



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF DUBOVIK v. UKRAINE

(Applications nos. 33210/07 and 41866/08)

JUDGMENT

STRASBOURG

15 October 2009

FINAL

15/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dubovik v. Ukraine,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in two applications (nos. 33210/07 and 41866/08) 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 Belarusian national, Ms Yekaterina Viktorovna Dubovik (“the applicant”), on 6 August 2007 and 6 August 2008 respectively.

2. The applicant was represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged, in particular, that in the event of her extradition to Belarus she would face the risk of torture and of an unfair trial, that her detention was unlawful, that her applications for release were not examined promptly and effectively by a court and that she had no right to compensation for her detention.

4. On 3 November 2007 and 2 October 2008 respectively the President of the Fifth Section decided to give notice of the applications to the Government. On 3 September 2008 an additional question was put to the Government concerning the applicant's complaint under Article 5 § 1 of the Convention. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Kyiv.

6. In February 2005 the applicant left Belarus for Ukraine. From that time on she has been residing in Ukraine with her family.

7. On 10 March 2006 the Deputy Prosecutor General of Belarus issued an arrest warrant in respect of the applicant on suspicion of aggravated trafficking in human beings and organised crime.

8. On 26 July 2007 the applicant was apprehended in Kyiv under an international arrest warrant with a view to her extradition issued on 21 June 2007 and a Belarus Interpol Bureau letter of 15 July 2007 to the Ukrainian authorities informing them that the applicant was on the territory of Ukraine and requesting them to find and arrest her with a view to extradition. She was thus separated from her newly-born child, who was exactly one month old when the applicant was apprehended.

9. On 27 July 2007 the Golosiyivskyy District Court of Kyiv ("the District Court") ordered the applicant's detention for forty days pending an official request for her extradition to Belarus. On 6 August 2007 the Kyiv City Court of Appeal upheld that decision.

10. On 29 July 2007 the applicant applied for refugee status in Ukraine.

11. On 27 August 2007 the General Prosecutor's Office of Ukraine ("the GPO") received an official request from the Deputy Prosecutor General of Belarus for the applicant's extradition to Belarus with the aim of prosecuting her for aggravated trafficking in human beings and organised crime. The request contained detailed information about criminal acts of which the applicant was suspected by the Belarusian authorities, as well as assurances that the applicant would be prosecuted only for these crimes, that she would be free to leave Belarus after her trial and serving a sentence, and that she would not be deported or expelled to any third country without Ukraine's consent. No decision was taken with regard to the above request.

12. On 3 September 2007 the District Court ordered the applicant's continued detention without a fixed time-limit and until the GPO had decided on her extradition to Belarus. The Kyiv City Court of Appeal upheld this decision on 13 September 2007.

13. On 12 September 2007 the President of the Chamber decided to apply Rule 39, indicating to the Government that the applicant should not be extradited to the Republic of Belarus.

14. By letter of 21 September 2007, the Belarusian General Prosecutor's Office sent to the First Deputy Prosecutor General of Ukraine assurances that, if extradited to Belarus, the applicant would not be subjected to any kind of treatment prohibited by Article 3 of the Convention, that she would

receive a fair trial, and that the death penalty would not be applied in her case.

15. On 5 March 2008 the State Migration Committee (“the Committee”) granted the applicant refugee status.

16. On 6 March 2008 the applicant received a refugee certificate.

17. On 7, 14 and 21 March 2008 the applicant's lawyer lodged applications for her release with the District Court on the ground that the applicant had refugee status and therefore could not be extradited.

18. By letters of 12 and 31 March 2008, the District Court refused to consider the applications for release on the ground that there was a final and binding court decision ordering the applicant's detention pending extradition and that it was the prosecution service that was competent to decide whether there were grounds or not for the applicant's detention.

19. On 18 April 2008 the GPO lodged an objection with the Committee against its decision of 5 March 2008. The objection had the effect of suspending the Committee's decision.

