

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

FIFTH SECTION

CASE OF BORISENKO v. UKRAINE

(Application no. 25725/02)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

12/04/2012

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



In the case of Borisenko v. Ukraine,

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 25725/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Sergey Vasilyevich Borisenko ("the applicant"), on 20 June 2002.

2. The Ukrainian Government ("the Government") were represented by their Agents, Mrs V. Lutkovska and Mr Y. Zaytsev.

3. On 27 March 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the length of pre-trial detention and of criminal proceedings to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Due to the absence of a National Judge at the relevant time, Mr M. Buromenskiy was appointed to sit as *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and lives in Novotroitske, in the Donetsk Region.

5. On 17 February 1999 criminal proceedings were instituted against the applicant and three other persons on suspicion of having robbed a café.

6. On 23 March 1999 a bill of indictment was drafted in the applicant's respect and he was placed under an obligation not to abscond. However, as

the applicant's whereabouts were unknown, he was placed on the wanted list and the proceedings were suspended.

7. On 17 July 1999 the applicant was arrested by the police while attempting to flee after having robbed a store. Following this incident a new criminal case was initiated against him and he was remanded in custody.

8. On 30 December 1999 the Voroshylovsky District Court of Donetsk sentenced the applicant to four years' imprisonment for having robbed a store on 17 July 1999. The court ordered that the term of imprisonment be calculated from 18 July 1999, when the applicant had initially been remanded in custody. Following this conviction, the applicant was detained in the Donetsk Region Correctional Labour Colony no. 57 (*ВТК № 57*).

9. On 22 November 2000 the criminal proceedings initiated against the applicant and three other persons in February 1999 were resumed and the applicant was presented with the bill of indictment of 23 March 1999.

10. On 28 December 2000 a decision was taken to transfer the applicant temporarily (for two months) from the Correctional Labour Colony where he was serving his sentence of 30 December 1999 to the Donetsk Temporary Detention Unit (SIZO) no. 5 (*СІЗО № 5 м. Донецьк*) for questioning in connection with the pending criminal case.

11. On 23 January 2001 the criminal case against the applicant was joined with twelve other criminal cases involving nine more defendants and concerning numerous robberies and other crimes committed by them as members of a gang.

12. On 31 January 2001 the applicant's bill of indictment of 23 March 1999 was updated. Together with three other presumed gang members he was additionally charged with having robbed another commercial facility on 14 February 1999.

13. On 1 February 2001 the Dokuchayevsk Town Prosecutor authorised the applicant's detention on remand in SIZO no. 5 until 28 March 2001 in connection with the pending criminal proceedings against him. By way of reasoning it was noted that the applicant was a convicted prisoner whose transfer to the SIZO was necessary in view of the need to investigate the accusations pending against him.

14. On 22 March 2001 the applicant's bill of indictment was updated, in particular to mention his membership of a gang.

15. In March 2001 the defendants commenced familiarisation with the case-file materials.

16. In June 2001 the criminal case was transferred to the Dokuchayevsk Town Court.

17. On 21 June 2001 the court held a preliminary hearing and found that the case had been properly investigated and was ready for trial. It further ordered, without any additional reasoning, that the applicant should remain in custody in SIZO no. 5 pending trial. It did not specify for how long. The court scheduled the first hearing for 17 July 2001. This hearing did not take

place, however, as the court allowed the applicant's and several other defendants' requests to familiarise themselves with the case file.

18. A new hearing was scheduled for 14 November 2001. It was adjourned because the applicant asked for it to be recorded but the requisite recording equipment was unavailable. The court also upheld the previously decided preventive measure – the applicant's detention in SIZO no. 5 – without fixing any time-limits or giving any reasons. The next hearing was eventually scheduled for 4 September 2002. Between that date and August 2004 some fifty hearings were scheduled. On some fifteen occasions the hearings were adjourned because of the authorities' failure to deliver the accused, who were in custody, for the hearings. On seven occasions the hearings were adjourned because the prosecutor failed to appear and on ten occasions because various private parties (victims, accused, witnesses) failed to appear.

