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

FIFTH SECTION

CASE OF FELDMAN v. UKRAINE

(Applications nos. 76556/01 and 38779/04)

JUDGMENT

STRASBOURG

8 April 2010

FINAL

04/10/2010

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

In the case of Feldman v. Ukraine**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*
Mykhaylo Buromenskiy, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 16 March 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 76556/01 and 38779/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Boris Mordukhovich Feldman ("the applicant"), on 14 November 2000 and 2 September 2004 respectively.

2. The applicant was represented by Mr V.N. Ageyev, 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 pre-trial detention had been lengthy and unlawful and that it had not been reviewed speedily. He further alleged that the domestic courts had lacked independence and impartiality, that his right to defence had been violated and that his presumption of innocence had not been respected.

4. On 15 November 2006 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3). On 13 April 2007 the Court put additional questions to the parties.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Dnipropetrovsk, Ukraine.

A. Background of the case

6. The applicant was the Vice-President, founder and majority shareholder of the Bank Slavyansky (*hereinafter* – the Bank). On 2 February 2000 the State Tax Police instituted criminal proceedings into tax evasion by the management of the Bank.

7. On 10 March 2000 the State Tax Administration instituted another set of criminal proceedings for abuse of office by the management of the Bank.

B. Criminal proceedings against the applicant

8. On 13 March 2000 the applicant was arrested and detained first in the temporary detention centre (the ITU) and then in the pre-trial detention centre (the SIZO) (see below the part on the applicant's pre-trial detention).

9. On 14 March 2000 criminal proceedings were instituted against the applicant for abuse of office with particularly aggravated consequences.

10. On the same day the State Tax Administration issued a press release, the relevant extract of which reads as follows:

> "...During the investigation into a criminal case concerning financial fraud related to the transfer of significant funds abroad, it was established that the founders and chairpersons of the Bank Slavyansky had abused their power and had increased the interest rates on their and their relatives' deposit accounts....
>
> ... The activities of the above persons were aimed at artificially decreasing the Bank's income, which would make it possible to pay less taxes to the State Budget.... All these funds were redistributed by the bankers among a narrow circle of chairpersons who were, in fact, the real owners of the Bank..."

11. In April 2000 the Ukrainian News Agency "UNIAN" provided information about the session of the Coordinating Committee on Combating Corruption and Organised Crime. The relevant extract reads:

> "It is a matter of honour for the General Prosecutor's Office and the State Tax Administration to bring the story of the Bank Slavyansky to a logical conclusion" – said the President of Ukraine during his speech at the session... He stated that the chairpersons of the Bank had turned it into a source of uncontrolled personal income. "Such money-makers have powerful patrons, and there is great pressure on the investigation", - mentioned the President."

12. These statements were reproduced by several Ukrainian newspapers – *Pravda Ukrainy*, no. 61, 25 April 2000; *Kyivskie Vedomosti*, no. 90, 22 April 2000; *Galitski Kontrakty*, no. 36, September 2001.

13. On 18 April, 2 and 16 June 2000 the Tax Police instituted three more sets of criminal proceedings against the applicant and subsequently joined all these criminal cases against the applicant together.

14. On 21 August 2000 the applicant was formally charged with tax evasion, abuse of power, embezzlement and bribery.

15. On 1 February 2001 the investigation in the case was completed.

16. In April 2001 the *Radio Svoboda* web-site made available recordings of conversations which had allegedly taken place between the President of Ukraine, Mr Kuchma, and the Head of the State Tax Administration, Mr M. A. There recordings were provided by Mr Melnychenko, who claimed to have made them using a digital recorder placed under the sofa in the office of the President of Ukraine[1]. According to these records, the criminal proceedings against the applicant and the activities of his lawyers were being closely monitored and an arrangement had been made to secure the applicant's conviction by changing the territorial jurisdiction of the case to courts in which the applicant had no connections and could not interfere with the proceedings; accordingly, the jurisdiction of the Artemivskiy Local Court of Lugansk and the Lugansk Regional Court of Appeal had been arranged following discussions with the Deputy President of the Supreme Court of Ukraine, the presidents of the above courts and other judges.

17. On 12 July 2001 the pre-trial investigation was resumed for one day to include additional materials.

18. On 13 July 2001 the pre-trial investigation was completed and the applicant was given access to three additional volumes of the case-file.

19. On 1 November 2001 the investigator rejected a motion by the applicant, who already had several lawyers, to appoint one more lawyer, Mrs K.

20. On 5 November 2001 the Deputy Prosecutor General referred the case to the Supreme Court of Ukraine. The Deputy President of the Supreme Court of Ukraine referred the case to the Lugansk Regional Court of Appeal, which in its turn referred it to the Artemivsky Local Court of Lugansk ("the Artemivsky Court) for examination on the merits. According to the applicant he was not informed about the reasons or legal grounds for choosing the territorial jurisdiction of his case.

