



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

FIFTH SECTION

CASE OF RUSLAN YAKOVENKO v. UKRAINE

(Application no. 5425/11)

JUDGMENT

STRASBOURG

4 June 2015

FINAL

04/09/2015

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

In the case of Ruslan Yakovenko v. Ukraine,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

Vincent A. De Gaetano,

André Potocki,

Aleš Pejchal, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 21 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 5425/11) 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 Ruslan Anatoliyovych Yakovenko (“the applicant”), on 17 January 2011.

2. The applicant was represented by Mr O.V. Levytskyy, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their then Agent, Mr Nazar Kulchytskyy.

3. The applicant complained of the unlawfulness of his detention and of a violation of his right of appeal in criminal proceedings.

4. On 12 December 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Korolivka, in the Kyiv Region.

6. On 12 July 2010 the Bila Tserkva Town Court (“the Bila Tserkva Court”) found the applicant guilty of inflicting grievous bodily injuries on a certain Mr N. on 12 May 2006. Although this type of crime was punishable with five to eight years’ imprisonment, the court considered it possible to apply a more lenient sanction to the applicant. It had regard, in particular, to

the fact that he had pleaded guilty and had shown remorse. Accordingly, the court sentenced the applicant to four years and seven months' imprisonment. It also decided to include in the served part of the applicant's sentence the period from 20 October 2005 to 3 May 2006 (six months and fourteen days), during which he had been detained in the context of another criminal case. Lastly, in fixing the applicant's sentence the court had regard to the fact that he "had spent more than four years in [pre-trial] detention facilities in which the detention conditions were considerably harsher than in a post-conviction prison, and the previous judgments in respect of him had been quashed". No further information is available about the earlier detention of the applicant, the other criminal cases involving him, or the judgments that had been quashed.

7. In the operative part of its judgment, the Bila Tserkva Court also ruled that during his pre-trial detention the applicant should remain in a pre-trial detention centre (SIZO) as a preventive measure until the judgment became final. It further noted that the judgment was amenable to appeal within fifteen days of the date of its delivery.

8. On 15 July 2010 the term of the applicant's sentence expired, and he asked the SIZO administration to release him. His request was rejected. On the same day the SIZO administration, however, applied to the Bila Tserkva Court for permission to release the applicant subject to an undertaking not to abscond, given that he had served his prison sentence in full. No reply was received.

9. On 19 July 2010 the applicant's lawyer applied once again to the SIZO administration for the applicant's immediate release. He submitted, in particular, that there were no grounds for his client's continued detention. A copy of that letter was also sent to the Kyiv Region Prosecutor's Office.

10. On 27 July 2010 the fifteen-day time-limit for lodging an appeal against the judgment of 12 July 2010 expired and, in the absence of an appeal, it became final.

11. On the same day the SIZO administration wrote to the applicant's lawyer stating that it could not release the applicant until either the preventive measure in respect of him was changed or the judgment became final. It was noted in the letter that, in any event, it was for the Bila Tserkva Court to authorise the applicant's release.

12. On 29 July 2010 the SIZO received the court's order to enforce the final judgment and the applicant was released.

13. On 5 August 2010 the State Prisons Department wrote to the applicant's lawyer in reply to his complaints about the delayed release of the applicant, stating that there had been no violation of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW AT THE MATERIAL TIME

A. Code of Criminal Procedure (1960)

14. Article 148 specified the purpose and grounds for the application of preventive measures. It stated, in particular, that a preventive measure was to be imposed where there were sufficient grounds to believe that a suspect, an accused, a defendant or a convicted person would attempt to abscond, fail to comply with procedural decisions, obstruct the establishment of the truth in the case or pursue criminal activities.

15. At the stage of judicial proceedings a detainee could be released only on the basis of a decision of the judge or the court to that effect (Article 165). As also provided in Article 165, a preventive measure could be lifted or changed if the measure applied earlier was no longer necessary.

16. Although during the pre-trial investigation a detainee was to be released immediately by the administration of the detention facility if the term of his or her detention had expired and if no court ruling on its extension had been received by that time (Article 156 *in fine*), no such provision existed in respect of the procedure for releasing a detainee at the stage of judicial proceedings.