20. On 5 May 2008 the Committee rejected the GPO's objection and confirmed its decision of 5 March 2008.

21. On 20 May 2008 the GPO made an objection to the decision of the Committee on the applicant's refugee status to the Regional Administrative Court of Kyiv (“the Kyiv Court”) and requested the suspension of the Committee's decision.

22. On 26 June 2008 the applicant's lawyer lodged an application for the applicant's release with the Kyiv Court under the Code of Administrative Justice. No decision was taken on this application.

23. On 9 July 2008 the Kyiv Court rejected the request for suspension of the Committee's decision pending the administrative proceedings.

24. On 21 July 2008 the Kyiv Court rejected the GPO's objection and confirmed the lawfulness of the Committee's decision of 5 March 2008.

25. On 23 December 2008 the Kyiv Administrative Court of Appeal (the Court of Appeal) overruled the decision of 21 July 2008 and cancelled the Committee's decision of 5 March 2008.

26. On 28 January 2009 the Highest Administrative Court decided to initiate the examination of the administrative case in cassation and suspended execution of the decision of 23 December 2008.

27. On 23 February 2009 the General Prosecutor's Office of Belarus informed their Ukrainian counterpart that the maximum eighteen-month time-limit for the applicant's pre-trial detention had expired and therefore her detention was replaced by an obligation not to abscond. On this ground the Belarus authorities asked the GPO to leave the extradition request without consideration and to release the applicant.

28. On 25 February 2009 the Deputy Prosecutor General ordered the applicant's release on the basis of the above request of the Belarus General Prosecutor's Office. On the same day the applicant was released.

29. On 1 April 2009 the Highest Administrative Court upheld the decision of the Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Code of Civil Procedure, 1963 (no longer in force)

30. Article 248¹ of the Code (Chapter 31-A) provided in so far as relevant:

“Every citizen has the right to apply to court ... with an application, should he consider that a decision, action or inactivity of a public authority, legal person or official during the exercise of their administrative functions has violated his rights or freedoms”

2. The Code of Administrative Justice (in force since 1 September 2005)

31. The relevant provisions of the Code read as follows:

Section 2

Task of the administrative justice system

“1. The task of the administrative justice system is the protection of the rights, freedoms and interests of physical persons, and the rights and interests of legal entities in the field of public law relations from violations by public authorities ...

2. Any decisions, actions or inactivity of public authorities can be appealed against in administrative courts, except for cases in which the Constitution and laws of Ukraine foresee a different procedure of judicial appeal against such decisions, actions or inactivity ...”

Section 17

Competence of the administrative courts in deciding administrative cases

“1. The competence of the administrative courts shall cover:

...

3) disputes between public authorities ...

4) disputes following an application by a public authority in the situations set forth by the law...

2. The competence of the administrative courts shall not cover public law cases:

...

2. that shall be decided under the criminal justice procedure ...”

Section 117

Securing an administrative claim

“1. The court, upon the request of the claimant or of its own motion, can render a ruling on taking measures for securing an administrative claim ...

3. The lodging of the administrative claim or the initiation of administrative proceedings in the case does not suspend the challenged decision of the public authority, but the court may, in order to secure the claim,, suspend the decision by a ruling to that effect ...

6. A ruling on securing an administrative claim can be appealed against. An appeal against the ruling does not stop its enforcement, and does not prevent further examination of the case.”

Final and transitional provisions

“...7. After the entry into force of this Code applications and complaints that derive from administrative law relations ... (Chapters 29-32 of the Code of Civil Procedure, 1963) ... shall be considered under the procedure established by this Code ...”

3. Prosecution Service Act of 1 December 1991 (with amendments)

32. The relevant provisions of the Prosecution Service Act provided:

Section 19

“Supervision over the compliance and application of laws

“Supervision over the compliance and application of laws covers:

1) compliance of acts issued by all bodies, enterprises, institutions, organisations and public officials with the requirements of the Constitution of Ukraine and laws in force ...”

Section 20

Competences of the prosecutor

“...Having established a violation of the law the prosecutor or his deputy shall be competent:

1) to make objections to acts of ... ministries and other central bodies of the executive power ...”

Section 21

Objection by the Prosecutor

“An objection to an act which contradicts the law may be submitted by the prosecutor or his or her deputy to the body that issued the act in question or to a higher body ...

