CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 65550/01
by Vasyl Gavrylovych KOVAL
against Ukraine

The European Court of Human Rights (Second Section), sitting on 30 March 2004 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 12 October 2000,

Having regard to the partial admissibility decision of 10 December 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Vasyl Gavrylovych Koval, is a Ukrainian national who was born on 28 April 1951 and currently resides in Kyiv. He is represented before the Court by Mr Dunikowski and Ms Vakulenko, practicing lawyers. The applicant was formerly employed as Head of the Consular Department of the Ministry of Foreign Affairs of Ukraine.

A. The circumstances of the case

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

1. The investigation into the circumstances of the case

(a) First period of the applicant's detention

On 29 November 1997 the General Prosecution Service of Ukraine (the "GPS") detained the applicant on suspicion of forgery committed by a public official (*державним службовцем*). In a resolution of 30 November 1997, the Head of the Department of the GPS (the "Head of the Department") ordered that the applicant be placed in custody since there was a risk that he would abscond and obstruct the investigation of the case. In the meantime, however, on the night of 29 November 1997, the applicant had a heart attack in detention.

On 2 December 1997 the Head of Department ordered the applicant's detention on remand. Following a complaint by the applicant's lawyer, on 5 December 1997 the Head of the Department refused to release the applicant despite the latter's undertaking not to leave the jurisdiction. The Head of the Department considered that there was still a risk that the applicant would abscond and obstruct the investigation of the case. Furthermore, new charges of unlawful currency transactions, abuse of power and forgery committed by a public official were brought against the applicant. The applicant was subsequently transferred to the Zhytomyr Regional Investigative Detention Centre (*Слідчий Ізолятор Житомирської області*).

On 30 December 1997 the Minister of Foreign Affairs dismissed the applicant from his post as Head of the Consular Department of the Ministry of Foreign Affairs as being unsuitable for the position by reason of the pending criminal investigation (*взв'язку із невідповідністю зайнятій посаді*).

From December 1997 to June 1998 the applicant, his wife, his defence lawyers and employees of the Consular Department of the Ministry of Foreign Affairs repeatedly lodged petitions with the GPS, the Verkhovna Rada (the Parliament of Ukraine), the President of Ukraine and other governmental bodies, complaining about the unlawfulness of the investigation, the lack of valid reasons for the applicant's detention, the unlawful search of his house and office, the unfairness of the seizure of documentation and foreign currency (10,000 US dollars and 320 Polish Zlotys [Around EUR 7,875 and EUR 66 respectively]), an unfair restriction on the sale of the property of the applicant and his sister imposed by the GPS, an unfounded refusal to provide him with medical assistance while in detention and the inhuman conditions of his detention.

On 17 January 1998 the GPS decided to conduct a medical examination of the applicant's fitness for detention.

On 20 January 1998 the applicant was examined by a physician as he had complained about his poor state of health. In particular, he referred to heart problems and headaches.

On 5 February 1998 the applicant was transferred to the Cardiology Department of the Zhytomyr Regional Hospital (*Житомирська обласна лікарня*) for examination by a commission of medical specialists. The examinations took place on 5 and 6 February 1998. The applicant was examined by an ophthalmologist, an otolaryngologist, a urologist, a neurologist, a gastroenterologist, etc.

Another medical examination of the applicant commenced on 18 February 1998. The expert commission was composed of the Heads of Neurology and the Cardiology Departments and a forensic medical expert.

On 11 March 1998 the Bureau of Forensic Medical Expertise of the Zhytomyr Regional Administration's Department of Health Protection adopted an expert opinion following an assessment of the applicant's health between 18 February and 3 March 1998. It found that the applicant's diseases included first degree myocardial cardio sclerosis (*міокардичний кардіосклероз першого ступеня*), extensive spinal osteochondrosis (*поширенний спинний остеохондроз*), chronic duodenitis (*хронічний дуоденіт*), chronic parenchyma of the prostate (*хронічний паренхіматозний простатіт*), internal-external haemorrhoids (*внутрішньо-зовнішній геморрой*) and the residual effects of a small cerebral haemorrhage in the basin of the right middle cerebral artery with a left-hand side pyramidal deficiency and general vasomotor neurosis (*залишкові явища малого інсульту в басейні правої середньо-мозкової артерії з лівосторонньою пірамідальною недостатністю на фоні вегето-судинної дистонії*). It concluded that the applicant could be held in custody in the Investigative Detention Centre and was fit to take part in the investigation. He could be provided with emergency medical assistance if necessary.

On 12 May 1998 the GPS ordered another a medical examination of the applicant's state of health.

On 14 May 1998 the applicant was transferred to the Investigative Detention Centre of the Kyiv Region (*Слідчий Ізолятор Київської області*).

On 19 May 1998 the Kyiv City Bureau of Forensic Medical Examination conducted a second examination of the applicant. The examination revealed that the applicant suffered from second degree hypertension, the residual effects of the stroke, a benign tumour of the occipital part of the head and extensive spinal osteochondrosis.

(b) The applicant's release on bail

On 29 June 1998 the GPS decided to release the applicant on bail as it was impossible to provide him with the necessary medical treatment in detention. The applicant was also prohibited from leaving the territory of Ukraine. The applicant's wife (Ms Larysa M. Koval) deposited the sum of 500,000 Ukrainian Hryvnias (UAH) [The applicant claimed that at the time of the deposit, 500,000 UAH amounted to approximately 250,000 USD (around EUR 196,900)] in a GPS account on 23 and 26 June 1998. On the same date Ms Koval signed an attestation that she had been informed about the conditions of bail and the possibility of its confiscation. The same document was signed by the applicant.

From 2 to 28 July 1998 the applicant was treated in Hospital No. 22 in Kyiv.

On 24 July 1998 the GPS prohibited the applicant from occupying positions in the Consular Department of the Ministry of Foreign Affairs during the pre-trial investigation.

On 6 August 1998 the applicant was hospitalised at the Kyiv Oncological Centre where he underwent an operation.

On 2 September 1998 the applicant's lawyer requested the Zhytomyr Investigative Detention Centre to provide him with a copy of Mr Koval's medical file. On 16 September 1998 the Head of the Medical Unit of the Zhytomyr Detention Centre informed the lawyer that the medical file could not be made available to him, as it was part of the applicant's personal record.

On 9 September 1998 the applicant, allegedly by chance, met one of the witnesses, Mr O. Bogomolov, at the Kyiv Central Train Station. During the meeting with the witness, the applicant apparently asked him to tell the investigation the truth about the money and currency with which the applicant had bought an apartment from him.

On 12 October 1998 the investigator of the GPS received information from Mr O. Bogomolov to the effect that the applicant had met with him on 9 September 1998 and tried to influence his statement. This was later confirmed in writing by the witness's wife (Mrs Tyshchenko), who informed the prosecution that the applicant had threatened her and Mr Bogomolov with the initiation of criminal proceedings against them for unlawful currency transactions.

(c) The second period of the applicant's detention

On 20 October 1998 the GPS initiated a criminal investigation into unlawful currency transactions and abuses of power. On the same date the GPS resolved that the applicant be taken into custody on the grounds that he was obstructing the investigation of criminal acts. New charges concerning other serious offences were brought against the applicant. The applicant was transferred to the Investigative Detention Centre of the Security Service (*Слідчий Ізолятор Служби Безпеки України*). After his transfer, he was

examined by a neuropathologist of the Centre who was on duty. An electric cardiogram, blood test and biochemical test were carried out. From this date onwards, the applicant went on a hunger strike.

