

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

FIFTH SECTION

CASE OF RUDNICHENKO v. UKRAINE

(Application no. 2775/07)

JUDGMENT

STRASBOURG

11 July 2013

FINAL

11/10/2013

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



In the case of Rudnichenko v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 11 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 2775/07) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Sergey Vladimirovich Rudnichenko ("the applicant"), on 4 December 2006.

2. The applicant, who had been granted legal aid, was represented by Mr Sergey Zayets, a lawyer practising in Sevastopol. The Ukrainian Government ("the Government") were represented by their Agent, Mr Nazar Kulchytskyy.

3. The applicant complained, in particular, that his pre-trial detention had been unlawful and unreasonably long. He raised these complaints in his initial application of 4 December 2006. Subsequently, on 23 September 2010, the applicant submitted an additional complaint that the judge dealing with his criminal case had not been impartial and that he had been unable to obtain the attendance of a key witness during his trial.

4. On 14 February 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981. On 9 January 2013 he was due to be released from Sukhodilska Prison no. 36 in the Lugansk Region, having served his sentence. His current place of residence is unknown.

6. On 22 October 2005 two people attempted to break into a car belonging to K., who impeded the thieves and caught one of them ("B.").

7. On 6 January 2006, at about 6 p.m., the applicant broke into a car belonging to N. and tried to dismantle some equipment therein. N. caught the applicant and handed him over to the police.

8. On the same date, one of the arresting officers wrote a report to his superior in the Sevastopol Police Department about the aforementioned incident, referring to the car theft, the complaint by N. in that regard, and the applicant's apprehension and arrest. It was mentioned in the report that the applicant had been drunk and had to be restrained with handcuffs.

9. On 7 January 2006 the Leninskyy District Court of Sevastopol ("the Leninskyy Court") ordered that the applicant be placed in administrative detention for three days for being drunk in a public place at 6 p.m. on 6 January 2006.

10. On 9 January 2006 an investigator of the Leninskyy District Police Department, referring to the events of 6 January 2006, arrested the applicant on suspicion of robbery.

11. On 12 January 2006 the Leninskyy Court remanded the applicant in custody for two months, allowing an application by the investigator to that effect. The court noted that the applicant had been caught in *flagrante delicto*. Furthermore, he had committed the offence in question while drunk, and within a year of being released from prison. The court also noted that the applicant was unemployed. It was mentioned in the ruling that the decision could be appealed against within three days.

12. From 13 January 2006 the applicant was represented by a lawyer.

13. With regard to the events of 22 October 2005 (see paragraph 6 above), on 7 February 2006 the Leninskyy Court, sitting in a single-judge formation ("Judge R."), found B. guilty of robbery while drunk and following conspiracy by a group. It relied on the factual account given by B., who had said that he had become acquainted with the applicant (referred to in the verdict as "the other person" and known to B. as "Sergey") shortly before the incident, and that it had been the applicant's initiative to steal stereo equipment from cars. According to B., the applicant had undertaken to teach him car theft techniques.

14. The court also established that the applicant had tried to break into K.'s car using scissors, while B. had been standing by. As the car had had

tinted windows, the thieves had not noticed that K. had been inside. He had opened the door and asked them what they had been doing. The applicant had threatened K. with the scissors and had rudely told him to leave the scene, while B. had taken a knife out of his pocket and had pointed it at him. As the owner of the car resisted, the applicant had hit him with a bottle, which had been in his other hand. B. and the applicant had then tried to escape. K. had however managed to catch B.

15. Judge R. sentenced B. to three years and six months' imprisonment. The punishment, being more lenient than the minimum sentence prescribed by the criminal legislation, was deemed appropriate given that B. had confessed in full to having committed the crime and had shown genuine remorse. He had compensated the victim for the pecuniary and non-pecuniary damage suffered, and K. had submitted that he had no further complaints or claims against B.

16. The applicant was not involved in the above proceedings.

17. The judgment of 7 February 2006 was not challenged on appeal and became final.

18. On 23 February 2006 K. identified the applicant as the second thief who had tried to break into his car. B. also identified the applicant as his accomplice.

19. On 1 March 2006 the applicant requested the investigator to consider replacing his detention with a less restrictive preventive measure; however, on the same date the investigator rejected that request. He noted that the applicant had an extensive criminal record (four convictions), that his pre-trial detention had been authorised by a reasoned court decision, and that, having been legally represented from the day after the decision of 12 January 2006 had been delivered, he could have, but had chosen not to, appeal.

