CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 64200/00
by Valeriy Mykhaylovych FALKOVYCH
against Ukraine

The European Court of Human Rights (Second Section), sitting on 29 June 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 13 October 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Valeriy Mykhaylovych Falkovych, is a Ukrainian national born on 12 October 1960. He is a former Deputy General Director of the *Yedyni Energetychni Systemy Ukrayiny* company (*hereinafter Y.E.S.U.*). The applicant absconded after his release from detention on 18 August 2001 and his whereabouts are unknown. The application was lodged with the Court on his behalf by Mr Volodymyr Kutovy, later succeeded by Mr Yaroslav Zeykan, both lawyers practising in Ukraine.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 18 August 2000 the applicant was summoned to the General Prosecution Service (the "GPS") where he was interrogated as a witness in a criminal investigation against the Y.E.S.U. company. On the same day the applicant was arrested on suspicion of having embezzled funds (Article 86-1 of the 1960 Criminal Code [The new Criminal Code was adopted on 1 April 2001 and entered into force on 1 September 2001], the "CC"). Also on the same day the investigator of the GPS decided that the applicant should be held in custody and issued a resolution for that purpose.

On 19 August 2000 the GPS instituted a criminal investigation into the offences envisaged by Articles 70 (smuggling) and 172-1 (forgery) of the CC.

On 19 August 2000 the applicant was provided with the assistance of a lawyer.

On 21 August 2000 the investigator of the GPS issued a bill of indictment ordering the applicant's arrest and charging him with smuggling (Article 70 of the CC), embezzlement of funds (Article 86-1 of the CC) and forgery (Article 172-1 of the CC). The applicant's lawyer lodged an application to be allowed to inspect the materials on which the indictment was based. The investigator of the GPS dismissed this application on the ground that it had no basis in law and returned it to the applicant without having considered it. He further mentioned that the motion did not comply with the requirements of Article 48 of the Code of Criminal Procedure (the "CCP").

On 22 August 2000 the applicant's lawyer filed a motion with the Pechersky District Court of Kyiv (the "Pechersky Court") seeking the applicant's release and requesting that the resolution of 21 August 2000 be quashed.

On 23 August 2000 the GPS allowed the applicant's lawyer's petition of 21 August 2000 and gave him permission to examine certain materials in the applicant's case file. After inspection of these materials the applicant's lawyer applied to the GPS for permission to examine all the materials in the case file against the applicant.

On 23 August 2000 the GPS, by means of a resolution, rejected this request stating that the other materials would be available for inspection after the completion of the preliminary investigation. The GPS referred to Article 218 of the CCP, including those provisions relating to the applicant's initial arrest on 18 August 2000.

On 29 August 2000 the applicant's lawyer lodged a complaint with the GPS claiming that the resolution of 23 August 2000 was unlawful. On 11 September 2000 this complaint was rejected as unsubstantiated.

On 5 September 2000 the applicant's lawyer lodged a complaint with the Pechersky Court against the GPS claiming that the resolution of 18 August

2000 authorising the applicant's detention (*постанова про затримання*) was unlawful. He alleged that there were no reasonable grounds on which to base that resolution.

On 8 September 2000 the Pechersky Court rejected the applicant's complaints about the unlawfulness of the prosecutor's arrest warrant of 21 August 2000 (*санкцію прокурора на арешт*) as unsubstantiated.

On 11 September 2000 the President of the Pechersky Court returned the applicant's lawyer's complaints about the resolution of 18 August 2000 without having considered them. He observed, in particular, that on 8 September 2000 the Pechersky Court had already examined the applicant's complaints about his detention on remand. No procedural decision was given.

On 12 September 2000 the applicant's lawyer lodged requests with the GPS seeking permission to examine the materials in the applicant's case file relating to his detention and the issue of the bill of indictment. On 13 September 2000 the GPS gave the applicant's lawyer permission to examine some of the materials in the case file.

