



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

FIFTH SECTION

CASE OF SHALIMOV v. UKRAINE

(Application no. 20808/02)

JUDGMENT

STRASBOURG

4 March 2010

FINAL

04/06/2010

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

In the case of Shalimov v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

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. 20808/02) 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 Sergey Vasiliyevich Shalimov (“the applicant”), on 8 May 2002.

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

3. On 25 November 2008 the Court declared the application partly inadmissible and decided to communicate the complaints concerning refusal of family visits (Article 8), excessive length of pre-trial detention (Article 5 § 3), failure of the courts to consider his complaints about the unlawfulness of his detention (Article 5 § 4), length and fairness of the criminal proceedings (Article 6 §§ 1 and 3 (c) and (d)) and lack of effective remedies for his complaints under Articles 6 and 8 (Article 13) 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

4. The applicant was born in 1968 and is currently in detention.

5. According to the applicant, on 26 October 1998 he found a small-bore rifle and cartridges. He checked whether the rifle worked and then practised shooting. While doing this he was accompanied by his friend T. At one moment the applicant needed to go to the toilet and went over to some bushes near the road. Behind the bushes he came face to face with two strangers, later identified as E. and D., who allegedly behaved aggressively towards him. According to the applicant, one of the strangers was holding an object in his hand which the applicant took for a gun. Fearing for his life, he fired at one of them in self-defence and left. Soon he joined T., who was waiting for him at some distance. The applicant told T. that he had fired into the river.

6. Later the same day the applicant separated the breechblock from the rifle and threw them both into the river.

On 27 October 1998 E. and D. were found shot dead and criminal proceedings were instituted.

7. On 30 October 1998 the applicant was arrested on suspicion of the murder of E. and D. The applicant confessed to firing at D. in self-defence.

8. On 31 October 1998 investigating prosecutor Z. conducted a videotaped on-site reconstruction of the events. During the reconstruction the applicant asked to be represented by a lawyer. This request was rejected by prosecutor Z.

9. On 2 November 1998 the Yenakiyevo Prosecutor ordered the applicant's pre-trial detention on the ground that he was suspected of having committed a crime punishable by imprisonment and that he might abscond. The applicant's detention was extended on several occasions by the prosecutors: to three months on 21 December 1998, to five months on 25 January 1999 and to six months on 25 March 1999, without indicating any grounds for the detention.

10. On 4 November 1998 K. was appointed as the applicant's lawyer.

11. Between 2 November 1998 and 27 April 1999 the investigation conducted several different forensic examinations and questioned several witnesses. In ordering a medical examination, the investigator requested the expert to check whether the findings of the examination corresponded to the applicant's statements as to the circumstances of the crime.

12. On 27 April 1999 the applicant requested that Ms P. be appointed his lawyer. This request was granted.

13. From 27 April to 1 July 1999 the applicant and his lawyer were given time to study the case file materials. On several occasions they requested extension of the period of access to the case file.

14. On 1 July 1999 the bill of indictment was completed by the investigation and referred to the Donetsk Court of Appeal (the Donetsk Court), acting as a first-instance court.

15. On 15 July 1999 the applicant was committed for trial. The Donetsk Court also continued to remand him in custody having decided to leave the chosen preventive measure without changes.

16. On 10 December 1999 the court ordered two additional forensic examinations in respect of the victims and the weapon which had been used to commit the crime.

17. An additional forensic medical examination in respect of the victims was concluded on 14 June 2000.

18. An additional ballistic examination was concluded on 5 January 2001.

19. On 1 March 2001 the judicial examination of the applicant's case was resumed. The Donetsk Court also continued to remand the applicant in custody without indicating any grounds.

20. In September 2001 the Vice-President of the Donetsk Court of Appeal, in reply to a complaint from the applicant that he was not being allowed family visits, informed him that the hearing in his case had been fixed for 14 January 2002 and that he would be allowed a family visit after his case had been decided.

21. On 14 to 17 January 2002 the Donetsk Court held hearings in the case and questioned several witnesses. Witnesses T. and K. failed to appear before the court.