21. On 10 December 2001 the trial proceedings commenced. During the hearings the applicant and his lawyers unsuccessfully challenged the judges of the court on numerous occasions (31 January, 1 February, 22 February, 8 April 2002).

---

[1] For further factual circumstances on the matter see *Melnychenko v. Ukraine*, no. 17707/02, §§ 7-9, ECHR 2004-X, and also *Gongadze v. Ukraine*, no. 34056/02, § 138, ECHR 2005-…

22. On 6 February 2002 the prosecutor requested the court to deprive the applicant and his lawyers of the right to lodge motions. He maintained that they had been lodging multiple motions, all of which had been rejected in any case, and that the further examination of such motions would therefore be a waste of time. The court allowed this request.

23. On 18 February 2002 the weekly newspaper *Business* published an interview with the Presiding Judge L., the relevant extract of which reads as follows:

> "...The lawyers had a hundred motions! And when, so to speak, we were "fed up" with them – we "hurled them back" in some way and said: that's enough!"
>
> *Business*: Does a court have a right to forbid the lodging of motions in this way?
>
> L.: No, it hasn't. But the trial is [following] a certain sequence, and if one of the stages is delayed and thus the truth is not being established, but its establishment is being obstructed ... we can, roughly speaking, "throw" the lawyers out of the proceedings, but we do not do that. We only stopped their "logorrhoea" and started the trial..."

24. According to the applicant's submissions, Judge L. also forbade lawyers to communicate with the applicant in the court room, whereas they were able to communicate with him fully in the SIZO.

25. On 8 April 2002 Presiding Judge L. interrupted the lawyer F.'s speech for the defence, which had lasted since 22 March 2002 in seven consecutive hearings, and forbade him to continue it. He considered that this speech was no longer defensive, but "was political and only contained criticism of the authorities".

26. On 9 April 2002 the court deprived three of the other lawyers, Mr P, Mr A. and Mrs Y., of the possibility of delivering their speeches for the defence.

27. The applicant pronounced his final pleadings from 11 to 17 April 2002 in six consecutive hearings. On 17 April 2002 the court interrupted him and prohibited him from finishing his plea. The court noted that despite two warnings on 11 and 15 April 2002 the applicant had continued to abuse his right to a last plea by repeating his previous arguments, reading out paragraphs from law textbooks, expressing negative remarks and threats in respect of the investigators, making political statements and claiming that his case had been specially mounted. The court also expelled the applicant from the court room.

28. On 19 April 2002 the Artemivskiy Court convicted the applicant of tax evasion and embezzlement by abuse of power and sentenced him to nine years' imprisonment. This judgment was challenged before the Lugansk Regional Court of Appeal.

29. During a press conference on 16 May 2002 Mr M. A. announced that the audio recordings allegedly made in the President's Office (see paragraph 16 above) were false and had been forged at the applicant's instructions. On

16 October 2002 Mr Melnychenko wrote a letter to the Kyiv Shevchenkivskiy District Court ("the Shevchenkivskiy Court") and the Head of the Temporary Investigative Commission of the Verkhovna Rada of Ukraine, denying Mr M. A.'s accusations and confirming the authenticity of these recordings. He also stated that he had never met the applicant or received any order on his behalf.

30. On 28 August 2002 the applicant's lawyer challenged the judges of the appellate court.

31. The same day the applicant's lawyer F. was stopped by the tax police while driving a car belonging to a Mr K. According to the Government this measure was taken in the context of criminal proceedings instituted against the above-mentioned Mr K. on 9 April 2002 and in accordance with a seizure order issued by the tax police on 15 April 2002. According to the applicant, the police took the materials of the file concerning his case from lawyer F. The Government denied this latter contention.

32. On 3 September 2002 the hearings before the Lugansk Regional Court of Appeal ("the Lugansk Court") took place without the applicant's lawyers Mr F. and Mr A., although the applicant and his lawyer P., who was present, insisted on their participation. The Court of Appeal also denied the applicant's right to a final plea.

33. On 14 September 2002 the Lugansk Court upheld the judgment with minor changes and found no procedural breaches in the proceedings before the first-instance court. By a separate ruling the court noted that the applicant's lawyers A. and F. had been breached the code of ethics for lawyers.

34. On 10 March 2004 the Supreme Court of Ukraine acquitted the applicant of tax evasion, but upheld his conviction for embezzlement by abuse of power. The Supreme Court reduced his sentence to five years' imprisonment. The court found no procedural violations in the proceedings before the lower courts.

