



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

FIFTH SECTION

CASE OF SERGEY VOLOSUYUK v. UKRAINE

(Application no. 1291/03)

JUDGMENT

STRASBOURG

12 March 2009

FINAL

12/06/2009

This judgment may be subject to editorial revision.

In the case of Sergey Volosyuk v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 1291/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Sergey Viktorovich Volosyuk (“the applicant”), on 22 October 2002.

2. The applicant, who had been granted legal aid, was represented by Mr A. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant complained under Article 5 § 3 of the Convention that he had not been tried within a reasonable time or released pending trial. He further complained under Article 5 § 4 of the Convention that throughout the whole period of his detention on remand his requests for release pending trial had not been examined by a court. Invoking Article 6 § 1 of the Convention the applicant alleged that the criminal proceedings against him had lasted an unreasonably long time. The applicant lastly complained that officials at the detention centre had monitored his letters and that he had been punished for having bypassed the official channel for sending letters in the detention centre.

4. On 22 May 2007 the Court declared the application partly inadmissible and decided to communicate the above complaints to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and is currently imprisoned.

A. Criminal proceedings against the applicant

6. On 31 December 1999 the applicant, Mr D. and Mr G. were arrested by the police on suspicion of having committed a murder.

7. On 3 January 2000, given the gravity of the offence of which the applicant was suspected, the investigator of the Druzhkivka District Prosecutor's Office decided that the applicant should be remanded in custody for up to two months. The same day the Druzhkivka District Prosecutor issued the arrest warrant, authorising thereby the investigator's decision.

8. On 20 February 2000 the Druzhkivka District Prosecutor extended the term of the applicant's detention until 31 March 2000.

9. On 23 March 2000 the applicant, Mr D. and Mr G. were charged with murder.

10. On 24 March 2000 the investigator completed the investigation and gave the applicant and the co-accused access to the case file. However, on 11 April 2000 the investigator reopened the investigation and additionally charged the applicant with aggravated robbery. On 12 April 2000 the investigation was completed and the applicant and the co-accused continued studying the case-file until 27 April 2000.

11. On 6 May 2000 the supervising prosecutor approved the bill of indictment and transferred the case file to the Donetsk Regional Court of Appeal (hereafter "the Court of Appeal") for trial proceedings.

12. On 17 May 2000 the Court of Appeal committed the applicant and the co-accused for trial and held that the preventive measure in their respect was to remain unchanged. The hearing took place in the presence of the prosecutor, but the applicant and his lawyer were absent.

13. On 2 October 2001 the Court of Appeal held a hearing in the applicant's case, where it considered several applications submitted by the co-accused and adjourned consideration of the case until the requisite technical facilities could be installed for the proceedings. According to the applicant, the Court of Appeal also adjourned consideration of his release request, lodged before the hearing.

14. According to the applicant, in the period between 2 October 2001 and 6 October 2003 he lodged about twenty requests for his release with the Court of Appeal, referring to his health problems and relying on his right to a trial within a reasonable time or release pending trial as guaranteed by

Article 5 § 3 of the Convention. Those requests remained unanswered however.

15. On 6, 7, 8, 9 and 10 October 2003 the Court of Appeal held hearings in the case during which it examined the evidence and questioned the defendants and witnesses.

16. Further court hearings took place on 26 and 27 January, 9, 10, 11, 15, 23, and 24 March, and 26 and 28 April 2004, during which the Court of Appeal continued examining the evidence and questioning witnesses. Within that period the hearings were adjourned three times because one of the defendants was feeling ill and twice because the counsel of the other defendant failed to appear before the court.

17. In a letter of 4 March 2004 the Deputy President of the Court of Appeal informed the applicant that his latest complaint about the excessive length of the proceedings had been rejected on the same basis as the previous ones, namely that there were compelling and valid reasons for the delays in the proceedings. However, the nature of those reasons was not specified in the letter.

18. On 6 May 2004 the Court of Appeal considered the applicant's release requests and rejected them, holding that he was charged with a grave offence and, if at large, might influence the proceedings. The Court of Appeal further adjourned the case in order to question additional witnesses.