20. On 7 March 2006 the applicant was indicted on two counts of robbery in respect of the incidents involving K. and N.

21. On 9 March 2006 the case was sent to the Leninskyy Court for trial.

22. On 10 March 2006 the applicant's lawyer, relying on Article 5 §§ 1 and 5 of the Convention, complained to the Leninskyy Court that his client had been unlawfully detained between 6 and 12 January 2006 and had a right to compensation. He requested the court to summon N. and the police officers who had arrested the applicant on 6 January 2006. They had witnessed the events and could potentially confirm that the applicant had in fact been detained as a criminal suspect rather than someone who had committed an administrative offence.

23. On the same date the applicant's lawyer lodged an administrative claim against the Governor of the Simferopol Pre-Trial Detention Centre (SIZO) with the Zaliznychnyy District Court of Simferopol ("the Zaliznychnyy Court"), alleging that the continued detention of the applicant after 6 March 2006 (that is, after the expiry of his two months' pre-trial

detention calculated from 6 January 2006) was unlawful. Relying on Article 5 § 4 of the Convention, the lawyer requested the immediate examination of his complaint and the applicant's release.

24. On 21 March 2006 the applicant's lawyer again requested the SIZO administration to release his client immediately. On the same date he complained to the President of the Zaliznychnyy Court about the delay in the examination of his claim of 10 March 2006.

25. On 21 March 2006 a judge of the Leninskyy Court rejected the applicant's request to have witnesses summoned with a view to determining that his detention on 6 January 2006 had been unlawful.

26. On 29 March 2006 the Leninskyy Court rejected the applicant's complaint regarding the alleged unlawfulness of his detention from 6 to 12 January 2006. The court noted in its ruling as follows:

> "The court has established that the pre-trial investigation authority was clearly aware of the fact that the applicant had been arrested immediately after having committed a criminal offence on 6 January 2006. Nevertheless, his arrest [as a criminal suspect] only took place on 9 January 2006. Those circumstances disclose a violation by the pre-trial investigation authority of the provisions of the Code of Criminal Procedure ... concerning detention and would justify the delivery of a special ruling".

27. Nevertheless, the court arrived at a general conclusion that there had been no significant violation of the criminal procedural legislation and rejected the complaint.

28. The applicant appealed.

29. On 7 April 2006 the Leninskyy Court held a preparatory hearing for the trial. It rejected the applicant's request for release given, in particular, his criminal record, lack of employment and the fact that he had no permanent place of residence.

30. On 1 June 2006 the applicant's mother was admitted in the proceedings as his lay representative in her capacity as a close relative.

31. On 6 June 2006 the Sevastopol Court of Appeal ("the Court of Appeal") upheld the ruling of the Leninskyy Court of 29 March 2006 (see paragraphs 26-27 above). It noted that the issue of the applicant's administrative detention from 6 to 9 January 2006 was beyond the scope of the examination. The subsequent detention was regarded as being in compliance with the law. As to the applicant's unsuccessful request to have the witnesses to his arrest on 6 January 2006 summoned, the appellate court pointed out that such a request had no basis in the applicable provisions of the Code of Criminal Procedure.

32. On 19 September 2006 the applicant requested the Leninskyy Court to release him subject to him giving an undertaking not to abscond. He contended that there were no reasons to fear that he would abscond or impede the investigation if at liberty. The applicant provided his address and stated that before the arrest he had been working on a construction site. He

further stated that his past criminal convictions should not be used to justify his pre-trial detention in the ongoing criminal proceedings.

33. On the same date the Leninskyy Court rejected the request. It noted that, in the light of all the circumstances, the applicant could not be trusted to cooperate with the investigation or to not commit further offences.

34. On 10 December 2006 the term of office of the judge dealing with the applicant's case in the Leninskyy Court expired.

35. On 25 April 2007 the case was referred to Judge R., the same judge who had earlier tried B. (see paragraphs 13-15 above).

36. On 12 October 2007 Judge R. sought to recuse herself from the case. Her reasons were as follows:

> "Given that I have examined the criminal case of [B.] and that I have already expressed my opinion as regards the incident involving both [the applicant] and [B.], I withdraw from the case."

37. On 22 October 2007 the President of the Leninskyy Court rejected Judge R.'s application for self-recusal, having found no grounds for it under Article 54 of the Code of Criminal Procedure (see paragraph 56 below).

38. With regard to the incident involving K., on 14 November 2007 the Leninskyy Court, sitting in a single-judge formation (Judge R.), found the applicant guilty of robbery following conspiracy with B. and sentenced him to seven years' imprisonment with confiscation of all his personal property. Referring to the judgment of 7 February 2006 in respect of B., the court relied on the evidence given by B. during that trial (see paragraphs 13-14 above), which were read out at the hearing. The applicant's submissions that he and B. had been merely looking at K.'s car without any intention of breaking into it, and that the applicant had hit K. with a bottle in self-defence, were dismissed by Judge R. as untruthful.

