the national law and therefore there were lawful grounds for the applicants' detention.

2. Court's assessment

(a) General principles enshrined in the case-law

64. 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 lay down an obligation to conform to the substantive and procedural rules thereof. While it is for the national authorities, notably the courts, to interpret and apply domestic law, the Court may review whether national law has been observed for the purposes of this Convention provision (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

65. 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 the detention, during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see *Winterwerp v. the Netherlands*, 24 October 1979, § 45, Series A no. 33).

(b) The lawfulness of the applicants' detention

66. The Court notes that the applicants' pre-trial detention falls into three categories: when the applicants' custody was covered by the detention orders issued by prosecutors; when the applicants' detention was not covered by any decision; when their detention was covered by the court decisions.

(i) Applicants' detention under prosecutors' orders

67. The Court notes that the applicants' detention was initially ordered by the Kyiv Podolsky District Prosecutor on 20 August 1998 in respect of Mr Zozulya and on 21 August 1998 in respect of Mr Solovey. The relevant periods covered by such decisions of the prosecutor were between 20 August and 20 October 1998 for Mr Zozulya and between 21 August and 21 October 1998 for Mr Solovey. Detention under this procedure was covered by a reservation to Article 5 § 1 (c) of the Convention that had been entered by Ukraine in accordance with Article 57 of the Convention with the intention of preserving the procedure governing arrest and detention in force at the material time until 29 June 2001. The Court refers to its findings in the *Nevmerzhitsky* case that under the terms of the above reservation, Ukraine was under no Convention obligation to guarantee that the initial arrest and detention of persons such as the applicants be ordered by a judge. The Court also found in that case, however, that the issue of continued detention was not covered by the above reservation (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, §§ 112-114, ECHR 2005-II).

68. The Court notes that several further periods of the applicants' detention were also covered by decisions of a prosecutor. They were the periods between 20 October and 20 November 1998, and between 27 March and 17 June 2000 for Mr Zozulya, and between 21 October and 21 November 1998, and between 27 March and 18 June 2000 for Mr Solovey, as well as the period between 28 January 2000 and 28 February 2000 in respect of both applicants.

69. The Court notes that there were no court decisions taken as to the applicants' continued detention during the above periods. The decisions to prolong the applicants' detention were taken by prosecutors, who were a party to the proceedings, and cannot in principle be regarded as "independent officers authorised by law to exercise judicial power" (see *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004). In these circumstances, the Court concludes that the applicants' continued detention ordered by the prosecutors was not lawful within the meaning of Article 5 § 1 (c) of the Convention.

(ii) Applicants' detention not covered by any decision

70. The Court notes that no domestic decision was required to validate a period of detention during which a person had been given access to the case file, in accordance with Article 156 of the Code of Criminal Procedure as then in force. Furthermore, the periods of transmittal and transfer of the case from the prosecutor to the court and back were often not covered by any decision either. In the present case, these periods were between 20 November 1999 and 19 May 2000 and between 17 June 2000 and 17 August 2000 for Mr Zozulya, and between 21 November 1999 and 19 May 2000 and between 18 June 2000 and 17 August 2000 for Mr Solovey, as well as between 28 February 2000 and 27 March 2000 and between 5 January and 21 February 2001 for both applicants.

71. Furthermore, as to the period between 9 December 1999 and 28 January 2000, the Court notes that, having quashed the judgment of the first-instance court on 9 December 1999, the Supreme Court made no ruling on the applicants' further detention and no such decision was made until 28 January 2000 when the prosecutor ordered the applicants' further detention for one month. The Court does not accept the Government's contention that this period of the applicants' detention was covered by the judgment of 1 July 1999, as this judgment was quashed in its entirety, including the ruling on the applicants' further detention. Therefore, the Court considers that the period between 9 December 1999 and 28 January 2000 was not covered by any judicial decision either.