19. On 14 May 2004 the Court of Appeal found, *inter alia*, that the applicant was guilty of having committed a murder and aggravated robbery. It sentenced him to fourteen years' imprisonment, minus the time spent in pre-trial detention, and ordered the confiscation of his property. On 16 December 2004 the Supreme Court upheld that judgment.

B. The applicant's correspondence

20. During his detention on remand the applicant wrote letters in which he complained about his conditions of detention to various officials, including a public prosecutor supervising penitentiary establishments, the Ombudsman, the Prisons Department and Members of Parliament. In accordance with the prescribed procedure, these letters were sent through officials at the detention centre, who dispatched them to the addressees. The applicant's letters were subject to automatic monitoring and censorship except for those addressed to the prosecutors and, in the later stages of his detention, to the Ombudsman.

21. According to the applicant, in February 2003, while being held in the detention centre, he wrote a complaint to the Donetsk Directorate of the Prisons Department, describing the ill-treatment and arbitrary punishment inflicted on him by officials at the detention centre. He sent the complaint without going through the officials at the detention centre, in violation of the domestic legislation. Shortly after the complaint had reached the

addressee, the governor of the detention centre punished the applicant with ten days' confinement in a disciplinary cell for breaching the procedure for sending letters.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure of 28 December 1960 (in the wording relevant at the material time)

22. Article 236-3 of the Code provides that the detainee or his defence counsel or legal representative may appeal against the prosecutor's arrest warrant to the relevant district (city) court. The appeal may be lodged directly with the court or through the officials at the pre-trial detention centre, who must send the appeal to the relevant court within twenty-four hours of receiving it.

23. On 21 June 2001 amendments were introduced to the Code, providing that within seventy-two hours the arrested criminal suspect was to face the court for deciding on his further detention.

24. Article 273 of the Code provides, *inter alia*, for the court to set out interim decisions on preventive measures in the form of a separate document.

25. According to Article 274 of the Code the court, if appropriate, may order, change, or discontinue a preventive measure in respect of the defendant.

B. The Pre-Trial Detention Act of 30 June 1993 (in the wording relevant at the material time)

26. Section 13 of the Act provides, *inter alia*, for persons detained on remand to be able to correspond with relatives, other persons and legal entities upon written consent by the authority in charge of the criminal case against the detainee concerned.

The officials of the detention centre must review all the letters of the detainees except for those which are addressed to the prosecutor. Since 6 February 2003 this exception has been extended to cover letters addressed to the Ombudsman.

If the letter is related to the criminal case against the detainee concerned it has to be handed over within three days to the authority in charge of the detainee's criminal case for consideration. Letters containing information which can obstruct justice must not be dispatched to the addressee but must be handed over to the authority in charge of the detainee's criminal case. The detainee and the prosecutor must be informed of the interception made.

If a letter is not related to the detainee's criminal case, it must be answered by the officials at the detention centre or sent to the addressee.

27. The same section of the Act requires any appeal against the prosecutor's arrest warrant authorising pre-trial detention as a preventive measure to be sent by the detention centre to the relevant court within twenty-four hours. The prosecutor must be notified at the same time.

28. Under section 15 of the Act detention centre officials may impose on detainees who violate detention regime rules such penalties as warnings or reprimands, additional cleaning of the cell or a one-month ban on buying food and receiving parcels.

If a detainee intentionally violates detention regime rules, he may be placed in a disciplinary cell for up to ten days, following a reasoned order issued by the governor of the detention centre.

The section further stipulates that the penalties imposed on detainees should be proportionate to the gravity and nature of the infringement.