An objection by the prosecutor shall have the effect of suspending the act objected to, and shall be subject to compulsory consideration by the relevant body ... within ten days of its receipt. The prosecutor shall be informed of the results of the examination of his/her objection within the same time-limit.

Should the objection be rejected ... the prosecutor may apply to a court to have the act declared unlawful. An application to a court may be lodged within fifteen days of receipt of the notification of rejection of the objection ... The lodging of such an application shall suspend the legal act in question.”

4. Refugees Act of 21 June 2001

33. Section 3 of the Act read:

Section 3

Prohibition of expulsion or forced return of a refugee to the country from which he came and where his life or freedom is endangered

“No refugee may be expelled or forcibly returned to a country where his or her life or freedom is threatened for reasons of race, religion, ethnicity, nationality, membership of a particular social group or political opinion.

No refugee may be expelled or forcibly returned to a country where he or she may suffer torture and other severe, inhuman or degrading treatment or punishment, or to a country from where the refugee may be expelled or forcibly returned to a country where his or her life or freedom is threatened for reasons of race, religion, ethnicity, nationality, membership of a particular social group or political opinion.

This Article shall not apply to refugees convicted of a serious crime in Ukraine.”

5. The Act “on the procedure for the compensation of damage caused to a citizen by the unlawful actions of bodies of inquiry, the pre-trial investigative authorities, prosecutors and courts” of 1 December 1994 (with amendments)

34. The relevant provisions of the Act provide:

Section 1

“Under the provisions of this Law a citizen is entitled to compensation for damage caused by:

(1) unlawful conviction, unlawful indictment, unlawful arrest and detention, unlawful conduct of a search, seizure of property during the investigation and trial, unlawful removal from work (office) and other procedural actions that interfere with citizens' rights;

(2) unlawful imposition of administrative arrest or correctional labour, unlawful confiscation of property, unlawful imposition of a fine;

(3) the unlawful conduct of search and seizure activities foreseen by the Laws of Ukraine “on Search and Seizure Activities”, “on Organisational Legal Basis for Combating Organised Crime” and other legal acts.

In the cases indicated in part 1 of this Section, the damage sustained shall be compensated in full irrespective of the guilt of the officials of the bodies of inquiry, the pre-trial investigative authorities, prosecutors and courts.”

Section 2

“The right to compensation for damage in the amount of and in accordance with the procedure established by this Law shall arise in cases of:

(1) acquittal by a court;

(1-1) the finding in a judgment by a court or other decision by a court (except a ruling or decision of a court on remittal of the case for further investigation or for retrial) of the fact of unlawful indictment, unlawful arrest and detention, unlawful conduct of search, seizure of property during the investigation and trial, unlawful removal from work (office) and other procedural actions that interfere with citizens' rights, unlawful conduct of search and seizure activities;

(2) the termination of a criminal case on the grounds of the absence of proof of the commission of a crime, the absence of *corpus delicti*, or a lack of evidence of the accused's participation in the commission of the crime;

(3) the refusal to initiate criminal proceedings or the termination of criminal proceedings on the grounds stipulated in paragraph 2 of part 1 of this section;

(4) the termination of proceedings for an administrative offence.

The right to compensation for damage caused by the search and seizure activities indicated in section 1 of this Law, conducted prior to the institution of criminal proceedings, arises in the cases set out in paragraph 1(1) of part 1 of section 1, or in cases in which no decision was taken on instituting criminal proceedings within six months of the conduct of such activities, as a result of which such activities ... were cancelled.”

Section 3

“In the cases referred to in section 1 of this Law the applicant shall be compensated for ...

(5) non-pecuniary damage.”

Section 4

“... Compensation for non-pecuniary damage shall be awarded in cases in which unlawful actions by bodies of inquiry, pre-trial investigative authorities, prosecutors

and courts have caused non-pecuniary losses to a citizen, led to disruption of his or her usual relations and required additional efforts for the organisation of his or her life.