72. The Court notes that relevant domestic law regulates procedural steps concerning the study of the case-file, the committal proceedings and transmittals of the case for further investigation, but it does not set clear rules as to by what authority, on what grounds and for what term the detention of the accused can be prolonged (see paragraph 43 above). The Court has held on many occasions that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Korchuganova v. Russia*, no. 75039/01, § 57, 8 June 2006; *Nakhmanovich v. Russia*, no. 55669/00, §§ 67-68, 2 March 2006; and *Khudoyorov v. Russia*, no. 6847/02, §§ 146-148, ECHR 2005-X).

73. Therefore, the periods of the applicants' detention without any decision ordering such detention were not in accordance with Article 5 § 1 of the Convention.

(iii) Lawfulness of the applicants' detention under the court orders

74. The Court observes that under Article 242 of the Code of Criminal Procedure, a domestic court, when committing a person for trial, must check

whether the preventive measure that was selected at the investigation stage is appropriate. Reasons for the preventive measure are required from the court only when it decides to change the measure (Article 244 of the CCP). It does not appear that the court is required to give reasons for continuing the accused's detention or to fix any time-limit when maintaining the detention (see paragraph 43 above).

75. The Court considers that the absence of any precise provisions laying down whether – and if so, under what conditions – detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings does not satisfy the test of “foreseeability” of a “law” for the purposes of Article 5 § 1 of the Convention (see *Baranowski v. Poland*, no. 28358/95, § 55, ECHR 2000-III, and *Kawka v. Poland*, no. 25874/94, § 51, 9 January 2001).

76. The Court observes that, although the Kyiv Court upheld the pre-trial detention measure in respect of the applicants on 19 May and 17 August 2000 and 21 February 2001, it did not set a time-limit for their continued detention and did not give any reasons for its decisions (see paragraphs 30, 35 and 37 above). This left the applicants in a state of uncertainty as to the grounds for their detention. In this connection, the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (see *Nakhmanovich*, cited above, §§ 70-71, and *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002). In these circumstances, the Court considers that the Kyiv Court's decisions of 19 May and 17 August 2000 and 21 February 2001 did not afford the applicants the adequate protection from arbitrariness which is an essential element of the “lawfulness” of detention within the meaning of Article 5 § 1 of the Convention, and that, therefore, the applicants' detention on remand during the periods covered by the judicial decisions was likewise not in accordance with Article 5 § 1 of the Convention.

(c) Conclusion

77. In the light of the above findings, which are based on non-compliance of the existing domestic law with the requirements of Article 5 § 1 of the Convention rather than on an improper application of the law in question, the Court considers that complaints to bodies such as the prosecutor's office or courts of general jurisdiction, which are not empowered to overrule the law, would not remedy the situation. The Court has also found on many occasions that a direct and accessible remedy by which an individual can seek the overriding of the law itself is not available in the Ukrainian legal system (see, for example, *Sheidl v. Ukraine* (dec.), no. 3460/03, 25 March 2008). In these circumstances, the Government's preliminary objection about the failure of the applicants to complain of

unlawfulness in respect of the whole period of their detention must be rejected as the Government failed to demonstrate that the applicants had had an effective and accessible domestic remedy for their complaints about a lack of clear and foreseeable legal grounds for their detention.

78. The foregoing considerations are sufficient to enable the Court to dismiss the Government's preliminary objections and to conclude that there has been a violation of Article 5 § 1 (c) of the Convention.

C. Unreasonable length of detention under Article 5 § 3

1. Parties' submissions

79. The applicants complained that their detention on remand had been excessively long.

80. The Government maintained that the length of the applicants' detention had been reasonable and that there had been sufficient grounds for holding the applicants in custody during the whole period of their detention given that the applicants were suspected of having committed a serious crime and could abscond. In particular, the Government submitted that the Kyiv Court maintained the applicants' detention on 19 May 1999 owing to the risk of the applicants' absconding.