17. Article 274 concerned the application, lifting or change of a preventive measure by a trial court. It obliged the court to be guided by the relevant provisions of Chapter 13 (“Preventive measure” – Articles 148 to 165-3).

18. Article 324 required the sentencing court to decide, in particular, on the preventive measure to be applied to a convicted person until the judgment became final.

19. Article 343 reiterated in substance the above provision and further specified that the court could remand a convicted person in custody as a preventive measure only on the grounds provided for in the relevant provisions of Chapter 13.

20. Article 358 listed the issues which the appellate court could consider at a preparatory hearing. It could decide, in particular, to change, lift or apply a preventive measure in respect of a convicted person.

21. Under Article 401, a judgment would become final if it was not challenged on appeal before the statutory deadline (fifteen days – Article 349). If an appeal was lodged, a judgment would become final after the examination of the case by the appellate court (unless it was quashed). An acquittal judgment, or a judgment lifting the punishment, was to be enforced immediately, whereas a judgment involving a guilty verdict was to be enforced once it had become final. Article 404 provided that the court that delivered the judgment had to send the case for enforcement no later than three days after the judgment became final.

B. Civil Code (2003)

22. Article 1176 imposed on the State an obligation to “fully compensate an individual for the damage caused to him or her by unlawful conviction, unlawful imposition of criminal liability, unlawful application of a preventive measure [or] arrest ... regardless of the guilt of officials of the bodies of inquiry, pre-trial investigation authorities, prosecutor’s offices or courts” (paragraph 1). It further specified that “the right to compensation for damage caused to an individual by unlawful actions of a body of inquiry, a pre-trial investigation authority, prosecutor’s office or a court [would] arise in cases envisaged by law” (paragraph 2).

C. Law of Ukraine on the procedure for compensation for damage caused to citizens by the unlawful acts of bodies of inquiry, pre-trial investigation authorities, prosecutor’s offices and courts 1994 (“the Compensation Act”)

23. Under section 1, a person was entitled to compensation for damage caused, in particular, by an unlawful conviction, unlawful indictment, unlawful arrest or remand in custody. In the listed cases damage was to be compensated for regardless of whether the officials from the bodies of inquiry, pre-trial investigation authorities, prosecutor’s offices or courts were guilty.

24. Section 2 listed the cases in which the right to compensation arose. They included the following: (1) an acquittal judgment; (1-1) a judicial decision acknowledging, in particular, that the detention was unlawful; and (2) discontinuation of the criminal proceedings on grounds of lack of *corpus delicti* or of proof of guilt of an accused.

THE LAW

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

25. The applicant complained that that his detention from 15 to 29 July 2010 had been unlawful. He relied on Article 5 § 1 of the Convention, the relevant part of which reads as follows:

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

(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

1. Exhaustion of domestic remedies

(a) The parties' submissions

26. The Government argued that the applicant had not complied with the rule of exhaustion of domestic remedies. They conceded that his detention from 15 to 29 July 2010 had indeed been groundless. Relying on Article 1176 of the Civil Code (see paragraph 22 above), they maintained that it had been open to the applicant to seek damages but that he had failed to avail himself of that remedy.

27. The applicant disagreed. He submitted, in particular, that in order for a remedy to be effective in his case, it should have been able to ensure his immediate release once the term of his prison sentence had expired. He had applied for release to the SIZO administration and to the prosecution authorities. However, the SIZO administration had considered his release impossible until the judgment became final. As to the prosecutor's office, it had not found it necessary to intervene at all.

(b) The Court's assessment

(i) General case-law principles

28. The Court notes that the rule of exhaustion of domestic remedies is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that the domestic legal system provides an effective remedy which can deal with the substance of an arguable complaint under the Convention and grant appropriate relief. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 93, 10 January 2012, with further references).

29. An applicant is normally only required to have recourse to domestic remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It is incumbent on the Government claiming non-exhaustion to satisfy the Court on these points,

that is to say, that the remedy to which they refer was accessible and capable of providing redress in respect of the applicant's complaints, and offered a reasonable prospect of success. However, once the question of this burden of proof has been satisfied it falls to applicants to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in their case, or that there existed special circumstances exempting them from the requirement to have recourse to it (see, for example, *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006).

