



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

FIFTH SECTION

CASE OF GAVAZHUK v. UKRAINE

(Application no. 17650/02)

JUDGMENT

STRASBOURG

18 February 2010

FINAL

18/05/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gavazhuk v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 26 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 17650/02) 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 Boris Mykhaylovych Gavazhuk (“the applicant”), on 28 September 2001.

2. The applicant was represented by Mr B. Shelepa, a lawyer practising in Zhytomyr. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. On 8 February 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1971. He is currently serving a prison sentence at the Berdychiv Town Correctional Colony (Prison) No. 70, Zhytomyr Region (“the Berdychiv Colony”).

5. On 4 November 1998 the Deputy Prosecutor of Chernivtsi initiated criminal investigations into the murder of Mrs S.

6. On 30 July 1999 the applicant’s wife was arrested on suspicion of the murder of Mrs S. On 2 August 1999 she was released.

7. On 4 August 1999 the prosecutors placed Mr V. on the list of persons suspected of the crime. The investigations were suspended.

8. On 2 September 1999 the applicant was arrested following the issue of a warrant by the Head of the Investigation Unit of the Chernivtsi Town Prosecutor's Office on suspicion of the murder of Mrs S., and the criminal investigations resumed. The applicant chose Mr Shelepa to defend him in the proceedings.

9. On 4 September 1999 the Chernivtsi Town Prosecutor remanded the applicant in custody in view of the pending criminal investigations against him. The applicant remained in detention throughout the proceedings.

10. On 7 September 1999 the applicant and Mr V. were charged with aggravated murder.

11. On 18 October 1999 the Chernivtsi Town Prosecutor extended the maximum period of the applicant's pre-trial detention to three months.

12. On 23 November 1999 the investigations were completed and the applicant, together with his lawyer, was given access to the case file.

13. On 20 December 1999 the applicant and his lawyer completed their study of the case file.

14. On 28 January 2000 the prosecutors referred the case together with the indictment, containing charges of aggravated murder and theft, to the Chernivtsi Regional Court ("the Chernivtsi Court"). The latter received the case file on 4 February 2000.

15. On 25 February 2000 the court remitted the case for additional investigation as it was incomplete. It also ordered the applicant to remain in detention. On 6 March 2000 the prosecutors received the case file.

16. On 9 March 2000 the prosecutors resumed the pre-trial investigations.

17. On 13 March 2000 the Chernivtsi Regional Prosecutor extended the maximum period of the applicant's detention to five months on the ground that it was not possible to complete the investigation.

18. On 15 May 2000 the investigations were completed and the applicant, together with his lawyer, was given access to the case file. On 5 June 2000 the latter finished consulting the file.

19. On 22 June 2000 the prosecutors referred the case to the Chernivtsi Court.

20. On 30 June 2000 the court received the case file and on 19 September 2000 it remitted the case for additional investigation. The court refused to change the applicant's preventive measure.

21. On 26 September 2000 the prosecutors received the case file.

22. On 10 October 2000 the Chernivtsi Regional Prosecutor extended the maximum period of the applicant's detention to six months.

23. On 25 October 2000 the Deputy Prosecutor General of Ukraine extended the maximum period of the applicant's detention to nine months.

24. On 28 November 2000 the investigations were completed and the applicant, together with his lawyer, was given access to the case file. On the same day they completed their study of the case file.

25. On 22 December 2000 the case was referred to the Chernivtsi Court.

26. On 12 January 2001 the Deputy Prosecutor of the Chernivtsi Region withdrew the case from the court and resumed the investigations.

27. On 18 January 2001 the applicant was informed that the investigations were complete and that he was charged with concealment of crime.

28. On 26 January 2001 the applicant and his lawyer were given access to the case file. On the same day they completed consulting the case file.

29. On 1 February 2001 the case was referred to the Chernivtsi Court.

30. On 5 February 2001 the court received the case file.

31. On 14 March 2001 the court remitted the case for additional investigation. The applicant was ordered to remain in detention.