On 25 September 2000 the applicant's lawyer complained to the President of the Kyiv City Court about the decision of the Pechersky Court of 11 September to return the applicant's complaints without having considered them. On 10 October 2000 the Kyiv City Court dismissed his complaints in a letter. The letter stated that the refusal of the President of the Pechersky Court to consider the complaints about the unlawfulness of the applicant's detention was lawful and complied with the Constitution, domestic legislation and the European Convention on Human Rights.

On 9 and 11 October 2000 the applicant's lawyer requested the Pre-Trial Detention Centre No. 13 (*Київський Слідчий Ізолятор № 13*) to certify the applicant's letter of authority to allow him to represent the applicant before the European Court of Human Rights.

On 18 October 2000 the Detention Centre transmitted the request to the GPS since it was responsible for the investigation of the case. On 7 and 11 November 2000 the GPS advised the applicant's lawyer that he should contact a notary as the Governor of the Detention Centre was not authorised to certify letters of authority.

In January 2001 the applicant's lawyer lodged a petition with the Pechersky Court against the allegedly unlawful acts of the prosecutor who initiated the proceedings in the criminal case against the applicant. On 19 February 2001 this complaint was dismissed as being outside the court's jurisdiction in accordance with Article 248-3 of the Code of Civil Procedure and Chapter 22 of the CCP.

On 27 June 2001 the Prosecutor General extended the applicant's detention to 18 February 2002.

On 9 August 2001 the Kyiv-Svyatoshynsky District Court of the Kyiv Region quashed the resolution of the Prosecutor General authorising the applicant's detention.

On 3 October 2001 the Kyiv Regional Court of Appeal dismissed the appeal of the GPS and upheld the decision of 9 August 2001.

On 30 April 2002 the applicant's lawyer informed the Court that his client was released from detention on 18 August 2001.

On 20 December 2002 the Pechersky Court ordered the applicant's detention because of his failure to co-operate with the investigating authorities. The court ordered the applicant to appear before it.

The proceedings in the case are still pending. The investigating authorities have ordered a nation-wide search for the applicant.

B. Relevant domestic law

1. Constitution of Ukraine, 1996

Article 29

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

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

In the event of an urgent need to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonableness of the grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the remand in custody.

Everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to defend himself or herself in person, or to have the legal assistance of a defender.

Everyone detained has the right to challenge his or her detention in court at any time.

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention."

2. Constitution of 28 June 1996 (Transitional Provisions)

Chapter XV

"1. Laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine.

...

9. The prosecution continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws regulating the activity of State bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect.

...

13. The current procedure for arrest, remand in custody and detention of persons suspected of committing a crime, and also for the examination and search of a dwelling place or other possessions of a person, is preserved for five years after this Constitution enters into force."

3. Code of Criminal Procedure of 28 December 1960 (in force at the material time)

Article 115
Detention by the investigator of a person suspected of having committed a crime

"The investigator shall be authorised to detain and interrogate a person suspected of having committed a crime on the grounds and according to the procedure specified in Articles 106, 106-1 and 107 of this Code.

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 upon its receipt."

(Article 236-3 was excluded from the Code of Criminal Procedure on the basis of the Law of 21 June 2001 "on the introduction of changes and amendments to the Code of Criminal Procedure of Ukraine".)

4. Reservation contained in the instrument of ratification deposited on 11 September 1997 (the period covered being 11 September 1997 - 28 June 2001)

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

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

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

5. Appendix to the reservation handed over to the Secretary General at the time of depositing the instrument of ratification on 11 September 1997

(a) Transitional Provisions in the Constitution of Ukraine

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

(b) Article 106 of the Code of Criminal Procedure: detention of a person suspected of committing an offence by a body of inquiry

"A body of inquiry shall be entitled to detain a person suspected of committing an offence for which a penalty in the form of deprivation of freedom could be imposed, subject to the existence of one of the following grounds:

(1) if the person is discovered whilst committing an offence or immediately after committing one;

(2) if eye-witnesses, including victims, directly identify this person as the one who committed the offence;

(3) if clear traces of the offence are found on the body of the suspect or on the clothing which he is wearing or which is kept at his home.