Non-pecuniary damage shall be defined as the suffering caused to a citizen due to physical or psychological influence which resulted in a deterioration or deprivation of his or her ability to act in accordance with his or her usual habits and wishes, a deterioration of relations with the people around him or her, and other adverse effects of a non-pecuniary nature.”

5. Other relevant legislation

35. Other relevant domestic law and practice is summarised in the judgments *Soldatenko v. Ukraine* (2440/07, §§ 21-29 and 31, 23 October 2008) and *Svetlorusov v. Ukraine* (2929/05, § 32-34, 12 March 2009).

THE LAW

I. JOINDER OF THE APPLICATIONS

36. 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. ALLEGED VIOLATION OF ARTICLES 3, 6 AND 13 OF THE CONVENTION

37. The applicant complained that her extradition to Belarus would expose her to a risk of torture and unfair trial, contrary to Articles 3 and 6 of the Convention, and that she had no remedy with respect to these complaints as required by Article 13 of the Convention. Articles 3, 6 § 1 and 13 of the Convention read, in so far as relevant, as follows:

Article 3

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

Article 6 § 1

“In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

38. After the extradition proceedings were discontinued at the request of the Belarus authorities and the applicant was released, the Government submitted that the applicant lost her status of a potential victim.

39. The applicant submitted that the risk of her extradition to Belarus persisted and that nothing prevented the General Prosecutor's Office of Belarus from requesting her extradition again.

40. The Court notes that the extradition proceedings were discontinued without any decision to extradite having been taken by the Ukrainian GPO. Although the possibility of the renewal of such extradition proceedings against the applicant cannot be excluded, there is nothing to suggest that the applicant is at an imminent risk of removal from the Ukrainian territory or that any valid decision by the Ukrainian authorities on such removal exists at the moment.

41. Accordingly, given that the applicant's complaints under Article 3 and 6 of the Convention concerned Ukraine's responsibility under the Convention for events which might happen in Belarus if she were extradited or otherwise removed and that there is now no risk of removal, the applicant cannot claim to be a victim of a violation of her rights under Articles 3 and 6 § 1 of the Convention as required by Article 34 of the Convention. In the absence of any arguable claim under Articles 3 and 6 of the Convention, the Court is not required to consider whether there were effective domestic remedies, as required by Article 13, for the above complaints. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

42. Alleging that the Ukrainian authorities had had no grounds for reasonable suspicion that she had committed a crime, the applicant complained that her detention prior to receipt of the extradition request had been contrary to Article 5 § 1 (c). She also alleged that her detention on 26 July 2007 had had no legal basis, since it had not been warranted by a judicial decision and had not been aimed at preventing or discontinuing a crime. The applicant further complained under Article 5 § 1 of the Convention that her detention had been unlawful. She considered that her detention until 5 March 2008 and then between 18 April and 5 May 2008, when the GPO suspended her refugee status, was not in compliance with Article 5 § 1 (f). She further considered that since the date when she received refugee status, with the exception of the above-mentioned period

when it was suspended, none of the grounds listed in Article 5 § 1 of the Convention was applicable to her detention, as the domestic law prohibited removal of refugees from the territory of Ukraine.

43. Relying on Article 5 §§ 4 and 5 of the Convention, the applicant complained that Ukrainian law provided no possibility of taking proceedings by which the lawfulness of her detention could be reviewed and of obtaining redress if that detention was found unlawful.

44. The relevant parts of Article 5 read 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;

...

(f) the lawful arrest or detention of ... a person against whom action is being taken with a view to ... extradition...

4. 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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

1. Government's objections

(a) Incompatibility *ratione personae*

45. The Government maintained that the applicant had not claimed to be a victim under Article 5 § 1 (f) of the Convention with respect to the initial period of her detention, as she had maintained that her detention between 26 July and 27 August 2007 was primarily in violation of Article 5 § 1 (c).