32. On 19 March 2001 the prosecutors received the case file.

33. On 29 March 2001 the applicant was informed that the investigations were complete, and was given a copy of the indictment, in which he was charged with aggravated murder and robbery. Between 29 March and 2 April 2001 the applicant and his lawyer consulted the case file.

34. On 6 April 2001 the case was referred to the Chernivtsi Court. On 9 April 2001 the court received the case file.

35. On 17 April 2001 the prosecutors withdrew the case and resumed the investigations. On the same day they issued an indictment, containing the same charges and based on the same facts as the indictment of 29 March 2001.

36. On 16 May 2001 the applicant was informed that the investigations were complete and he was given a copy of the indictment of 17 April 2001. On the same day the applicant was provided with another lawyer, Mr B., whom the prosecutors gave access to the case file.

37. According to the applicant, he had agreed to have another lawyer, as the prosecutors told him that Mr Shelepa had not been able to participate in the proceedings due to his illness. From mid-April to 5 May 2001 Mr Shelepa was having medical treatment in a hospital in Kyiv. The latter was not informed that the investigations were complete on 16 May 2001.

38. On the same day the applicant and his new lawyer finished consulting the case file and on 18 May 2001 the case was referred to the Chernivtsi Court, the latter having received it on 24 May 2001.

39. On 29 May 2001 Mr Shelepa was again admitted to participate in the proceedings.

40. In the course of the investigations, in particular on 11 June and 28 November 2000, and 30 March 2001 the applicant's lawyer made three requests to the prosecutors that the proceedings against the applicant be discontinued for absence of elements of a crime in his actions. The requests were dismissed as unfounded by the prosecutors' decisions of 13 June and 30 November 2000 and 3 April 2001.

41. In the course of the trial, the applicant and his lawyer argued that some of the evidence submitted by the prosecutors had been collected after the expiry of the statutory terms of the investigation and the applicant's detention and therefore should not be admitted by the court.

42. On 26 June 2001 the court found the applicant and Mr V. guilty of aggravated murder and sentenced the applicant to twelve years' imprisonment. It rejected the applicant's and his lawyer's argument concerning the admissibility of evidence, holding in particular that the maximum statutory terms of the investigation and pre-trial detention envisaged by the Code of Criminal Procedure had not expired in the case, and that those terms had ceased to run during the periods when the applicant and his lawyer were studying the case file, when it had been referred to the court, and when the lawyer's petitions had been considered by the prosecutors. The court, relying on Articles 120 and 156 of the same Code, also noted that the terms of the investigation and detention had actually been extended up to twelve months, as the case had been remitted for additional investigation on three occasions.

43. In his appeal in cassation, the applicant complained about the wrongful assessment of the facts and a violation of his procedural rights in the course of the investigation and trial.

44. On 25 September 2001 the Supreme Court rejected the applicant's appeal in cassation as unsubstantiated.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

45. The relevant provisions of the Constitution read as follows:

Article 29

"Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in detention other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law..."

Chapter XV

Transitional Provisions

“...13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an inspection and search of a person’s home and other property, shall be retained for five years after the entry into force of the present Constitution...”

B. Code of Criminal Procedure of 1960

46. The relevant provisions of the Code, as worded at the material time, read as follows:

Article 115

Arrest of a suspect by an investigator

“An investigator may arrest and question a person suspected of having committed a crime according to procedure envisaged by Articles 106, 106-1, and 107 of the Code.”

Article 120

Terms of pre-trial investigation

“Pre-trial investigation in criminal cases shall be completed within two months. The [running of this] term shall commence from the moment the criminal proceedings are initiated up to the moment when the case is referred to the prosecutor together with an indictment or a resolution concerning the referral of the case to the court for a decision concerning the application of the measures of compulsory medical treatment, or until the proceedings are suspended or discontinued. If it is impossible to complete the investigation, this term may be extended to up to three months by district, city prosecutor, military prosecutor of the army, fleet, military districts (commands), garrisons, and prosecutors of equal rank. The time it takes for the accused and his defence to familiarise themselves with the materials of the criminal case file shall not be included in the calculation of the term of pre-trial investigation.