39. As to the incident with N., the Leninskyy Court classified the applicant's actions as attempted petty theft, an administrative (minor) rather than a criminal offence. Accordingly, the applicant was acquitted in that regard for lack of *corpus delicti* in his actions.

40. Lastly, the Leninskyy Court stated that the term of imprisonment was to be calculated from 9 January 2006. It also decided that the applicant should remain in detention as a preventive measure pending the verdict's entry into force.

41. In the course of the trial, the applicant had unsuccessfully requested the attendance and questioning of B. as a witness. According to the Government, his request had been made at an inappropriate stage of the proceedings and never repeated thereafter.

42. The applicant appealed. He submitted, in particular, that it was unacceptable to rely on the statements B. had made in a trial in which the applicant himself had not participated. Alleging a breach of Article 6 § 3 (d) of the Convention, the applicant emphasised that B. had not been summoned to attend his (the applicant's) trial, and that he had therefore not

had the opportunity to contest his submissions or to have him questioned as a key witness. The applicant further pointed out in this connection that Judge R., who had dealt with both his and B.'s cases, had in fact admitted to having a preconceived opinion about the circumstances of the case and had asked to withdraw from it.

43. The applicant further complained that his actions had wrongly been classified as robbery following conspiracy by a group. He contended that he and B. had been surprised that K. had been in the car, and that they could not have possibly planned to assault him. The applicant also noted several inconsistencies and changes to B.'s statements. He stated, in particular, that he had not met B. on the day of the events, but that they had once served a sentence together in the same prison. That being said, the applicant denied that it had been his initiative to steal property from cars or that he had undertaken to teach B. anything in that domain, given that the latter had himself already had a criminal conviction for several counts of car theft.

44. On 28 July 2009 the Court of Appeal, following a hearing with the participation of the applicant's lawyer, but in the absence of the applicant, upheld the judgment of 14 November 2007, without undertaking its own judicial investigation of the witnesses' statements and other evidence in the case. At the same time, it invited the first-instance court to clarify the date from which the term of imprisonment was to be calculated. While acknowledging that the Leninskyy Court had relied on the statements B. had made in the framework of a different trial, the Court of Appeal noted that those statements were concordant with the other evidence and that there was therefore no reason to question their credibility.

45. On 16 September 2009 the applicant, relying on the above-mentioned ruling, requested the Leninskyy Court to rectify the calculation of his term of imprisonment to have started running from 6 January 2006. On 20 October 2009 his request was rejected as unfounded.

46. On 30 December 2009 the applicant's mother, acting in his interests, lodged an appeal on points of law against the judgment of 14 November 2007 and the Court of Appeal's ruling of 28 July 2009. She complained, in particular, relying on Article 6 §§ 1 and 3 (d) of the Convention, that the applicant had been deprived of the opportunity to challenge B.'s depositions, which had been given in a different trial and which had been used for the applicant's conviction.

47. On 14 January 2010 a judge of the Supreme Court, in written proceedings without the parties' notification or participation, rejected the applicant's mother's request for leave to appeal on points of law.

48. According to a letter of the Supreme Court to the applicant's lawyer of 28 December 2010, sent in reply to an enquiry by the latter about how the case was progressing, the aforementioned ruling had been sent to the applicant's mother on 14 January 2010.

49. According to the applicant, his mother had never received the Supreme Court's letter with the ruling. The applicant also submitted a document from the local authorities, which suggested that there was another street in the town with the same name as the street where his mother lived.

50. The applicant submitted that he, his lawyer and his mother as his lay representative only found out about the Supreme Court's ruling of 14 January 2010 in December 2010.

II. RELEVANT DOMESTIC LAW AND PRACTICE

51. Article 29 of the Constitution of Ukraine on the right to freedom and personal inviolability can be found in the judgment in the case of *Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04, § 121, 21 April 2011).

52. Under Article 187 of the Criminal Code, robbery is punishable by a term of three to seven years' imprisonment (paragraph 1). Robbery following conspiracy by a group is punishable by seven to ten years' imprisonment, with confiscation of property (paragraph 2).

53. Article 178 of the Code on Administrative Offences provides that the punishment for being drunk in public is, *inter alia*, administrative detention for up to fifteen days. Pursuant to Article 287 (as worded at the material time), a court's decision imposing a penalty for an administrative office was final and not amenable to appeal.

54. The provisions concerning the application of preventive measures and their types, time-limits for pre-trial detention, and the grounds for and procedure of detention by an investigation authority can be found in the judgment in the case of *Molodorych v. Ukraine* (no. 2161/02, §§ 56-58, 28 October 2010).