C. Applicant's pre-trial detention

35. On 13 March 2000 the applicant was arrested on suspicion of tax evasion. In particular, he was suspected of under-reporting the income of the "Ibris Ltd", where he also worked at that time as a General Director. He had allegedly obtained a bank credit and failed to include the amount of this credit in the company's gross income for the purpose of the tax declaration. The reason given for the applicant's arrest was the risk of his absconding and obstructing the course of justice.

36. On 14 March 2000 the Deputy Prosecutor General of Ukraine ordered the applicant's detention on remand on the ground that the applicant was suspected of a serious crime and there were grounds to believe that he might abscond or obstruct the course of justice. The applicant's detention

was extended on successive occasions by the Deputy Prosecutor General of Ukraine – to four months on 11 May 2000; to six months on 12 July 2000, to nine months on 13 September 2000 and to twelve months on 20 November 2000 on the ground that he was suspected of serious crimes and could abscond.

37. On 16 May 2000 the Kyiv Pecherskiy District Court ("the Pecherskiy Court") dismissed the applicant's application for release, lodged by his lawyer on 17 March 2000. The court decided that the detention order was well-founded and made in accordance with law. This ruling was not subject to appeal.

38. On 23 March 2001 the applicant lodged an application for release with the Shevchenkivskiy Court. On 27 April 2001 the court dismissed this request, having found that on 1 February 2001 the pre-trial investigation had been completed, the applicant and thirteen co-accused had been given access to the case-file and the period for consulting the case materials was still ongoing. On 13 June 2001 the Kyiv City Court upheld the ruling of 27 April 2001 on cassation. However, on 30 May 2002 the Supreme Court quashed the decisions of the lower courts under the new cassation procedure and referred the matter for fresh consideration to the first-instance court. The Supreme Court found that the lower courts had not decided on what grounds the applicant was to remain in custody after the period of his detention under the prosecutors' orders had expired.

39. On 16 August 2001 the Shevchenkivskiy Court dismissed the applicant's application for release, lodged on 6 August 2001.

40. On 21 August 2001 the Pecherskiy Court allowed the applicant's application for release, lodged on 3 August 2001. The court found that since the pre-trial investigation had been resumed on 12 July 2001, the duration of the applicant's pre-trial detention had to be extended by the Supreme Court. As the investigative authorities had failed to seek such an extension, the applicant's further detention was unlawful and the applicant had to be immediately released.

41. On 22 August 2001 the applicant, who was about to leave the SIZO, was apprehended again, following an investigator's order within the framework of another criminal case which had been instituted against him and was later joined to the initial case.

42. On 23 August 2001 an investigator of the State Tax Administration requested the Shevchenkivskiy Court to order the applicant's detention on remand. The investigator referred to the seriousness of the charges against the applicant and the risk of his absconding. In particular, the request stated:

> "During the pre-trial investigation Mr Feldman expressed his mistrust in the Ukrainian law-enforcement bodies and courts on several occasions, and maintained that his case ought to be examined by the European Court alone, and that for this purpose he had to be outside Ukraine..."

43. On 24 August 2001 the Shevchenkivskiy Court extended the period of the applicant's detention until 2 September 2001.

44. On 28 August 2001 the Kyiv Court of Appeal quashed the decision of 21 August 2001 (see paragraph 40 above) on the ground that despite the fact that the prosecutors had extended the applicant's pre-trial detention for twelve months the prosecution had taken only ten months and seventeen days for the investigation. Therefore, in the court's opinion, the reopening of the investigation for one day did not require any new decision on the applicant's detention.

45. On 3 September 2001 the *Business* weekly newspaper published an interview with Mr P., the Head of the Investigation Department of the State Tax Administration. The relevant extract reads as follows:

> "Why are Feldman and others detained today? Because Feldman stressed on several occasions that he did not trust Ukrainian justice. He considers that in Ukraine he will not have a fair trial. If he does not trust Ukrainian justice, he will try to find another system. Which one? Outside Ukraine? So how we can release him?"

46. On 19 September 2001 the Shevchenkivskiy Court, following a complaint by the applicant, found that the applicant's arrest on 22 August 2001 had been unlawful. The court established that there had been no legal grounds for such an arrest and that the suspicion of the applicant's absconding abroad had been unsubstantiated. The court, however, refused to allow the applicant's claim for immediate release for lack of jurisdiction. This decision was overruled by the Kyiv City Court of Appeal on 1 October 2001. The appellate court found that the applicant's arrest on 22 August 2001 had been lawful.

47. On 25 September 2001 the Pecherskiy Court examined the applicant's complaint against the prosecutor's detention order of 14 March 2000 and terminated the proceedings on the ground that the same issue had been resolved in the decision of the same court of 16 May 2000.