C. The Resolution of the Plenary Supreme Court of Ukraine of 30 September 1994 “on certain issues that emerge in the course of application by the courts of the legislation providing for appeal against the prosecutor’s arrest warrant” (in force at the relevant time)

29. Paragraph 1 of the Resolution provides that in accordance with Article 236-3 of the Code of Criminal Procedure, the subject of appeal shall only be the arrest warrant issued by the prosecutor for the detention of the suspect or accused, and not the decision of the investigator or the investigating body concerning the applicable custodial preventive measure or the decision of the court (judge) to detain the defendant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

30. The applicant complained that he had not been tried within a reasonable time or released pending trial as provided for in Article 5 § 3 of the Convention, which reads, in so far as relevant, as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article 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

31. The Government maintained that as regards the applicant's detention during the investigation it had been open for the applicant to challenge before the court the prosecutor's warrant authorising the investigator's decision to have the applicant detained. Therefore this part of the complaint was to be rejected for failure to exhaust domestic remedies.

32. The applicant disagreed, arguing that the remedy indicated by the Government could not be regarded as an effective one for complaints about excessively long detention. He insisted that the domestic court considering the appeal against the prosecutor's warrant would only review the facts that existed at the time of issuing of the warrant, whereas the conditions that initially justified the detention might have changed in the meantime.

33. The Court observes that the remedy referred to by the Government, concerned appeal against the prosecutor's warrant authorising detention pending trial, but not the investigator's decision by which that preventive measure had been imposed or extended (see paragraphs 22, 27, and 29 above). The impugned remedy, therefore, could not be regarded as an effective one in so far as it did not open the possibility to challenge the decision applying the preventive measure (see *Nevmerzhitsky v. Ukraine* (dec.), no. 54825/00, 25 November 2003). It follows that the Government's objection should be dismissed.

34. The Court 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. Merits

1. *The parties' submissions*

35. The applicant argued that, despite the fact that the overall length of his detention had exceeded four years and four months, none of the national bodies had substantiated the reasons for his prolonged detention. He further claimed that the Government had failed to provide any proof that the applicant, if released, could have negatively influenced the proceedings.

36. The Government contended that the applicant's prolonged detention did not breach the 'reasonable time' requirement and emphasised that the applicant was largely responsible for the overall period of his detention as he had taken a long time to familiarise himself with the case file. The Government further submitted that the court hearings had been adjourned several times because of the illness of one of the defendants and their counsel's failure to appear before the court. In any event the reasons for the applicant's detention on remand had always been sufficient.

2. *The Court's assessment*

a. General principles established by the Court's case-law

37. The Court reiterates that it falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions ordering continued detention. It is essentially on the basis of the reasons given in these decisions that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings" (*Tkachev v. Ukraine*, no. 39458/02, §§ 45-46, 13 December 2007).

38. Under Article 5 § 3 of the Convention the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (*Iłowiecki v. Poland*, no. 27504/95, § 63, 4 October 2001, with further references).

b. Application in the present case

39. The Court first observes that for the purpose of Article 5 § 3 of the Convention the applicant's detention began on 30 December 1999 and continued uninterruptedly until his conviction by the Court of Appeal on 14 May 2004 (see, among other authorities, *Piotr Baranowski v. Poland*, no. 39742/05, § 45, 2 October 2007). Thus the applicant's detention lasted a total of four years, four months and fourteen days.

40. The Court notes that the applicant's detention during the period of pre-trial investigation and his committal for trial was apparently substantiated by the gravity of the crime he had been charged with. As regards the trial stage, the Government presented only the judicial decision taken by the Court of Appeal, on 6 May 2004, where it stated that the applicant's preventive measure was to be left unchanged because of (i) the

gravity of the crime and (ii) the risk that the applicant, if released, might influence the proceedings in the case. However, the Court of Appeal failed to provide any details or refer to any evidence whatsoever showing that such a risk existed.

41. The Court therefore concludes that throughout the whole period of the applicant's detention the only reason for applying and maintaining the preventive measure was the gravity of the crime of which the applicant was suspected. However, after a certain lapse of time this reason could no longer be sufficient to justify the lengthy detention on remand and the judicial authorities should have given more grounds which should have been expressly mentioned and substantiated in their decisions. No such reasons were given by the courts in the present case, however. Furthermore, at no stage did the domestic authorities consider any alternative preventive measures instead of detention, as required by Article 5 § 3 of the Convention.