30. The Court further notes that, where a violation of Article 5 § 1 is in issue, Article 5 §§ 4 and 5 of the Convention constitutes *leges speciales* in relation to the more general requirements of Article 13 (see *Svetoslav Dimitrov v. Bulgaria* (dec.), no. 55861/00, 9 May 2006). Accordingly, in order to decide whether an applicant was required to make use of a particular domestic remedy in respect of his or her complaint under Article 5 § 1 of the Convention, the Court must evaluate the effectiveness of that remedy from the standpoint of the aforementioned provisions.

(ii) *Existence of a preventive remedy in compliance with Article 5 § 4*

31. The Court observes that from the day when a charge is determined, even if only by a court of first instance, the defendant is detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) (see paragraphs 46-51 below for a more detailed review of the relevant principles established in the Court's case-law).

32. The Court has held in its case-law that in such circumstances the judicial supervision of the deprivation of liberty required under Article 5 § 4 is considered to be already incorporated into the initial conviction and sentence. However, whenever fresh issues affecting the lawfulness of such detention arise, Article 5 § 4 comes back into play (see, as a recent authority, *Stoichkov v. Bulgaria*, no. 9808/02, §§ 64 and 65, 24 March 2005, with further references).

33. The Court is prepared to accept that in the present case a fresh issue concerning the lawfulness of the applicant's detention arose for him once his prison sentence had expired but he had not been released. At that stage he had no possibility of bringing judicial proceedings, by which the lawfulness of his continued detention thereafter would have been decided speedily and his release would have been ordered. Thus, the case was no longer before the first-instance court. As to an ordinary appeal, its examination would have been likely to last longer than the detention of which the applicant complained (twelve days). Moreover, it is not improbable that lodging an appeal would have entailed further extension of his detention as a preventive measure until the judgment became final. The Court will, however, analyse this issue in more detail.

34. As regards the applicant's applications to the SIZO administration and the prosecution, those authorities were not "a court" within the meaning of Article 5 § 4 of the Convention.

35. It follows that there were no effective domestic remedies for the applicant to exhaust with a view to putting an end to the alleged violation of Article 5 § 1.

(iii) Existence of a compensatory remedy in compliance with Article 5 § 5

36. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 of Article 5 where that deprivation has been established, either by a domestic authority or by the Court. The effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Lobanov v. Russia*, no. 16159/03, § 54, 16 October 2008, with further references).

37. The Court observes that in the present case the Government confined their objection to a statement that the applicant's detention had been without basis and that he could claim damages under Article 1176 of the Civil Code. The Court notes, however, that that provision is worded in quite general terms: it neither establishes legal preconditions for claiming compensation nor provides for specific mechanisms or procedures. Instead, Article 1176 refers to a separate law regulating those issues. It appears that it is the special law on compensation which should be applicable (see paragraphs 23 and 24 above). The Government did not refer to that law in their observations. Nor did they specify which provision of the domestic law the applicant's detention had in fact violated. The Government also failed to cite any relevant domestic case-law in this regard. It therefore remains unclear on what grounds and using which mechanisms the applicant could have obtained a judicial finding at the domestic level that his detention had been unlawful and could have claimed compensation for damages in that regard.

38. In such circumstances, the Court is not persuaded by the Government's argument that the remedy advanced by them was effective and had to be pursued by the applicant.

(iv) Conclusion

39. In the light of the foregoing considerations, the Court concludes that the applicant did not have at his disposal any effective domestic remedy to pursue in respect of his complaint under Article 5 § 1 of the Convention. The Court therefore rejects the Government's objection in this regard.

2. *Other considerations as to admissibility*

40. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

41. The applicant submitted that his detention from 15 to 29 July 2010 had been without basis and was thus contrary to Article 5 § 1 of the Convention.

42. In their observations on the admissibility of this complaint (see paragraph 26 above) the Government agreed with the applicant on this point. They did not, however, submit any observations on the merits of the complaint.

2. *The Court's assessment*

43. The Court considers that for the purposes of its analysis the applicant's detention should be divided into two distinct periods:

(1) from 15 to 27 July 2010, that is after the delivery of the judgment by the first-instance court and before it became final; and

(2) during the subsequent two days, from 27 to 29 July 2010, the time the authorities took to complete all the administrative formalities with a view to implementing the applicant's release after the judgment of the trial court had become final.