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

For each case of detention of a person suspected of committing an offence, the body of inquiry shall be required to draw up a record mentioning the grounds, the motives, the day, time, year and months, the place of detention, the explanations of the person detained and the time when it was recorded that the suspect was informed of his right to have a meeting with a defence counsel before his first questioning, in accordance with the procedure provided for by Part 2 of Article 21 of the present Code. The body of inquiry shall also be required to notify the public prosecutor of the detention in writing within twenty-four hours and, at his request, give him the documents constituting grounds for detention. The record of detention shall be signed by the person who drew it up and by the detained person. Within forty-eight hours of the time of receipt of notification of the detention, the public prosecutor shall be required to authorise the person detained to be taken into custody or order his release.

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

(c) Article 157 of the Code of Criminal Procedure: the duties of a public prosecutor when issuing a warrant for arrest

"The public prosecutor shall issue a warrant for the arrest of a suspect or accused subject to the existence of the grounds prescribed by law. When deciding whether to issue a warrant for arrest, the public prosecutor shall be required to study conscientiously all the relevant documents and, where necessary, question the suspect or accused personally. In the case of a suspect or accused under the age of majority, such questioning shall be mandatory.

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

6. Resolution of the Plenary Supreme Court of Ukraine No. 10 of 30 September 1994 on issues related to the application by the courts of the legislation regulating the lodging of complaints with the courts against an arrest warrant issued by a prosecutor

"...By way of explanation, in accordance with Article 236-6 of the Code of Criminal Procedure of Ukraine only the warrant of the prosecutor authorising the arrest of the suspect or accused, as well as the decision of the court (judge) concerning the application of preventive measures, can be appealed to the courts, but not the decision of the investigator or body of inquiry to apply the preventive measure of taking into custody or to continue the term of detention..."

7. Resolution of the Plenary Supreme Court of Ukraine No. 8 of 24 October 2003 on issues related to the application of legislation that governs the rights to legal representation and defence in criminal proceedings

"... 5. The authority to represent shall be proved by the following: ... a) for an advocate, who is a member of the advocates' union – by the legal practice license and the order of the advocates' union with regard to the legal services agreement or agreement concerning participation in the case;..."

COMPLAINTS

The applicant complains under Article 5 §§ 1(c), 3 and 4 of the Convention that he was arrested and detained unlawfully in the absence of any prompt judicial supervision and that his appeal against the resolution authorising his detention was unfairly rejected without being considered.

He next complains about the infringement of the principle of the presumption of innocence since the prosecutor issued an arrest warrant, thereby suspecting the applicant of involvement in a crime. The prosecutor thus presumed that the applicant was guilty. He alleges an infringement of Article 6 § 2 of the Convention.

The applicant also complains about the infringement of Articles 6 § 3 and 13 of the Convention since the Pechersky District Court of Kyiv rejected his complaints and disallowed his petitions. As his rights were not effectively protected, he maintains that there has been a breach of Article 13 of the Convention. In his further observations in response to those of the Government of 16 July 2003 the applicant referred only to the infringement of Article 6 § 2 of the Convention.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION TO THE VALIDITY OF THE APPLICATION

The Government stated that the application submitted on behalf of the applicant was not signed by the applicant personally. Moreover, his lawyers did not submit any confirmation to the Court or any written power of attorney to prove that they were authorised to represent the applicant. The Government advised that the application should be struck out of the Court's list of cases under Article 37 of the Convention since the application had been introduced by persons who cannot claim to be victims of the alleged violations of the Convention or its Protocols within the meaning of Article 34 of the Convention.