42. The Court therefore finds that the grounds for the prolongation of the applicant's detention on remand for more than four years and four months cannot be regarded as "relevant" and "sufficient". It follows that there has been a violation of Article 5 § 3 of the Convention.

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

43. The applicant complained that throughout the whole period of his detention on remand his requests for release pending trial had not been examined by a court, in violation of Article 5 § 4 of the Convention, which reads 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. Admissibility

44. The Court 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. Merits

1. *The parties' submissions*

45. The applicant asserted that at no stage of the proceedings had he been provided with an effective judicial remedy to challenge the lawfulness of his detention.

46. The Government maintained that under domestic law it was open for the applicant to challenge in court the prosecutor's warrant authorising the investigator's decision to remand the applicant in custody. They further submitted that the Court of Appeal, when committing the applicant for trial, had considered his release requests, in so far as it found that the preventive measure in the applicant's respect was to be left unchanged. Lastly, they contended that the Court of Appeal's decision of 6 May 2004 constituted an effective judicial review of the lawfulness of the applicant's detention on remand, as required by Article 5 § 4 of the Convention.

2. *The Court's assessment*

a. General principles established in the Court's case law

47. The Court reiterates that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty. This means that the competent court has to examine not only the compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Grauslys v. Lithuania*, no. 36743/97, §§ 51-55, 10 October 2000).

48. Article 5 § 4 provides that "the lawfulness of the detention shall be decided speedily". There are two aspects to this requirement: first, the opportunity for legal review must be provided soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter. Second, the review proceedings must be conducted with due diligence (see *Khudobin v. Russia*, no. 59696/00, § 115, ECHR 2006-... (extracts)).

49. The proceedings concerning detention issues must be adversarial and must always ensure equality of arms between the parties (see *Trzaska v. Poland*, no. 25792/94, § 74, 11 July 2000). The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, § 47).

50. Whilst Article 5 § 4 of the Convention does not impose an obligation to address every argument contained in the detainee's submissions, the judge examining remand appeals must take into account concrete facts which are referred to by the detainee and capable of casting doubt on the existence of those conditions essential for the "lawfulness", for Convention purposes, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 61, ECHR 1999-II).

b. Application in the present case

51. The Court shall examine the applicant's complaint under Article 5 § 4 of the Convention by dividing the period of his detention on remand into the following intervals: (i) detention before committal for trial; (ii) detention during committal for trial; (iii) detention during the trial proceedings.

i. As regards the period, before the applicant was committed for trial

52. The Court has considered above the effectiveness of the appeal against the prosecutor's warrant authorising the investigator's decision for the applicant's detention (see paragraph 33 above). For the same reasons the Court holds that this remedy did not comply with the requirements under Article 5 § 4 of the Convention.

53. The Court further notes that the domestic legislation did not provide the applicant with any other remedies enabling him to obtain judicial review of the lawfulness of his detention, either at the initial stage or at reasonable intervals thereafter, before his committal for trial. It follows that during this period of the applicant's detention the requirements of Article 5 § 4 of the Convention had not been respected.

ii. As regards the period during the applicant's committal for trial

54. The Court observes that on 17 May 2000 the Court of Appeal considered the issue of the applicant's further detention when committing him for trial. However, the relevant decision was taken by the Court of Appeal following a hearing held in the presence of the prosecutor and in the absence of both the applicant and his lawyer. There is no indication in the case file that the applicant or his lawyer waived their right to participate in the above hearing. Accordingly, the guarantee of equality of arms in the course of that hearing was not respected since the applicant had no opportunity to comment on the arguments or contest the reasons invoked by the prosecuting authorities to justify his detention. Moreover, reasoning of the resulting decision in respect of the applicant's preventive measure did not in fact refer to any particular circumstances justifying the applicant's further detention.

55. The Court therefore finds that the hearing and the resulting decision reached when the applicant was committed for trial did not comply with the requirements of Article 5 § 4 of the Convention.

iii. As regards the period during the trial proceedings

56. The Court observes that under the domestic law the applicant was entitled to lodge various applications with the trial court, including applying for the court to decide on the lawfulness of his detention on remand; such requests would be considered in the course of the hearings held in the applicant's case.