On 21 October 1998 the GPS informed the Head of the Investigative Detention Centre about the applicant's physical condition and asked him to provide the applicant with the necessary medical assistance and treatment.

On 21, 28 and 30 October, and 2 and 15 November 1998, the applicant's lawyer and wife requested that the GPS release the applicant due to his poor state of health. On the same date, following a request from the prosecution, the applicant was examined by the doctor of the Investigative Detention Centre.

The applicant was subjected to force feeding as from 23 October 1998.

On 4 November 1998 the applicant's lawyers appealed against the applicant's detention to the Pechersky District Court of Kyiv as his state of health had substantially deteriorated, which was confirmed by the medical checks conducted on 2 and 4 November 1998.

(d) The applicant's release on an undertaking not to abscond

On 27 November 1998 the Pechersky District Court of Kyiv quashed the resolution of the GPS of 20 October 1998 following the applicant's appeal. On the same date the GPS changed the preventive measure to an undertaking by the applicant not to abscond.

On 30 November 1998 the applicant was hospitalised with acute hypertension. On the same day the GPS lodged a *protest* against the decision of the Pechersky District Court of Kyiv, seeking to annul the decision on the grounds that it was not justified by the case-file and contravened the relevant legislation.

(e) The third period of the applicant's detention

On 30 November 1998 the Kyiv City Court allowed the *protest* of the Deputy Prosecutor General and quashed the decision. On the same date the GPS resolved to detain the applicant on remand. As a result, the applicant was immediately arrested and transferred to the Investigative Detention Centre of the Security Service (“the SBU Detention Centre”). The applicant's complaints, with a view to initiating supervisory review proceedings against the Kyiv City Court's decision, were dismissed on 13 January 1999 as being unsubstantiated.

On 19 January 1999 the GPS investigator refused to institute criminal proceedings against the applicant for his attempt to influence witnesses as there was no *corpus delicti* in the applicant's actions.

From December 1998 until June 1999 the applicant unsuccessfully lodged a number of complaints with the GPS, the Supreme Court of Ukraine and the SBU Detention Centre, seeking release from custody on account of his poor state of health.

On 11, 21 and 22 November 1998, 13 (twice), 15, 17 and 18 March and 22 April, 27 May, 1, 2, 4, 16 June, 8, 9, 11, 13, 16 (twice) and 18 July 1999, the applicant was examined by doctors from the Ambulance Service and doctors of the SBU Detention Centre. Between 10 October 1998 and 19 July 1999, the applicant was visited 10 times by doctors of the SBU Detention Centre. These included two visits by a dentist and a surgeon. On 5 and 12 March 1998 the applicant refused to familiarise himself with an indictment and the case file because of his poor health.

2. Proceedings before the domestic courts

On 27 May, 1 June and 4 June 1999 the applicant, his wife and his lawyers lodged complaints with the Kyiv City Court seeking to change the preventive measure to an undertaking by the applicant not to abscond and to have the applicant medically examined. Hearings took place on 14 June, 15 July, 20 July, 27 July, 29 July and 3 August 1999.

During the hearing on 14 June 1999 the Kyiv City Court decided to assume jurisdiction of the case, not to release the applicant from detention and to order his medical examination.

Between 30 June and 1 July 1999 the applicant's state of health was examined in the SBU Detention Centre and the outpatient's department of the Kyiv Central Hospital.

On 7 July 1999 the court requested the SBU Detention Centre to inform it as to whether it was possible to provide the applicant with the necessary medical treatment for the diseases from which he was suffering. On 14 July 1999 the SBU Detention Centre replied that it was impossible to provide such treatment.

On 16 July 1999 the medical examination concluded that the applicant was not suffering from any life-threatening disease, and that he should be given in-hospital medical treatment should it transpire that he could not be treated adequately during his detention. In particular, the medical examination revealed that the applicant was suffering from critical second degree idiopathic hypertension (*гіпертонічна хвороба другого ступеню*), a second degree circulatory brain disorder (*дисциркуляторна енцефалопатія другого ступеня*), the residual effects of a small cerebral haemorrhage, an astheno-vegetative syndrome (*астено-вегетативний синдром*), a duodenal papilla ulcer (*виразкова хвороба дванадцятиперсної кишки*), gastritis (*гастрит*), erosive bulbitis (*ерозивний бульбит*), large bowel hypokinetic dyskinesia (*гіпокінетична дискінезія товстої кишки*), spastic colitis (*спастичний коліт*), internal-external haemorroids (*зовнішньо-внутрішній геморой*), fibrolipoma of the left tenth rib (*фіброліпома десятого міжреб'я зліва*), seborrhoeac dermatitis (*себорейний дерматит*) and eye retina angiopathy with an impairment of visual acuity (*ангіопатія сітчатки із зниженням гостроти зору*).

On 22 July 1999 the Head of the Investigative Detention Centre No. 1 of the Kyiv Region informed the court that the applicant could be provided with the necessary medical treatment at the Centre's medical unit.

On 3 August 1999 the Kyiv City Court decided to transfer the applicant from the SBU Investigative Detention Centre to the Detention Centre in the Kyiv Region due to his need for medical assistance. (The applicant alleges that he received no medical treatment whilst detained in the SBU Detention Centre from 3 August until 3 September 1999.) The court also ordered the Detention Centre in the Kyiv Region to inform it about the applicant's state of health and about his ability to participate in hearings. The court refused to change the preventive measure to an undertaking by the applicant not to abscond.

In the course of the hearing on 3 September 1999, the applicant lodged a plea challenging the prosecutor on the grounds of bias. This plea was dismissed by the Kyiv City Court as unsubstantiated. It also dismissed the applicant's motion for release.

On 3 September 1999 the applicant lodged a motion with the President of the Kyiv City Court challenging the judge presiding at the hearings in his case. On 6 September 1999 the President of the Kyiv City Court rejected this motion as unsubstantiated.

On 27 December 1999 the Kyiv City Court sentenced the applicant to five years and six months' imprisonment and ordered the confiscation of his personal property. The court also deprived the applicant of the right to occupy official positions for three years and stripped him of the rank of Ambassador Extraordinary and Plenipotentiary, second class, following his conviction for unlawful currency transactions (Article 80-2 of the Criminal Code 1960 [The new Criminal Code of Ukraine of 5 April 2001 entered into force on 1 September 2001] (hereinafter the “CCU”), abuse of power (Article 165-1 of the CCU), and forgery committed by a public official (Article 172 of the CCU). It also ordered the forfeiture of the applicant's bail, i.e. UAH 500,000. In the course of the proceedings the applicant requested leave to question particular witnesses who, he maintained, could prove his innocence. This request was refused by the Kyiv City Court which based its findings of guilt on other corroborating evidence.

On 4 January 2000 the applicant appealed to the Supreme Court of Ukraine, seeking to have the Kyiv City Court decision of 27 December 1999 quashed and the proceedings in the case terminated. He and his advocates claimed that the Kyiv City Court unfairly assessed the evidence in the case, based its finding on evidence that did not prove his guilt and failed to establish the objective truth in the case.