The applicant's lawyer disagreed. In particular, he stated that he held a valid order, issued by the advocates' union (*адвокатське об'єднання*) of which he was a member, authorising him to represent the applicant in the

criminal proceedings instituted against the latter by the GPS. This power of attorney was never disputed in the course of those proceedings and conferred on him the authority to lodge an application on the applicant's behalf with the European Court of Human Rights. Moreover, the advocates' union had issued a special order enabling the applicant's representation before the European Court. Furthermore, the GPS and the Kyiv Pre-Trial Detention Centre rejected both the applicant's and his own requests to certify and provide the letter of authority required for the proceedings before the Court. He noted that only the Governor of the Pre-Trial Detention Centre could certify the letter of authority under domestic law.

Rule 36 of the Rules of Court reads, in relevant part:

> "1. Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention themselves or through a representative.
>
> ...(a) The representative acting on behalf of the applicant pursuant to paragraphs 2 and 3 of this Rule shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber."

Rule 45 § 3 of the Rules of Court reads:

> "Where applicants are represented in accordance with Rule 36, a power of attorney or written authority to act shall be supplied by their representative or representatives."

Rule 47 § 6 of the Rules of Court reads:

> "Applicants shall keep the Court informed of any change of address and of all circumstances relevant to the application."

Article 37 of the Convention reads:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires..."

Article 34 of the Convention reads:

> "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 Court notes that where an applicant chooses to be represented by a lawyer under Rule 36 of the Rules of Court, rather than to introduce an application himself, it is a requirement, under Rule 45 § 3 of the Rules of

Court, that a power of attorney or written authority to act shall be supplied by his representative (see *Willis and Others v. the United Kingdom* (dec.), no. 49764/99, 4 March 2003). There is no requirement in the Rules of Court that the letter of authority must be certified.

The Court notes that, under Article 44 of the CCP and Resolution No. 8 of the Plenary Supreme Court of 24 October 2003 (see relevant domestic law above), an order issued by the advocates' union in favour of an advocate who is a member of that union is sufficient to confer on him a power of representation for the purposes of domestic criminal proceedings. It observes that the applicant's lawyer represented the applicant in the domestic proceedings and in the Convention proceedings on the basis of an order issued by the union. The domestic authorities never challenged the validity of the order in the course of the domestic proceedings. The order did not specify any limits to the acts of the applicant's representative and did not exclude the possibility for the latter to lodge an application with the Court on the applicant's behalf. A specific order was in fact issued by the advocates' union for the purposes of the proceedings before the Court.

It can be implied from the order issued by the advocates' union that the representative was entitled to take any legal action aimed at remedying the applicant's situation. Such legal action must also be taken to include the lodging of an application with the European Court of Human Rights by way of follow-up to the advocate's efforts at the domestic level to secure redress for the alleged breaches of the applicant's Convention rights resulting from the criminal proceedings instituted against him by the GPS.

In these circumstances, the Court considers that the order issued by the advocates' union is sufficient to validate the lawyer's power to represent the applicant in the Convention proceedings. The Government's objection is therefore dismissed.

II. MERITS OF THE APPLICANT'S COMPLAINTS

A. Complaints concerning Article 5 §§ 1(c) and 3 of the Convention

1. Submissions of the parties concerning Ukraine's reservation to Article 5 of the Convention

The applicant complained that he was detained unlawfully for a period of 21 days without any judicial review of his detention (from 18 August 2000 to 8 September 2000, the date on which the Pechersky District Court of Kyiv reviewed his complaints). He referred to Article 5 §§ 1(c) and 3 of the Convention, which in so far as relevant provide:

> "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."