22. On 21 January 2002 the Donetsk Court decided to refer the criminal case for further investigation on the grounds that prosecutor Z., who had been in charge of the investigation, did not have legal power to conduct the investigation; that the investigators had not located the breechblock of the rifle; that it had not been proved beyond doubt that the applicant had intentionally killed E. and D.; and that the investigators had not fully checked the circumstances of the applicant's confession. The court also continued to remand the applicant in custody without indicating any grounds.

23. On 28 January 2002 the Donetsk Regional Prosecutor's Office lodged an appeal against the decision of 21 January 2002.

24. On 14 March 2002 the Supreme Court quashed the decision of the Donetsk Court of 21 January 2002 and remitted the case to it for examination. The court noted that the prosecutor did have power to conduct the investigation, and that the investigators had searched for the breechblock of the rifle but that after three years it was not possible to remedy the situation with regard to the missing item. The court further noted that the first-instance court should have verified the circumstances of the applicant's confession in the trial proceedings. The court maintained, lastly, that the issue as to whether there was sufficient evidence on which to convict the applicant should be decided by the first-instance court during the examination of the case on the merits.

25. On 15 April 2002 the applicant was committed for trial. The Donetsk Court also continued to remand the applicant in custody without indicating any grounds.

26. By a letter of 12 September 2002, the Acting President of the Donetsk Court, in reply to the applicant's complaint, informed him, among other things, that due to the illness of Judge S., who had originally dealt with his case, the case had been transferred to Judge D. on 1 March 2001 and was scheduled for examination on 14 January 2002. Following the remittal of the case to the court on 4 April 2002 the case was scheduled for 5 August 2002 and then, due to the illness of Judge D., postponed to 9 September 2002.

27. On 24 September 2002 the Donetsk Court found the applicant guilty of two murders motivated by hooliganism and sentenced him to fifteen years' imprisonment. The court found that both victims had been killed by the same weapon, which could have been the rifle used by the applicant (conclusive identification was not possible without the missing breechblock). The court established, *inter alia*, that no other gun had been found at the site of the crime or elsewhere in the neighbourhood, that T. had heard several shots while the applicant had been behind the bushes and that the applicant had behaved normally immediately after the incident and had not shown any signs of agitation. The court further examined the procedural shortcomings of the pre-trial investigation and disregarded the pieces of evidence, including the videotaped reconstruction of events of 31 October 1998, which had been obtained in violation of the applicant's right to defence.

28. The applicant appealed against the judgment of 24 September 2002 challenging, among other things, the testimonies of witness K. and interpretation of evidence by the court.

29. By a separate ruling of the same day, the Donetsk Court brought to the attention of the Donetsk Regional Prosecutor's Office the procedural violations committed by prosecutor Z. during the pre-trial investigation, including refusing the applicant a lawyer during the videotaped reconstruction of events. As a result of that ruling, prosecutor Z. was found disciplinarily liable.

30. Following the applicant's conviction, he was allowed to see his mother and his wife. He had in total thirteen family visits between 25 September 2002 and 30 October 2003.

31. On 4 February 2003 the Donetsk Court gave a ruling rejecting the applicant's request for access to the audio records of the hearings. The applicant appealed.

32. On 26 February 2003 the Donetsk Court examined the applicant's complaints concerning the records of the hearings and dismissed them.

33. On 15 May 2003 the Supreme Court quashed the rulings of 4 and 26 February 2003.

34. On 7 August 2003 the Donetsk Court rejected the applicant's challenge of the court and his request for access to the audio records. The court also examined the applicant's objections to the minutes of the hearings and dismissed them.

35. On 2 October 2003 the Supreme Court upheld the judgment of 24 September 2002.

36. In 2002-2003 the applicant and his representative made number of requests to the Donetsk Court of Appeal for receiving copies of the documents from his criminal case file. In reply, they were informed that only copies of the court judgment and respective decisions by the higher courts on his appeal were furnished to the defendant. As to other documents, the court informed that the applicant or his representative could have access to the case file and could copy the documents from it.

37. On 16 January 2004 the Debaltsevo Prosecutor's Office refused to institute criminal proceedings against prosecutors Z. and N. following a complaint by the applicant that his right to defence on 31 October 1998 had been violated and that the prosecutors had claimed bribes from him in return for closing the case against him. It was established that prosecutor Z. had been subject to disciplinary sanctions for the above violation of the applicant's right to defence. As to the allegations of proposed bribes, the investigator rejected this complaint as unsubstantiated.