In especially complicated cases the term of pre-trial investigation set by part 1 of this Article may be extended to up to six months by the Prosecutor of the Autonomous Republic of the Crimea, prosecutors of regions, the prosecutor of Kyiv, military prosecutors of the military district (command), navy and prosecutors of equal rank or their deputies on the basis of a reasoned resolution of the investigator.

Further extension of the term of pre-trial investigation may only be enacted by the Prosecutor General of Ukraine or by his deputies.

Where the case has been remitted for additional investigation, or if the discontinued proceedings have resumed, the term of additional investigation shall be established by the prosecutor who supervises the investigation, and shall not exceed one month from the moment when the investigation is resumed. Further extension of this term shall be enacted on general grounds.

The rules set in this Article shall not be applicable to criminal proceedings where the person having committed the crime has not been identified. The running of the term of investigation in such cases shall commence from the date on which the person who committed the crime is identified.”

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 the investigation or trial, or will obstruct the establishment of the truth in a criminal case or will pursue criminal activities, and if it is necessary to ensure the execution of a 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...

In exceptional cases a preventive measure may be applied in respect of a person suspected of having committed a crime before the charges are brought against that person. In such a case the charges shall be brought [against the suspect] within ten days of the application of the preventive measure...”

Article 149

Preventive measures

“The preventive measures shall be as follows:

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

Article 155

Placement in custody

“Placement in custody as a preventive measure shall be applied in cases concerning criminal offences for which the law envisages a punishment of more than one year’s imprisonment. In exceptional circumstances this preventive measure may be applied in cases concerning criminal offences for which the law envisages a punishment of up to one year’s imprisonment...”

Article 156 (as worded before the amendment on 21 June 2001)

Terms of remand in custody (pre-trial detention)

“Pre-trial detention during the investigation of criminal offences in criminal cases shall not last more than two months. This term may be extended to three months by district, city prosecutors, military prosecutors of the army, fleet, military districts (commands), garrisons, and prosecutors of equal rank, if it is not possible to complete the criminal investigation and there are no grounds for changing the preventive measure. Further extension of this term to six months from the moment of the arrest may only be enacted if the case is exceptionally complex by the Prosecutor of the Republic of the Crimea, prosecutors of regions, the prosecutor of Kyiv, military prosecutors of the military district (command), navy and prosecutors of equal rank.

The six-month term of pre-trial detention may be extended to one year by the Deputy Prosecutor General of Ukraine and to one year and a half by the General Prosecutor of Ukraine.

No further extension of the term of pre-trial detention is allowed; an accused held in detention must be immediately released.

If it is impossible to complete the investigation within the terms set by the law for pre-trial detention and there are no grounds for changing the preventive measure, the General Prosecutor of Ukraine or his Deputy shall have the power to approve the referral of the case to the court in the part relating to proven charges. The part of the case relating to criminal offences, the investigation of which has not been completed, shall be disjoined from the proceedings and completed in accordance with the general rules.

The accused and his defence shall be provided, not later than one month before the expiry of the term of pre-trial detention set by part 2 of the Article, with the materials of the part of the criminal case in respect of which the investigation has been completed, so that they can familiarise themselves with [those materials].

The time it takes for the accused and his defence to familiarise themselves with the materials of the criminal case shall not be taken into account in the calculation of the term of pre-trial detention.

If the court remits the case for a new investigation, and where the term of pre-trial detention has ended, and the preventive measure of pre-trial detention may not be changed, an extension, for up to one month following the receipt of the case, of the term of pre-trial detention shall be enacted by the prosecutor supervising investigation. Further extension of this term shall be enacted according to the procedure envisaged by paragraphs 1, 2 and 6 of the Article, taking into account the period the accused has been held in detention.”

Article 156 (as worded after the amendment on 21 June 2001)

Terms of pre-trial detention

“Pre-trial detention during pre-trial investigation shall not last more than two months.

