



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

FIFTH SECTION

CASE OF GARKAVYY v. UKRAINE

(Application no. 25978/07)

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 Garkavyy v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Zdravka Kalaydjieva, *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. 25978/07) 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 Aleksandr Leonidovich Garkavyy (“the applicant”), on 13 May 2007.

2. The applicant, who had been granted legal aid, was represented by Ms I. Pikh, a lawyer practising in Kyiv. 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 his detention was unlawful.

4. On 17 February 2009 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the alleged unlawfulness of the applicant's detention 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 1973 and is currently detained.

1. Criminal proceedings in the Czech Republic

6. On 30 March 2004 the Prague City Court (*městský soud*) found the applicant guilty of murder and unlawful possession of arms under Articles 219 §§ 1, 2 (h) and 185 § 1 of the Criminal Code, sentenced him to fourteen years' imprisonment and ordered his expulsion from the Czech Republic, in accordance with Article 57 of the Criminal Code. The court considered the applicant a fugitive and therefore decided in his absence. The applicant's interests were represented by defence counsel pursuant to Article 304 of the Code of Criminal Procedure.

7. On 8 September 2004 the High Court (*Vrchní soud*), on an appeal by the applicant's defence counsel, upheld the judgment of the City Court. It pointed out that an appeal on points of law to the Supreme Court lay against its decision; the appeal on points of law had to be lodged within two months from the date of its notification through defence counsel.

8. Pursuant to Article 306 § 1 of the Code of Criminal Procedure, the aforesaid decisions were notified only to the applicant's defence counsel.

9. On 7 October 2004 the City Court ordered the applicant's arrest.

10. The applicant received a copy of the Prague City Court's judgment on 19 April 2006.

2. Proceedings in Ukraine

11. According to the applicant, on 27 April 2003 he came back from the Czech Republic, which he had been visiting as a tourist. Thereafter he lived at his registered place of residence and worked in Ukraine.

12. On 28 January 2006 officers of the Kyiv City Department for Combating Organised Crime of the Ministry of the Interior (the Kyiv COC Department) arrested the applicant under the international arrest warrant issued by the Czech authorities. This fact was mentioned in a letter of 17 February 2006 from the Deputy Head of the Kyiv COC Department to the applicant's mother. According to the applicant, the officers asked him about his stay in the Czech Republic and informed him that he was wanted by the Czech law-enforcement authorities for murder. Later the same day he was taken to the Kyiv Holosiyvskyy District Police Department.

13. According to the Government, the police arrested the applicant for swearing in public and resisting the police.

14. On 30 January 2006 the applicant was taken to the Kyiv Holosiyvskyy District Court (the District Court), which considered materials submitted by the Kyiv Holosiyvskyy District Police Department and found the applicant guilty of swearing in public and resisting the police and sentenced him to five days' administrative detention. The applicant's detention took effect from 1 p.m. on 28 January 2006.

15. According to the Government it was on 30 January 2006 that the National Central Bureau of Interpol in Ukraine informed the Kyiv COC

Department that the applicant's name appeared in the database of international arrest warrants.

16. On 3 February 2006 the applicant was taken to the Kyiv COC Department.

17. The same day the National Central Bureau of Interpol in Ukraine sent a copy of the applicant's arrest warrant to the Kyiv COC Department. The same day the applicant was arrested as a criminal suspect under the Code of Criminal Procedure (Article 106).

18. On 7 February 2006 the applicant was taken to the District Court, which decided to detain him for forty days under Articles 12 and 16 of the 1957 Convention on Extradition, on the basis of the arrest warrant issued by the Prague City Court on 30 March 2004. The decision mentioned that the applicant was a Ukrainian national and that he had been arrested on 3 February 2006 at 7.30 p.m.

19. On 13 March 2006 the Kyiv COC Department requested the District Court to extend the applicant's detention on the basis of the request of the Ministry of Justice of the Czech Republic to the Ministry of Justice of Ukraine concerning the transfer of the criminal case against the applicant under the European Convention on the Transfer of Proceedings in Criminal Matters.