55. Under Article 23-2 of the Code of Criminal Procedure, if the court discovers a violation of law and/or of citizens' rights in the course of a pre-trial enquiry or investigation, or during an examination of a case in a lower-level court, it issues a separate ruling by which it draws the attention of the respective authorities to the established facts and directs them to take certain measures to remedy the situation.

56. Article 54 of the Code of Criminal Procedure provides that a judge is precluded from participating in a trial in the following cases:

> "(1) if he or she is a victim, a civil claimant, a civil defendant, or a relative of anyone of them, or a relative of the investigator, the inquiry officer, the prosecutor or the accused;
>
> (2) if he or she has already participated in the proceedings as a witness, an expert, a specialist, an interpreter, the inquiry officer, the investigator, the prosecutor, a defence counsel or a representative of the victim, the civil claimant or the civil defendant;
>
> (2-1) if during the pre-trial investigation he or she: ordered searches, seizures or inspections; ordered, changed or discontinued preventive measures or extended time-

limits for detention on remand; examined appeals against arrest warrants or examined appeals against the discontinuation of criminal proceedings;

(2-2) if during the pre-trial investigation he or she examined the issue of [the defence counsel's removal from the proceedings];

(3) if he or she, or his or her relatives, are interested in the outcome of the proceedings;

(4) if there are other circumstances giving rise to doubts about the impartiality of the judge ..."

III. RELEVANT INTERNATIONAL DOCUMENTS

57. Relevant international documents concerning the impartiality of judges can be found in the judgment in the case of *Harabin v. Slovakia* (no. 58688/11, §§ 104-110, 20 November 2012).

THE LAW

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

58. The applicant complained that his detention from 6 to 12 January 2006 had been unlawful. He relied on Article 5 § 1 of the Convention which reads, in so far as relevant, 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:

(a) the lawful detention of a person after conviction by a competent court;

...

(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 ..."

A. Admissibility

59. The Government contended that the applicant's complaint regarding the alleged unlawfulness of his detention from 6 to 9 January 2006 had been lodged out of the six-month time-limit, to be calculated from the

last-mentioned date. They noted that during those three days, the applicant had been in administrative detention on account of his being drunk in public, and that the relevant ruling had not been amenable to appeal. Accordingly, the Government maintained that this complaint, which had been lodged on 4 December 2006 (see paragraph 3 above), should be declared inadmissible.

60. The applicant denied that the six-month rule applied to that period of his detention. He insisted that in reality it had been a part of the longer uninterrupted period of his detention as a criminal suspect under Article 5 § 1 (c). The applicant cited in this connection the Court's judgment in the case of *Doronin v. Ukraine* (no. 16505/02, § 55, 19 February 2009), where a similar situation was examined.

61. The Court considers that the applicant's administrative detention was indeed closely linked to his arrest as a criminal suspect and his detention in this quality. It therefore joins the Government's objection as to this period of the applicant's detention to the merits of his complaint under Article 5 § 1 of the Convention (see *Doronin*, cited above, § 49).

62. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Neither is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

63. The applicant maintained that his detention could not be regarded as lawful because from 6 to 9 January 2006 it had been based on fictitious grounds and from 9 to 12 January 2006 it had not been authorised by any court order.

64. The Government contended that the applicant's detention had been in compliance with the domestic legislation. Having regard to the circumstances of his apprehension on 6 January 2006, the Government noted that there had been a reasonable suspicion to justify the applicant's arrest as a criminal suspect on 9 January 2006. As to his detention from 9 to 12 January 2006, which was not covered by any court order, they submitted that under the Ukrainian Constitution and the Code of Criminal Procedure, no such order was obligatory for the first seventy-two hours following arrest.

2. The Court's assessment

(a) The applicant's detention from 6 to 9 January 2006

65. The Court observes that, as suggested by the facts of the case and admitted by the domestic authorities themselves (namely in the report by the arresting officer of 6 January and the ruling of the Leninskyy Court of 29 March 2006 – see paragraphs 8 and 26 above), on 6 January 2006 the applicant was arrested on suspicion of having committed a criminal offence (car theft). Nevertheless, his three-day detention was documented as a punishment for an administrative (minor) offence, namely being drunk in public.

66. The Court notes that the practice of placing a person in administrative detention on an artificial pretext, in order to have him available for questioning in respect of a criminal offence under investigation appears to have been a recurring problem in Ukraine, and has been condemned in a number of the Court's judgments (see *Doronin*, cited above, § 56; *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 88, 24 June 2010; and *Nechiporuk and Yonkalo*, cited above, § 264).

67. In the present case, similarly, the Court considers that the authorities acted in bad faith and deceitfully in respect of the applicant, thus breaching the principles of legal certainty and protection from arbitrariness enshrined in Article 5 § 1 of the Convention.