When it is impossible to complete the investigation within the period provided for in part 1 of the Article and there are no grounds for discontinuing the preventive measure or substituting it with a less restrictive measure, [the term of pre-trial detention] may be extended:

(1) up to four months – upon a request approved by the prosecutor supervising the compliance with the laws by the bodies of inquiry and investigation, or at the same prosecutor’s [own request], by a judge of the court, which adopted a resolution on the application of the preventive measure;

(2) up to nine months – upon a request approved by the Deputy Prosecutor General of Ukraine, the Prosecutor of the Autonomous Republic of the Crimea, prosecutors of regions, prosecutors of Kyiv and Sevastopol, and prosecutors of equal rank, or at the same prosecutor’s [own request] in cases concerning serious and particularly serious crimes, by a judge of a court of appeal;

(3) up to eighteen months - upon a request approved by the Prosecutor General of Ukraine and his Deputy, or at the same prosecutor’s [own request] in particularly complex cases concerning particularly serious crimes, by a judge of the Supreme Court of Ukraine;

In each case, when it is impossible to complete the investigation within the terms specified in parts 1 or 2 of the Article and there are no grounds for changing the preventive measure, the prosecutor supervising the compliance with the law in the course of the investigation in the case shall have the right to approve the referral of the case to the court in the part relating to proven charges. In such an event, the part of the case relating to criminal offences or episodes of criminal activities, the investigation of which has not been completed, shall be disjoined from the proceedings pursuant to the requirements of Article 26 of the Code and completed in accordance with the general rules.

The term of pre-trial detention shall be calculated from the moment when the person was placed in custody, or, if his placement in custody was preceded by his arrest [within the meaning of Article 115 of the Code], from the moment of the arrest. The term of pre-trial detention shall include the time during which the person underwent in-patient expert examination at a psychiatric medical institution of any type. If the person is repeatedly placed in custody in the framework of the same proceedings ... or

if new charges are brought against him, the time the person has spent in detention before this shall be taken into account when calculating the term of pre-trial detention.

The term of pre-trial detention shall end on the day the court receives the case file; however, the time it takes for the accused and his defence to familiarise themselves with the materials of the criminal case shall not be taken into account when calculating the term of pre-trial detention as a preventive measure. If the case is withdrawn by the prosecutor from the court pursuant to Article 232 of the Code, the running of the term shall resume from the day on which the prosecutor receives the case.

If the case is returned by the court to the prosecutor for additional investigation, the term of pre-trial detention shall be calculated from the moment the case is received by the prosecutor and shall not exceed two months. Further extension of that term shall be enacted in accordance with the procedure envisaged by part 2 of the Article and the time the accused was held in detention before the referral of the case to the court shall be taken into account.

If the term of pre-trial detention ... envisaged by parts 1 and 2 of the Article has ended and if this term was not extended in accordance with the procedure envisaged by the Code, the body of inquiry, investigator, or prosecutor shall immediately release the person from detention.

Governors of pre-trial detention centres shall immediately release from detention any accused in whose respect no court resolution extending the term of pre-trial detention has been received on the day of expiry of the terms of pre-trial detention envisaged by parts 1, 2, and 6 of the Article. They shall notify accordingly the person or authority before whom the case is pending and the prosecutor supervising the investigation.”

Article 218

Notification of the accused of the completion of the investigation and providing him with the case materials

“Having found the collected evidence to be sufficient for formulating charges and having satisfied the requirements of Article 217 of the Code, the investigator shall notify the accused of the completion of the investigation in his case and of his right to familiarise himself, personally or with the assistance of defence, with the materials of the case...

The accused and his defence shall not be limited in the time which they require to familiarise themselves with the materials of the case file. However, if the accused and his defence are obviously trying to delay the completion of the case, the investigator shall have the right to set, by a reasoned resolution, a certain time-limit for study of the case file. Such a resolution shall be approved by the prosecutor.”