20. On 14 March 2006 the District Court extended the applicant's detention for thirty days under Articles 32 and 33 of the European Convention on the International Validity of Criminal Judgments and Article 165-2 of the Code of Criminal Procedure.

21. The applicant was not present in court and received a copy of this decision only ten days later.

22. On 20 March 2006 the Kyiv City Court of Appeal (the Court of Appeal) upheld the decision of 14 March 2006.

23. On 11 March 2006 the Ministry of Justice of Ukraine received the materials in the criminal case file against the applicant from its Czech counterpart and transferred them to the Supreme Court of Ukraine for examination.

24. By a letter of 7 April 2006, the Supreme Court of Ukraine referred the case file materials to the Court of Appeal to bring the judgment of the Czech courts into compliance with Ukrainian law under the Convention on the Transfer of Sentenced Persons. The Court of Appeal scheduled the case for a hearing on 27 April 2006.

25. According to the Government, on 14 April 2006 the District Court extended the applicant's detention until the decision on recognition and enforcement of the judgment of the Prague City Court of 30 March 2004 was given. According to the applicant, he had not been aware of this decision and learned about it only from the Government's observations.

26. On 26 April 2006 the applicant's lawyer submitted a request to the Court of Appeal, stating that several different international treaties on

cooperation in criminal matters had been applied in the applicant's case, which meant that the competent authorities of the Czech Republic and Ukraine had not decided what treaty was to serve as the basis for enforcement of the judgment against the applicant. Therefore, in the lawyer's opinion, the European Convention on the International Validity of Criminal Judgments was an appropriate legal basis in the applicant's case and the judgment of the Czech court could not be enforced owing to the fact that the applicant had been tried and sentenced *in absentia* and Ukraine had made a reservation to the said treaty, refusing to enforce judgments rendered *in absentia*. The lawyer requested postponement of the hearing scheduled on 27 April 2006, to request the Czech authorities to provide additional documents, to give him and the applicant the opportunity to study the case file, and to release the applicant.

27. On 15 May 2006 the lawyer submitted another request to the Court of Appeal, repeating his arguments about the principle of refusing to enforce judgments rendered *in absentia*, as expressed by Ukraine in the law on ratification of the European Convention on the Transfer of Proceedings in Criminal Matters. He further submitted that other European treaties in criminal matters could not apply either. He noted in particular that Article 3 of the Convention on the Transfer of Sentenced Persons required the consent of the sentenced person for his transfer and that the applicant did not give such consent. He requested, therefore, that the Czech authorities' request for their judgment to be brought into compliance with Ukrainian law be refused.

28. On 24 May 2006 the applicant's lawyer made further written submissions to the Court of Appeal. He reiterated that the applicant had been absent for the whole of the criminal proceedings against him in the Czech Republic. He repeated the arguments in his requests of 26 April and 24 May 2006. In addition he noted that although the Additional Protocol to the Convention on the Transfer of Sentenced Persons foresaw a possibility of transferring the sentenced person without his consent, it applied only to persons who had fled from justice to their home country after the trial, and could not apply to persons tried *in absentia*. He also noted that the instructions of the Supreme Court in its letter of 7 April 2006 could not be binding on the Court of Appeal, as the above letter was not a procedural document. The lawyer requested that the Court of Appeal reject the request of the Czech authorities and release the applicant.

29. On 16 June 2006 the Court of Appeal examined the case and decided to recognise the judgment of the Prague City Court of 30 March 2004 as being in compliance with Ukrainian legislation. In its decision the court noted that the applicant, a citizen of Ukraine, could not be extradited to the Czech Republic. Given that the applicant had been sentenced in the Czech Republic and the judgment and case file materials had been transferred to Ukraine in order to recognise the judgment and to convert the sentence, the

court considered that it was actually a *de facto* and *de jure* transfer of the applicant as a sentenced person for serving his sentence in Ukraine. The court considered that such solution was based on paragraph 1 of Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons and that paragraph 2 of the same Article confirmed the lawfulness of the applicant's detention in Ukraine.