81. The Court reiterates its above reasoning as to the necessity of a global assessment of the aggregate duration of two or more separate periods of detention on remand for the purposes of the reasonable-time guarantee of Article 5 § 3 and finds that the period to be taken into consideration in the present case consisted of two separate terms, the first lasting from 18 August 1998 to 1 July 1999 for Mr Solovey and from 19 August 1998 to 1 July 1999 for Mr Zozulya, and the second from 9 December 1998 to 25 April 2001 for both applicants, and amounted to two years and almost three months.

82. The Court further reiterates that it is necessary, when examining the question whether Article 5 § 3 has been observed, to consider and assess the reasonableness of the grounds which persuaded the judicial authorities to decide, in the case brought before the Court, on this serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction (see *Stogmüller v. Austria*, 10 November 1969, § 4, Series A no. 9).

83. The Court notes that the seriousness of the charges against the applicants and risk of their absconding had been advanced in the initial order on the applicants' detention. Thereafter, the prosecutors and the courts did not advance any grounds whatsoever for maintaining the applicants' detention, simply stating that the previously chosen preventive measure was correct. However, Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of

liberty and the judicial authorities should give other grounds for continued detention (see *Jabłoński v. Poland*, no. 33492/96, § 80, 21 December 2000, and *I.A. v. France*, no. 28213/95, § 102, *Reports of Judgments and Decisions* 1998-VII). Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Iłowiecki v. Poland*, no. 27504/95, § 61, 4 October 2001). No such reasons were given by the courts in the present case. Furthermore, at no stage did the domestic courts consider any alternative preventive measures instead of detention on remand, and by relying essentially on the gravity of the charges, the authorities prolonged the applicants' detention on grounds which cannot be regarded as "relevant and sufficient".

84. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

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

85. The applicants complained that the criminal proceedings against them had been unreasonably long. They relied on Article 6 § 1 of the Convention.

86. The Government contested that argument.

87. The period to be taken into consideration began on 18 August 1998 and ended on 25 April 2002. It thus lasted three years, eight months and seven days for two levels of jurisdiction.

88. The Court reiterates that, in assessing the reasonableness of the length of the proceedings in question, it is necessary to have regard to the particular circumstances of the case and the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicants and of the relevant authorities, and what was at stake for the applicants (see, for instance, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

89. The Court notes that during the criminal proceedings in question the case was remitted several times for additional investigation. At the same time, all the domestic courts examined the case as well as the applicants' appeals without any delays which would be in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention.

90. Regard being had to all the circumstances, the Court concludes that in the present case the overall length of the proceedings was not excessive and cannot be considered unreasonable (see, for example, *Smirnov v. Ukraine* (dec.), no. 1409/03, 10 July 2007, and *Shavrov v. Ukraine* (dec.), no. 11098/03, 11 March 2008).

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. Mr Solovey claimed 300,000 euros (EUR) in respect of non-pecuniary damage. Mr Zozulya claimed EUR 154,290 in respect of pecuniary damage and EUR 1,299,000 in respect of non-pecuniary damage.

94. The Government requested the Court, in the event it found a violation, to determine the amount of compensation on an equitable basis.

95. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards each of the applicants EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. Mr Solovey and Mr Zozulya also claimed EUR 8,000 and EUR 30,000 respectively for the costs and expenses incurred before the Court.

97. The Government noted that these claims were not supported by any documents and proposed that they be rejected.

98. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicants did not substantiate their claims and did not support them by any relevant documents. Therefore, the Court rejects these claims.

C. Default interest

99. 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. *Decides* to join the applications;

2. *Joins to the merits* the Government's contention concerning the exhaustion of domestic remedies in respect of the applicants' complaint under Article 5 § 1 of the Convention; and rejects it after an examination on the merits;
3. *Dismisses* the remainder of the Government's preliminary objections;
4. *Declares* the complaints concerning the unlawfulness and length of the applicants' detention on remand admissible and the remainder of the applications inadmissible;
5. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
6. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
7. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts plus any tax that may be chargeable on those amounts:
 - (i) to Mr Solovey, EUR 5,000 (five thousand euros) for non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (ii) to Mr Zozulya, EUR 5,000 (five thousand euros) for non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (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;
8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Rait Maruste
President