19. In decisions on adjournments of the hearings of 24 September, 29 October, 12 and 22 November, 18 December 2002, 25 December 2003, 13 and 28 January, 9 June and 17 June 2004, the domestic courts also continued to uphold the applicant's detention without giving any reasons or fixing any time-limits.

20. On 17 August 2004 the Dokuchayevsk Town Court remitted the case for additional investigation without deciding on the applicant's further detention.

21. On 11 February 2005 the Donetsk Regional Court of Appeal set aside that decision and remitted the case to the trial court for fresh consideration.

22. On 26 April 2005 the applicant requested the Dokuchayevsk Court to release him from custody under an undertaking not to abscond. He referred to the incompatibility of his state of health with the conditions of his detention and to his hope of producing evidence of his innocence in the event of his release. On the same date the court rejected his request, citing the general legal provisions applicable, which authorised detention pending trial for defendants charged with serious crimes in order to prevent them from absconding, interfering with the establishment of the facts or continuing their criminal activities, as well as to ensure compliance with procedural decisions. It further stated, that the applicant did not substantiate his request and there were no grounds for his release under the undertaking not to abscond.

23. Between February and June 2005 some twenty-eight hearings were scheduled. About ten of them did not take place on account of the prosecutor's failure to appear and five hearings were adjourned on account of the failure of various third parties to appear.

24. On 1 June 2005 the Dokuchayevsk Town Court convicted the applicant as charged and sentenced him to seven years' imprisonment. The court further decided:

> "In accordance with part 3 of Article 42 of the C[riminal] C[ode] of Ukraine in the wording of 1960, the ultimate punishment shall be determined for the multiple offences, by the partial addition of the sentences under the judgment of the Voroshylovsky District Court of Donetsk of 30 December 1999 and under this judgment, as nine years' imprisonment with confiscation of all personal property.
>
> The period of serving the sentence under this judgment shall include the part of the sentence served under the judgment of the Voroshylovsky District Court of 30 December 1999, which was one year, six months and seventeen days, and the ultimate [remaining] sentence shall be determined as seven years five months and seventeen days' imprisonment and confiscation of all personal property.
>
> The term of the sentence of the convict Borisenko S.V. shall be calculated as from 1 February 2001."

25. On 20 January 2006 the Donetsk Regional Court of Appeal upheld the applicant's sentence.

26. The applicant appealed in cassation, submitting that the courts had wrongly determined his ultimate sentence as he considered that he had served his first sentence in full. He considered that he had been detained as a convicted person, referring to a number of parcels he had been allowed to receive.

27. On 14 November 2006 the Supreme Court of Ukraine rejected the applicant's cassation appeal against the judgment of 1 June 2005. It noted in particular that the first-instance court had calculated the applicant's sentences correctly and in accordance with the law, namely Article 42 § 3 of the Criminal Code of 1960, Article 65 of the Criminal Code of 2001 and Article 338 of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW

A. Pre-trial Detention Act

28. Under section 4 of the Act, during the investigation and trial suspects may be kept in a SIZO (temporary detention centre) or a prison acting as a SIZO. Exceptionally the suspects can be kept in "IVS" short-stay cells in police stations. If a convicted person is under investigation in respect of another crime, he or she may be kept in the disciplinary detention unit of a correctional colony. Section 8 of the Act provides for suspects who have been convicted of a different offence to be kept separately from other detainees.

B. Correctional Labour Code (in force at the material time).

29. The Code provided for a convicted person normally to be kept in the same custodial institution (Article 22). Under Article 23 of the Code a person who was sentenced to imprisonment in a colony could be temporarily kept in a SIZO or prison in connection with different criminal proceedings, as a witness (for up to six months with the authorisation of the prosecutor) or as a suspect, under the general rules governing detained suspects under Article 156 of the Code of Criminal Procedure.