38. By letters of 29 October 2004 and 8 September 2005, the Supreme Court informed the applicant that there were no grounds for an extraordinary review of his case.

II. RELEVANT DOMESTIC LAW

A. Pre-trial detention

39. The Code of Criminal Procedure 1960 (prior to 21 June 2001) provided:

Article 236-3

Appeal against the prosecutor's arrest warrant

“The detainee, his defender or legal representative may appeal against the prosecutor's arrest warrant to the relevant district (city) court...

The appeal may be lodged directly with the court or through the administration of the pre-trial detention centre, which must send the appeal to the relevant court within twenty-four hours of its receipt.”

Article 263**Rights of the defendant during the trial**

“In the court proceedings the defendant has the right:

...3) to lodge requests...”

Article 273**Procedure for rendering rulings in the court sittings**

“In all matters decided by the court during the trial, the court gives a ruling. Rulings on ... selection, change or cancellation of a preventive measure ... decided by the court in camera and drawn in form of a separate document signed by all judges.

Rulings rendered by the court during the trial shall be pronounced... “

Article 274**Selection, termination or change of a preventive measure in court**

“During the court proceedings, if there are any grounds to do so, the court may by its ruling change, cancel or select a preventive measure in respect of the defendant ...”

40. The above-mentioned Article 236-3 was excluded from the CCP on the basis of the Code of Criminal Procedure Amendment Act of 21 June 2001. By the Amendment Act, the new procedure of ordering and maintaining detention at the pre-trial stage has been introduced:

Article 165**General provisions on the procedure of application, cancellation and change the preventive measure**

“A custodial preventive measure shall be applied only by motivated judge order or court ruling...”

Article 165-2**Procedure for the selection of a preventive measure**

“...In the event that the investigating body or investigator considers that there are grounds for selecting a custodial preventive measure, with the prosecutor's consent he shall lodge an application with the court. The prosecutor is entitled to lodge an application to the same effect. In determining this issue, the prosecutor shall be obliged to familiarise himself with all the material evidence in the case that would justify placing the person in custody, and to verify that the evidence was received in a lawful manner and is sufficient for charging the person.

The application shall be considered within seventy-two hours of the time at which the suspect or accused is detained.

In the event that the application concerns the detention of a person who is currently not deprived of his liberty, the judge shall be entitled, by means of an order, to give permission for the suspect to be detained and brought before the court under guard. Detention in such cases may not exceed seventy-two hours; and in the event that the person is outside the locality where the court is situated, it may not exceed forty-eight hours from the moment at which the detainee is brought within the locality.

Upon receiving the application, the judge shall examine the material in the criminal case file submitted by the investigating bodies or investigator. A prosecutor shall question the suspect or accused and, if necessary, shall hear evidence from the person who is the subject of the proceedings, shall obtain the opinion of the previous prosecutor or defence counsel, if the latter appeared before the court, and shall make an order:

- (1) refusing to select the preventive measure if there are no grounds for doing so;
- (2) selecting a preventive measure in the form of taking of a suspect or accused into custody.

The court shall be entitled to select for the suspect or accused a non-custodial preventive measure if the investigator or prosecutor refuses to select a custodial preventive measure for him or her.

The judge's order may be appealed against to the court of appeal by the prosecutor, suspect, accused or his or her defence counsel or legal representative, within three days from the date on which it was made. The lodging of an appeal shall not suspend the execution of the judge's order."

41. Relevant parts of articles 263, 273 and 274 of the Code remained unchanged after the amendments of 21 June 2001.

42. Other relevant domestic law concerning pre-trial detention and investigation is summarised in the cases of *Solovey and Zozulya v. Ukraine* (nos. 40774/02 and 4048/03, § 43, 27 November 2008) and *Shavel v. Ukraine* ((dec.), no. 25486/03, 8 January 2007).

B. Family visits

43. Under section 12(1) of the Pre-Trial Detention Act 1993, permission for relatives to visit a detainee (in principle, once a month for one to two hours) can be given by the authorities of the place of detention, but only with the written approval of an investigator or a court dealing with the case depending on whether it is the investigation or the trial stage.