30. As to the applicant's argument that Ukraine undertook not to enforce judgments rendered *in absentia*, the court noted that the Czech Republic was not a party to the European Convention on the International Validity of Criminal Judgments to which Ukraine made such reservation. Furthermore, the court considered that the term "*in absentia*" should be interpreted in the light of the reasons for absence of the person concerned from the court proceedings. The court observed that there could be plausible reasons for the absence of the accused and considered that the legislature had had such situations in mind when it made the reservation in the law on ratification of the European Convention on the International Validity of Criminal Judgments. On the other hand, if the accused knowingly absconded, such a person could be sentenced *in absentia*. The court noted that it could not question what had been established by the Prague City Court, which had stated in its decision that the applicant had absconded and had therefore been sentenced *in absentia*. The court continued as follows:

"The conviction *in absentia* of [Mr] Garkavyy O. L. on the territory of the Czech Republic, by analogy, fully corresponds to the provisions of the second paragraph of Article 262 of the C[ode of] C[riminal] P[rocedure] of Ukraine concerning the possibility and lawfulness of examination of a judicial case in the absence of the defendant, in particular when he is outside the territory of Ukraine and avoids appearing before the court."

31. The court further noted that the fact that the Ministry of Justice of Ukraine had accepted the request of their Czech counterpart demonstrated the readiness of the Ukrainian State to comply with the judgment despite the fact that it had been rendered *in absentia*.

The court noted as follows:

"Erroneous reference by the Ministry of Justice of the Czech Republic and the Ministry of Justice of Ukraine, in their cover letters, to the sending of the judgment to bring it into compliance with the Ukrainian legislation in force under the European Convention on the Transfer of Proceedings in Criminal Matters does not deprive the court of the right to apply the Convention on the Transfer of Sentenced Persons, on which the defendant's representative insisted. On the contrary, the Kyiv City Court of Appeal is obliged to examine this judicial case under the rules of the latter Convention, as correctly indicated in the cover letter of the Supreme Court, because only such a procedure of judicial examination corresponds to the spirit of this Convention as well as that of the Constitution of Ukraine and the current criminal and criminal procedure legislation of Ukraine."

This means that application of the European Convention on the Transfer of Sentenced Persons in the examination of the present judicial case is the only correct and lawful action.”

32. The court concluded that there were no procedural or other legal obstacles to recognising the judgment of the Prague City Court in compliance with Ukrainian legislation, and converted the sentence under the Criminal Code of Ukraine. The court left the sentence of the Prague City Court unchanged.

33. On 14 July 2006 the applicant's lawyer appealed against this decision to the Supreme Court. In his appeal he complained that Ukrainian legislation and European treaties on criminal matters had been applied incorrectly. The applicant's lawyer noted that despite the fact that the European Convention on the International Validity of Criminal Judgments could not apply between Ukraine and the Czech Republic, the law on ratification of this treaty was in force and had to be used in any case. He noted that the applicant's trial had been conducted in his absence and that there was nothing to indicate that the Czech authorities had tried to inform the applicant about the trial or to use the Convention on Mutual Assistance in Criminal Matters to involve him in the proceedings. He further noted that neither international treaties nor Ukrainian law rendered the application of provisions about judgments rendered *in absentia* dependent on reasons for absence before the courts and that the Court of Appeal had adopted its own interpretation of the term “*in absentia*”, in contravention of the law. He also criticised the analogy used by the court in comparing the trial *in absentia* in the Czech Republic with the provisions of the Code of Criminal Procedure of Ukraine. He further noted that the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto were inapplicable in the applicant's case, because the judgment against him had been rendered *in absentia* and the Ministry of Justice of the Czech Republic had not made a request for the applicant to be transferred as a sentenced person. He noted that the Czech Republic and Ukraine had agreed on the application of the European Convention on the Transfer of Proceedings in Criminal Matters, and the Court of Appeal had merely to decide on the agreement between the Ministry of Justice of Ukraine and the Ministry of Justice of the Czech Republic by declaring their reference to the European Convention on the Transfer of Proceedings in Criminal Matters erroneous. Furthermore, Article 22 of the Convention on the Transfer of Sentenced Persons clearly stipulated that it was for the central authorities to decide under what treaty on international legal assistance their requests should be treated. He further noted that the court had not verified that the judgment of the Czech court was final and enforceable. He requested the Supreme Court to quash the decision of the Court of Appeal and to reject the request of the Czech authorities concerning the applicant.