48. On 26 September 2001 the Pecherskiy Court considered the applicant's complaint against the General Prosecutor's Office and the administration of SIZO no. 13 in Kyiv concerning his unlawful detention from 31 August 2001 onwards. The court rejected part of this complaint for lack of jurisdiction. On 27 September 2001 the Pecherskiy Court considered the remainder of the complaint and found for the applicant. It acknowledged the unlawfulness of the applicant's detention from 31 August 2001 onwards on the ground that there was no court decision authorising the applicant's detention. The court ordered the SIZO to release the applicant immediately but this decision was not enforced (see next paragraph) and was later overruled by the Kyiv Court of Appeal on 22 November 2001 on the ground that the first-instance court had applied the provisions of civil and criminal law together. The decision of the Court of Appeal was also quashed in its turn by the Supreme Court on 6 November 2002. The case was remitted for a fresh consideration on appeal. On 14 November 2003 the Court of Appeal

quashed the decision of the first-instance court and issued a new decision rejecting the applicant's complaint against the administration of the SIZO. On 17 March 2005 the Supreme Court quashed the decision of the Court of Appeal of 14 November 2003 and upheld the decision of the Pecherskiy Court of 27 September 2001.

49. Following the judgment of the Pecherskiy Court of 27 September 2001 ordering the applicant's immediate release (see previous paragraph), the Deputy Prosecutor General of Ukraine issued on the same day the “Prescription on elimination of breaches of law” (*„Припис про усунення порушень закону”*), requesting the State Penitentiary Department not to allow the applicant's release from detention on the basis of the above Pecherskiy Court's decision, stating that this decision was unlawful. The applicant was not released and the same day an investigator of the State Tax Administration requested another local court - the Shevchenkivskiy Court to order the applicant's detention on remand. The investigator referred again to the risk of the applicant's absconding abroad, formulated in the same way as the request of 23 August 2001. On the same day the Shevchenkivskiy Court extended the period of the applicant's detention until 7 October 2001.

50. On 12 December 2001 the trial proceedings commenced and the Artemivskiy Court upheld the applicant's detention on remand, referring to the seriousness of the charges against him.

51. On 1 February 2002 the court further rejected requests for release lodged by the applicant's representative during the court hearings.

D. Other events

52. In the context of civil proceedings to which one of the applicant's companies was a party, the Tax Administration lodged on 25 January 2007 a request for renewal of the time-limit to appeal against the decision of 30 December 2004, of which it was allegedly not aware. The court allowed the request on 31 January 2007. The applicant considered the renewal as an attempt to exert pressure on him for lodging applications with the Court.

II. RELEVANT DOMESTIC LAW

A. The Law of Ukraine “on the procedure for the compensation of damage caused to a citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts” of 1 December 1994

53. The relevant provisions of the Law (first published in the Gazette of the Verkhovna Rada of Ukraine of 3 January 1995, No. 1, article 1) read:

Section 1

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

...

(3) unlawful conduct in the course of search and seizure activities ...

Section 2

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

acquittal by a court;

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

the refusal to initiate criminal proceedings or the termination of criminal proceedings on the grounds stipulated in sub-paragraph 2 of paragraph 1 of this section;

the termination of proceedings for an administrative offence.”

B. The Code of Criminal Procedure

54. The text of Article 120 of the Code of Criminal Procedure of 1960 (terms of pre-trial investigation) is summarised in the judgment *Merit v. Ukraine* (no. 66561/01, 30 March 2004, Relevant domestic law and practice).

55. The texts of Article 156 of the Code of Criminal Procedure (periods of detention during an investigation) and Article 218 (announcing to the accused the termination of the investigation in the case and allowing him to inspect the materials in the case file) are summarised in the judgment *Nevmerzhitsky v. Ukraine* (no. 54825/00, 5 April 2005, § 53).

56. Under Article 37 of the Code of Criminal Procedure a criminal case is to be examined in a court of the region where the crime was committed. If the place of crime is unknown, the case should be examined by a court of the region where the pre-trial investigation was completed.

57. In order to provide the most effective and full examination of a case, it can, in special circumstances, be referred to a court of the region where the accused works or lives, or where a majority of the witnesses are located (Article 38 § 1 of the Code of Criminal Procedure).

58. The question of referring a case from a court in one region to one in another region is decided by the Head of the Supreme Court of Ukraine or his Deputy (Article 38 § 4 of the Code of Criminal Procedure).