57. The Court notes, however, that in the course of the applicant's trial there was an interval between 2 October 2001 and 6 October 2003 when no hearings were held. It follows that for two years and four days the applicant had not been in a position to obtain a judicial review of the lawfulness of his detention, which is incompatible with the requirements of Article 5 § 4 of the Convention.

58. The Court further notes that the Government did not expressly contest the fact that the applicant lodged a number of release requests during the trial. However, they placed before the Court only one decision on the applicant's preventive measure which the domestic court took during the trial. That decision was adopted on 6 May 2004, shortly before the applicant's conviction on 14 May 2004. The Court therefore finds that the applicant did not obtain a proper judicial response to the various release requests he lodged, as required by Article 5 § 4 of the Convention.

iv. Conclusion

59. The Court concludes that during each of the intervals, examined above, the applicant had not been provided with an opportunity to obtain effective judicial review of the lawfulness of his detention, as required by Article 5 § 4 of the Convention, and holds therefore that there has been a violation of that provision of the Convention.

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

60. The applicant complained that the criminal proceedings against him had lasted an unreasonably long time. The applicant relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

61. The Court 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. Merits

62. The Government maintained that the criminal case against the applicant was quite complex since it concerned several accused persons and two offences, namely, murder and robbery. It had been a difficult task for the prosecuting authorities to carry out a thorough and effective investigation. They further submitted that the applicant and the other accused persons had contributed significantly to the overall length of the proceedings.

63. The Court reiterates that the period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is “charged” within the autonomous and substantive meaning to be given to that term. It ends with the day on which a charge is finally determined or the proceedings are discontinued (see *Rokhlina v. Russia*, no. 54071/00, § 81, 7 April 2005, and *Antonenkov and Others v. Ukraine*, no. 14183/02, §§32-33, 22 November 2005).

64. The period to be considered in the present case thus began on 31 December 1999, when the applicant was arrested as a suspect on a murder charge, and ended on 16 December 2004, when the Supreme Court upheld the sentence passed by the Court of Appeal. It therefore lasted four years, eleven months, and seventeen days for the investigation and two levels of jurisdiction.

65. 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, and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II). It further recalls that an accused in criminal proceedings should be entitled to have his case conducted with special diligence, particularly, where he is, as in the present case, kept in custody (see *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006, and *Yurtayev v. Ukraine*, no. 11336/02, § 37, 31 January 2006).

66. The Court notes that the investigation in the applicant’s case was successfully completed in about four months after the applicant’s arrest, the rest of the period being taken up by the consideration of the case by the domestic courts. However, while the proceedings were pending before the domestic courts there were significant periods of inactivity which have not

been reasonably explained by the Government. In particular, the Court refers to the period between 17 May 2000 and 2 October 2001, which lasted more than a year and four months; the period between 2 October 2001 and 6 October 2003, which lasted more than two years; and the period between 10 October 2003 and 26 January 2004, which lasted about three months and a half. It appears that no procedural steps were taken within those periods and the delays identified are attributable to the conduct of the domestic authorities.

67. As regards the applicant's conduct, the Court notes that he cannot be blamed for using the avenues available to him under domestic law in order to protect his interests (see, *Silin v. Ukraine*, no. 23926/02, § 29, 13 July 2006). Even assuming the applicant's requests for release were groundless, they did not contribute to the overall length of the proceedings.

68. 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, *Antonenkov and Others*, cited above, § 45; *Ivanov v. Ukraine*, no. 15007/02, §§ 74-75, 7 December 2006; and *Benyaminson v. Ukraine*, no. 31585/02, § 104, 26 July 2007).

69. 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.