On 27 April 2000 the Supreme Court of Ukraine partly allowed the applicant's appeal, re-classified the offence of unlawful currency transactions, and sentenced him to five years' imprisonment for aiding and abetting the perpetration of unlawful currency operations. It also held that the applicant should be regarded as having been sentenced for forgery

committed by a public official, as established by the Criminal Code of 12 January 1983. For the rest, it upheld the decision.

3. Subsequent proceedings and the applicant's detention after conviction

On 8 June 2000 the applicant was transferred to the Mensk Penitentiary to serve his sentence, where he received in-patient treatment in the medical unit.

On 6 July 2000 and 18 July 2000 the applicant and his lawyers lodged complaints with the President of the Supreme Court, seeking to institute supervisory proceedings in the case and to quash the preceding decisions. On 6 December 2000 the Deputy President of the Supreme Court of Ukraine rejected these complaints as being unsubstantiated.

On 18 September 2000 the Governor of Mensk Penitentiary No. 91 informed the applicant's lawyer that, even though the applicant was receiving medical treatment, his state of health was deteriorating.

The applicant and his lawyers lodged further complaints against the above-mentioned decisions with the President of the Supreme Court. On the basis of these complaints, on 5 February 2001, the Deputy President of the Supreme Court lodged a *protest* with the Plenary Supreme Court seeking to have the decisions quashed, the applicant's acts re-classified and the case remitted for fresh consideration as regards the forfeiture of his bail.

On 6 April 2001 the Plenary Session of the Supreme Court, attended by 85 judges, partly allowed the *protest* of its Deputy President. It decided to amend the judgment of the Kyiv City Court of 27 December 1999 and the ruling of the Supreme Court of 27 April 2000. It also held that one of the offences committed by the applicant should be re-classified from abuse of power with grave consequences to abuse of power with no grave consequences. It decided to sentence the applicant to 4 years' imprisonment and to prohibit him from occupying governmental positions for two years. It ruled that the penalty stripping the applicant of the rank of Ambassador Extraordinary and Plenipotentiary, second class, should be deleted from the decisions. It also upheld the decision on the forfeiture of his bail, finding that there had been no substantive infringement of the law on criminal procedure in this matter.

On 27 April 2001 the Mensk City Court amnestied the applicant, pursuant to section 5 of the Amnesty Law of 11 May 2000. He was released the same day.

On 2 July 2001 the Kyiv City Court decided to return to the applicant the USD 10,000 and PLZ 320 [Around EUR 7,875 and EUR 66 respectively], which had been seized from him and kept on the GPS bank account. It also annulled preventive measures which had been imposed on the applicant's apartments in Kyiv and Simferopil, on the apartment of his sister in Kyiv and on other property belonging to the applicant.

On 21 March 2003 the Head of the Department of the State Department for the Enforcement of Sentences informed the applicant that the legislation in force "did not provide for the study or copying of inmates' archived personal records" and, therefore, the applicant's motion of 24 February 2003 to familiarise himself with his medical records whilst in detention, in order to prepare his submissions to the Court, was refused.

On 18 February 2003 the applicant lodged a complaint with the Supreme Court with regard to an alleged infringement of the presumption of innocence. On 21 February 2003 the Supreme Court dismissed the complaint as the judgment in the applicant's case was final and not subject to appeal. On 22 May, 2 July and 17 September 2003 the applicant lodged a similar complaint with the President of Ukraine. On 20 October 2003 the Deputy Head of the Administration of the President of Ukraine dismissed the applicant's complaint for lack of jurisdiction.

On 19 September 2003 the General Prosecution Service dismissed the applicant's further complaints as unsubstantiated.

On 21 December 2003 the applicant lodged complaints of a violation of his constitutional rights with the Pechersky District Court of Kyiv. These proceedings are still pending.

B. Relevant domestic law and practice

1. Constitution of Ukraine, 26 June 1996

Article 29

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

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

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

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

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

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

Transitional provisions

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

2. Criminal Code of Ukraine, 1960

Article 180: Interference with a witness

"Interference with the witness's appearance ... before a court, preliminary investigation or inquiry bodies, unlawful pressure on a witness aimed at a refusal to testify or to produce evidence, or pressurising him to give false evidence under threat of murder, violence, the destruction of property of these person or of their close relatives, or disclosure of information defaming them, bribing the witness, ... with the same purpose, as well as threats to implement the above-mentioned actions in revenge for previously produced evidence, shall be punished by up to 4 years' imprisonment or by compulsory labour in a penitentiary for a term up to 2 years."

3. Code of Criminal Procedure of Ukraine, 1960

Article 148: Purpose and grounds for the application of preventive measures

"Preventive measures shall be imposed on a suspect, accused, defendant, or convicted person in order to prevent his/her attempts to abscond from an inquiry, investigation or the court, to obstruct the establishment of the truth in a criminal case or pursue criminal activities, and in order to ensure the execution of procedural decisions.

Preventive measures shall be imposed where there are sufficient grounds to believe that the suspect, accused, defendant or convicted person will attempt to abscond from investigation and the court, or if he fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues the criminal activities.

If there are insufficient grounds for the imposition of preventive measures, the suspect, accused or convicted person shall sign a written statement undertaking to appear upon notification by the inquirer, investigator, prosecutor or the court, and shall also undertake to notify them of any change in his place of residence.

If a preventive measure is applicable to a suspect, he shall be charged within 10 days from the time of imposition of the measure. In the event that the indictment is not issued within that time, the preventive measure shall be annulled."

Article 149: Preventive measures

"The preventive measures are as follows:

(1) a written statement undertaking not to abscond;

(2) a personal surety;

(3) a surety of a public organisation or labour collective;

(3-1) bail;

(4) remand in custody;

(5) supervision by the command of a military unit.

As a temporary preventive measure, a suspect may be detained on the grounds and pursuant to the procedure provided for by Articles 106, 115 and 165-2 of this Code."

Article 150:
Circumstances that shall be taken into account
in choosing a preventive measure

"In resolving the issue of imposing a preventive measure, in addition to the circumstances specified in Article 148 of this Code, such circumstances as the gravity of the alleged crime, the person's age, state of health, family and financial status, type of activity, place of residence and other circumstances relating to the person shall be taken into consideration."

Article 154-1: Bail

"Bail consists in the deposit, by the suspect, accused, defendant, other natural or legal persons, of money or other assets with the body of preliminary investigation or a court for the purpose of ensuring the proper conduct of the person with respect to whom the preventive measure has been applied, his fulfilment of the obligation not to leave the place of permanent or temporary residence without the permission of the investigator or the court, and his appearance upon a summons before the investigative body or the court.

The amount of bail is determined taking into account the circumstances of the case by the body that applies the preventive measure. It cannot be less than: one thousand times the citizen's tax-exempt minimum income, with regard to a person who is accused of committing a serious crime punishable by deprivation of liberty for a term of more than 10 years'; 500 times the citizen's tax-exempt minimum income with regard to a person accused of committing another serious crime or a previously convicted person; and 50 times the citizen's tax-exempt minimum income, with regard to any other persons. In all cases the amount of bail shall not be less than the amount of the civil claim substantiated by sufficient evidence.