(b) The applicant's detention from 9 to 12 January 2006

68. The Court notes that on 9 January 2006, the three-day period of the applicant's detention, documented as being administrative, expired. The investigator then re-arrested him, this time on suspicion that he had committed a criminal offence three days earlier.

69. The Court observes that under Ukrainian law, deprivation of liberty without a reasoned court order was only possible in a limited number of situations. Article 29 of the Constitution permitted such a measure to be applied for a maximum of three days, only in cases where there was an urgent need to prevent or stop an offence being committed, while Articles 106 and 115 of the Code of Criminal Procedure provided that an investigator could arrest a person if the latter was caught in *flagrante delicto*, was identified as the perpetrator by eyewitnesses or the victim(s), or if there was clear evidence on his body or clothing which linked him to the crime (follow the references given in paragraphs 51 and 54 above).

70. Turning to the facts of the present case, the Court notes that on 6 January 2006, the applicant was arrested having been caught in *flagrante delicto*. The procedural three-day time-limit for his detention without a court order should have started running from that date. The authorities,

however, circumvented it by placing him in administrative detention on an artificial pretext.

71. Accordingly, the malpractice regarding his initial detention criticised above also undermined the lawfulness of his detention without a court order during the subsequent three days, that is to say the period between 9 and 12 January 2006.

(c) Conclusion

72. The Court thus concludes that there has been a violation of Article 5 § 1 of the Convention as regards the applicant's detention from 6 to 12 January 2006. That being so and having regard to its considerations in paragraphs 65-67 above, the Court dismisses the Government's objection as to whether the applicant complied with the six-month time-limit, which was previously joined to the merits of this complaint (see paragraph 61 above).

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

73. The applicant further complained about the length of his pre-trial detention under Article 5 § 3 of the Convention, which reads as follows:

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

A. Admissibility

74. 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. The Court therefore declares it admissible.

B. Merits

75. The applicant maintained that his pre-trial detention, having lasted from 6 January 2006 to 14 November 2007, had been excessively long and unjustified.

76. The Government submitted that the length of the applicant's pre-trial detention – one year, ten months and five days as calculated from 9 January 2006 to 14 November 2007 – had been reasonable. They also contended that the investigation had been conducted with the requisite expedience and that the courts had given relevant and sufficient reasons in justification of the applicant's continued detention.

77. The Court notes from the outset that the period to be taken into consideration commenced on 6 January 2006 – the date of the applicant's arrest, and terminated on 14 November 2007 – the date of his conviction by the first-instance court (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI). It follows that the applicant was held in pre-trial detention for one year, ten months and eight days.

78. As the Court has held in its case-law on many occasions, the reasonableness of a period of detention is never assessed *in abstracto*. In other words, Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally, provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see, for example, *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I).

79. The Court further emphasises that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV).

80. As regards the present case, the Court accepts, given the context of the applicant's initial arrest, that it was based on a reasonable suspicion that he had committed an offence (see paragraphs 7 and 11 above). The Court notes that, in justification of the applicant's remand in custody on 12 January 2006 the Leninskyy Court also referred to the fact that he had committed the offence in question while on probation following an earlier criminal conviction and that he was unemployed (see paragraph 11 above).

81. The Court observes, however, that those reasons did not evolve with the passage of time. Thus, the applicant's argument about his permanent place of residence and employment remained without assessment, and his further pre-trial detention continued to be justified solely by his extensive criminal record (see paragraphs 19, 29 and 32-33).

82. Although the applicant's criminal past could indeed be regarded by the authorities as an indication regarding his personality, the Court is not convinced that this reason alone, which in principle was not susceptible of reassessment with the passage of time as it concerned the past events, was sufficient for keeping the applicant in pre-trial detention for over one year and ten months.

83. The Court also does not lose sight of the fact that about a year after the beginning of the applicant's trial the examination of his case in the first-instance court had in fact to be started anew following its reassignment to a

different judge (see paragraphs 29 and 34-35 above). Furthermore, during about four months of the mentioned period there appeared to be no judge in the trial court responsible for the proceedings, as the office term of the one, who had earlier been in charge, expired on 10 December 2006 and a new judge was assigned only on 25 April 2007 (see paragraphs 34-35 above). Having regard to these delays, the Court does not consider that the national authorities displayed "special diligence" in the conduct of the proceedings during which the applicant was remaining in pre-trial detention.

84. In the light of the foregoing considerations the Court concludes that the applicant's right to "trial within a reasonable time or to release pending trial" was breached.