III. UKRAINE'S RESERVATION TO ARTICLE 5 OF THE CONVENTION

47. The relevant extracts from the Reservation contained in the instrument of ratification deposited by Ukraine on 11 September 1997 (period covering 11 September 1997 – 28 June 2001) provide as follows:

“...2. The provisions of Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution of Ukraine and Articles 106 and 157 of the Code of Criminal Procedure of Ukraine concerning the detention of a person and the issue of an arrest warrant by a public prosecutor.

Such reservations shall be in force until appropriate amendments to the Code of Criminal Procedure of Ukraine are introduced or until the adoption of the new Code of Criminal Procedure of Ukraine, but not later than 28 June 2001...

The provisions of Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene Articles 48, 49, 50 and 51 of the Disciplinary Statute of the Armed Forces of Ukraine concerning the imposition of arrest as a disciplinary sanction.”

48. The relevant extracts from Article 106 of the Code of Criminal Procedure, the English translation of which was provided in the appendix to the reservation of Ukraine, read as follows:

“A body of inquiry shall be entitled to detain a person suspected of committing an offence for which a custodial penalty may be imposed, subject to the existence of one of the following grounds:

1. if the person is discovered whilst committing an offence or immediately after committing one;
2. if eyewitnesses, including victims, directly identify this person as the one who committed the offence;
3. if clear traces of the offence are found on the body of the suspect or on the clothing which he is wearing or which is kept at his home.

If there are other data which constitute grounds for suspecting the person of committing an offence, he may be detained only if he attempts to escape, or if he has no permanent place of residence, or if the identity of the suspect has not been established.

For each case of detention of a person suspected of committing an offence, the body of inquiry shall be required to draw up a record setting out the grounds, the reasons, the day, time, year and month, the place of detention, the explanation given by the person detained and the time when it was recorded that the suspect was informed of his right to have a meeting with defence counsel before being questioned for the first time, in accordance with the procedure provided for in Part 2 of Article 21 of the present Code. The body of inquiry shall also be required to notify the public

prosecutor of the detention in writing within twenty-four hours and, at his request, give him the documents constituting the grounds for detention. The record of detention shall be signed by the person who drew it up and by the detained person. Within forty-eight hours of receipt of the notification of detention, the public prosecutor shall authorise the person detained to be taken into custody or order his release.

The body of inquiry shall inform the suspected person's family of his detention if his place of residence is known."

49. The relevant extracts from Article 157 of the Code of Criminal Procedure, which set out the specific duties of a public prosecutor when issuing a warrant for arrest, provide as follows:

"The public prosecutor shall issue a warrant for the arrest of a suspect or accused subject to the existence of the grounds prescribed by law. When deciding whether to issue a warrant for arrest the public prosecutor shall be required to study conscientiously all the relevant documents and, where necessary, question the suspect or accused personally. In the case of a suspect or accused who has not attained the age of majority, such questioning shall be mandatory.

The right to issue a warrant for the arrest of a person shall be vested in the Prosecutor General of Ukraine, the public prosecutors of the Republic of the Crimea, the regional prosecutors, the prosecutors of the cities of Kyiv and Sevastopol, and other equal-ranking prosecutors. The same right shall also be vested in the deputy public prosecutors of towns and districts with a population exceeding 150,000, unless otherwise stipulated in a special order of the Prosecutor General of Ukraine."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

50. The applicant complained under Article 5 § 1 (c) of the Convention that his pre-trial detention had been unlawful. In his initial submissions, the applicant alleged that his detention during the intervals between 26 December 1999 and 4 February 2000, 26 March and 30 June 2000, 20 November and 22 December 2000, 12 January and 6 February 2001, 14 March and 9 April 2001, and 17 April and 24 May 2001 had not been duly authorised.

51. Subsequently, in his submissions of 3 July 2007, he maintained his complaint that his detention was unlawful, referring however to different periods. In particular, he alleged that he had been detained without lawful grounds from 29 December 1999 to 28 January 2000, from 6 April to 15 May 2000, from 5 to 22 June 2000, from 30 November to 22 December 2000, from 12 to 18 January 2001, from 26 January to 1 February 2001, from 14 March to 6 April 2001, and from 17 April to 18 May 2001.