C. Criminal Code, 1960 (in force until 1 September 2001)

30. The relevant provision of the Code provides:

Article 42

Sentencing for several crimes

"If a person is found guilty of committing two or more offences under different articles of the criminal law, and has not been convicted for any of them, the court, having determined the punishment for each crime separately, shall ultimately determine the aggregate punishment by absorption of the less severe penalties by the more severe ones, or through full or partial cumulation of determined punishments within the limits established by the article of law that provides for the more severe punishment.

The main punishment may be supplemented by any additional penalty provided for in the laws governing liability for the crimes of which the person was found guilty.

The same rules shall apply when, after having been sentenced in one case, the sentenced person is found guilty of another crime, committed before the sentence was pronounced in the first case. In such cases the term of the sentence shall include the part or all of the sentence not yet served under the first judgment."

D. Criminal Code, 2001 (in force since 1 September 2001)

31. The relevant provision of the Code provides:

Article 65

General principles of imposition of punishment

"1. A court shall impose a punishment:

(1) within the limits prescribed by a sanction under that article of the Special Part of this Code which creates liability for the criminal offence concerned;

(2) pursuant to provisions of the General Part of this Code;

(3) having regard to the degree of gravity of the offence committed, the character of the offender, the method used and the motives for the offence, the nature and extent of the damage done, and any mitigating or aggravating circumstances.

2. The punishment imposed on an offender should be adequate and sufficient to reform the offender and prevent new offences.

3. The grounds for imposing a punishment milder than that prescribed for a given offence in the relevant article of the Special Part of this Code are specified in Article 69 of this Code.

4. A punishment heavier than that prescribed for a given offence in the relevant article of the Special Part of this Code may be imposed pursuant to Articles 70 and 71 of this Code in the event of cumulative offences and cumulative sentencing."

E. Code of Criminal Procedure, 1960:

32. The relevant provisions of the Code provide:

Article 156 (as worded before 29 June 2001)

Term for holding a person in custody

"The term for remanding a person in custody during the investigation of criminal offences shall be not more than two months. This term may be extended to four months by district, city or military prosecutors, prosecutors of the fleet or command garrison, or other prosecutors of the same rank, if it is not possible to terminate the criminal investigation, and in the absence of any grounds for changing the preventive measure. A further extension of this term to six months from the time of arrest shall be effected – only if the case is exceptionally complex – by the Prosecutor of the Republic of the Crimea, regional prosecutors, Kyiv prosecutors, military prosecutors of the district or fleet, or other prosecutors equal to them in rank.

Further periods of remand in custody may be extended for up to one year by the Deputy Prosecutor General of Ukraine, and up to eighteen months by the Prosecutor General.

Subsequent to the above, no further extensions of detention on remand shall be allowed. The accused must then be immediately released.

If it is impossible to terminate the investigation within these remand periods and there are no grounds for changing the preventive measure, the Prosecutor General or his Deputy shall be entitled to refer the case to a court in the part which relates to accusations which can be proved. As regards the incomplete investigation, the case shall be divided into separate proceedings and completed in accordance with the general rules.

The material relating to the completed part of the criminal case shall be provided to the accused and his representative for examination not later than one month before the expiry of the remand period, as established by paragraph 2 of this Article.

The time taken by the accused and his representative to apprise themselves of the material in the case file shall not be taken into account in calculating the overall term of remand in custody.

If the court refers the case back for fresh investigation, and where the term of remand in custody has expired, and an alternative preventive measure cannot be applied in the circumstances of the case, the detention on remand shall be extended by the prosecutor, whose task is to supervise the lawfulness of the pre-trial investigation in the case, within one month from the time he receives the case file. Further extension of such detention before the case is remitted to the court shall be governed by paragraphs 1, 2 and 6 of this Article."

After June 2001 the detention order was given along the same lines, but by the courts and not the prosecutor.

Article 338

Calculation of the period of serving the sentence

"The beginning of the serving of a sentence in the form of imprisonment or corrective labour for a defendant who has not been in custody prior to his conviction shall be calculated from the date of execution of the sentence.

When the defendant, prior to his conviction, has been in custody for the purposes of the same case, the period of serving the sentence shall include the period of pre-trial detention.