46. The applicant submitted that this complaint was admissible, given that the substance of the alleged violation had been indicated, although the qualification of the facts under the particular subparagraph of Article 5 § 1 was disputable. She further noted that such qualification was not always obvious. She also observed that in previous cases against Ukraine, in which

similar complaints had been made concerning applicants' detention pending extradition, the Court had accepted such complaints and examined them under Article 5 § 1 (f) despite the applicants' reference to Article 5 § 1 (c) (see, for example, *Soldatenko v. Ukraine*, no. 2440/07, §§ 98-103, 23 October 2008)

47. The Court observes that in the instant case the applicant initially complained that her detention had been unlawful. It is true, as the Government note, that she analysed the detention by reference to Article 5 § 1 (c) of the Convention, rather than Article 5 § 1(f), but the erroneous reference to subparagraph (c) of Article 5 § 1 does not prevent the Court, which is master of the characterisation to be given in law to the facts of the case (see *Nadtochiy v. Ukraine*, no. 7460/03, § 31, 15 May 2008), from examining the problem raised by the applicant under the Convention provision which the Court finds relevant to the circumstances of the case. The Court therefore dismisses this objection of the Government.

48. The Court notes that no other reason, except extradition, has ever been advanced by the authorities for the applicant's detention and there is no evidence in the case file to suggest that any other reason has ever existed. Therefore, notwithstanding the applicant's submissions to the contrary, her detention prior to 5 March 2008 was always with a view to extradition and her complaint about this period of her detention falls to be considered under Article 5 § 1 (f) of the Convention (see *Soldatenko*, cited above, § 99).

(b) Non-exhaustion of domestic remedies

49. The Government maintained that the applicant had at her disposal an effective procedure under Article 5 § 4 of the Convention to challenge the lawfulness of her detention. They noted in particular that Article 55 of the Constitution guaranteed to everybody the right to challenge any decision, act or omission of the State authorities in the courts. Furthermore, Article 2 of the Code of Administrative Justice made it possible to challenge any action that the prosecutor took within the extradition proceedings.

50. They further contended that depending on the outcome of the administrative proceedings, the applicant would be able to claim compensation under the Act “on the procedure for the compensation of damage caused to citizens by the unlawful actions of bodies of inquiry, pre-trial investigative authorities, prosecutors and courts”.

51. Therefore, they considered that the applicant had failed to exhaust the remedies available to her under Ukrainian law.

52. The applicant disagreed.

53. The Court finds that the Government's contentions concerning non-exhaustion are so closely linked to the merits of the applicant's complaints under Article 5 §§ 4 and 5 that they should be joined to them and considered together.

2. Conclusion

54. The Court therefore joins to the merits the Government's contentions about the availability and effectiveness of remedies for the applicant's complaints under Article 5 §§ 4 and 5. The Court notes that the complaints under Article 5 §§ 1 (f), 4 and 5 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. Article 5 § 1 of the Convention

a) Period between 26 July 2007 and 5 March 2008.

55. The parties submitted arguments similar to those made in the cases of *Soldatenko* (cited above, §§ 104-107) and *Svetlorusov* (cited above, §§ 43-46). In particular the Government contended that the clear and foreseeable procedure for the applicant's detention awaiting extradition was provided by the Constitution of Ukraine, the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 ("the Minsk Convention"), the Code of Criminal Procedure and Resolution no. 16 of the Plenary Supreme Court of 8 October 2004 on certain issues relating to the application of legislation governing the procedure and length of detention (arrest) of persons awaiting extradition.

56. The Court has previously found violations of Article 5 § 1 of the Convention in cases raising issues similar to those in the present case (see *Soldatenko*, cited above, §§ 109-114, and *Svetlorusov*, cited above, §§ 47-49). These findings were primarily based on the lack of a sufficient legal basis for the applicants' detention pending extradition proceedings.

57. Having examined all the materials 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. There has accordingly been a violation of Article 5 § 1 of the Convention in this connection.

b) The period between 5 March 2008 and 25 February 2009

58. The Government maintained that the applicant's extradition was impossible due to the interim measure indicated by the Court. They also observed that the decision on the applicant's refugee status had been cancelled by the Kyiv Administrative Court of Appeal. They also repeated their reasoning with respect to the first period in question (see paragraph 55 above).