THE LAW

I. JOINDER OF THE APPLICATIONS

59. Pursuant to Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their common factual and legal background.

II. SCOPE OF THE CASE

60. In his reply to the Government's observations the applicant made several new complaints under Article 5 § 5 and 14 which are not an elaboration of the applicant's original complaints on which the parties had commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

61. The applicant alleged that his detention had been unlawful and unreasonably long and that the lawfulness of his detention had not been reviewed. He relied on Article 5 §§ 1 (c), 3 and 4 of the Convention, which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 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. Lawfulness of the applicant's pre-trial detention under Article 5 § 1 (c)

1. Admissibility

62. The Government maintained that the unlawfulness of the applicant's detention from 31 August 2001 to 12 December 2001 had been ultimately recognised by the domestic courts (see paragraph 48 above) and that the applicant, on the basis of these findings by the domestic courts, could claim compensation under the Law of Ukraine "on the procedure for the compensation of damage caused to a citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts" (see paragraph 53 above). Furthermore, the above period had been included in his overall term of detention. Accordingly, the Government concluded that the applicant had lost his victim status.

63. The applicant noted that the possibility to claim compensation for unlawful detention was open only to those who were acquitted; as he had been convicted he could not claim compensation under the law mentioned by the Government. He further submitted that the fact that the period of detention which was found to be unlawful had been included in the general period of his detention did not constitute a redress.

64. The Court notes that part of the applicant's pre-trial detention was found unlawful by the domestic authorities, however, the applicant was not offered any redress for such violation and could not claim any compensation under the law referred to by the Government, given that it applied only to those who had been acquitted. The Court therefore rejects this objection.

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

2. Merits

66. The applicant contended that the reasons for his detention had been unfounded and that the actions of which he had been accused did not constitute a crime.

67. The Government considered that, with the exception of the period which had been recognised as unlawful by the domestic courts, the

applicant's detention was in compliance with law. In particular, after the investigation in the applicant's case had been completed on 1 February 2001, the applicant and co-accused had been given access to the case file. The accused and their lawyers had studied the case file until 11 July 2001. On 12 July 2001 the investigation was reopened for one day to admit new materials and on 13 July 2001 the accused were given access to the case file until 1 November 2001. On 5 November 2001 the case file was submitted to the court, which held a preparatory hearing on 12 December 2001 and, among other things, considered the applicant's application for release. They also observed that, of the statutory twelve-month time-limit for pre-trial detention, the investigative authorities had used less than eleven months, and noted that the under domestic law the period taken by the defendant to study the case file was not included in the period of his pre-trial detention.

68. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and lay down an obligation to conform to the substantive and procedural rules thereof. While it is for the national authorities, notably the courts, to interpret and apply domestic law, the Court may review whether national law has been observed for the purposes of this Convention provision (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

69. However, the "lawfulness" of detention under domestic law is the primary, but not always the decisive element. The Court must, in addition, be satisfied that the detention, during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see *Winterwerp v. the Netherlands*, 24 October 1979, § 45, Series A no. 33).

70. Turning to the present case, the Court notes that the applicant's pre-trial detention can be divided into three periods.

71. The first period, covered by the detention orders issued by the prosecutors, lasted from the day of the applicant's arrest on 13 March 2000 until 13 March 2001, when the last extension of the detention ordered by the prosecutor expired (see paragraph 36 above). The Court notes that there were no court decisions taken as to the applicant's continued detention during the above periods. The decisions to prolong the applicant's detention were taken by prosecutors, who were a party to the proceedings, and cannot in principle be regarded as "independent officers authorised by law to exercise judicial power" (see *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004).

72. The second period, which lasted from 14 March 2001 until 12 December 2001, was not covered by any decision ordering his further detention. The Court notes that no domestic decision was required to validate a period of detention during which a person had been given access to the case file, in accordance with Article 156 of the Code of Criminal Procedure as then in force. Furthermore, the periods of transmittal and transfer of the case from the prosecutor to the court and back were often not covered by any decision. The Court further notes that the relevant domestic law regulates procedural steps concerning the study of the case file, the committal proceedings and transmittals of the case for further investigation, but does not set clear rules as to which authority may prolong the defendant's detention, on what grounds and for what term. The Court has held on many occasions that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Svershov v. Ukraine*, no. 35231/02, § 54, 27 November 2008; *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, § 72, 27 November 2008 and *Khudoyorov v. Russia*, no. 6847/02, §§ 146-148, ECHR 2005-X).

73. The third period, which was covered by the above-mentioned court decision of 12 December 2001 and several consecutive court orders, started on 12 December 2001 and ended with the applicant's conviction on 19 April 2002. The Court considers that the absence of any precise provisions laying down whether – and if so, under what conditions – detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of court proceedings does not satisfy the test of the "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention (see *Baranowski v. Poland*, no. 28358/95, § 55, ECHR 2000-III, and *Kawka v. Poland*, no. 25874/94, § 51, 9 January 2001).

74. The Court observes that under Article 242 of the Code of Criminal Procedure, a domestic court, when committing a person for trial, must examine whether the preventive measure that was selected at the investigation stage is appropriate. The reasons for the preventive measure are required from the court only when it decides to change the measure (Article 244 of the CCP). It does not appear that the court is required to give reasons for continuing a defendant's detention or to fix any time-limit when maintaining the detention.