When the accused, while in custody, stayed in a medical institution, the period of stay there shall be included the period of serving the sentence.

If the defendant, prior to conviction, has been in custody and is sentenced to correctional labour, the time spent in custody shall be included in the period of correctional labour at the rate of one day of custody for three days of correctional labour. If the defendant was sentenced to correctional labour, and during the re-hearing of the same cause he is sentenced to imprisonment, the served period of correctional labour shall be included in the term of imprisonment at the rate of three days of corrective labour for one day of imprisonment."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

33. The applicant complained that the length of his pre-trial detention in the second set of criminal proceedings was excessive, contrary to the guarantees of Article 5 § 3 of the Convention, which, insofar as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

....

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.

A. Admissibility

34. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore declare this complaint admissible.

B. Merits

1. The period to be taken into consideration

35. The Government alleged that for the purposes of Article 5 § 3 of the Convention the applicant's detention on remand had not started until 18 July 2003. The period between 1 February 2001 and 18 July 2003 should not be taken into account, as the applicant had concurrently been serving his sentence pursuant to the judgment of 30 December 1999 and could not have been released from custody in any event. Consequently, his detention during the above period fell under Article 5 § 1(a) and not Article 5 § 1(c). Article 5 § 3 could therefore not be applied to the period in question. They further contended that the period of the applicant's detention on remand had ended on 1 June 2005, when he was convicted by the Dokuchayevsk Town Court. It had therefore lasted one year and nearly eleven months.

36. The applicant contended that the period of his pre-trial detention had commenced on 1 February 2001, when the order was issued to remand him in custody in connection with the criminal proceedings pending against him, and lasted until his transfer to the colony. Concerning the nature of his detention between 1 February 2001 and 18 August 2003, he noted, in

particular, that his placement in the SIZO had significantly worsened his situation compared to that of a convicted prisoner. In particular, the unit lacked facilities for a long-term stay; the possibilities of receiving visits and parcels from relatives were extremely limited and, moreover, the applicant had lost his reasonable expectations of an amnesty or an early release from serving the sentence of 1999.

37. The Court reiterates that Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X). On this latter point, it should be recalled that Article 5 § 3 applies solely in the situation envisaged in Article 5 § 1 (c), with which it forms a whole. It ceases to apply on the day when the charge is determined, even if only by a court of first instance, as from that day on the person is detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV). Furthermore, a person who has cause to complain of continuation of his detention after conviction because of delay in determining his appeal, cannot avail himself of Article 5 § 3 but could possibly allege a disregard of the "reasonable time" provided for by Article 6 § 1 (see *Solmaz v. Turkey*, no. 27561/02, §§ 24 to 26, 16 January 2007, with further references).

38. The Court further reiterates that the applicability of one ground listed in Article 5 § 1 of the Convention does not necessarily preclude the applicability of another and detention may be justified under more than one sub-paragraph of that provision (see, among many others, *Brand v. the Netherlands*, no. 49902/99, § 58, 11 May 2004, and *Johnson v. the United Kingdom*, 24 October 1997, § 58, *Reports of Judgments and Decisions* 1997-VII). Therefore, the Court is called upon to decide whether in such circumstances Article 5 § 3 is applicable to the period in question too.

39. Article 5 § 3 is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *McKay v. the United Kingdom* [GC], cited above, § 31).

40. Since the case of *Wemhoff v. Germany*, the Court, in deciding the moment from which Article 5 § 3 ceased to apply, has considered the legal basis for detention "autonomously". It noted, among other things, that guarantees of Article 5 § 3 could not depend on the specificities of the domestic legal system and that the person complaining of the continuation of his detention after conviction cannot avail himself of Article 5 § 3. In the above judgment, Court further noted that it could not be overlooked that the guilt of a person who was detained during appeal or review proceedings had been established in the course of a trial conducted in accordance with the requirements of Article 6 (see *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7).