The Government contested this allegation. They stated that Ukraine had introduced a reservation to Article 5 of the Convention, in accordance with Article 57 of the Convention, in view of the fact that the provisions of the Code of Criminal Procedure and the Transitional Provisions of the Constitution of Ukraine, which provided for an arrest warrant to be issued by a public prosecutor, did not comply with Article 5 of the Convention. This reservation concerned the preservation of the procedure which existed at the time for authorising arrest (detention) by the public prosecutor until changes had been introduced to the domestic legislation and the Transitional Provisions of the Constitution had expired. They further submitted that a prosecutor was "an officer authorised by law to exercise judicial power" since he enjoyed guarantees of independence from the executive and the parties.

The Government concluded, therefore, that in accordance with the reservation made by Ukraine at the time of ratification of the Convention, the public prosecutor was entitled to order and review the arrest of persons detained pursuant to Article 5 § 1(c) of the Convention. Moreover, the status of the public prosecutor complied with all the requirements encompassed in the expression "officer authorised by law to exercise judicial power" used in Article 5 § 3 of the Convention.

The applicant did not dispute as such the validity of the reservation made to Article 5 § 1(c) of the Convention.

2. The Court's assessment

The Court considers it necessary to examine the following issues: firstly, whether the reservation made by Ukraine to Article 5 § 1(c) complied with Article 57 of the Convention, as alleged by the Government, and whether it also related to Article 5 § 3 of the Convention; secondly, whether the prosecutor could be considered, as claimed by the Government, "an officer authorised by law to exercise judicial power", within the meaning of Article 5 § 3 of the Convention; and thirdly, whether the applicant was brought "promptly" before a judicial officer in order to have his arrest and detention reviewed.

(a) The applicant's complaints under Article 5 § 1(c) of the Convention

The Court notes Ukraine's reservation in respect of the provisions of Article 5 § 1(c) of the Convention. It observes that the reservation refers, *inter alia*, to Articles 106 and 157 of the Code of Criminal Procedure which provided for the detention of a person by a decision of a public prosecutor without there being any requirement for judicial supervision of that decision. The reservation under Article 5 § 1(c) did not affect the requirement that there must exist a reasonable suspicion against a person before a prosecutor or investigator can arrest or detain him.

Although the validity of the reservation made in respect of Article 5 § 1(c) has not been contested by the applicant, the Court considers it necessary to rule on this matter.

It recalls in this connection that, in accordance with Article 57 of the Convention (former Article 64), a reservation may be made in respect of "any particular provision of the Convention". In order to be valid, a reservation must satisfy the following conditions: (1) it must be made at the time the Convention is signed or ratified; (2) it must relate to specific laws in force at the time of ratification; (3) it must not be of a general character; and (4) it must contain a brief statement of the law concerned. As regards the first and second conditions, the Court notes that the reservation was contained in the instrument of ratification and excluded from the scope of Article 5 § 1(c) the application of certain specific provisions of the Code of Criminal Procedure governing the procedure for arrest and detention by order of a prosecutor.

By "reservation of a general character" in Article 57 is meant a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope (see *Belilos v. Switzerland*, judgment of 29 April 1988, Series A no. 132, p. 26, § 55). The Court considers that the present reservation is couched in sufficiently precise terms as it refers to a particular area of law and specific provisions which are excluded from the scope of a particular Convention Article (Article 5 § 1(c) of the Convention). As to the requirement that the reservation contain a brief statement of the law concerned, the Court notes that the texts of the provisions concerned were attached to the reservation. The reservation thus complies with the requirements of Article 57 of the Convention.

Having regard to the terms of the reservation, Ukraine was therefore under no Convention obligation to guarantee that the arrest and detention of persons be ordered by a judge.