75. The Court further notes that similar situations were previously examined by this Court in other cases against Ukraine and with respect to the same legal framework. The Court has found the continued pre-trial detention ordered by the prosecutor and the following period not covered by any order to be incompatible with the requirements of lawfulness under

Article 5 § 1 given that there were no judicial decision ordering such detention (see *Yeloyev v. Ukraine*, no. 17283/02, §§ 45-51, 6 November 2008; *Solovey and Zozulya v. Ukraine*, cited above, §§ 70-73). As to the consecutive period of detention under the judicial order, the Court found that judicial detention orders for indefinite period of time and without indication of the grounds for such detention did not afford the applicant the adequate protection from arbitrariness which is an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1 (see *Yeloyev v. Ukraine*, cited above, §§ 52-55). The Court sees no reason to depart from its reasoning given in the above-mentioned judgments and concludes that there has accordingly been a violation of Article 5 § 1 of the Convention in the present case.

B. Unreasonable length of detention (Article 5 § 3)

1. Admissibility

76. The Court notes that this part of the application 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

77. The applicant considered that the investigative measures taken by the domestic authorities had been excessive and could not justify his lengthy detention.

78. The Government maintained that the length of the applicant's pre-trial detention had been reasonable in view of the complexity of the case and the large number of investigative measures that had had to be taken. They therefore considered that the domestic authorities had dealt with the case with due diligence. They also contended that the grounds for the applicant's detention had been relevant and sufficient because of the serious risk of the applicant's absconding, as he had had significant financial resources and many contacts abroad.

79. The Court notes that the applicant was apprehended on 13 March 2000. He was sentenced to imprisonment on 19 April 2002, thus the period of his detention on remand lasted two years and one month, which was not short in absolute terms.

80. The Court notes that the seriousness of the charges against the applicant and risk of his absconding remained the only reasons for the local courts' refusals to release him. However, Article 5 § 3 requires that after a certain lapse of time the persistence of reasonable suspicion does not in itself justify the deprivation of liberty and the judicial authorities should

give other grounds for continued detention (see, *Jablonski v. Poland,* no. 33492/96, § 80, 21 December 2000; *I.A v. France,* no. 28213/95, § 102, ECHR 1998-VII). Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Ilowiecki,* cited above, § 61). No such reasons were given by the courts in the present case. By relying essentially on the gravity of the charges and the risk of absconding, the authorities prolonged the applicant's detention on grounds which cannot be regarded as "relevant and sufficient".

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

C. Lack of review of the lawfulness (Article 5 § 4)

1. Admissibility

82. The Government considered that the review proceedings had been conducted with due diligence, with exception of two sets of the proceedings: the proceedings initiated in March 2001 (see paragraph 38 above) and those in September 2001 (see paragraph 48 above), which lasted one year and five months and three years and six months respectively. However, in the Government's opinion although these proceedings could raise an issue of speediness, they fell outside the scope of Article 5 § 4, since they concerned the period of detention prior to the applicant's release on 22 August 2001 and, thus, an interruption in the applicant's pre-trial detention.

83. The applicant disagreed.

84. The Court notes that although the applicant's pre-trial detention had been formally interrupted by the immediate release order, it appears from the materials submitted by the parties that the applicant had not been able to regain his liberty on the date mentioned by the Government, since he was immediately rearrested by the investigator (see paragraph 41 above). Therefore, there had been no visible signs of a change of the applicant's situation during this very short period of formal but not actual liberty. Therefore, the Court concludes that the applicant's detention both prior and after 22 August 2001 was in reality the uninterrupted period of the applicant's detention on remand under Article 5 § 1 (c) as a criminal suspect. The Court therefore rejects the Government's objection.

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

2. Merits

86. The applicant contended that the review proceedings were lengthy and the decisions were unfounded. Even where the courts decided on his release, such decisions remained ineffective due to interference by the prosecutor's office, which prohibited its enforcement or ordered his immediate re-arrest.

87. The Government maintained that the lawfulness of the applicant's pre-trial detention had been reviewed speedily, except the ones initiated in March and September 2001.

88. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest and the legitimacy pursued by the arrest and the ensuing detention (see *Butkevičius v. Lithuania*, no. 48297/99, § 43, ECHR 2002-II (extracts).

89. The Court further reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see, *Baranowski v. Poland*, no. 28358/95, § 68, ECHR 2000-III).