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

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

71. The applicant complained that during his detention on remand his letters had been monitored by officials at the detention centre. He further complained that he had been punished for having sent a letter bypassing the detention centre's official channels. In both cases the applicant relied on Article 10 of the Convention. The Court, which is master of the characterisation to be given in law to the facts of the case, will examine these issues under Article 8 of the Convention, which is the relevant provision and which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

72. The Government maintained that the applicant had failed to exhaust domestic remedies in respect of his complaint about the automatic monitoring of his correspondence. In particular, the applicant should have raised this complaint before the prosecutor and challenged in court the interference with his correspondence by detention centre officials.

73. The applicant disagreed, claiming that no effective remedy had been available to him at the national level.

74. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).

75. The Court observes that the applicant's letters had been monitored by officials at the detention centre pursuant to section 13 of the Pre-Trial Detention Act, which provided for the monitoring of all detainees' letters except for those addressed to the prosecutor and, as of 6 February 2003, to the Ombudsman. It follows that the applicant's complaint to the prosecutor or to the court in this connection would have had no prospect of success in so far as neither of those authorities was empowered to overrule the legal provision underpinning such a practice. In any event, the Government have not supplied any example from the domestic case-law to show that the remedies in question could have effectively redressed the applicant's situation.

76. In view of the above considerations, the Court finds that the applicant cannot be reproached for not having used the legal channels suggested by the Government, and rejects their objection to this effect.

77. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

78. The applicant argued that the interference with his correspondence had not been in accordance with the law within the meaning of the Convention. He further contended that it had not pursued a legitimate aim, especially as regards his letters to the Ombudsman and other state authorities, and had not been necessary in a democratic society.

79. The applicant further asserted that his placement in a disciplinary cell for ten days as a punishment for sending a letter bypassing the control of detention centre officials had constituted an interference with his right under Article 8 of the Convention which did not meet the requirements of the second paragraph of that Article.

80. The Government admitted that the practice of monitoring the applicant's letters constituted an interference with his right to respect for his correspondence. They maintained, however, that the interference had been in accordance with the law and pursued the legitimate aim of preventing the applicant's absconding from justice and obstructing the investigation of the crime he had been charged with. They further submitted that the interference had been necessary in a democratic society to achieve that aim. Lastly, they noted that as of 6 February 2003 the applicant's letters to the Ombudsman had not been subject to review.

2. The Court's assessment

a. Monitoring of correspondence

81. The Court notes that it is not disputed between the parties that the monitoring of the applicant's letters by officials at the detention centre constituted an interference with the applicant's right to respect for his correspondence, which is guaranteed by paragraph 1 of Article 8 of the Convention. The Court further notes that such an interference will contravene Article 8 of the Convention unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is "necessary in a democratic society" in order to achieve them (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 84, Series A no. 61; *Campbell v. the United Kingdom*, 25 March 1992, § 34, Series A no. 233; *Calogero Diana v. Italy*, 15 November 1996, § 28, *Reports* 1996-V; and *Petra v. Romania*, 23 September 1998, § 36, *Reports* 1998-VII).

82. The expression "in accordance with the law" does not only necessitate compliance with domestic law, but also relates to the quality of that law (see, *mutatis mutandis*, *Halford v. the United Kingdom*, 25 June 1997, § 49, *Reports* 1997-III, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III). The Court recalls that domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see *Domenichini v. Italy*, 15 November 1996, § 33, *Reports* 1996-V).

83. The Court has already held that the practice of automatic monitoring of prisoners' correspondence, based on legal rules worded in a rather general manner and providing prison authorities with wide discretion in this

regard was not in compliance with the requirements of Article 8 of the Convention (see *Niedbala v. Poland*, no. 27915/95, §§ 81-84, 4 July 2000; *Salapa v. Poland*, no. 35489/97, §§ 97-102, 19 December 2002).

84. In the instant case the Court observes that under the domestic law (see paragraph 26 above) officials at the detention centre monitored all the letters sent by detainees, with very limited exceptions. In particular, until 6 February 2003 an exception existed only in respect of letters addressed to the prosecutor and, after 6 February 2003, during the applicant's stay in custody, the exception was extended to cover letters addressed to the Ombudsman.