34. On 12 December 2006 the Supreme Court upheld the decision of the Court of Appeal. It noted, in particular, that the judgment of the Czech Court was final, that the applicant could not be extradited and that application of the Convention on the Transfer of Sentenced Persons in the applicant's case was reasonable. In addition, it noted that the Court of Appeal had correctly interpreted the issue of the applicant's trial *in absentia* with reference to Article 262 of the Code of Criminal Procedure.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. The relevant domestic law of Ukraine

1. *Constitution of Ukraine*

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

Article 9

“International treaties that are in force and are agreed to be binding by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine.”

Article 25

“...A citizen of Ukraine shall not be expelled from Ukraine or surrendered to another State...”

Article 29

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

No one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on grounds and in accordance with a procedure established by law...”

2. *Code of Criminal Procedure*

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

Article 262

Participation of the defendant in court sittings

“Examination of the case in sittings of the court of first instance shall be conducted with the participation of the defendant, whose appearance before the court is obligatory.

Examination of the case in the absence of the defendant shall be allowed only in exceptional circumstances:

(1) if the defendant is outside the territory of Ukraine and avoids appearing before the court;

(2) if the defendant requests examination in his absence of a case concerning an offence not punishable by imprisonment. However, the court shall be entitled in this case to decide on the obligatory appearance of the defendant.”

3. Law on ratification of the European Convention on the International Validity of Criminal Judgments

37. The relevant provision of the Law reads as follows:

“...Ukraine will refuse:

...sanctions rendered in the absence of the defendant...”

B. International treaties pertinent to the case

1. European Convention on Extradition

38. Both Ukraine and the Czech Republic are parties to the Convention. It entered into force in respect of the Czech Republic on 1 January 1993 and in respect of Ukraine on 9 June 1998. When ratifying the Convention, Ukraine made a reservation that it would not extradite citizens of Ukraine to another State.

39. Article 16 of the Convention reads as follows:

Article 16 – Provisional arrest

“1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

2. The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.

3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.

5. Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.”

2. European Convention on the International Validity of Criminal Judgments

40. This Convention entered into force in respect of Ukraine on 12 June 2003. Ukraine declared that it reserved the right to refuse enforcement of sanctions rendered *in absentia*.

41. The Czech Republic is not a party to this Convention.

42. The Articles relied on by the Ukrainian court in extending the applicant's detention read as follows:

Article 32

“1. When the requesting State has requested enforcement, the requested State may arrest the person sentenced:

a. if, under the law of the requested State, the offence is one which justifies remand in custody, and

b. if there is a danger of abscondence or, in case of a judgment rendered in absentia, a danger of secession of evidence.

2. When the requesting State announces its intention to request enforcement, the requested State may, on application by the requesting State arrest the person sentenced, provided that requirements under a and b of the preceding paragraph are satisfied. The said application shall state the offence which led to the judgment and the time and place of its perpetration, and contain as accurate a description as possible of the person sentenced. It shall also contain a brief statement of the facts on which the judgment is based.”

Article 33

“1. The person sentenced shall be held in custody in accordance with the law of the requested State; the law of that State shall also determine the conditions on which he may be released.

2. The person in custody shall in any event be released:

a. after a period equal to the period of deprivation of liberty imposed in the judgment;

b. if he was arrested in pursuance of Article 32, paragraph 2, and the requested State did not receive, within 18 days from the date of the arrest, the request together with the documents specified in Article 16.”

3. European Convention on the Transfer of Proceedings in Criminal Matters

43. Both Ukraine and the Czech Republic are parties to the Convention. It entered into force in respect of the Czech Republic on 1 January 1993 and in respect of Ukraine on 29 December 1995.