41. Turning to the circumstances of the present case, the Court notes that the applicant was detained within the framework of two different sets of criminal proceedings. By a judgment of 30 December 1999 the applicant was sentenced to four year's imprisonment for robbing a store. His sentence under the said judgment was due to expire on 18 July 2003. While serving his sentence, the applicant was further charged in a different set of criminal proceedings and transferred to a SIZO on 1 February 2001 and ultimately convicted on 1 June 2005. There is no argument between the parties as to the applicability of Article 5 § 3 of the Convention to the period between 18 July 2003, when the applicant's original sentence was due to expire, and 1 June 2005, when the applicant was convicted of a new crime.

42. The issue arises, however, as to the applicability of Article 5 § 3 to the period between 1 February 2001 and 18 July 2003, when the applicant's deprivation of liberty could be argued to have fallen within the ambit of both sub-paragraphs (a) and (c) of Article 5 § 1. In this regard the Court notes that despite the fact that on 1 February 2001 the prosecution authorities issued an order for the applicant's detention in the SIZO in connection with the new set of criminal proceedings against him, no formal decision on suspending or terminating the applicant's original imprisonment under the judgment of 30 December 1999 was taken at that time. Nor could it be seen from the relevant domestic law referred to by the courts (see paragraphs 27, 30, 31 and 32 above) that the applicant's transfer to the SIZO and the selection of that preventive measure in a different set of proceedings implied automatic suspension of the original sentence. Therefore, during the period in question there were no objective grounds to consider that the applicant stopped serving his prison sentence on 1 February 2001 and that his continued detention required any additional justification prior to 18 July 2003. The subsequent interpretation by the domestic courts of the legal basis for the applicant's detention could not retroactively create an obligation to justify the applicant's deprivation of liberty with a view to his "conviction by the competent court". Therefore, the applicant's detention during the period in question was justified under Article 5 § 1 (a) of the Convention.

43. The applicant's complaint concerns the detention pending trial, in respect of which this Court has constantly held that the presumption under Article 5 is in favour of release. As established in *Neumeister v. Austria* (27 June 1968, § 4, Series A no. 8), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (as confirmed in *McKay*, cited above, § 41).

44. Indeed, the Court finds it difficult to see any practical purpose in requesting the State authorities to justify the applicant's detention under Article 5 §§ 1 (c) and 3 of the Convention in the circumstances, when such detention was justified under Article 5 § 1 (a). Any request for release would thus be limited to the purely hypothetical question whether the person could be released if he was not already serving a prison sentence. Therefore, even if the applicant's continuing detention within the meaning of Article 5 § 1 (c) ceased to be reasonable, it would not automatically cease to be lawful and justified under Article 5 § 1 (a). In short, the applicant cannot argue that while serving his prison sentence, he was "entitled ... to release pending trial" in the parallel judicial proceedings which did not concern his original conviction. Accordingly, Article 5 § 3 of the Convention does not apply to the applicant's detention between 1 February 2001 and 18 July 2003, which amounted to "lawful detention after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention.

45. As to the applicant's arguments that in the pre-trial detention centre he was placed in harsher conditions of detention that he would have in a colony, the Court considers that such harsher conditions of detention, as well as restrictions on family visits and on correspondence could effect the applicant's rights under Articles 3, 8 or 9 of the Convention (see, for example, *Visloguzov v. Ukraine*, no. 32362/02, §§ 59 and 60, 20 May 2010; *Shalimov v. Ukraine*, no. 20808/02, §§ 89 and 91, 4 March 2010; and *Poltoratskiy v. Ukraine*, no. 38812/97, §§ 170 and 171, ECHR 2003-V), but all these considerations cannot, in the Court's opinion, affect the classification of the applicant's detention for the purposes of Article 5 § 1.

46. Accordingly, the period to be taken into consideration started on 18 July 2003 and ended on 1 June 2005. It therefore lasted one year and ten and a half months.

2. Reasonableness of the duration of the pre-trial detention

47. The applicant considered that the duration of his pre-trial detention was excessively long.

48. The Government alleged that the length of the applicant's detention on remand had not been excessive, regard being had to the complexity of the case and the likelihood that the applicant, charged with several serious offences, would have absconded.