44. Relevant provisions of the Code of Criminal Procedure 1960 read as follows:

Section 162**Visiting a detainee**

“Visits of relatives or other persons to a detainee can be allowed by a person or an institution that deals with the case. The duration of the visit shall be fixed from one to two hours. The visit can be allowed, as a rule, not more than once a month.”

Section 345**Granting relatives permission to visit a convicted person**

“Prior to entry of the judgment into force, the presiding judge or the president of the relevant court shall be obliged to grant close relatives of a convicted person, upon their request, permission to visit the detained convicted person.”

THE LAW**I. SCOPE OF THE CASE**

45. In his reply to the Government's observations, the applicant submitted new complaints under Article 5 §§ 1 (c) and 3 and Article 6 §§ 1 and 3 (c) of the Convention, alleging that his pre-trial detention was unlawful, that he was not brought promptly before the judge, that he had no access to the audio records of the hearings and that his lawyer had not been allowed to visit him during the pre-trial detention. The Court notes that these new belated complaints are not an elaboration of the applicant's original complaints on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see, *mutatis mutandis*, *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

46. The applicant complained that the duration of his pre-trial detention was excessive and that he had been unable to bring court proceedings to contest the lawfulness of his pre-trial detention. He invoked Article 5 §§ 3 and 4 of the Convention, which provides, in so far as relevant, as follows:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Length of the applicant's pre-trial detention

1. Admissibility

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

2. Merits

48. The Government maintained that the domestic authorities had grounds for holding the applicant in custody, given that he was suspected of a serious crime and could abscond from justice and obstruct investigation. They considered that the domestic authorities conducted the investigation with due diligence given the complexity of the case and number of forensic examinations and other investigative actions to be conducted.

49. The applicant disagreed. He considered that the domestic authorities had not acted with due diligence in his case and that the decisions on maintaining his detention contained no reasoning.

50. The Court recalls that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. This must be assessed in each case according to its special features, the reasons given in the domestic decisions and the well-documented facts mentioned by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among others, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV).

51. The Court notes that the applicant's pre-trial detention lasted for three years and almost eleven months. It observes that the seriousness of the charges against the applicant and the risk of his absconding had been advanced in the initial order on the applicant's detention. Thereafter, the prosecutors and the courts did not advance any grounds whatsoever for maintaining the applicant's detention, simply stating that the previously chosen preventive measure was correct. However, Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention (see *Jabłoński v. Poland*, no. 33492/96, § 80, 21 December 2000, and *I.A. v. France*, no. 28213/95,

§ 102, *Reports of Judgments and Decisions* 1998-VII). Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Iłowiecki v. Poland*, no. 27504/95, § 61, 4 October 2001). No such reasons were given by the courts in the present case. Furthermore, at no stage did the domestic authorities consider any alternative preventive measures instead of detention.

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

B. Lack of review of the lawfulness of the detention

53. The Government noted that the domestic courts reviewed the lawfulness of the applicant's detention throughout the court proceedings. They further noted that the applicant did not challenge any of the prosecutor's detention orders before the courts. During the judicial proceedings the courts ordered the applicant's continued detention due to the seriousness of the crime and risk of absconding.

54. The applicant did not dispute the fact that he had not challenged the prosecutor's detention order to the courts, but claimed that such a challenge had no relevance to the possibility of periodic review of lawfulness of his detention for the purposes of Article 5 § 4. He maintained that he had lodged a number of applications for release with the investigator and that he had had no access to the court prior to 8 December 1999, when he was first brought before a judge. He also claimed that during the court hearings he raised the issue of lawfulness of his detention on many occasions but to no avail.

55. The Court reiterates that the purpose of Article 5 § 4 is to secure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 76). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII (extracts)). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

56. The Court notes that in the instant case the applicant did not provide any details or documents and did not substantiate otherwise that he had lodged any formal application for release with a court during his pre-trial detention. Furthermore, it is not persuaded by the applicant's arguments that he did not have access to the court during the investigation stage, given that the applicant was represented by a lawyer as from 4 November 1998, which was the fifth day of his detention.