On the payment of bail, the suspect, accused or defendant shall be apprised of his obligations and the consequences of their non-fulfilment, and the person who stands surety shall be apprised of the offence of which the person in respect of whom bail is applied is suspected or accused, and informed that, in the event that this person fails to fulfil his obligations, the bail will be forfeited to the State.

Before the case is committed to the court, the preventive measure in the form of bail may be imposed on a person who is held in custody only with the permission of the prosecutor who authorised the detention and, after the case has been received by the court, such a measure may only be imposed by the court.

The person who stands surety may refuse to perform the obligations undertaken prior to the emergence of the circumstances for the forfeiture of the bail to the State. In this case he shall ensure the appearance of the suspect, accused or defendant before the investigative body or the court with a view to having the preventive measure imposed on him replaced by a different one. Bail shall be returned only after a new preventive measure has been chosen.

In the event that a suspect, accused or defendant breaches his obligations, bail shall be forfeited to the State. The issue of forfeiture of bail to the State shall be resolved by the court at a hearing during the consideration of the case or in separate proceedings. The person who stands surety shall be summoned to the court in order to give explanations. Failure of that person to appear before the court for a hearing without good reason shall not obstruct the examination of the issue of the forfeiture of bail to the State.

The issue of the return of bail to the person who stood surety shall be resolved by the court during the trial of the case. The bail deposited by the suspect, accused or defendant may be withheld by the court for the execution of the judgment in the form of compensation for damage." *(As amended by Article 154-1 in accordance with the Law of 20.11.96 p. N 530/96-BP)*

Article 165-1:
Decree (Ruling) on the Application, Annulment or Modification of a Preventive Measure

"With regard to the application, annulment or modification of a preventive measure, the investigative body, investigator, prosecutor or judge shall issue a decree, and the court shall give a ruling."

Article 165-2: Procedure for the Selection of a Preventive Measure

"At the stage of the pre-trial investigation, a non-custodial preventive measure shall be selected by the investigative body, investigator or prosecutor.

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

The motion shall be considered within seventy-two hours of the detention of the suspect or accused.

In the event that the motion concerns the detention of a person who is currently not deprived of his liberty, the judge is entitled, by means of a decree, to give permission

for the suspect to be detained and brought before the court under guard. Detention in such cases may not exceed seventy-two hours; and in the event that the person is outside the locality where the court is situated, it may not exceed forty-eight hours from the moment at which the detainee is brought within the locality.

Upon receiving the motion, the judge shall examine the material in the criminal case file submitted by the investigative bodies or investigator. A prosecutor shall interrogate the suspect or accused and, if necessary, shall hear the person who is the subject of the proceedings, shall take the opinion of the any previous prosecutor or defence counsel, if the latter appeared before the court, and shall issue a decree:

(1) refusing to select the preventive measure if there are no grounds for so doing;

(2) selecting a preventive measure in the form of taking of a suspect or accused into custody.

The court is entitled to select for the suspect or accused a non-custodial preventive measure if the investigation or prosecution refuses to select a custodial preventive measure for him/her.

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

4. Resolution of the Plenary Supreme Court of Ukraine on the practice of the applying bail as a preventive measure, no. 6 of 26 March 1999

"... 2. Judging from the content of Article 154-1 of the Code of Criminal Procedure, a decision concerning bail, or a refusal to apply it, falls entirely within the jurisdiction of the person or body responsible for the proceedings in the case at the relevant time. The court shall consider the bail application taking into consideration the relevant reasoning [of the parties] in each individual case, and taking into account the nature and the gravity of the crime committed, information about the accused person and the other circumstances of the case; it [the court] can apply bail instead of detention only if there are reasonable grounds for considering that bail would ensure the appropriate conduct of the person concerned and his fulfilment of procedural obligations, as well as the enforcement of a judgment...

9. ...In determining the amount of bail, the courts shall take into account the specific circumstances of the case and the personality of the accused/suspect (in particular, his family and financial status).

12. In accordance with paragraph 6 of Article 154-1 of the Code of Criminal Procedure a breach by the suspect, accused or convicted person of his/her bail obligations shall lead to bail forfeiture. [Bail forfeiture] shall be decided upon at the trial stage of the proceedings (substantiated by the judgment, and, before its delivery, by a resolution or ruling of the court), or in the course of separate judicial proceedings."

COMPLAINTS

The applicant complained under Article 3 of the Convention of his ill-treatment in detention pending trial. He stated that he was deprived of proper and necessary medical treatment and assistance, and criticised the conditions of his detention as inadequate. He also complained that he did not have any effective remedies in respect of his Article 3 complaints, contrary to Article 13 of the Convention.

On 25 November 2002 the applicant submitted a new complaint under Article 3 about the conditions of his detention after the final judgment on 27 April 2000 by the Supreme Court and his transfer to the Mensk Penitentiary, where he was serving his sentence.

In his observations in response to those of the Government on 10 May 2003, the applicant lodged the following further complaints:

- a lack of independence and impartiality of the courts whilst considering his case (Article 6 § 1 of the Convention);
- an infringement of the principle of *res judicata,* in relation to the quashing of the final judgment of the Pechersky District Court of Kyiv concerning his release from custody by the Presidium of the Kyiv City Court on 30 November 1998 (Article 6 § 1 of the Convention);
- the infringement of the principle of equality of arms, and the right to examine witnesses and prepare his defence (Articles 6 §§ 1, 3(b) and (d) of the Convention);
- the limitations imposed on his right to examine evidence and prepare his defence on the bail forfeiture (Articles 6 §§ 1, 3(b) and (d) of the Convention);
- being force fed on 22, 26 and 29 May, and 1, 4, 9, 11, 16, 18, 22 and 25 June 1998 while he was on a hunger strike (Article 3 of the Convention).

The applicant also complained about the unfairness of his bail forfeiture. In his submissions he referred to Article 6 § 1 of the Convention.

THE LAW

A. Preliminary considerations

The Court notes at the outset that the applicant's complaints under Articles 3, 4, 5 §§ 1, 6 § 1 (overall fairness of the proceedings), 6 § 2 and 14 of the Convention were rejected for the reasons set out in its partial decision of 10 December 2002. It confirms the grounds for dismissing those complaints. Its decision thereon cannot be reopened.

The Court next observes that further new complaints were submitted by the applicant after communication of the case to the respondent Government. They were based on an alleged infringement of Article 3 in respect of the conditions of his detention after the final judgment on 27 April 2000 by the Supreme Court, and his transfer to the Mensk Penitentiary, where he was serving his sentence. They were also based on allegations of being force fed in May and June 1998 during his hunger strike while in pre-trial custody.

The applicant added other complaints at that time concerning the lack of independence and impartiality of the courts in considering his case (Article 6 § 1 of the Convention), allegations of an infringement of the principle of *res judicata,* in relation to the quashing of the final judgment of the Pechersky District Court of Kyiv by the Presidium of the Kyiv City Court on 30 November 1998 (Article 6 § 1 of the Convention), allegations of an infringement of the principle of equality of arms, the right to examine witnesses, and the right to examine evidence and prepare his defence on the bail forfeiture (Articles 6 §§ 1, 3(b) and (d) of the Convention).