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

50. The Court notes that the applicant's pre-trial detention lasted one year and ten and a half months. This period can not be considered excessive *per se*. However, throughout the period in question the courts simply stated that the previously ordered preventive measure was correct, although under Article 5 § 3, after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty, and the judicial authorities should give other grounds for continued detention. Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Yeloyev v. Ukraine*, no. 17283/02, § 60, 6 November 2008). No such reasons were given by the courts in the present case.

51. Furthermore, in reply to the request for release lodged by the applicant on 26 April 2005, the Dokuchayevsk Town Court not only gave no reasons for the applicant's continued detention but rejected his request for release as unsubstantiated. In the Court's opinion, the domestic court's decision requesting the detainee to justify his right to liberty runs contrary to the very essence of Article 5 § 3, which enshrines the presumption in favour of liberty and requires the authorities to justify detention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

53. The applicant next complained that the length of the criminal proceedings against him had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

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

B. Merits

55. In his submissions, the applicant complained about the length of the criminal proceedings in their entirety, without specifying the period to be taken into account.

56. According to the Government, the period in question commenced on 22 November 2000, when the applicant was presented with the bill of indictment of 23 March 1999, and lasted until the final judgment of the Supreme Court of 14 November 2006.

57. The Court observes that Article 6 § 1 applies throughout the entirety of proceedings for "the determination of ... any criminal charge" (see *Phillips v. the United Kingdom*, no. 41087/98, § 39, ECHR 2001-VII). It considers that the period to be taken into consideration in the present case began on 17 February 1999, when the criminal proceedings were initiated, and ended on 14 November 2006, when the final judgment was taken by the Supreme Court. However, the period during which the applicant was on the run (23 March to 17 July 1999) should be excluded from the overall length of the proceedings (see *Girolami v. Italy*, judgment of 19 February 1991, Series A no. 196-E, § 13, and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 81, ECHR 2003-IX). At the same time, from 17 July 1999 the applicant was in the hands of the authorities and he could not be held responsible for any further delay in the resumption of the criminal proceedings in question. The period to be taken into account thus lasted seven years and some five months before the investigating authorities and the courts at three levels of jurisdiction.

58. The Court observes that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II). It further considers that an accused in criminal proceedings should be entitled to have his case conducted with special diligence, particularly, where he is kept in custody (see *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006, and *Yurtayev v. Ukraine*, no. 11336/02, § 37, 31 January 2006).

59. The Court appreciates that the criminal proceedings at issue in the present case, which concerned numerous counts of robbery and other offences with which ten defendants stood charged, were of a certain

complexity and required the collection of voluminous evidence. It also notes the tight schedule of hearings scheduled by the trial court between September 2002 and August 2004 and between February and June 2005.

60. On the other hand, the Court observes that nearly two-thirds of these hearings were eventually adjourned for various reasons, including some seventeen adjournments in connection with the prosecutor's failure to appear and some fifteen in connection with the authorities' failure to ensure the delivery of the defendants, who were in custody, for the hearings. It further notes that according to the case-file materials no investigative activities were carried out in the case between March 1999 and November 2000 (one year and eight months), apparently because the applicant was unavailable. In the meantime, the applicant's whereabouts were established no later than 17 June 1999, when he was arrested and subsequently detained and charged with a new crime. Another significant delay (one year and two months) can be observed in the period from June 2001, when the case was transferred to the court, to September 2002, when the hearings eventually started taking place.

61. The Court has frequently found violations of Article 6 § 1 of the Convention in cases where the authorities were responsible for repeated adjournments of hearings and significant periods of unjustified inactivity (see, among other authorities, *Kobtsev v. Ukraine*, no. 7324/02, § 71, 4 April 2006; *Antonenkov and Others v. Ukraine*, no. 14183/02, § 46, 22 November 2005; and *Mazurenko v. Ukraine*, no. 14809/03, § 47, 11 January 2007).