59. The applicant maintained that from 5 March to 18 April 2008, from 5 May to 23 December 2008 and from 28 January to 1 April 2009, the decision on her refugee status had been valid and the ban on her extradition under the law had been in force. Therefore, she considered that her detention had been unlawful in general and in the above periods it had not fallen under any permissible grounds of detention set forth in paragraph 1 of Article 5 either.

60. The Court first notes that its interim measure concerned the applicant's removal from Ukraine, and did not require her detention. Without more, it cannot therefore provide a basis in domestic law for the applicant's detention. The Court next notes that it has already found that domestic law did not provide a sufficient legal basis for the applicants' detention pending extradition proceedings in the period from 26 July 2007 to 5 March 2008 (see paragraph 56 above with further references). Those findings are equally pertinent for the period in question, in respect of which there was also no adequate legal basis in domestic law.

61. In addition, on 5 March 2008 the applicant was granted refugee status, and this status was uncontested until 18 April 2008. Notwithstanding the protection in domestic law from removal of a person with refugee status (see paragraph 33 above), the applicant remained in detention. The Government have not explained how, if the applicant could not be removed, her detention could have been "with a view to extradition" within the meaning of Article 5 as regards the period from 5 March 2008 to 18 April 2008.

62. There has accordingly been a violation of Article 5 § 1 of the Convention with respect to this period of the applicant's detention too.

2. Article 5 § 4

63. The parties submitted arguments similar to those made in the cases of *Soldatenko* (cited above, §§ 116-120) and *Svetlorusov* (cited above, §§ 52-56). In particular the Government referred to the provisions of the Code of Criminal Procedure that regulated pre-trial detention in Ukraine. They also referred to the Code of Administrative Justice, which set forth the procedure for appealing against the actions of public authorities and maintained that the applicant could have challenged the lawfulness of her detention and had actually tried to do so, but the proceedings had still been pending.

64. The applicant claimed that the domestic courts had refused to review the lawfulness of her detention and the last application for release referred to by the Government was not considered until the applicant had been released on other grounds.

65. The Court has previously found violations of Article 5 § 4 of the Convention in cases raising issues similar to those in the present case (see

Soldatenko, cited above, §§ 125-127, and *Svetlorusov*, cited above, §§ 57-59).

66. The Court further observes that the Government also referred to Article 2 of the Code of Administrative Justice, which in their opinion provided the applicant with an effective remedy to challenge the decision on extradition and any action taken during the extradition proceedings. This provision guarantees to everyone the right to challenge any decisions, actions and omissions of the State authorities in the administrative courts. However, the Government do not give any indication of the powers of the courts in such a review, and do not submit any decisions in which such actions have been used, while the Court has previously been furnished with cases in which the domestic courts found that the Code of Administrative Justice did not provide for an appropriate procedure for challenging extradition decisions and did not give the courts competence to decide on the lawfulness of the extradition (*Soldatenko*, cited above, §§ 46 and 49). The Court also notes that the applicant made a complaint under the Code of Administrative Justice on 26 June 2008, but that by her release in March 2009 the complaint had not been dealt with.

67. Lastly, in the instant case, despite a significant change of circumstances and apparent lack of grounds for the applicant's detention due to a statutory ban on her removal, the domestic courts on several occasions refused to look again into the reasonableness of the applicant's detention on the ground that there was a final and binding court decision of 3 September 2007 ordering the applicant's detention pending extradition (see paragraph 18 above), therefore denying the applicant's right to a review of the lawfulness of her detention as guaranteed by Article 5 § 4. In the Court's view, there was thus no adequate judicial response to the applicant's complaints, contrary to the requirements of Article 5 § 4 (see, *mutatis mutandis*, *Yeloyev v. Ukraine*, no. 17283/02, § 65, 6 November 2008).

68. The Court concludes that remedies invoked by the Government are not sufficiently certain to satisfy the requirements of Article 5 § 4. Therefore, it rejects the Government's preliminary objection concerning necessity to appeal against detention under the Code of Administrative Justice and considers that there has been a violation of Article 5 § 4 of the Convention.