The Court observes that all of these complaints were submitted on 10 May 2003, i.e. more than six months after the events of which complaint is made. In particular, the final decision upon the applicant's complaints under Article 6 §§ 1 and 3(b) and (d) was given by the Supreme Court of Ukraine on 6 April 2001 and the applicant was subjected to force feeding in May and June 1998. Even assuming that the applicant may be said to have exhausted domestic remedies, if any, in respect of these matters, the Court considers that these complaints must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for failure to observe the six-month rule laid down in the former provision (for further details of which, see below).

B. The parties' submissions as to the admissibility of the communicated complaints

1. Application of the six month rule to the applicant's complaints about the conditions of detention

(a) The Government's preliminary objection as to the six months

The Government submitted that, in accordance with Article 35 § 1 of the Convention, the Court "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". The Government stressed that the applicant's complaints were lodged with the Court on 12 October 2000. However, they mentioned that there were three periods of the applicant's detention. The first period ran from 29 November 1997 and 29 June 1998, i.e. his arrest and release on bail, respectively. The second ran from 12 October 1998 and finished on 27 April 2000, i.e. the applicant's second detention on remand and the adoption of the subsequent decision of the Supreme Court of Ukraine, respectively. The third period ran from the applicant's detention after his conviction, i.e. from 27 April 2000 and to 27 April 2001, the date on which the applicant was amnestied and released by the Mensk City Court.

The Court recalls that the object of the six month time-limit under Article 35 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with within a reasonable time and that past decisions are not continually open to challenge. The rule also affords the prospective applicant a time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (see, for example, *Worm v. Austria*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1534, at p. 1547, §§ 32-33). In cases where there is a continuing situation, the six month period runs from the cessation of the situation (*B. and D. v. the United Kingdom*, no. 9303/81, Commission decision of 13 October 1986, D.R. 49, p. 44). The concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicant a victim (see, *Montion v. France*, no. 11192/84, Commission decision of 14 May 1987, D.R. 52, p. 227; *Hilton v. the United Kingdom*, no. 12015/86, Commission decision of 6 July 1988, D.R. 57, p. 108). Normally, the six month period runs from the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date

of the acts or measures complained of (see, *D.P. and J.C. v. the United Kingdom* (dec.), no. 38719/97, 26 June 2001).

In the present case, since the applicant referred to specific events which occurred on identifiable dates, they cannot be construed as a "continuing situation" (see, *G.R. v. the United Kingdom* (dec.), no. 24860/94, 30 November 1994). The Court concludes therefore that the six month period envisaged by Article 35 § 1 of the Convention must be counted from the date on which the situation in question ended.

(b) Admissibility of the complaint about conditions of detention between 29 November 1997 and 29 June 1998

Applying the aforementioned principles to the applicant's complaint about the conditions of his detention from 29 November 1997 until 29 June 1998, the Court considers that this complaint was extinguished by the latter date, whereas the application was submitted to the Court on 12 October 2000, that is, more than six months later.

Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period. The Court notes that the applicant's petitions on this matter to the GPS, the parliamentary Human Rights Committee and Commissioner, as well as the President of Ukraine, cannot be taken into account, as these procedures cannot be considered effective remedies to be pursued under Article 35 § 1 of the Convention. The Court considers therefore that the six month period began to run from 29 June 1998, the date of the applicant's release. Moreover, no circumstances exist to show that the applicant was unable to lodge his complaints with the Court after his release from custody on that date.

It follows that this complaint was introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(c) Admissibility of the applicant's complaint concerning his further detention from 12 October until 27 November 1998

The Court notes that the applicant was detained for the second time on 12 October 1998 and subsequently released on 27 November 1998. For the same reasons as above, the Court considers that his complaint about his conditions of detention during that period has been introduced out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

(d) Admissibility of the applicant's complaints concerning his further detention from 30 November 1998 until 8 June (July) 2000

The Court observes that the applicant was arrested in hospital and detained on 30 November 1998. His pre-trial detention ended with his transfer from the Kyiv Investigative Detention Centre to the Mensk Penitentiary on 8 June 2000. The Court finds that this period of detention,

amounting to 1 year, 7 months and 8 days, falls within its six-month jurisdiction.

(e) The applicant's complaints concerning the conditions of his detention after his conviction

As to the applicant's complaint about the conditions of his detention after his conviction and transfer to the Mensk Penitentiary on 8 June 2000, until his release following an amnesty on 27 April 2001, the Court notes that the applicant did not raise these matters with the Court until 25 November 2002, more than six months after the cessation of the alleged problem. It follows that this complaint has also been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(f) Conclusions as to compliance with the six month rule

The Court considers, taking into account that the application was lodged on 12 October 1998, that it is only those complaints of the applicant concerning the conditions of his detention between 30 November 1998 and 8 June 2000 that can be considered by the Court, as it is only with regard to this period that the applicant has complied with the six month rule prescribed by Article 35 § 1 of the Convention.

2. Government's objection as to the exhaustion of domestic remedies by the applicant

As to the Government's objection to the admissibility of the application on account of the applicant's failure to exhaust domestic remedies, and in particular his failure to complain to the prosecution service about the poor conditions of his detention and the lack of adequate and necessary medical treatment, as envisaged by the Law on Prosecution and the Law on Pre-trial Detention, the Court finds that these complaints cannot be considered effective and accessible remedies for the purpose of Article 35 § 1 of the Convention (see decision as to the admissibility in *Nevmerzhitsky v. Ukraine*, no. 54625/00, 25 November 2003).

As to the Government's reference to the fact that the applicant has not applied to the domestic courts in order to challenge the conditions of his detention, the Court finds that the Government have failed to show that this remedy was effective and accessible, or that it would have offered immediate and effective redress for the applicant's complaints (*see four judgments of 29 April 2003: Dankevich v. Ukraine*, no. 40679/98, § 112; *Khokhlich v. Ukraine*, no. 41707/98, § 154; *Nazarenko v. Ukraine*, no. 39483/98, § 114; *Aliev v. Ukraine*, no. 41220/98, § 110).

The Court considers that this part of the applicant's complaints cannot be declared inadmissible for non-exhaustion of domestic remedies. The Court finds the cases referred to by the Government in their observations of little

assistance to the aforementioned issue. It concludes therefore that the Government's objection should be rejected.

C. Merits of the applicant's complaints

1. Complaints about the conditions of the applicant's detention between 28 November and 8 June 2000

The applicant complains about his ill-treatment whilst remanded in custody. In particular, he complains about a lack of proper and necessary medical treatment and assistance, denied to him between 30 November 1998 and 2 June 2000. He alleges that the poor conditions of his detention caused him severe suffering and resulted in the deterioration of his health. He relies in this connection on Article 3 of the Convention, which in so far as relevant provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(a) Conditions of detention in the Kyiv Regional Detention Centre and the SBU Detention Centre

The Government recalled that, in accordance with the Court's case-law, Article 3 of the Convention enshrines one of the fundamental values of the democratic society (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 62). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and the state of health of the victim. Furthermore, in considering whether ill-treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, *Peers v. Greece*, no. 28524/95, §§ 67-68, ECHR 2001-III; *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII). The Government focussed on a few issues raised by the applicant as he had mainly complained about the failure of the authorities to provide him with proper medical treatment and nutrition. The Government denied the applicant's allegations and contended that he had not been subjected to inhuman and degrading treatment during his stay in the Investigative Detention Centres of the SBU and the Kyiv Region.