44. The relevant provisions of the Convention read as follows:

Article 8

“1. A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:

- a. if the suspected person is ordinarily resident in the requested State;
- b. if the suspected person is a national of the requested State or if that State is his State of origin;
- c. if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;
- d. if proceedings for the same or other offences are being taken against the suspected person in the requested State;
- e. if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;
- f. if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;
- g. if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;
- h. if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;

2. Where the suspected person has been finally sentenced in a Contracting State, that State may request the transfer of proceedings in one or more of the cases referred to in paragraph 1 of this article only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence.”

Article 28

“Upon receipt of a request for proceedings accompanied by the documents referred to in Article 15, paragraph 1, the requested State shall have jurisdiction to apply all such provisional measures, including remand in custody of the suspected person and seizure of property, as could be applied under its own law if the offence in respect of which proceedings are requested had been committed in its territory.”

4. Convention on the Transfer of Sentenced Persons

45. Both Ukraine and the Czech Republic are parties to the Convention. It entered into force in respect of the Czech Republic on 1 January 1993 and in respect of Ukraine on 1 January 1996.

Article 9

Effect of transfer for administering State

“1. The competent authorities of the administering State shall:

a. continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

b. convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

2. The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.

3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.

4. Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.”

Article 22

Relationship to other Conventions and Agreements

“... 4. If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.”

5. Additional Protocol to the Convention on the Transfer of Sentenced Persons

46. Both Ukraine and the Czech Republic are parties to the Convention. It entered into force in respect of the Czech Republic on 1 February 2003 and in respect of Ukraine on 1 November 2003. The relevant provisions of the Protocol read as follows:

Article 2

Persons having fled from the sentencing State

1. Where a national of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence.

2. At the request of the sentencing State, the administering State may, prior to the arrival of the documents supporting the request, or prior to the decision on that request, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory, pending a decision on the request. Requests for provisional measures shall include the information mentioned in paragraph 3 of Article 4 of the Convention. The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reason of this paragraph.

3. The consent of the sentenced person shall not be required to the transfer of the execution of the sentence.

47. The explanatory report to the Additional Protocol notes that Article 2 “envisages a situation where a national of State A is sentenced in State B and subsequently leaves State B before or while serving the sentence and voluntarily enters State A.” It further provides that this Article does not cover the situations where a national of State A is tried and sentenced *in absentia* in State B.

THE LAW

I. SCOPE OF THE CASE

48. In reply to the Government's observations, the applicant reiterated his complaints under Article 6 concerning his trial *in absentia* in the Czech Republic that had been found inadmissible in the partial decision as to admissibility of 17 February 2009 and submitted new, belated complaints under Article 6 concerning the judicial proceedings in Ukraine. The Court

considers that the scope of the case now before it is limited to the complaints which have been communicated to the parties for observations.

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

49. The applicant complained that his detention in Ukraine was unlawful. The Court, master of the characterisation to be given in law to the facts of the case, decided to examine the problem raised by the applicant under Article 5 of the Convention, which is the relevant provision and which provides as follows:

Article 5 § 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:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

A. Admissibility

50. The Government considered that the applicant had not exhausted domestic remedies as he had failed to appeal against the decision of 14 April 2006 to the Kyiv Court of Appeal.

51. The applicant maintained that he had exhausted all domestic remedies and had not been aware of the above decision of 14 April 2006.

52. The Court notes that the Government did not provide the Court with a copy of the impugned decision and did not comment on the applicant's

contention that he had not been aware of the above decision. It was for the Government, raising such objection, to demonstrate that the applicant could have exhausted the available domestic remedies but failed to do so. Furthermore, the Court notes that, as is apparent from the case-file materials, the applicant raised the issue of the lawfulness of his detention at every stage of the proceedings and appealed against every relevant appealable decision. The Court therefore dismisses this objection of the Government.