Article 5 § 1 (c) of the Convention, relied upon by the applicant, reads, in so 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...”

A. Admissibility

52. The Government argued that the applicant had failed to comply with the six-month rule with respect to his complaint that he had been unlawfully detained during the periods from 26 December 1999 to 4 February 2000, from 26 March to 30 June 2000, from 20 November to 22 December 2000, and from 12 January and 6 February 2001, to which he had initially referred.

53. The applicant contested the Government’s argument. In particular, he contended that the whole period of his detention must be taken for the purposes of an examination under Article 35 § 1 of the Convention.

54. The Court observes that the applicant was arrested on 2 September 1999 and subsequently remained in detention throughout the whole duration of the investigations and his trial, which ended with his conviction on 26 June 2001. Thus, the applicant’s uninterrupted detention during the specific periods to which he referred, as well as during the remaining periods between 2 September 1999 and 26 June 2001, was of the same legal nature and constituted, for the purposes of the Convention, a continuous situation which ceased to exist on the latter date.

55. As the application was introduced on 28 September 2001, less than six months after 26 June 2001, the applicant’s complaint under Article 5 § 1 (c) of the Convention cannot be dismissed as lodged out of time (see *Nikolay Kucherenko v. Ukraine*, no. 16447/04, § 29, 19 February 2009). The Court therefore dismisses the Government’s objection in this respect.

56. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

57. The applicant maintained his complaint that his pre-trial detention was unlawful.

58. The Government contended that the applicant's pre-trial detention had been lawful. They referred to the findings concerning the applicant's complaints of the unlawfulness of his detention contained in the judgment of 26 June 2001 and argued that the first-instance court rightfully dismissed the complaints, holding that his detention had not exceeded the maximum statutory term envisaged by Ukrainian law. The Government argued that the findings of the first-instance court had been confirmed by the Supreme Court and that the Court had limited jurisdiction to interpret domestic rules of procedure and, in principle, it could not substitute its view for that expressed by the domestic courts.

59. Furthermore, according to the Government, the maximum statutory term had not included the periods during which the applicant and his lawyer had been studying the case file and when it had been referred to the court, the applicant's continued detention during those periods having been governed by Article 156 of the Code of Criminal Procedure and not requiring any separate decision to this effect. They submitted that the delays which had taken place after the applicant and his lawyer had completed their study the case file, but before it had been referred to the trial court, should also be excluded from the calculation of the maximum statutory term of the applicant's detention, as during those periods the prosecutors had been considering the defence lawyer's requests (see paragraph 40 above).

60. The applicant disagreed. In particular, he contended that, according to the domestic law, the introduction of a request by a defending party and its consideration by the investigating authorities did not interrupt the running of the statutory term at issue.

2. The Court's assessment

61. At the outset, the Court notes that some of the dates referred to by the applicant do not coincide with the events which were established on the basis of the information submitted by the parties. For instance, the Court observes that no event which could arguably be considered relevant to the subject matter of this part of the case, took place on 26 or 29 December 1999. Such inconsistency in the applicant's submissions may be explained by his specific view, which differs from that of the Government, as to how the maximum statutory period of his detention was to be calculated.

62. In particular, the Court notes that, while both parties seem to agree that the periods during which the applicant and his lawyer was given access to the case file and when the case was pending before the first-instance court should be excluded from the calculation of the maximum statutory term of the applicant's detention, their principal disagreement concerns the periods after the applicant and his lawyer had completed their study of the case file, but before it had been referred to the trial court.

63. The Court reiterates that, although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the Court has the power to review whether this law has been complied with the purposes of Article 5 § 1 of the Convention (see *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports of Judgments and Decisions* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II). Furthermore, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see *Baranowski v. Poland*, no. 28358/95, § 51, ECHR 2000-III).