The applicant disagreed. In particular, he alleged that the denial of medical treatment was only one of the aspects of his complaints. He further

insisted that he sustained horrendous treatment in detention which was meted out deliberately and was aimed at breaking his moral resistance and forcing him to testify against third persons, as well as to confess to having committed crimes he did not commit. He also maintained that the atrocious manner in which certain investigative procedures were applied to him, and the cumulative effects of the ill-treatment on his physical and moral integrity, support a finding that there was an extremely grave violation of Article 3 of the Convention.

The applicant claimed that his being taken into custody on 30 November 1998 contravened the principles enshrined in Article 3 of the Convention, as his state of health, and the diseases from which he was suffering, showed that the prosecution deliberately acted in violation of the Convention.

The applicant stressed again that the conditions of his detention in both Detention Centres were degrading. He referred to the fact that the cells of the Investigative Detention Centre No. 1 of Kyiv Region were infested with pests. An elevated, open toilet was situated not far from the table, opposite the door of the 12 square meter cell inhabited by eight inmates. There was no privacy in the cell and everybody smoked. There was no opportunity to be alone in the cell. The conditions in the Medical Unit, where the applicant stayed from 3 August 1999 till 6 June 2000, were practically the same as in other cells. The cells were overcrowded, with 10-12 persons in a space of 14 square meters. Ill detainees who transited under guard from other Penitentiary institutions or detention facilities, some of them suffering from tuberculosis and venereal diseases, were held with other detainees in the same detention facilities, thus creating a risk of contagion.

As to the detention conditions in the SBU Investigative Detention Centre, the applicant stated that they were much better, but the cell was equipped in such a way that a detainee constantly felt humiliated. The toilet was situated in the middle of the cell, on an elevated concrete base, absolutely open. It was placed so as to be seen not only by the cell-mates, but also by the prison guards. Almost half of the prison guards were women. There was no water in the cell. Cold water was supplied only upon the request of a detainee for a short period of time.

The applicant maintained, referring to the 1999 Report of the Accounting Chamber of Ukraine "on the results of inspecting the budgetary allocations for the maintenance of the State Department of Ukraine for the Execution of Sentences and its Facilities and Enterprises", that the detention conditions were of a poor standard because the State Budget only allocated UAH 2.9 million to the penitentiary system, which left an average of UAH 13 (approximately EUR 2) per detainee a year, or one UAH per month. In 2000 that sum was reduced to UAH 11 a year (EUR 1.5), i.e. UAH 0.90 a month. In 1999 the State budget only provided 25.4% of the sum requested for the nutrition of prisoners, and in 2000 this sum was reduced to 14.5%, which resulted in the allocation of UAH 0.38 a day per person for food. The applicant alleged that, at the time of his incarceration,

the Detention Centre of the Kyiv Region received only UAH 0.08 a day per detainee from the State budget and, therefore, the applicant could not be treated for a disease such as his ulcer whilst in detention. The applicant also stressed that he was subjected to some 70 humiliating searches during the six months of his trial.

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

(b) Medical treatment and assistance

The Government stressed that their position is based, in the first place, on the comparison of the examinations of the applicant's state of health when he was dismissed from the Security Service of Ukraine and the three conducted during his detention on remand. The analysis shows that, taking into consideration the applicant's occupation of an executive position involving travel and changes of climate over a long period, as well as the stress caused by the criminal investigation against him, the applicant's diseases could have developed normally, even without his placement in a remand facility. Moreover, the Government drew attention to the fact that the applicant was provided with the relevant medical treatment while in detention. They further referred to the fact that the medical file contained references to medicines with which the applicant was provided and which were made freely available to him. The Government said that they were willing to provide additional documentation to the Court in this respect. Nevertheless, having analysed the above-mentioned data, the Government concluded that the applicant had received adequate treatment during his detention in the Investigative Detention Centres of the SBU and the Kyiv Region. The Government stressed that the applicant's submissions in this respect were unsubstantiated.

The applicant refuted the Government's submissions. He maintained that his state of health in detention had progressively deteriorated, which means that he did not receive proper medical treatment or nutrition. The applicant claimed that medical treatment had been denied to him with malicious intent. He further submitted that the effects of such treatment amounted to torture. In October 1998 the applicant's heart problems had worsened. In March 1999 the applicant again suffered from the open duodenal ulcer, the tumour in his back and skin diseases. The same health problems recurred when the applicant's detention was renewed by the judge of the Kyiv City Court hearing his case in June–August 1999.

The applicant stressed that the Government in their observations had incorrectly stated that he had received proper and timely medical treatment

while detained in the Investigative Detention Centres of the SBU and the Kyiv Region. In particular, the applicant mentioned that the medical treatment provided to him did not lead to his recovery, but to a deterioration of his health. The applicant submitted therefore that the Government's claim does not correspond to the reality and can be rebutted by an analysis of the documentary annexes to the Government's observations. Moreover, the applicant submitted that some of the information presented by the Government in the medical records was untrue or had been intentionally omitted by them.

The applicant concluded that, in the light of the aforementioned Court judgments of 29 April 2003 against Ukraine (*Dankevich*, § 112; *Khokhlich*, § 154; *Nazarenko*, § 114 and *Aliev*, § 110), the conditions of detention in all the detention facilities referred to by the applicant were inhuman and degrading. The applicant stressed that the torture and ill-treatment he sustained was inflicted on him deliberately, with a view to humiliating him, compelling him to plead guilty and to testify against a third person.

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

2. Complaints about the lack of effective remedies in respect of poor conditions of detention

The applicant also alleges that he had no effective remedies for his complaints under Article 3 of the Convention. He alleges an infringement of Article 13 of the Convention, which in so far as relevant provides:

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

The Government reiterated that, in accordance with the Court's case-law concerning Article 13, where an individual has an arguable claim to be the victim of a violation of the right set forth in the Convention, he or she should have a remedy before a national authority in order to have the claim decided and, if appropriate, to obtain redress (see, *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports* 1996-III, § 70). The Government averred that the applicant had had effective domestic remedies at his disposal, but had failed to use them.

In particular, the Government maintained that in accordance with the Law on Prosecution and the Law on Pre-trial Detention, every detainee has a right to complain about the actions of an official to a public prosecutor, who supervises the detention conditions in remand facilities. The public prosecutor has to carry out an investigation into such complaints and take

measures to eliminate the violation. The results of the investigation are communicated to the complainant. If dissatisfied, the complainant can appeal to the higher prosecutor or a court, in accordance with the provisions of domestic law. This means that a person who wishes to complain against the actions or omissions of the administration of a detention facility, where he/she is detained, has the right to apply directly to a court about the matter. In that event, the court has to examine the complaints and deliver a judgment in accordance with Ukrainian legislation.

The Government reiterated that Article 28 of the Constitution of Ukraine prohibits torture and inhuman or degrading treatment or punishment. The Constitution contains direct norms and can be referred to by the claimant as a legal basis for his claim. Moreover, in accordance with the Constitution, the Convention forms an integral part of Ukrainian legislation. The present applicant faced no obstacles to complain to the domestic courts, seeking redress for alleged violations of Article 3 of the Convention. The Government shared the Court's position, elaborated in the *Aksoy v. Turkey* judgment, where the investigating officer of the Public Prosecution, who dealt with the applicant's case, could have checked whether the applicant was being provided with adequate medical assistance, had he taken into account the applicant's health conditions and acted in good faith.