90. In the present case, the applicant's requests for release, lodged on 17 March 2000, 23 March, 3 and 6 August 2001 were examined on 27 April, 16 May, 16 and 21 August 2001 respectively. Thus they were dealt within periods of sixty, thirty-five, eighteen and ten days respectively. The Court finds that the applications for release introduced by the applicant were not examined “speedily” as required by Article 5 § 4 (see *Kadem v. Malta*, no. 55263/00, §§ 41-45, 9 January 2003, and *Rehbock v. Slovenia*, no. 29462/95, §§ 82-86, 28 November 2000). Moreover, even in those situations when the courts ordered the applicant's release, such release orders remained ineffective either due to the applicant's immediate re-arrests or an objection by the prosecutor (see paragraphs 41 and 49 above). In the Court's view, there was thus no adequate judicial response to the applicant's complaints, contrary to the requirements of Article 5 § 4.

91. The Court considers that there has accordingly been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

92. Referring to Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention, the applicant complained that he had not had a fair trial, that the domestic courts lacked impartiality and had violated his procedural rights and that his presumption of innocence had not been respected as a result of the statements published in the media (see paragraphs 10, 11 and 12 above). The relevant parts of Article 6 provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 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..."

A. Admissibility

93. The Court notes that this part of the application 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. Independence and impartiality of the tribunal (Article 6 § 1)

94. The applicant maintained that the reasons given by the Government for changing the jurisdiction in his case had never been set out in any official documents and they had not been among the reasons foreseen by the law for changing jurisdiction. He considered that the recordings made in the President's Office confirmed that a conspiracy against him was the only reason for sending his case for consideration to the Lugansk Region, and that such records confirmed that the Lugansk courts had been biased from very beginning.

95. The Government reiterated the guarantees of independence of judges provided for in the Ukrainian legislation. They further contended that there were grounds for changing the territorial jurisdiction of the applicant's case, given his possible influence on different officials in Zaporizhzhya Region,

Dnipropetrovsk Region and the Autonomous Republic of Crimea. They also maintained that the applicant's challenges of judges were not founded.

96. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the *Findlay v. the United Kingdom* judgment of 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I, ...).

97. As to the condition of "impartiality" within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. The Court considers that only the second of these tests was relevant in the instant case (see, *mutatis mutandis*, *Gautrin and Others v. France*, 20 May 1998, § 58, *Reports* 1998-III,).

98. In the instant case, the Court notes that despite the strict rules on the courts' territorial jurisdiction set up in the CCPU, the decision to send the applicant's case to the Artemivsky Court was not justified by any of these rules. It does not appear from the materials of the case that the applicant was notified about the reasons or legal grounds for choosing the territorial jurisdiction in his case. The Court further notes that the applicant's fear as to the bias of the domestic courts in his case had been further supported by the public statements made by the President and the Tax Administration (see paragraphs 10 and 11 above) and the actions taken against his lawyer (see paragraph 31).

99. Finally, the Court notes the applicant's arguments that according to the audio-recording of President Kuchma's conversations, the domestic courts were not impartial and independent. The Court considers that it does not need to have regard to these controversial recordings as the other materials available to it are sufficient to conclude the applicant's fears that the domestic courts lacked impartiality can be held to be objectively justified.

100. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. *Presumption of innocence (Article 6 § 2)*

101. The applicant maintained that publications in the media about him had not respected his presumption of innocence.

102. The Government maintained that the publications in question concerned an important topic of general interest and no names were mentioned in the above publications.

103. The Court notes that the public statements made by the President and the Tax Administration concerning the applicant's case were part of the

reasoning for concluding that the applicant had not had a fair trial by the independent and impartial tribunal (see paragraph 98 above). Therefore, the Court does not find it is necessary to examine this issue separately under this head.

3. *Right to defence (Article 6 § 3 (c))*

104. The applicant maintained that the interference with the work of his defence team was in breach of his rights.

105. The Government noted that the applicant was not deprived of the right to lodge motions in the courts. They further contended that the court had given the applicant ample opportunity to deliver his final plea and that the interruption of his speech had been justified. They also maintained that the applicant had access to his lawyers in the detention centre and that the limitation on communication between the applicant and his lawyers in the courtroom had been justified. They submitted that the incident when the applicant's lawyer F. was stopped by the police had no relevance to the applicant's case, and had been conducted in the framework of a separate investigation concerning the car's owner.

106. The Court notes that the actions taken against the applicant's lawyer were part of the reasoning for concluding that the applicant had not had a fair trial by the independent and impartial tribunal (see paragraph 98 above). Therefore, the Court does not find it is necessary to examine this issue separately under this head.

V. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

107. Referring to the request for his arrest by the State Tax Administration, the interview with the Head of its Investigation Department and the reopening of the civil proceedings to which one of the applicant's companies was a party (see paragraphs 42, 45 and 52), the applicant complained that the authorities had justified the detention by his intention to submit an application to the Court and thus urged him to withdraw his application. The applicant further complained that renewal of the proceedings in the civil case had been made with the same purpose. He referred to Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A. Parties' submissions

108. The Government maintained that the formulation used by the law-enforcement authorities concerned the assessment of the risk of the applicant's absconding and was by no means aimed at preventing his lodging of an application with the Court. They noted that the domestic courts had not expressed any opinion to the effect that the applicant's detention was necessary for to prevent him from communicating with the Court. Furthermore, there was no indication that the applicant's right to individual petition had ever been impaired by the domestic authorities. The fact that the applicant had maintained communication with the Court demonstrated that there was no such intention.

109. As to the applicant's additional complaint about the renewal of proceedings in the civil case concerning one of his companies, the Government considered that it had no relevance to the present case and that the applicant failed to demonstrate any such link.

110. The applicant considered that the domestic authorities had clearly expressed their positions that the reason for his detention was his attempt to address international tribunals (which could be only the European Court of Human Rights).

B. General principles

111. Under the Court's case-law, a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see *Cooke v. Austria*, no. 25878/94, § 46, 8 February 2000, and *Ergi v. Turkey*, 28 July 1998, § 105, *Reports* 1998-IV).

112. The Court reiterates that Article 34 of the Convention imposes an obligation on a Contracting State not to hinder the right of individual petition. While the obligation imposed is of a procedural nature, distinguishable from the substantive rights set out in the Convention and Protocols, it flows from the very essence of this procedural right that it is open to individuals to complain of its alleged infringements in Convention proceedings (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002). The Court also underlines that the undertaking not to hinder the effective exercise of the right of individual application precludes any interference with the individual's right to present and pursue his complaint before the Court effectively (see, among other authorities and *mutatis mutandis*, *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV, § 105; *Kurt v. Turkey*, 25 May 1998, *Reports* 1998-III, § 159; *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV; *Şarlı v. Turkey,* no. 24490/94, §§ 85-86, 22 May 2001; and *Orhan v. Turkey*, no. 25656/94, 18 June 2002).

113. The Court further reiterates that it is of the utmost importance for the effective operation of the system of individual petition, guaranteed by Article 34 of the Convention, that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the paragraphs, cited above, of the *Akdivar and Others* and *Kurt* judgments). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention complaint (see the above-mentioned *Kurt* and *Şarlı* cases, §§ 160 and 164, and §§ 85-86 respectively).

C. Court's assessment

114. The Court notes that the applicant did not allege that he had ever been questioned by the authorities concerning his application lodged with the Court. Nor did he present any proof that the domestic authorities had ever prevented his communicating with the Court at any stage of the proceedings. In the Court's opinion, it is regrettable that a mention of the Court appeared in the context of the investigator's request that the court order the applicant's arrest, but the Court is not persuaded that the wording of the above request, apart from expressing the fears that the applicant might leave the territory of Ukraine, suggests also a link between the fact that he had lodged an application with this Court and the necessity to detain him, (see paragraph 42 above). The other arguments presented by the applicant concerning the conduct of the domestic authorities (see paragraphs 45 and 52), which he interpreted as interference with his right to individual petition, are even more tenuous.

115. The Court considers that Ukraine has not failed to comply with its obligations under Article 34 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

116. The applicant made a number of other complaints referring to Articles 3, 6, 7 and 8 of the Convention, and Article 2 of Protocol No. 7.

117. The Court has examined the remainder of the applicant's complaints as submitted by him. However, in the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

118. Accordingly, it rejects this part of the application in accordance with Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. 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

120. The applicant claimed 437,019,230 euros (EUR) in respect of pecuniary damage and EUR 5,000,000 in respect of non-pecuniary damage.

121. The Government considered that there was no causal link between the pecuniary damage claimed and the violations alleged. They further considered the claim for non-pecuniary damage unsubstantiated.

122. The Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *Nadtochiy v. Ukraine*, no. 7460/03, § 55, 15 May 2008). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction for the violation of Article 6. As to the other violations found, the Court does not discern any causal link between these violations and the pecuniary damage claimed. At the same time, the Court takes the view that the applicant has suffered non-pecuniary damage as a result of the violations of Article 5. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

123. The applicants also claimed UAH 456,261,500 (EUR 66,238,131.87) for costs and expenses.

124. The Government considered that the applicant failed to demonstrate that the claimed costs had been reasonable and had actually occurred.

125. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

126. 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 complaints under Article 5 §§ 1, 3 and 4 and Article 6 §§ 1 (courts' impartiality), 2 and 3 (c) of the Convention admissible and the remainder of the complaints inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention concerning the lack of impartiality of the domestic courts;

6. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 6 § 2 of the Convention;

7. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 6 § 3 of the Convention;

8. *Holds* that Ukraine has not failed to comply with its obligations under Article 34 of the Convention;

9. *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 8,000 (eight 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[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 8 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Peer Lorenzen President