85. There has thus been a violation of Article 5 § 3 of the Convention in this regard.

III. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

86. The applicant next complained that it had been impossible for him to obtain the attendance and examination of one of the key witnesses, and that Judge R. had not been impartial in dealing with his case. He relied on Article 6 §§ 1 and 3 (d) of the Convention which, in so far as relevant, read as follows:

> "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. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

A. Admissibility

87. The Government argued that these complaints, which were raised by the applicant for the first time on 23 September 2010 (see paragraph 3 above), should be rejected as having been lodged outside the six-month time-limit. They referred in this connection to the Supreme Court's letter of 14 January 2010, by which its final ruling of the same date had been sent to the applicant's mother (see paragraph 48 above). Assuming that the aforementioned letter had reached her on 1 February 2010, the Government submitted that the six-month period had expired on 1 August 2010.

88. The applicant contested this objection. He noted that the Government had not provided any evidence proving that he, his mother or his lawyer had received the aforementioned ruling of the Supreme Court.

The applicant insisted that he had only found out about the ruling as a result of his lawyer's enquiries on 28 December 2010 (see paragraph 48-50 above).

89. The Court notes that, as a rule, the six-month period runs from the final decision in the process of exhaustion of domestic remedies. The date of such final decision is the day on which the judgment is rendered orally in public, or, where judgment has not been publicly pronounced, the day on which the applicant or his representative are informed of it, whichever is earlier (see *Loveridge v. the United Kingdom* (dec.), no. 39641/98, 23 October 2001).

90. The Court further reiterates that the six-month time-limit is an autonomous rule which must be interpreted and applied in a given case in such a manner as to ensure the effective exercise of the right of individual petition (see *Balogh v. Hungary* (dec.), no. 47940/99, 13 May 2003).

91. Turning to the present case, the Court notes from the outset that the final ruling of the Supreme Court of 14 January 2010 was not pronounced in a public hearing (see paragraph 47 above). Accordingly, the applicant could have only become aware of it once it had been served on him or his representative. There is no evidence, however, that a written copy, even if sent by the Supreme Court to the applicant's mother on 14 January 2010 by regular post, in fact reached her and, if so, when. Accordingly, the Court finds no reason to question the applicant's submission that he had only found out about the ruling in December 2010 after his lawyer had made an enquiry to that end.

92. Having lodged the respective complaints with the Court on 23 September 2010, the applicant cannot therefore be regarded as having missed the six-month time-limit under Article 35 § 1 of the Convention.

93. The Court dismisses this objection of the Government.

94. It further notes that these complaints are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Examination of B. as a witness in the applicant's trial (Article 6 §§ 1 and 3 (d))

(a) The parties' submissions

95. The applicant maintained that the judgment of 14 November 2007 was based on the facts established in the framework of B.'s trial, and that he had been unable to examine or have examined Mr B., as one of the key

witnesses in his case, in the court proceedings. In his opinion, B.'s statements were of importance for the legal classification of the incident of 22 October 2005, its background and the applicant's real intents and motives. The applicant also noted that he had insisted on the attendance of this witness during the examination of his case by courts at all three levels of jurisdiction.

96. The Government noted that, in accordance with the Court's case-law, it is for the national courts to assess the evidence before them and to decide whether it is appropriate to call witnesses. They emphasised that the applicant had never denied his involvement in the incident of 22 October 2005 and had only disagreed with its classification as robbery following conspiracy by a group. However, the testimonies of B., which had been read out in the applicant's trial, refuted those arguments. In the Government's opinion, the situation was quite straightforward for the court and did not warrant an examination of B.

97. The Government further observed that the applicant had requested the attendance of Mr B. only once, without success and at an inappropriate stage of the proceedings, and that he had not repeated that request later on in the course of his trial (see paragraph 41 above).

98. Lastly, the Government contended that, given all the circumstances of the case, the attendance and examination of B. could not have been decisive for the outcome of the applicant's trial.

(b) The Court's assessment

99. Given that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1, it is appropriate to examine the complaint under the two provisions taken together (see, among other authorities, *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203).

100. The Court notes that the admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports of Judgments and Decisions* 1996-II).

101. The Court reiterates that Article 6 § 3 (d) of the Convention enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Delta v. France*,

19 December 1990, § 36, Series A no. 191-A; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports* 1997-III; and *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II).

102. The term "witness" referred to above has an "autonomous" meaning in the Convention system. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà v. Italy*, cited above, § 41, with further references).

103. There are two requirements which follow from the above general guarantees. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 119, ECHR 2011).

104. The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined. This is because, as a general rule, witnesses should give evidence during the trial and all reasonable efforts should be made to secure their attendance. Thus, when witnesses do not attend to give live evidence, there is a duty to enquire whether that absence is justified (ibid., § 120).

105. Turning to the present case, the Court notes that the applicant was found guilty of robbery following conspiracy with B. It therefore accepts B.'s status as a witness in the applicant's trial. It remains to be seen whether there were good reasons for the non-attendance of this witness.