57. The Court also notes that according to the relevant domestic law there were remedies that were effective at least in theory as the applicant was entitled to institute such proceedings for review of detention and the courts were competent to order his release by replacing pre-trial detention with another preventive measure. Given that the applicant had failed to use these remedies, the Court cannot speculate whether or not the applicant's application for release would be considered to be in compliance with the requirements of Article 5 § 4, and accordingly it is not in a position to assess the effectiveness of existing remedies in practice in the circumstances of the present case. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

58. The applicant complained that the criminal proceedings against him were unfair and unreasonably long. He also complained that his right to defence and his right to have witnesses examined had been violated. He relied on Article 6 §§ 1 and 3 (c) and (d) of the Convention, which 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 within a reasonable time by [a] ... tribunal...”

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

...

(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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...”

A. Admissibility

1. *Right to defence*

59. The applicant complained of a violation of his right to defence during the videotaped on-site reconstruction of the events on 31 October 1998, when the investigator rejected his request for representation by a lawyer.

60. The Government maintained that the violation of the applicant's right to defence, of which he had complained before this Court, had been acknowledged and remedied at the domestic level and therefore the applicant could no longer claim to be a victim of a violation of Article 6 § 3 (c) of the Convention.

61. The applicant contested the Government's objections, claiming that the videotaped on-site reconstruction of the events on 31 October 1998 obtained in breach of his right to defence had been used indirectly in medical forensic examinations and that the results of the said examinations were not excluded from the body of evidence.

62. The Court notes that, according to the case file materials, the applicant was represented by a defence lawyer during the investigation. The episode of which the applicant complained before this Court was carefully examined by the domestic courts and they decided not to include as evidence the above-mentioned videotaped on-site reconstruction of the events for this very reason: violation of the applicant's right to defence. Furthermore, the investigator was subjected to disciplinary sanctions for this violation of the applicant's right to defence. As to the applicant's argument that the results of the forensic medical examination had been linked to the excluded piece of evidence, it appears that the investigator among other things requested the experts to establish whether the actual data that would be obtained corresponded to the applicant's testimonies. The Court considers that this complaint, as worded by the applicant, was adequately addressed at the domestic level (see paragraphs 27 and 29 above) and the applicant can no longer claim to be a victim of the alleged violation. It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. *Right to summon witnesses*

63. The Government contended that the applicant had not raised his complaints about refusal to summon witnesses K. and T. in his cassation appeal and therefore had not exhausted remedies available to him under domestic law.

64. The applicant maintained that he had made several requests of the first-instance court to have witnesses K. and T. summoned, and in his

cassation appeal he questioned the credibility of the testimonies of witness T. and challenged the assessment of testimonies of witnesses by the first-instance court. Therefore, in his opinion, he had implicitly suggested that it was necessary to question these witnesses again.

65. The Court is not persuaded by the applicant's arguments and finds that the applicant did not formulate in his cassation appeal the complaint about the failure of the trial court to summon particular witnesses. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

3. Fair trial

66. The applicant complained that the proceedings were unfair, that the domestic courts were not impartial and independent, and that they had falsified the case file materials against him and misinterpreted the evidence in the case.

67. The Court notes that it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law. Furthermore, it is the domestic courts that are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case (see, among many other authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, p. 32, § 32, and *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34).

68. Having regard to the materials submitted by the applicant, the Court finds that the applicant has failed to substantiate any claim that the procedural guarantees contained in Article 6 were breached in his case.

69. As to the applicant's complaint of lack of impartiality of the courts, the mere fact that the court decided against the applicant is not sufficient to conclude that it was not impartial.

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

4. Length of proceedings

71. The Government considered that the length of the criminal proceedings against the applicant was reasonable.

72. The applicant disagreed.

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

B. Merits

74. The Government considered that the length of the criminal proceedings against the applicant was reasonable, having in mind the complexity of the case. Furthermore, there were thirteen witnesses, two victims and one expert involved in the proceedings at the investigation stage and nineteen witnesses, two victims and one expert at the judicial stage. The Government further contended that the applicant and other persons had contributed to the length of the proceedings. In particular, the applicant and his lawyer had made several requests for postponement of the date for examination of the case file. They had also challenged the judges and asked for additional witnesses to be summoned, which had contributed to the delays. The Government further noted that eight expert examinations had been conducted in the case.