It follows that the complaint under Article 5 § 1(c) of the Convention is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(b) As to the validity of the reservation to Article 5 § 3 of the Convention

The Court considers that it has already disposed of this issue in its admissibility decision in the case of *Salov v. Ukraine* (no. 65518/01, declared admissible on 27 April 2004), wherein it stated:

> "The Court considers it necessary to examine the following issues: firstly, whether the reservation made by Ukraine to Article 5 § 1(c) was, as alleged by the Government, also related to Article 5 § 3 of the Convention; ...
>
> ... The Court observes that the reservation refers, *inter alia*, to Articles 106 and 157 of the Code of Criminal Procedure according to which a person may be arrested or detained on the basis of a public prosecutor's decision without there being any requirement of judicial supervision of the detention.
>
> The Court, however, does not share the Government's view that the reservation covered both Article 5 § 1(c) and Article 5 § 3 of the Convention. It recalls that in accordance with Article 57 of the Convention a reservation may be made in respect of "any particular provision of the Convention". In the instant case the reservation made by Ukraine to Article 5 § 3 referred only to arrests constituting a disciplinary sanction imposed with regard to military personnel. No reference was made in the reservation to Article 5 § 3 and to the arrest and detention of a person suspected of committing a crime. The reservation was made only in respect of Article 5 § 1. The Court also notes that the validity of the reservation made to Article 5 § 1 is not contested by the parties and therefore it is not necessary to investigate this matter.
>
> The Court points out that Article 5 § 3 is not a constituent element of Article 5 § 1, neither is it *lex specialis* in relation to Article 5 § 1(c), as the Government have suggested. This latter provision must be read in conjunction with Article 5 § 3 which forms a whole with it (see *Ciulla v. Italy*, judgment of 22 February 1989, Series A no. 148, § 38). It further reiterates that Article 5 § 3 enshrines a specific right, the object and purpose thereof concerning "a right to be brought promptly before a judge in case of detention effected in accordance with Article 5 § 1(c)" (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, §§ 44 and 51).
>
> The Court finds, having regard to the above-mentioned considerations, that no reservation was made to Article 5 § 3 of the Convention in so far as it guarantees the right to judicial review of detention. It concludes therefore that the Government's preliminary objection must be dismissed."

Having regard to the above considerations, it concludes that the Government's submissions as to the validity of the reservation made under Article 5 § 1(c) in respect of Article 5 § 3 of the Convention must be dismissed.

(c) Conclusions of the Court as to the admissibility of the complaints under Article 5 § 3 of the Convention

The Government stated that, in view of their reservation to Article 5 of the Convention, there was no violation of the guarantee "to be brought promptly before a judge or other officer authorised by law to exercise judicial power" envisaged by Article 5 § 3 of the Convention. Furthermore, the Government maintained that it could be inferred from the prosecutor's

status that he could be regarded as "an officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention**.**

The applicant disagreed. In particular, he mentioned that Article 29 of the Constitution, notwithstanding the reservation made to Article 5, was in force. He stressed that the Constitution is a law of direct effect and therefore there was an infringement of the procedure envisaged by the Constitution, which may give rise to a violation of Article 5 of the Convention. He further alleged that the refusal of the domestic courts to consider on the merits his complaints about the resolution of 18 August 2000 (*протокол про затримання від 18 серпня 2000 року*) was unlawful. Moreover, the resolution of 18 August 2000 stated that the applicant had a right to appeal against the resolution to a court. He maintained that no procedural decisions were given by the courts in response to his complaints about the lawfulness and sufficiency of the grounds for his detention, although such were required by the CCP. Moreover, the complaints about his detention were considered by the Pechersky District Court of Kyiv only on 8 September 2000, namely 21 days later.

The Court considers, in the light of the parties' submissions, that the complaint under Article 5 § 3 of the Convention raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant's complaints under Article 5 § 4 of the Convention

The applicant complained under Article 5 § 4 of the Convention that his complaints about the resolution of 18 August 2000, authorising his initial detention, were not considered by the domestic courts on the merits, and that they were unfairly rejected by the Pechersky District Court of Kyiv and then by the Kyiv City Court. He further maintained that the decision to detain him on 18 August 2000 was unsubstantiated and that he could not challenge the grounds of his detention since he had not been provided with the relevant materials from the case file. Article 5 § 4 of the Convention reads:

> "... 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."