106. On the facts of the case, it appears that B. did not attend the applicant's trial simply because Judge R. had not summoned him.

107. Indeed, there is nothing in the case file to suggest that any efforts were made whatsoever to ensure B.'s attendance in the proceedings against the applicant, at least at the pre-trial investigation stage if not at a court hearing. Given that B. was at the time serving a prison sentence in Ukraine (see paragraph 15 above), the authorities could have identified his whereabouts and ensured his attendance without any difficulties had they wished to do so (see and compare with *Gabrielyan v. Armenia*, no. 8088/05, § 81, 10 April 2012). Furthermore, there is no evidence to suggest that B. was asked, but refused, to make depositions in the framework of the

applicant's trial for whatever reason, such as, for example, a fear of negative repercussions (see and compare with *Al-Khawaja and Tahery*, cited above, §§ 122-124).

108. The Court takes note of the Government's submission that the applicant had sought the attendance of B. at an inappropriate stage of the proceedings, and that he had not sufficiently persisted with that request (see paragraphs 41 and 97 above). It does not consider, however, that the applicant's behaviour indicated his eventual consent to the statements of B. given in different proceedings being read out in the trial court. Even had that been the case, it is not sufficient for the Court to conclude that he thereby waived his right to examine this witness. The Court notes that the applicant complained both before the appellate court and before the cassation court that he had been unable to examine B. as a witness (see paragraphs 42 and 46 above and, for the case-law, see *Gabrielyan*, cited above, § 85).

109. The foregoing considerations are sufficient to enable the Court to conclude that there were no reasons, let alone good reasons, for the restriction of the applicant's right to obtain the examination of the witness whose testimony had been used for his conviction. In these circumstances, the Court does not consider it necessary to proceed with the second part of the test as to whether the applicant's conviction was based solely or to a decisive degree on B.'s depositions (see paragraph 104 above).

110. Accordingly, there has been a violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention.

2. Alleged lack of impartiality of Judge R.

(a) The parties' submissions

111. The applicant further complained that Judge R. of the Leninskyy Court, who had dealt with his case, could not be regarded as impartial, given that she had already given her assessment as to the circumstances of the case in the framework of B.'s trial and had therefore had a preconceived opinion about them. Moreover, the applicant emphasised that the judge herself had admitted her lack of neutrality, having sought her own withdrawal from the case, a request which was however rejected.

112. The Government submitted that the President of the Leninskyy Court had examined and rejected Judge R.'s withdrawal and that there were no reasons to question the soundness of that decision. Overall, they did not discern any indication that the judge had been impartial.

(b) The Court's assessment

113. The Court reiterates that Article 6 § 1 of the Convention requires a court to be impartial. Impartiality denotes the absence of prejudice or bias. According to the Court's case-law, there are two tests for assessing whether

a tribunal is impartial within the meaning of Article 6 § 1. The first test (subjective) consists in seeking to determine the personal conviction of a particular judge in a given case. The personal impartiality of a judge must be presumed until there is proof to the contrary. As to the second test (objective), it means determining whether, quite apart from the personal conduct of a judge, there are ascertainable facts which may raise doubts as to his/her impartiality (see, for example, *Gautrin and Others v. France*, 20 May 1998, § 58, *Reports* 1998-III, and *Padovani v. Italy*, 26 February 1993, § 26, Series A no. 257-B).

114. The Court notes that in the vast majority of cases raising impartiality issues it has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III).

115. The Court also emphasises that in this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII, and *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009).

116. Turning to the present case, the Court notes that Judge R., who convicted the applicant as a single-judge formation, had earlier examined the merits of the case of the applicant's co-defendant, B., in the framework of which she had expressed her view on the involvement and roles of both B. and the applicant, having held, in particular, that they had acted in conspiracy and that it had been the applicant's initiative to steal, together with B., equipment from cars (see paragraph 13 above). Both aforementioned cases concerned the same event and implied the evaluation of the same evidence.

117. Moreover, as the applicant pointed out, Judge R. had herself admitted this as a ground for her self-recusal application, which, however, had been dismissed with a formalistic wording that the withdrawal of this judge was not called for under the applicable legal provisions (see paragraphs 36-37 above).

118. The Court therefore accepts that this situation could raise objectively justified doubts in the applicant's mind concerning the impartiality of that judge (see *Morel v. France*, no. 34130/96, § 44, ECHR 2000-VI). Indeed, the very fact that the applicant was tried by the judge who herself raised doubts on her impartiality in his case undermined appearances of a fair trial.

119. The Court finds this sufficient to conclude that the tribunal which convicted the applicant could not be regarded as impartial.