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

B. Merits

1. Parties' submissions

(a) The applicant

54. The applicant maintained that his apprehension by the Kyiv COC Department had been conducted under the arrest warrant issued by the Czech law-enforcement authorities; however the Code of Criminal Procedure did not contain provisions on arrest under an arrest warrant originating from abroad.

55. He further maintained that it was clear that the officers from the Kyiv Holosiyvskyy District Police Department had not arrested him and that he had not committed the administrative offence for which he had been punished. He considered that his administrative arrest had been arranged by the authorities to gain some time pending receipt of the materials. He also noted that in any event his administrative detention had expired on 2 February 2006 and there had been no explanation for his detention the next day.

56. The applicant also noted that his detention with a view to extradition had been unlawful in terms of the relevant instruments, both national and international, since the Ukrainian Constitution and the Criminal Code unequivocally excluded the possibility of extraditing Ukrainian nationals.

57. His detention since 14 March 2006 had been based on Articles 32 and 33 of the European Convention on the International Validity of Criminal Judgments and Article 165-2 of the Code of Criminal Procedure. However, the above Convention was not applicable in relations between Ukraine and the Czech Republic, given that the latter was not a party to the Convention.

58. The applicant considered that the whole period of his detention between 28 January and 16 June 2006 had actually been aimed at

enforcement of the judgment rendered *in absentia* and was therefore contrary to Article 5 § 1 of the Convention.

59. He finally maintained that the validation of the judgment of the Prague City Court by the Ukrainian court had been made without sufficient legal grounds and contrary to the international treaties to which the courts referred. Furthermore, at no stage of the proceedings was he able to defend himself and have a proper trial. Therefore, he considered that his detention since 16 June 2006 had been contrary to Article 5 § 1 of the Convention.

(b) The Government

60. Referring to the facts, the Government maintained that between 28 and 30 January 2006 the applicant had been detained as a suspect in the administrative offence proceedings and that his detention had therefore fallen under Article 5 § 1 (c) of the Convention. From 30 January to 3 February 2006 the applicant's detention had fallen under Article 5 § 1 (a) of the Convention as the applicant had been sentenced to five days' administrative detention. From 3 February to 14 March 2006 the applicant had been detained with a view to extradition and his detention had fallen under Article 5 § 1 (f) of the Convention. From 14 March to 16 June 2006 the applicant's detention had fallen under Article 5 § 1 (a) of the Convention. They concluded that the whole period of the applicant's detention since 28 January 2006 had fallen under one of the permitted exceptions in Article 5 § 1.

61. As to the legal grounds for the applicant's detention, the Government referred to the domestic courts' decisions, to Article 106 of the Code of Criminal Procedure, to the Convention on the Transfer of Sentenced Persons and to its Additional Protocol.

2. The Court's assessment

(a) General principles

62. Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a “democratic society” within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33).

63. All persons are entitled to the protection of that right, that is to say, not to be deprived, or not to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV, and *Quinn v. France*, 22 March 1995, § 42, Series A no. 311) and only a narrow interpretation of

those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Engel and Others v. the Netherlands*, 8 June 1976, § 58, Series A no. 22, and *Amuur v. France*, 25 June 1996, § 42, *Reports* 1996-III).

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

65. The Court further reiterates that the authorities must also conform to the requirements imposed by domestic law in the proceedings concerning detention (see *Van der Leer v. the Netherlands*, 21 February 1990, §§ 23-24, Series A no. 170-A; *Wassink v. the Netherlands*, 27 September 1990, § 27, Series A no. 185-A; and *Erkalo v. the Netherlands*, 2 September 1998, § 57, 1998-VI).

66. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can, and should, exercise a certain power of review of such compliance (see *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III).