75. The applicant considered that only short delays could be attributed to him and noted that there had been long periods of inactivity during the judicial examination of his case.

76. The Court reiterates that the reasonableness of the length of these proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Lugovoy v. Ukraine*, no. 25821/02, § 33, 12 June 2008).

77. The Court notes that the criminal proceedings against the applicant lasted from 30 October 1998 until 2 October 2003, that is, four years, eleven months and three days. The Court also notes that there were periods when no or very little action was taken. It appears that it took more than a year for the domestic authorities to conduct additional medical and ballistic examinations in the case: from 10 December 1999 to 5 January 2001. After the latter date the preparatory hearing was conducted almost two months later and the hearing in the case was scheduled for 14 January 2002, that is ten and a half months later. No action appears to have been taken also between the preparatory hearing of 15 April 2002 and the hearings on the merits on 9 September 2002, that is almost five months. In the Court's opinion such delays are attributed to the domestic authorities and are not justified by the complexity of the case or by the applicant's behaviour. Furthermore, special diligence was required from the domestic authorities, given that the applicant was in detention during the period in question.

78. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings in the applicant's case were excessively long. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

79. The applicant further complained that he had not been allowed to see his family for four years during his pre-trial detention. Article 8 of the Convention, which reads, in so far as relevant, as follows:

“1. Everyone has the right to respect for his ... family life...

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

A. Admissibility

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

B. Merits

81. The Government admitted that there was an interference with the applicant's family life. However, they considered that such interference was justified. They maintained that the issue of allowing family visits was foreseen by the domestic law, namely Article 162 of the Code of Criminal Procedure. The refusal to allow such family visits during the investigation was in the interests of public safety and was necessary in a democratic society. They further noted that after the applicant's conviction he was allowed to see his mother and his wife on numerous occasions.

82. The applicant claimed that interference in his family life did not meet the conditions set on in the second paragraph of Article 8.

1. Whether there has been an interference

83. It was not disputed by the parties that there was “an interference by a public authority” within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his family life guaranteed by paragraph 1 of Article 8.

2. Whether the interference was justified

84. The cardinal issue that arises is whether the above interference is justifiable under paragraph 2 of Article 8. In particular, if it is not to contravene Article 8, the interference must be “in accordance with the law”,

pursue a legitimate aim and be necessary in a democratic society in order to achieve that aim (see *Silver and Others v. the United Kingdom*, judgment of 25 March 1993, Series A no. 61, p. 32, § 84, and *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2853, § 36).

85. The Court must first consider whether the interference was “in accordance with the law”. This expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27, and Series A no. 176-B, p. 52, § 26, respectively).

86. In contending that these requirements were met, the Government referred in their written observations to the provisions of Article 162 of the Code of Criminal Procedure which provides that a detainee may be allowed family visits during pre-trial detention.

87. The Court first notes that the applicant's complaint is limited to the period of his pre-trial detention. The fact that the applicant had family visits after his conviction is therefore of no relevance to the present application, and they indeed are governed by different provisions of the Code of Criminal Procedure, namely Article 345, which obliges the court to grant family visits to the convicted persons.

88. The Court further notes that Article 162 of the Code of Criminal Procedure and section 12(1) of the Pre-Trial Detention Act 1993 provide that an investigator or a judge can allow family visits during pre-trial detention, but that these provisions do not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities in respect of restrictions on detainees' contacts with family. Indeed the above provisions do not require them to give any reasons for their discretionary decision or even to take any formal decision that could be appealed against, and therefore contain no safeguards against arbitrariness or abuse. In the applicant's case the judge simply mentioned that the applicant would be allowed to see his family after consideration of the case on the merits, without any indication why such visits could not be allowed earlier.

89. The Court finds that in these circumstances it cannot be said that the interference with the applicant's right to respect for his family life was “in accordance with the law” as required by Article 8 § 2 of the Convention (see, *mutatis mutandis*, *Ostrovar v. Moldova*, no. 35207/03, §§ 107-108, 13 September 2005).

90. In view of the above finding, the Court considers it unnecessary to examine whether the interference in the present case was necessary in a democratic society for one of the legitimate aims within the meaning of Article 8 § 2 of the Convention.