120. There has accordingly been a violation of Article 6 § 1 of the Convention on this account too.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Complaint under Article 5 § 4 of the Convention

121. The applicant also complained under Article 5 § 4 of the Convention that he could not obtain a judicial review of the lawfulness of his detention from 6 to 9 January 2006.

122. The Court observes that, while the applicant's complaints under Article 5 §§ 1 and 3 of the Convention complied with the six-month time-limit given that he had been convicted by the first-instance court's judgment on 14 November 2007 (see paragraphs 61, 72 and 74 above), the same cannot be said of his complaint under Article 5 § 4.

123. The Court notes that the detention in question was formally classified under the domestic legislation as penalty for an administrative offence not amenable to appeal (see paragraph 53 above). This means that the six-month time-limit under Article 35 § 1 of the Convention, within which the applicant should have introduced this complaint before the Court, is to be calculated from 9 January 2006, even though the initial period of his detention did not fall into any separate legal category of detention for the purposes of the Convention (see paragraphs 65-67 above, and, for the case-law, see *Jamroży v. Poland*, no. 6093/04, § 45, 15 September 2009).

124. Given that the applicant lodged his application on 4 December 2006 (see paragraph 1 above), his complaint under Article 5 § 4 of the Convention must be dismissed as belated.

B. Other complaints

125. The applicant also complained under Article 6 that he had not been given prompt access to the case file after the judgment of 14 November 2007 had been pronounced, that his sentence had been too severe, and that the criminal proceedings against him had lasted too long. Lastly, he

complained under Article 7 that he had received a conviction despite not having committed a criminal offence.

126. In the light of all the material in its possession, and in so far as the matters complained of are 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. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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

128. The applicant claimed 43,500 euros (EUR) in respect of non-pecuniary damage, having submitted separate calculations of the respective amounts as regards each of the alleged violations.

129. The Government contested this claim.

130. The Court considers that the applicant must have suffered non-pecuniary damage, which cannot be sufficiently compensated by the finding of a violation alone. Ruling on an equitable basis, it awards him EUR 10,000 under that head.

131. Furthermore, given the Court's findings regarding the unfairness of the domestic proceedings resulting in the applicant's conviction (see paragraphs 110 and 120 above), the Court considers it indispensable for the proper protection of human rights that a retrial (the possibility of which is envisaged in the Ukrainian legislation) be provided forthwith should the applicant so request (see, for example, *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 65, 28 October 2010). Any such trial must observe, strictly, the substantive and procedural safeguards enshrined in Article 6 of the Convention (see *Nechiporuk and Yonkalo*, cited above, § 297).

B. Costs and expenses

132. The applicant also claimed the following amounts in respect of his legal representation: EUR 247 as regards the domestic proceedings and EUR 880 as regards the proceedings before the Court. In substantiation of this claim, he submitted copies of contracts dated 9 March and 24 March

2006 for his legal representation in the domestic proceedings, with the lawyer's fee being 500 and 1,000 Ukrainian hryvnias (UAH) respectively. The applicant also submitted a copy of the contract for his legal representation in the proceedings before the Court, in which the lawyer's hourly rate was set at UAH 250. According to calculations by the applicant's legal representative, he spent thirty-two hours on the case before the Court. The legal fees thus totalled UAH 9,500, or EUR 1,127 (under the exchange rate of the National Bank of Ukraine as at the date of the just satisfaction claim (9 August 2012)).

133. The applicant also claimed EUR 23 for postal expenses in respect of his correspondence to the Court, which he confirmed by postage receipts.

134. The Government contested the above claims as exorbitant and unsubstantiated. They however agreed to the Court awarding the applicant EUR 18 in respect of postal expenses.

135. 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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant's claims for costs and expenses in full, less EUR 850 as the sum received by way of legal aid, and plus any value-added tax that may be chargeable to the applicant. Accordingly, the Court awards the applicant EUR 300 under this heading (EUR 277 in respect of his legal representation and EUR 23 in respect of the postal expenses).

C. Default interest

136. The Court considers it appropriate that the default interest rate 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. *Decides* to join the Government's objection as to the compliance of the applicant's complaint under Article 5 § 1 of the Convention regarding the lawfulness of his detention from 6 to 9 January 2006 with the six-month rule to the merits of this complaint, and dismisses it after having examined this complaint on the merits;

2. *Declares* the applicant's complaints under Article 5 §§ 1 and 3, as well as Article 6 § 1 (the "impartial tribunal" requirement) and Article 6 §§ 1

and 3 (d) of the Convention, admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention as regards the lawfulness of the applicant's detention from 6 to 12 January 2006;

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

5. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the non-attendance of B. as a witness;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of impartiality of the first-instance court which convicted the applicant;

7. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 300 (three hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President