The Government maintained that the investigating officer of the Public Prosecution had inquired more than once of the Head of the SBU Investigative Isolation Block about the applicant's state of health and his treatment. The Government drew the Court's attention to the fact that the first instance court, which examined the case, took into account the applicant's state of health and his ability to participate in the proceedings while examining the issue of the applicant's possible release from detention. If the applicant had considered the Prosecution's supervision of his medical treatment had been defective, he should have complained to the court about this and the lack of proper medical care. In any event the Government reiterated that a simple doubt as to the effectiveness of a remedy did not exempt the applicant from the obligation to exhaust it before lodging an application with the European Court of Human Rights.

The Government concluded therefore that Ukrainian legislation provided an effective remedy within the meaning of Article 13 of the Convention, which would have allowed the applicant to complain about the alleged violation of Article 3.

The applicant submitted that the continuous rejection of his petitions for release by the prosecution and courts, as well as the failure to investigate his complaints, amounted to an infringement of Article 3, as the authorities acted in bad faith.

The applicant noted that the Government's reference to the possibility of seizing a court, with complaints about the actions of the prosecutor and the investigation, was unsubstantiated, as this remedy only came into effect on 23 May 2001, the date of the ruling of the Constitutional Court allowing

such complaints under Articles 234-236 of the Code of Criminal Procedure and Article 248-3 of the Code of Civil Procedure. The applicant contended that the application to the GPS could not be considered to have been an effective remedy for the purpose of Article 13, given the prosecution's investigative functions in his case and the unreasonable rejection of all the complaints he did make. No investigation whatsoever had been conducted upon his complaints to the prosecution.

The applicant contended that he could not have effectively challenged in court the inadequate conditions of his detention and the ill-treatment. He could not claim compensation for the harm caused to him during the pre-trial investigation and trial, as the courts were not competent to examine such complaints. The applicant submitted that he had availed himself of all judicial and non-judicial remedies that were at his disposal. However, the authorities had failed to carry out an effective investigation or adequately pursue his complaints. He concluded that he had no effective remedies for his complaints under Article 3, contrary to Article 13 of the Convention.

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

3. Complaints about the unfairness of the bail forfeiture

The applicant also alleges that he was denied a fair hearing, in that his wife was not invited to take part in the proceedings concerning the forfeiture of his bail. He alleges that Article 6 § 1 of the Convention was infringed, which in so far as relevant provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)."

(a) The Government's preliminary objection as to the applicability of Article 6

The Government considered that this complaint is incompatible *ratione materiae* with the provisions of Article 6 § 1 of the Convention as the procedure constituted the determination of neither a criminal charge nor "civil rights and obligations". In the Government's view, bail confiscation could only be examined under Article 5 of the Convention. The Government drew an analogy with tax disputes, bail forfeiture requiring a similar assessment of a failure to perform certain legal obligations. The Government also referred to the case-law of the Court under Article 5 § 4 of the Convention, Article 6 not being applicable to the procedure for the review of an application for release from detention. They cited the

Commission's decision in *Moudefo v. France* (Commission decision of 21 January 1987, no. 10868/84, D.R. 51, p. 62).

The Government also submitted that this part of the case should be declared incompatible *ratione personae* with the provisions of the Convention as the applicant's wife was not a party to the proceedings. They relied in this connection on the partial inadmissibility decision of the Court in the application of *Nevmerzhitsky v. Ukraine* (see *Nevmerzhitsky v. Ukraine,* no. 54825/00, 29 January 2003).

The applicant claimed that the bail forfeiture related to both a criminal charge and the determination of the applicant's civil rights and obligations, and rejected the Government's arguments.

(b) The Court's assessment

The Court recalls that *habeas corpus* proceedings fall outside the ambit of Article 6 § 1 of the Convention as they do not concern the determination of any criminal charge within the meaning of that provision and therefore do not necessarily attract all of the guarantees of Article 6. Nevertheless, the Court observes that the applicant's complaints do not concern the refusal to release the applicant on bail or to replace bail with detention on remand. In particular, the applicant complains about the bail forfeiture ordered by the judgment of the Kyiv City Court on 27 December 1999, upheld by the Supreme Court and the Plenary Supreme Court on 27 April 2000 and 6 April 2001, respectively. The Court notes that the decision to confiscate bail was given by the criminal court in the course of the criminal proceeding instituted against the applicant.

The Court recalls that, in their case-law, the Commission and Court never expressly stated whether Article 6 is applicable to such proceedings. However, it assumed that such proceedings should fall within the scope of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, §§ 23-24). Proceedings concerning a person's release on bail do not relate to a determination of "civil rights or obligations" or any "criminal charge" against him/her. Consequently, the Court reiterates its position with regard to the inapplicability of Article 6 § 1 of the Convention to the proceedings concerning preliminary judicial investigations or concerning the review of an order to remand in custody (see, *X. v. the Federal Republic of Germany*, no. 6541/74, Commission decision of 18 December 1974, D.R. 1, p. 82; *Witter v. the United Kingdom*, no. 13098/87, Commission decision of 6 May 1988; *Keijsper v. the Netherlands*, Commission decision of 8 September 1988, no. 12055/86). However, the Court notes that, in this particular case, the proceedings related not to the applicant's detention, but to the decision to confiscate bail following the finding by the prosecution, confirmed by the domestic courts, that the applicant had breached the conditions of his bail. The Court has therefore to decide whether the bail forfeiture attracted the

guarantees of Article 6 § 1 of the Convention and whether this provision was applicable.

The Court notes that the proceedings at issue concerned a pecuniary right; however, they were dealt with in the framework of criminal proceedings instituted against the applicant. Moreover, they concerned a breach of bail conditions and were of a public nature, whereas the party to these proceedings was the State, i.e. the GPS. Furthermore, an attempt to influence or threaten witnesses could have been classified as the criminal offence of interfering with witnesses under Article 180 of the Criminal Code 1960. The sanction for this offence was five years' imprisonment or two years' compulsory labour. It is therefore evident that these proceedings did not concern the determination of the applicant's civil rights and obligations, but were of a punitive nature, which is generally an element of a criminal offence. The question remains, therefore, whether the proceedings at issue concerned the determination of a criminal charge, within the meaning of Article 6 § 1 of the Convention.

The Court recalls that in order to assess whether proceedings involved the "determination of a criminal charge", it is necessary to examine whether they complied with the autonomous criteria developed in its case-law (see *Engel and Others v. the Netherlands,* judgment of 8 June 1976, Series A no. 22, §§ 81-82; *Öztürk v. Germany,* judgment of 21 February 1984 Series A no. 73, § 50). The Court recalls that there are three elements to be taken into account in this assessment: the qualification in domestic law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring. Regard must also be had to the object and purpose of Article 6 and to the ordinary meaning of the terms of that Article (see, among other authorities, *Garyfallou AEBE v. Greece*, judgment of 24 September 1997, *Reports* 1997-V, p. 1830, § 32).