64. Therefore, having carefully considered the appropriate approach to the applicant's complaint under Article 5 § 1 (c) of the Convention, the Court considers that its examination of this part of the case should not be limited to the parties' inconsistent submissions concerning the calculation of the maximum period of detention and the applicant's misleading reference to specific periods of his detention. On the contrary, the Court finds it appropriate in the circumstances to examine the lawfulness of the whole period of the applicant's detention in the light of the principles embodied in Article 5 § 1 of the Convention.

65. In this context, the Court reiterates that a period of detention is, in principle, "lawful" if it is based on a court order indicating the grounds for the judicial authorities' decision to authorise detention (see *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002; *Nakhmanovich v. Russia*, no. 55669/00, §§ 70-71, 2 March 2006; and *Nikolay Kucherenko*, cited above, § 34).

66. In the present case the applicant's arrest was initially ordered by the Head of the Investigation Unit of the Chernivtsi Town Prosecutor's Office on 2 September 1999, his remand in custody for the maximum statutory period of two months having been warranted by the Chernivtsi Town Prosecutor on 4 September 1999 (see paragraphs 8, 9, 46, and 48 above). Thus, the applicant's detention between 2 September and 2 November 1999 is covered by the relevant reservation of Ukraine valid at that time and falls outside the scope of the Court's assessment of the lawfulness of the

applicant's detention (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 112, ECHR 2005-II (extracts), and *Yeloyev v. Ukraine*, no. 17283/02, § 45, 6 November 2008).

67. The Court further observes that the maximum period of the applicant's pre-trial detention was extended by the prosecutors on four successive occasions from three to nine months. Under Ukrainian law in force at the material time that period was not applicable to the applicant's detention when he was given access to the case file (between 23 November and 20 December 1999, 15 May and 5 June 2000, 29 March and 2 April 2001, and on 28 November 2000 and 26 January and 16 May 2001) and when his case was referred to the first-instance court for trial (between 28 January and 25 February 2000, 22 June and 19 September 2000, 22 December 2000 and 12 January 2001, 1 February and 14 March 2001, 6 and 17 April 2001, and between 16 May and 26 June 2001). No formal decision was adopted with regard to the applicant's detention during the latter periods.

68. The Court also notes that there were three decisions of the first-instance court (25 February and 19 September 2000, and 14 March 2001), by which the applicant was ordered to remain in detention following the remittal of his case for additional investigation. These decisions contained no reasons and did not indicate a time-limit for the applicant's continuous detention.

69. The Court reiterates that it has already found a violation of Article 5 § 1 (c) of the Convention in cases against Ukraine based on similar circumstances. In particular, the Court held that an extension of detention by prosecutors was not covered by the Ukraine's reservation to Article 5 § 1 (c) of the Convention and, given that they could not be considered "independent officers authorised by law to exercise judicial power", was not acceptable under that provision (see *Nevmerzhitsky*, cited above, §§ 113-118, and *Yeloyev*, cited above, §§ 45-47). The practice of holding defendants in detention solely on the basis of the fact that they were studying the case file or that it was submitted to the trial court was found to be incompatible with the principles of legal certainty and protection from arbitrariness which are enshrined in Article 5 § 1 of the Convention and are common threads throughout the Convention and the rule of law (see *Yeloyev*, cited above, §§ 48-51; *Nikolay Kucherenko*, cited above, §§ 37-38; and *Doronin v. Ukraine*, no. 16505/02, § 58, 19 February 2009). In *Yeloyev* and *Doronin* the Court also held that the failure of the judicial authorities to give reasons for their decisions authorising detention and to fix a time-limit for such detention was contrary to Article 5 § 1 (c) of the Convention (see *Yeloyev*, cited above, §§ 52-55, and *Doronin*, cited above, § 59).

70. The Court does not see a reason to depart from its findings in the present case. Therefore, the Court concludes that the applicant's continued detention between 3 November 1999 and 26 June 2001 was not in accordance with the requirement of lawfulness under Article 5 § 1 (c) of the Convention.