44. The Court will examine each period of the applicant's detention separately to see whether they complied with Article 5 § 1 of the Convention.

(a) The applicant's detention from 15 to 27 July 2010

(i) Grounds for the applicant's deprivation of liberty

(a) General case-law principles

45. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty, and no deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds (see, among other authorities, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 60, 15 March 2012).

46. The Court notes that a defendant is considered to be detained “after conviction by a competent court” within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal. The Court has held in this connection that the phrase “after conviction” cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them (see *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7). Furthermore, a person convicted at first instance and detained pending appeal cannot be considered to be detained for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence under Article 5 § 1 (c) (see, in particular, *Solmaz v. Turkey*, no. 27561/02, § 25, 16 January 2007).

47. The Court has consistently stated in its case-law that it is mindful of significant differences among the Contracting States on the question whether a person convicted at first instance has started serving a prison sentence while an appeal is still pending. However, the Court reiterates that the important guarantees of Article 5 of the Convention are not dependent on national legislation (see *B. v. Austria*, 28 March 1990, § 39, Series A no. 175, and *Solmaz*, cited above, § 26). Thus, even if the domestic law of a member State provides that a sentence only becomes final on completion of all appeals, pre-trial detention comes to an end for the purposes of the Convention with the finding of guilt and the sentence imposed at first instance (see *Solmaz*, cited above, § 26).

48. For example, in the case of *Grubić v. Croatia* (no. 5384/11, §§ 30-45, 30 October 2012) the applicant, who had been convicted and sentenced to thirty years’ imprisonment by a first-instance court, complained of the unlawfulness of several months of his detention after the delivery of the judgment at first instance. His deprivation of liberty during that period was still considered “pre-trial detention” under the domestic legislation. The Court examined his complaint from the standpoint of Article 5 § 1 (a) of the Convention and found no indication of arbitrariness.

49. The Court has also held in its case-law that the word “conviction” for the purposes of Article 5 § 1 (a), having regard to the French text (*condamnation*), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39; *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50; and, for more recent case-law, *Del Río Prada v. Spain* [GC], no. 42750/09, § 123, ECHR 2013).

50. Furthermore, the word “after” in sub-paragraph (a) of Article 5 § 1 does not simply mean that the detention must follow the “conviction” in

point of time: in addition, the “detention” must result from, “follow and depend upon” or occur “by virtue of” the “conviction”. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty in issue (see *Murray v. the Netherlands*, no. 10511/10, § 77, 10 December 2013, with further references).

51. Thus, the Court has previously found that various forms of preventive detention beyond the prison sentence constituted an applicant’s detention “after conviction by a competent court” (see, for example, *Van Droogenbroeck*, cited above, §§ 33-42; *M. v. Germany*, no. 19359/04, § 96, ECHR 2009; and *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, §§ 197-99, 18 September 2012). The detention at issue was not part of a penalty in such circumstances, but rather ensued from another “measure involving deprivation of liberty”, as noted in paragraph 49 above.

(β) Application of the above principles to the present case

52. The Court notes that the applicant’s detention during this period took place after the delivery of the judgment in his criminal case, but was still considered “pre-trial detention” under the domestic legislation.

53. Regardless of the classification at the domestic level, the Court notes that this period of the applicant’s detention no longer fell under Article 5 § 1 (c) (see, in particular, paragraph 46 above). It remains to be seen whether it was justified under sub-paragraph (a) of Article 5 § 1 of the Convention, since no other sub-paragraph of this provision is in principle applicable to the situation at hand.

54. The Court observes that the judgment of 12 July 2010 provided for two separate measures involving the applicant’s deprivation of liberty: firstly, a prison sentence, and, secondly, the applicant’s detention as a preventive measure until the judgment became final. Although the penalty imposed was to expire three days later, the second measure was to last for at least twelve days longer, given the fifteen-day time-limit for lodging appeals. Had the applicant lodged an appeal, the duration of his detention would have been even longer and would have depended on the time taken by the appellate court to examine his case.

55. Accordingly, the Court considers that even though the detention of which the applicant complained took place after the prison sentence imposed on him had been served in full, it could be regarded as another “measure involving deprivation of liberty”, which took place “after conviction” within the meaning of Article 5 § 1 (a).