(b) Application of the general principles to the present case

(i) Period from 28 January to 3 February 2006

67. The Court notes that the parties disagreed as to the facts concerning the applicant's original arrest and detention between 28 January and 3 February 2006. However, the applicant's contention that he had been apprehended by the Kyiv COC Department under the international arrest warrant, and only after the administrative offence proceedings had commenced, appears to be supported by the official documents. Despite the fact that the administrative detention following the court's decision would generally fall under Article 5 § 1 (a) of the Convention, the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008-..., with further references). The Court has already been faced with the situation where administrative detention, formally falling under Article 5 § 1 (a), had been used to ensure the availability of a person for other purpose (see, *mutatis*

mutandis, Doronin v. Ukraine, no. 16505/02, §§ 54-56, 19 February 2009). The Court considers that the facts of the case strongly suggest that in the present case the applicant found himself in a similar situation. In the Court's view, the above conduct of the domestic authorities is incompatible with the principle of legal certainty and is arbitrary, and runs counter to the principle of the rule of law.

68. Furthermore, as the applicant noted, the Government furnished no explanations as to any grounds for his detention after the administrative detention expired on 2 February 2006 at 1 p.m. until he was formally arrested by the Kyiv COC Department on 3 February 2006 at 7.30 p.m.

69. The Court, therefore, concludes that there was a violation of Article 5 § 1 of the Convention during this whole period.

(ii) Period from 3 February to 16 June 2006

70. The Court further notes that the applicant's detention from 3 February 2006 was ordered with a view to his extradition. On 7 February 2006 the applicant's detention was ordered for forty days by the Ukrainian court under the European Convention on Extradition, although being a Ukrainian national he could not be extradited, as the domestic legislation excludes, in non-ambiguous terms, the extradition of Ukrainian nationals (see and compare with a case against Russia in which similar prohibition on extradition of nationals exists: *Garabayev v. Russia*, no. 38411/02, §§ 88-91, 7 June 2007, ECHR 2007-... (extracts)); moreover, Ukraine made a relevant reservation to the above Convention.

71. On 14 March 2006 the same court extended the applicant's detention for thirty days under the European Convention on the International Validity of Criminal Judgments, although at that time the Ministry of Justice of the Czech Republic had formally lodged a request with its Ukrainian counterpart to deal with the applicant's case under the European Convention on the Transfer of Proceedings in Criminal Matters. Furthermore, the European Convention on the International Validity of Criminal Judgments authorised detention for eighteen days only and could not apply to relations between the two countries as the Czech Republic had not acceded to it.

72. The Court also points out that the Government furnished no documents to support their contention that there had been a judicial decision authorising the applicant's detention between 14 April 2006 and the decision of the Kyiv Court of Appeal on 16 June 2006.

73. Furthermore, the Court notes that the Government failed to demonstrate that there were any legal provisions, whether in the Code of Criminal Procedure or in any other legislative instrument, that would provide, even by reference, a procedure for detention with a view to extradition or to implementation of other international instruments on legal assistance in criminal matters.

74. The Court considers that the facts of the case demonstrate that the applicant was detained during the period in question without sufficient legal basis in the domestic law.

75. The Court, therefore, concludes that there was a violation of Article 5 § 1 of the Convention during this period too.

(iii) Period since 16 June 2006

76. The Court notes that on 16 June 2006 the Kyiv Court of Appeal, after examining the case, reclassified the request of the Czech authorities for transfer of criminal proceedings in the applicant's case under the European Convention on the Transfer of Proceedings in Criminal Matters to a request for enforcement of the judgment of the Prague City Court of 30 March 2004 under the Convention on the Transfer of Sentenced Persons and the Protocol thereto, although no request under this Convention had been made and the provisions of the Protocol to this Convention were not applicable to persons tried *in absentia*. The Supreme Court upheld this decision.

77. The Court is not convinced that such solution chosen by the domestic courts meets the requirements of foreseeability and lawfulness. The Court accordingly finds that since 16 June 2006 the applicant has been detained in breach of Article 5 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

80. The Government considered that the amount claimed was exorbitant and had no causal link with the alleged violation.

81. The Court considers that the applicant suffered non-pecuniary damage on account of his unlawful detention, damage which cannot be compensated for by the mere finding of a violation of his Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards the applicant the claimed amount in full.

B. Costs and expenses

82. The applicant did not submit any claim under this head. The Court therefore makes no award.

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. *Declares* the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 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 10,000 (ten 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.

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