71. In the light of the foregoing, the Court does not find it necessary to determine whether the applicant's detention during the periods after the applicant and his lawyer had completed their study of the case file but before it had been referred to the trial court was covered by the maximum statutory term of his detention authorised by the prosecutors, as, in any event, the applicant's detention during those periods cannot be considered lawful within the meaning of Article 5 § 1 (c) of the Convention.

Accordingly, the Court finds that there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

72. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had been unfair, because the domestic courts had erroneously admitted and assessed evidence. In particular, the applicant argued that the evidence obtained by the prosecutors during the period of 17 April to 16 May 2001 should not have been admitted by the courts, because the terms of investigation had not been extended after 17 April 2001. He also alleged, without further specification, that the courts had not answered his lawyer's arguments in the applicant's defence.

73. The applicant further complained under Article 6 § 3 (a), (b), and (c) that he had not been provided with the copy of the indictment of 17 April 2001 in due time, that he had not had access to his lawyer when he had been charged by the prosecutors on 16 May 2001, and that he had not been provided with enough time to prepare his defence on that day.

Article 6 of the Convention reads, in so far as relevant, as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."

74. In so far as the applicant complained under Article 6 § 3 (a) and (b) of the Convention that the investigators had failed to give him a copy of the indictment of 17 April 2001 in due time and to provide him with enough time to prepare his defence on 16 May 2001, the Court observes that on 29 March 2001 the applicant, together with his lawyer, was informed that he was charged with aggravated murder and robbery and they were given full access to the case file for about five days. The indictment of 17 April 2001 contained the same charges and was based on the same facts. Therefore, the Court finds that the applicant was duly informed of the nature of the charges against him and that he was provided with adequate time and facilities for the preparation of his defence.

75. The Court further considers that the fact that the applicant's lawyer was, for reasons of illness, temporarily substituted by another lawyer does not disclose any appearance of a violation of Article 6 § 3 (c) of the Convention.

76. As to the applicant's complaints under Article 6 § 1 of the Convention, the Court reiterates that, while Article 6 guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court is not a court of appeal from the decisions of domestic courts and, as a general rule, it is for those courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings as a whole were fair (see *García Ruiz*, cited above, and, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports of Judgments and Decisions* 1996-II). In the applicant's case there is no indication that the courts went beyond their discretion to admit or refuse evidence or that they gave inappropriate weight to certain pieces of evidence.

77. On the whole, there is nothing in the case demonstrating that the proceedings were arbitrary or that the court decisions reached were manifestly unreasonable. The applicant, who had access to legal assistance of his own choosing, enjoyed the right to adversarial proceedings and was able to introduce all necessary arguments in his defence, and the judicial authorities gave them due consideration.

78. Therefore, this part of the application must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government submitted that the finding of a violation, if any, would constitute sufficient compensation for non-pecuniary damage in the present case.

82. The Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, considers it reasonable to award the applicant EUR 6,000 under this head.

B. Costs and expenses

83. The applicant also claimed 21,000 Ukrainian hryvnias (UAH)¹ for the legal costs incurred in the proceedings before the Court. He produced copies of receipts providing evidence of payments made to his lawyer and to a research institution for an external legal advice.

84. The Government contested this claim, stating that the applicant had failed to submit a copy of a contract with his lawyer specifying the nature of legal services he had been provided, and that the applicant's expenses for an external legal advice had not been necessary in his case.

85. 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 documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the requested amount for costs and expenses.

C. Default interest

86. 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 applicant's complaints under Article 5 § 1 (c) of the Convention about the alleged unlawfulness of his detention admissible and the remainder of the application inadmissible;

1. About EUR 1,760.

2. *Holds* that there has been a violation of Article 5 § 1 (c) of the Convention;
3. *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 6,000 (six thousand euros) in respect of non-pecuniary damage and EUR 1,760 (one thousand seven hundred and sixty euros) for costs and expenses, plus any tax that may be chargeable to the applicant on the above amounts, which shall be converted into the currency of the respondent State at the rate applicable on 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President