91. There has therefore been a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

92. The applicant further complained that there were no effective domestic remedies in respect of his complaints relating to the refusal of family visits and the length of the criminal proceedings. He invoked Article 13, which reads:

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

93. The Government argued that there had been no violation of Articles 6 and 8 of the Convention and therefore Article 13 was not applicable.

A. Lack of remedies for the complaint concerning the length of the criminal proceedings

94. The Court finds that this complaint is linked to the complaint about the length of the proceedings. It considers that it is not manifestly ill-founded or indeed inadmissible on any other ground cited in Article 35 of the Convention. It must therefore be declared admissible.

95. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). The Court further refers to its finding in the *Merit* case about lack of an effective and accessible remedy under domestic law for complaints in respect of the length of criminal proceedings (see *Merit v. Ukraine*, no. 66561/01, §§ 78-79, 30 March 2004).

96. The Court does not find any reasons to depart from this case-law in the present case.

97. There has, therefore, been a violation of Article 13 of the Convention.

B. Lack of remedies for the complaint concerning interference with family life

98. The Court finds that this complaint is linked to the complaint under Article 8 of the Convention above and must therefore likewise be declared admissible.

99. The Court notes that it appears that the Ukrainian legal system entitles the persons in pre-trial detention to family visits but does not offer any procedure that would enable to verify whether the discretionary powers

of the investigation and the courts in this matter are exercised in good faith and whether the decisions to grant or refuse all family visits are well reasoned and justified. However, it recalls that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 56, ECHR 2003-VI; *Ostrovar v. Moldova*, no. 35207/03, § 113, 13 September 2005). In so far, therefore, as no remedy existed in domestic law in respect of the quality of Article 162 of the Code of Criminal Procedure and section 12(1) of the Pre-Trial Detention Act 1993, the applicant's complaint is inconsistent with this principle. In these circumstances, the Court finds no breach of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

102. The Government considered this claim unsubstantiated.

103. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated 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 him EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

104. The applicant also claimed EUR 2 000 for the costs and expenses incurred before the Court.

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

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

C. Default interest

107. 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

1. *Declares* unanimously the complaints concerning the length of the applicant's pre-trial detention and of the criminal proceedings against him, the refusal of family visits and the lack of effective remedies for the above complaints admissible;
2. *Declares* by a majority the remainder of the application inadmissible;
3. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of length of the proceedings;
5. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
6. *Holds* unanimously that there has been a violation of Article 13 of the Convention in respect of length of the proceedings;
7. *Holds* unanimously that there has been no violation of Article 13 of the Convention in respect of refusal of family visits;
8. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnyas 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;

9. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Kalaydjieva is annexed to this judgment.

P.L.
C.W.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I fully share the views of my esteemed colleagues on the unnecessary length of the detention and of the criminal proceedings against the applicant. They are especially striking in a case like the present one, where the applicant reported himself to the police and made confessions. Following the investigation, the applicant remained in custody and was deprived of contacts with his family for almost three years (1999-2002) - a period necessary for the domestic authorities to prepare three additional expert reports.

I share the view that the “*delays (in the proceedings) are attributed to the domestic authorities and are not justified by the complexity of the case or by the applicant's behaviour*” and that “[f]urthermore, special diligence was required from the domestic authorities, given that the applicant was in detention during the period in question” (§ 77). The Court was unanimous (§ 51) that in holding their rulings of 15 July 1999, 1 March 2001, 21 January 2002 and 15 April 2002 (see paragraphs 15, 19, 22 and 25), “*the domestic courts did not advance any grounds whatsoever for maintaining the applicant's detention, simply stating that the previously chosen measure was correct*” and that “*at no stage did the domestic authorities consider any alternative preventive measures instead of detention*” (paragraph 50). Although reached separately in Article 6 § 1 and 5 § 3, both conclusions are equally pertinent to the question whether the applicant was “*entitled to trial within a reasonable time or to release pending*”. They are of relevance to the findings of the majority under Article 5 § 4 of the Convention, with which I disagree.