It is therefore necessary to examine whether the failure to comply with the conditions of bail and, in particular an attempt to influence and threaten witnesses, in the light of the second and third criteria mentioned above, could be considered relevant to the "determination of a criminal charge". In this respect, the Court recalls that these criteria are alternative and not cumulative. For Article 6 § 1 (criminal) to apply, it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (see, *inter alia*, *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 23, § 55). This does not exclude that a cumulative approach may be adopted where a separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, among other authorities, the above-mentioned *Garyfallou AEBE v. Greece*, judgment, p. 1830, § 33; *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, p. 20, § 47).

As regards the nature of the implicit offence committed by the applicant, the Court recalls that he was found liable for having attempted to interfere with a witness in order to change that person's testimony. This action resulted in the forfeiture of his bail under Article 154-1 of the Code of Criminal Procedure. Interference with witnesses in order to influence testimony is a crime envisaged by Article 386 of Chapter XVIII of the new Criminal Code 2001 (previously Article 180 of the Criminal Code 1960). Accordingly, the legal rule infringed by the applicant is directed towards all persons who are released on bail and who must comply with the conditions of bail, otherwise bail can be confiscated and they can be criminally prosecuted for interfering with witnesses. One of the conditions of release on bail was not to interfere with the course of the criminal investigation in the case and the establishment of the objective truth. The general and public character of the legal rule in question is further confirmed by the Section XVIII of the Criminal Code which ensures citizens' respect for the unhindered administration of justice in criminal matters (see the above-mentioned *Öztürk v. Germany,* 20, § 53). The forfeiture imposed on the applicant was a punishment for interfering with the administration of justice. Its purpose was to deter re-offending. Its punitive nature is a customary distinguishing feature of criminal penalties (see the above-mentioned *Öztürk v. Germany*, p. 20, § 53; *A.P., M.P. and T.P. v. Switzerland,* judgment of 29 August 1997, *Reports* 1997-V, p. 1488, § 41).

The Government contended that the minor offence of interfering with witnesses had several features which distinguished it from offences in the realm of the criminal law *stricto sensu*. However, the Court notes that the elements relied on by the Government, such as the fact that the commission of the offence was not punishable by imprisonment and was not entered on the criminal record of the applicant, is not decisive in the classification of the offence for the purpose of the applicability of Article 6 § 1 (see *Öztürk v. Germany*, cited above, pp. 20–21, § 53). Moreover, the decision not to charge the applicant with the interference with witnesses cannot deprive the offence of its inherently criminal character.

In sum, the general character of the legal provision infringed by the applicant (Article 154-1 of the Code of Criminal Procedure), together with the deterrent and punitive purpose of the penalty imposed on him and the considerable value of the confiscated sum of money (around EUR 196,900), suffice to show that the proceedings were in effect criminal in nature.

In the light of the foregoing considerations, the Court considers that Article 6 § 1 of the Convention, under its criminal head, is applicable in the instant case.

(c) Admissibility of the applicant's complaints about bail forfeiture

The applicant maintained that the bail forfeiture was a punishment for the alleged attempt to interfere with witnesses. However, he was never formally

charged with that attempt, even though Article 180 of the former Criminal Code envisaged such a *corpus delicti* as an "attempt to influence witnesses". The applicant states that he could not challenge this allegation of the witness, Mr O. Bogomolov, in the course of the trial, nor cross-examine him, as Mr O. Bogomolov died shortly after the first interrogation. The Kyiv City Court heard a tape-recording of Mr O. Bogomolov's evidence which should not have been admitted in evidence without a declaration from the witness that this recording was true and that he had made it himself. The applicant maintained that the judges hearing his case were not independent or impartial, but corrupt. The Ukrainian judiciary is not, in general, impartial and independent as the courts heavily depend on executive power and are controlled by the Government. The applicant referred to numerous procedural violations by the judges in the course of the proceedings. Furthermore, the applicant maintained that his prosecution was politically motivated.

He also complained that his wife, Mrs Larysa M. Koval, who had stood bail for him and was co-owner of the sum involved, was not summoned to the trial or heard on the question of forfeiture, as required by Article 154-1 of the Code of Criminal Procedure, even though she was present in court throughout the trial. The applicant maintained that he was never informed that the issue of bail confiscation was on the agenda of the Kyiv City Court on 27 December 1999 and, therefore, he did not have adequate time and facilities to prepare his defence. Moreover, he did not know of the bail confiscation until the judgment was pronounced. He alleged that the Supreme Court failed to review these issues properly. The applicant concluded that the failure of the domestic courts to hear his wife on the forfeiture question led to a serious breach of his defence rights envisaged by Article 6 § 1 of the Convention.

The Government refuted the applicant's allegations. They referred to the fact that, before the delivery of the judgment in his case by the court of first instance, the applicant had had a right, and used it, to contest the decision of the prosecution to renew the detention on remand. His claims were rejected. The court's decision to forfeit bail was a result of the applicant's breach of the bail conditions, a breach established by the prosecution's investigation into the facts. Furthermore, the decision on bail forfeiture was a part of the decision concerning the applicable preventive measure of detention on remand. The Government stressed that the forfeiture procedure could not be considered as falling within the ambit of a "criminal charge" within the meaning of Article 6 § 1 of the Convention.

The Government submitted that the former Criminal Code of 1960, in force at the material time, contained the offence of "interfering with witnesses in order to influence their statements". However, the elements of such a crime related to threats of murder, the destruction of property or the dissemination of false information about a witness, etc. There were no such threats during the applicant's meeting with the witness, Mr O. Bogomolov.

The only threat which the applicant used concerned the institution of criminal proceedings. This kind of offence was not provided for in the Criminal Code and therefore the prosecutor decided not to charge the applicant. However, the matter breached the bail conditions. Therefore, the prosecutor decided to change the preventive measure and to order forfeiture of bail.

The Government further maintained that this decision was based on the prosecution's verbatim record and the statement of Mr O. Bogomolov. Given that the prosecution's decision to change the preventive measure was contested by the applicant in court, and that it was found to be lawful and well-founded, the domestic courts upheld the breach of the bail conditions. The Government concluded therefore that, even assuming that the guarantees of Article 6 § 1 were applicable to the bail forfeiture, they were fully complied with.

The Government contended that the failure to hear the applicant's wife did not concern the applicant's right to a fair trial. It cannot be assumed that the funds deposited by the applicant's wife for the applicant's bail were jointly owned by the couple, because the applicant did not present any evidence of this either to the domestic courts or in his application lodged with the Court. On the contrary, he claimed that his wife had borrowed the money. They referred to the case-law of the Court in the partial inadmissibility decision in the case of *Nevmerzhitsky v. Ukraine (*see *Nevmerzhitsky v. Ukraine*, no. 54825/00, 29 January 2003), where the issue of funds confiscated by the police was found to be incompatible *ratione personae* with the provisions of the Convention, the applicant not having been a victim in relation to such a complaint.

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

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints about the conditions of his detention and lack of proper medical treatment and assistance from 30 November 1998 until 8 June 2000 (Article 3 of the Convention) and, the complaints with regard to the lack of effective remedies in respect of the complaint under Article 3 (Articles 3 and 13 of the Convention) and the complaints with regard to the bail forfeiture (Article 6 § 1 of the Convention);

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President