85. The applicable provisions of the domestic law did not draw any further distinctions between the different categories of persons with whom detainees could correspond, such as, for example, law-enforcement and other domestic authorities, Convention and other international bodies, relatives, legal counsel, and so on. Moreover, as the monitoring was automatic, the authorities were not obliged to give a reasoned decision specifying the grounds on which correspondence was monitored. Likewise, the law did not specify whether the detainee was entitled to be informed of any alterations of the contents of his or her outgoing correspondence. Nor did it provide for a specific remedy enabling the detainee to contest the manner or scope of the application of the screening measures provided for by the law.

86. In the light of the foregoing considerations, the Court concludes that the applicable domestic law did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities in respect of the monitoring of detainees' correspondence. It follows that the interference complained of was not "in accordance with the law". The Court therefore does not consider it necessary in the instant case to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with and holds that there has been a violation of that provision.

b. Placement of the applicant in a disciplinary cell

i. Establishment of facts

87. The Court notes that the Government neither submitted any evidence capable of disproving the applicant's allegations as regards this complaint, nor commented on them. The Court observes that the failure on the Government's part to submit such information which is in their hands without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see, *mutatis mutandis*, *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004). Given that the Government was completely silent in respect of the applicant's allegations, which are, however, consistent and clearly formulated, the Court accepts the applicant's account of the facts.

ii. Whether there was an interference

88. The Court observes that the applicant was placed in a disciplinary cell as a punishment for sending a letter through an unauthorised channel when he should have sent it through the officials of the detention centre, as required by the domestic law. Though the punishment did not directly affect the posting or arrival of the impugned letter itself, it was intended to influence the manner in which the applicant sent his subsequent correspondence.

89. The Court therefore finds that this punishment constituted an interference with the applicant's right to respect for his correspondence, within the meaning of Article 8 § 1 of the Convention.

iii. Whether the interference was in accordance with the law

90. The Court observes that section 15 of the Pre-Trial Detention Act provided that one of the penalties which could be imposed on detainees who violated detention regime rules was placement of the detainee in a disciplinary cell for up to ten days. The section did not specify in any detail the procedure and grounds for imposing this penalty (see paragraph 28 above), which could give rise to the question whether the requirement of the quality of law had been met. The Court does not find it necessary to dwell on this issue, however, since the interference was in any event not compatible with Article 8 of the Convention for the reasons set out below.

iv. Whether the interference pursued a legitimate aim and was necessary in a democratic society

91. The Court notes that the interference in question pursued the legitimate aim of preventing disorder and crime. However, the Court notes that the letter that gave rise to the punishment was addressed to the State authority responsible for the detention centre where the applicant was held. It follows that the letter did not give rise to any risk of the applicant's obstructing the course of justice, or to any other possible risk that justified the domestic requirement of sending letters exclusively through the authorised channels. Moreover, the applicant, in sending a letter bypassing the control of the detention centre, committed a relatively minor offence, but was still punished with the severest penalty. Lastly, the Court observes that the applicant had no remedy to effectively challenge the impugned disciplinary measure (contrast *Puzinas v. Lithuania (no. 2)*, no. 63767/00, §§ 30-35, 9 January 2007).

92. In these circumstances the Court considers that, even regard being paid to the ordinary and reasonable requirements of detention, the authorities overstepped their margin of appreciation in the present case, and that the interference was not proportionate and necessary in a democratic society. It follows that Article 8 of the Convention has been violated.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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

94. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage.

95. The Government submitted that the amount claimed by the applicant was exorbitant and unsubstantiated.

96. The Court notes that the applicant must have suffered distress and anxiety on account of the violations found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

97. The applicant also claimed EUR 3,000 for costs and expenses.

98. The Government contended that the claim was unsubstantiated as the applicant failed to present the requisite supporting documents.

99. The Court observes that the applicant has not provided any evidence in support of his claims for costs and expenses. It therefore decides not to award any sum under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds* that there has been a violation of Article 8 of the Convention in respect of monitoring the applicant's correspondence;
6. *Holds* that there has been a violation of Article 8 of the Convention in respect of disciplinary punishment imposed on the applicant in the detention centre;
7. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State 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 amount 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President