Looking at the circumstances in the case, one cannot avoid the impression that once the applicant was detained at the pre-trial stage of the proceedings, this measure was considered automatically and unquestionably necessary until the proceedings ended. The long and winding road to changing this concept with the value of personal liberty as a principle is illustrated in a series of Bulgarian cases (see *Iliev v. Bulgaria*, no. 33977/96, 26 July 2001, and many subsequent cases). A similar concept of automatically presumed necessity to deprive a person of his liberty is reflected in the provisions of the Ukrainian Code of Criminal Procedure concerning the continuation of detention at the same intervals and whenever a permission for continuation of the time-limits for finalizing investigation is granted as well as in the automatic continuation of detention during the time necessary for the accused to acquaint himself with the investigation file in the absence of any decision to continue the measure of detention. Any concept of automatic lawfulness of deprivation of liberty is incompatible with the Convention principles and there is no doubt that Article 5 § 4 is the procedural guarantee and remedy against such detention.

The brevity of the courts' rulings in the present case reflects the same principle of automatism and of the limited competence of the courts in performing their review on detention at the trial stage of the proceedings. That *“the national courts did not analyze the circumstances for the justification of his detention”* and used *“the standard formulation ‘leave the preventive measure without changes’”* was a central issue in the applicant's complaints under Article 5 § 4 of the Convention (§ 53 of his Observations).

I find myself unable to see what were the remedies which lead the majority to believe that there were remedies *“effective at least in theory as the applicant was entitled to institute proceedings for review of detention and the courts were competent to order his release”* (paragraph 56).

In this regard the Government relied on the fact that *“the national courts repeatedly reviewed the lawfulness of the applicant's detention (on 15 July 1999, 1 March 2001, 21 January and 15 April 2002). Each time the court came to a conclusion that it was the right preventive measure and that it was necessary to continue his detention on remand.... The grounds for his further detention were “relevant” and “sufficient” in view of the existence of a reasonable suspicion and that he was likely to abscond from investigation or court (§§ 90 and 91 of his Observations).* The same rulings were criticized by the Court under Article 5 § 3 in that the courts failed to *“advance any grounds whatsoever for maintaining the applicant's detention, simply stating that the previously chosen measure was correct”*. In my view these conclusions are equally relevant for the applicant's complaints of the formal character and limited scope of the performed review. Article 274 of the 1960 CCP did not require the domestic courts to provide any reasoning in “approving” the initially determined measure. Its second paragraph limits the scope of their review by referring it to the criteria applicable in the process of the initial determination of the measure. In the applicant's case they were considered several years ago and the outlined scope of review could not involve any subsequent circumstances such as the length of his detention up to this moment and/or the authorities' diligence in this period. Having joined the majority in the views on the formal nature and the limited scope of the performed review in Article 5 § 3, I cannot see how the same criticized rulings as the result of proceedings met the requirements of Article 5 § 4 of the Convention.

The respondent Ukrainian Government never argued that there existed other available remedies, or that the applicant failed to file requests for release at the trial stage of the proceedings. The question in the present case is not whether the applicant requested to be released, but whether any request or provision of the law effectively *“entitled him to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”*. The Court never failed to note that *“the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the*

accessibility and effectiveness required for the purposes of Article 5 § 4 (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, p. 30, § 54; *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, p. 19, § 39; and *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, p. 17, § 42 and many others). The general right of an accused “*to lodge requests and make observations on the requests of other parties to the proceedings*” under Article 263-3 of the CCP is not comparable to the *habeas corpus* proceedings required under Article 5 § 4. (paragraph 57) and it was not even argued otherwise. Thus, it remains unclear for example which would have been the competent court, what procedure it would have had to follow, what were the time-limits or periods for the review and on the basis of what criteria the court would have had to take its decision on a request for review of the lawfulness of detention.

The review undertaken in the present case demonstrates that in practice “*the domestic courts did not advance any grounds whatsoever for maintaining the applicant's detention, simply stating that the previously chosen measure was correct*”. Furthermore “*at no stage did the domestic authorities consider any alternative preventive measures instead of detention*”. There is no other provision of the applicable domestic law which establishes a procedure whereby a person can apply to a court to review the lawfulness of his or her detention and it is not entirely clear whether a remedy satisfying the requirements of Article 5 § 4 existed even “in theory”. The respondent Government have failed to establish or at even argue that there existed any practice of the courts other than the one relied on and criticised by the Court as part of its findings under Article 5.3.