The Government noted that the Code of Criminal Procedure in force at the material time provided sufficient guarantees for judicial review of the lawfulness of a person's arrest or detention. They maintained that all the guarantees of Article 5 § 4 of the Convention had been observed by the Pechersky District Court of Kyiv when it examined the lawfulness of the applicant's arrest and detention on 8 September 2000. That court examined the case file and the relevant materials corroborating the need for the

applicant's detention. Moreover, the court heard the applicant's lawyer, the applicant and the representative of the GPS. It reviewed whether the detention complied with the procedural requirements of Articles 155-157 of the CCP and whether it was justified by the facts of the case.

Furthermore, the Government submitted that the applicant did not complain about the lawfulness of his initial detention between 18 and 21 August 2001 to the Pechersky District Court of Kyiv at the hearing on 8 September 2000.

The applicant disagreed. In particular, he stated that he was not allowed to inspect the materials in the case file which formed the basis of his detention. The prosecution had failed to provide corroborating evidence capable of substantiating the grounds for his initial arrest, as required by Article 106 of the CCP. The decision to detain him did not refer to any of the reasons mentioned in Article 106 of the CCP and simply indicated that "he [the applicant] committed a crime under Article 86-1 of the Criminal Code". The applicant considered that the resolution on his detention (*протокол затримання*) was the only document that could justify his detention; however, the resolution did not contain any grounds which could be considered sufficient to justify his detention; nor did it refer to any evidence against him or provide any proof of the need to authorise his detention.

The Government maintained that the applicant had access to all the necessary materials in the case file in order to challenge the lawfulness of his arrest and detention. They contended that there was no need to give the applicant's lawyer access to the whole of the case file. Furthermore, the lawyer's requests only related to the materials concerning the charges against the applicant, not to his arrest and detention.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. The remainder of the applicant's complaints

1. Complaints under Article 6 §§ 1 and 3 of the Convention

The applicant complained that Article 6 §§ 1 and 3 of the Convention had been infringed as he had been denied a fair trial.

The Court notes that the proceedings in the applicant's case are still pending. This part of the application must therefore be rejected as premature under Article 35 §§ 1 and 4 of the Convention.

2. Complaints under Article 6 § 2 of the Convention

The applicant complained that Article 6 § 2 of the Convention had been infringed as the domestic authorities, by ordering his detention, presumed that he was guilty even though he was never found guilty by a domestic court. According to the applicant, the GPS had clearly indicated in its resolution of 18 August 2000 that he had committed a crime under Article 86-1 of the CC.

Article 6 § 2 of the Convention reads:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court recalls that the criminal proceedings against the applicant are still pending and the charges against him have not been determined. It further recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial guaranteed by Article 6 § 1. It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. Moreover, the presumption of innocence may be infringed not only by a judge or court but also by other public authorities, including the prosecution (see *Daktaras v. Lithuania,* no. 42095/98, §§ 41-42, ECHR 2000-X). For the Court, the statement in the resolution authorising the applicant's detention referred to the existence of a strong suspicion on the part of the prosecution authorities that the applicant had committed a crime under Article 86-1 of the CC, not to his actual guilt.

The Court therefore does not find any appearance of an infringement of the presumption of innocence in the circumstances alleged. The complaint is accordingly manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must therefore be rejected pursuant to Article 35 § 4.

3. Complaint under Article 13 of the Convention

The applicant also complained under Article 13 of the Convention that he had no effective remedies in relation to his complaints about the lawfulness of his detention, as required by Article 5 § 4 of the Convention. Article 13 of the Convention provides:

> "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."

The Government did not comment on the applicant's complaint.

On the understanding that the applicant has invoked this Article in conjunction with Article 5 § 4, the Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination

of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the alleged infringement of Articles 5 §§ 3 and 4 and 13 of the Convention;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President