62. Having regard to the material submitted to it and to its case-law on the subject, the Court considers that the Government have not provided sufficient explanation for the delay in the present case. The Court considers therefore that the duration of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement.

63. There has accordingly been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed, without providing any substantiation, 50,000 hryvnias (UAH) in medical expenses and UAH 150,000 in lost profits. He

further requested the Court to determine compensation for non-pecuniary damage on an equitable basis, suggesting that the total amount of just satisfaction should be no less than 100,000 euros (EUR).

66. The Government submitted that the applicant's claims were exorbitant and unsubstantiated.

67. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects that claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 1,700 in respect of non-pecuniary damage.

B. Costs and expenses

68. The applicant also claimed UAH 100,000 for unspecified costs and expenses.

69. The Government contended that this claim was exorbitant and unsubstantiated.

70. 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

71. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;

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

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *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 1,700 (one thousand seven hundred euros), plus any tax that may be chargeable, in respect of

non-pecuniary damage, to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

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

D.S.
C.W.

CONCURRING OPINION OF JUDGE BUROMENSKIY

There is no doubt that in the case of Borisenko v. Ukraine a violation of Article 5 § 3 of the Convention takes place. Thus, I fully support the decision of the Court. However, thinking about legal consequences of applying of preventive detention regime in the context of Article 5 § 3, which concerns the person who is imprisoned according to the court sentence, caused me to express some thoughts in this Opinion.

The main purpose of Article 5 is to protect the person from wilful infringement on personal freedom. At the same time, in my opinion, the concept of "personal freedom" cannot be examined abstractly. Article 5 protects the rights of "everyone", including arrested or detained persons *(Weeks v. the United Kingdom,* 2 March 1987, § 40, Series A no. 114), as well as "restrictions of freedom" or "imprisonment" must have a specific content *(Engel and Others v. the Netherlands,* 8 June 1976, § 59, Series A no. 22). Therefore, there cannot be an abstract notion of deprivation of liberty. Each kind of deprivation of liberty has its goals and is associated with the inherent limitations of freedom. All these restrictions are possible when based only on legal grounds and their applying is the subject to effective judicial control.

As the considered case witnesses, the prisoner's guarding at place of preceding detention (SIZO) instead of the colony while the preliminary investigation is ongoing, is traditionally considered in the context of Article 5 § 1 (a) of the Convention.

In my opinion, there is a substantial difference in the legal nature of pre-trial detention and imprisonment based on conviction, and therefore, in the legal consequences of these two types of deprivation of liberty. And the fact of deprivation of liberty in the first and second case does not allow speak about the identity of its grounds and conditions.

Pre-trial detention, as a kind of deprivation of liberty must be entirely subordinate to the goal of fair trial within a reasonable time. Correspondent legal guarantees are foreseen in Article 5 § 3 of the Convention. The period of preventive measure of pre-trial detention should be the minimum necessary to complete the proceedings, and I think, regardless of whether the measure is applied to a person not deprived of his liberty at the moment or to a person who has been imprisoned by a court sentence.

Imprisonment under a court sentence is also legitimate infringement of personal freedom, but of completely different type. The imprisoned person is deprived of his liberty within the regime defined in the court sentence. But the regime of imprisonment can not deprive of personal liberty as such. An imprisoned person always has and enjoys a certain level of freedom. (For example, according to Ukrainian legislation a person who committed for the first time a crime of medium severity should be sent to a colony with minimal or medium security level. In such colonies detainees have, although

restricted, but adequate freedom of movement during the daytime, they receive money, they have right to spend their money, they have right to correspondence and right to visits of family members.) This fact is important, even when assessments of the level of freedom are purely subjective

There is no doubt that the need to transfer of the prisoner to a place of preventive detention (SIZO) due to new criminal proceedings against him may arise. But that is always associated with an interference in the process of enforcement of the sentence. The court that makes such a decision, in the nature of things, affects the level of freedom which the prisoner has - and to which he is entitled throughout the term of the sentence - but that does not affect the finding in the present case that, for the period from 1 February 2001 to 18 July 2003, Article 5 § 3 did not apply.