3. Article 5 § 5

69. In the Government's view the applicant had effective compensatory remedies under Ukrainian law. They referred to Article 248¹ of the Code of Civil Procedure, which enabled every person to challenge in the courts decisions, acts or omissions of the authorities during the exercise of their administrative functions, if the person considered that they violated his or her rights and freedoms. They further maintained that the applicant could also claim damages under the Law of Ukraine “on the procedure for the

compensation of damage caused to citizens by the unlawful actions of bodies of inquiry, pre-trial investigative authorities, prosecutors and courts”, should her detention be found unlawful.

70. The applicant maintained that the remedies invoked by the Government were not effective.

71. The Court reiterates that Article 5 § 5 of the Convention is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 of that Article (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A, and *Vachev v. Bulgaria*, no. 42987/98, § 79, ECHR 2004-... (extracts)). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court.

72. In so far as the Court has found that there have been violations of Article 5 §§ 1 and 4 of the Convention, Article 5 § 5 of the Convention is also applicable (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 81, *Reports* 1998-VII, p. 2740). The Court must therefore establish whether Ukrainian law afforded the applicant an enforceable right to compensation for the breaches of Article 5 of the Convention.

73. The Court notes that the first remedy invoked by the Government has been previously analysed in the case of *Svetlorusov* (cited above, § 68) and found not to be sufficiently certain to satisfy the requirements of Article 5 § 5 of the Convention. Furthermore, the relevant Chapters of the Code of Civil Procedure, 1963, including Article 248¹ were no longer in force as from 1 September 2005, when the Code of Administrative Justice entered into force (see the final and transitional provisions, cited at paragraph 31 above) and therefore are not applicable to the facts of this case.

74. As to the second remedy invoked by the Government, the Court notes that the Government have not submitted any decisions in which the remedy they referred to has been used, in particular in the case of detention with a view to extradition. From the text of the Act “on the procedure for the compensation of damage caused to citizens by the unlawful actions of bodies of inquiry, pre-trial investigative authorities, prosecutors and courts” it appears that it deals with criminal proceedings in Ukraine and makes no reference to other situations in which a person is deprived of liberty. Furthermore, it appears that the domestic courts did not consider the applicant's deprivation of liberty as being in breach of the domestic law, although, as mentioned above, the Government have not shown that a law exists which would satisfy the requirements of Article 5 §§ 1 (f) and 4 of the Convention (see paragraphs 57 and 62 above). Given this situation, the applicant does not appear to have had even a theoretical opportunity to claim compensation in the domestic proceedings (see, *Svetlorusov v. Ukraine*, cited above, § 69). The Court therefore concludes that this

remedy invoked by the Government is not sufficiently certain to satisfy the requirements of Article 5 § 5 of the Convention either. The Government's objection as to non-exhaustion of this remedy must accordingly be rejected too.

75. The Court thus finds that Ukrainian law does not afford the applicant an enforceable right to compensation, as required by Article 5 § 5 of the Convention; therefore it rejects the Government's preliminary objection and concludes that there has been a violation of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

78. The Government considered these claims exorbitant and unsubstantiated and that a finding of a violation, if any, would be sufficient just satisfaction in the present case.

79. The Court considers that the applicant suffered non-pecuniary damage on account of her unlawful detention, damage which cannot be compensated by the mere finding of a violation of her Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards her EUR 5,000 under this head.

B. Costs and expenses

80. The applicant also claimed EUR 2,000 for costs and expenses.

81. The Government maintained that the costs and expenses claimed by the applicant were not supported by any documents.

82. 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, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

83. 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. *Joins to the merits* the Government's contention concerning the exhaustion of domestic remedies in respect of the applicant's complaints under Article 5 of the Convention; and rejected it after an examination on the merits;
2. *Declare* the complaints under Article 5 §§ 1(f), 4 and 5 of the Convention admissible and the remainder of the application inadmissible;
3. *Hold* that there has been a violation of Article 5 § 1 of the Convention;
4. *Hold* that there has been a violation of Article 5 § 4 of the Convention;
5. *Hold* that there has been a violation of Article 5 § 5 of the Convention;
6. *Hold*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment became final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President