56. In sum, the Court concludes that this period of the applicant’s detention falls within the exception set out in sub-paragraph (a) of Article 5 § 1 of the Convention. It remains to be seen, however, whether this provision has been complied with.

(ii) *Lawfulness of the applicant's detention during the period from 15 to 27 July 2010*

(a) *General case-law principles*

57. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be “lawful”. Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI, and *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III).

58. In assessing whether detention is lawful, the Court must also ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. The “quality of the law” implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of “lawfulness” set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention (see *Del Río Prada*, cited above, § 125, with further references).

59. Furthermore, arbitrary detention cannot be compatible with Article 5 § 1, as the notion of “arbitrariness” in this context extends beyond lack of conformity with national law. As a consequence, a deprivation of liberty that is lawful under domestic law can still be arbitrary and thus contrary to the Convention (see *Mooren v. Germany* [GC], no. 11364/03, § 77, 9 July 2009).

60. The Court has not previously formulated a general definition of what types of conduct on the part of the authorities might constitute “arbitrariness” for the purposes of Article 5 § 1. However, key principles that have been developed on a case-by-case basis demonstrate that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 68, ECHR 2008, and *Plesó v. Hungary*, no. 41242/08, § 57, 2 October 2012). One general principle established in the Court’s case-law is that detention will be “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities or where the domestic

authorities neglected to attempt to apply the relevant legislation correctly (see *Mooren*, cited above, § 78).

61. Furthermore, the requirement that detention must not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question (see *James, Wells and Lee*, cited above, § 195). The scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. In the context of detention pursuant to Article 5 § 1 (a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court (see *T. v. the United Kingdom* [GC], no. 24724/94, § 103, ECHR 2000-I, and *Saadi*, cited above, § 71). At the same time, in assessing whether there were indications of arbitrariness in the applicants' preventive detention not constituting a part of the sentence but still falling under Article 5 § 1 (a), the Court has found it necessary to identify the purpose of their detention under Article 5 § 1 (a) and has pursued the proportionality test (see *James, Wells and Lee*, cited above, § 205).

(β) Application of the above principles to the present case

62. The Court sees no indication that the decision of the Bila Tserkva Court to keep the applicant in detention until the judgment became final was contrary to the domestic law. Furthermore, the applicable legal provisions appear clear and foreseeable in their application. Thus, the Criminal Code of Ukraine explicitly states that the sentencing court must decide which preventive measure should be applied to the convicted person until the judgment becomes final (see paragraph 18 above). It also appears from the domestic legislation that the duration of the preventive measure does not depend on the duration of the prison sentence imposed, and can therefore be longer than that sentence.

63. The Court still has to satisfy itself that the applicant's detention during the period in issue, despite its compliance with domestic law, was not arbitrary and thus contrary to the Convention.

64. The Court does not consider that there was any bad faith on the part of the Bila Tserkva Court in its decision on the applicant's continued detention as a preventive measure. At the same time, the Court observes that the judgment contained no reasoning in that regard, apart from a general statement in the operative part on the application of the measure. The sentencing court's reasons for maintaining the applicant's detention as a preventive measure therefore remain unclear, particularly given that it meant that the detention would exceed the duration of the prison sentence imposed.

65. The Court accepts that there might be special considerations warranting, irrespective of the duration of the prison sentence, a convicted person's deprivation of liberty as a preventive measure aimed at ensuring

his or her availability for the judicial proceedings at appellate level in the event that the first-instance court's judgment is challenged on appeal. However, no such considerations were mentioned in, or can be inferred from, the judgment of the Bila Tserkva Court of 12 July 2010. On the contrary, the court noted the applicant's cooperation with the investigation and decided, on that ground, to apply a milder sanction than provided for in the relevant legislation (see paragraph 6 above). Accordingly, the applicant's continued detention beyond the duration of his prison sentence was unjustified. The Court notes in this connection that the Government admitted this in their observations (see paragraph 26 above).

66. In view of the above considerations, the Court concludes that the applicant's detention from 15 to 27 July 2010 was in breach of Article 5 § 1 of the Convention.

(b) The applicant's detention from 27 to 29 July 2010

67. The Court notes that the judgment of the Bila Tserkva Court of 12 July 2010 became final on 27 July 2010. Accordingly, the grounds for the applicant's detention, which had been ordered as a preventive measure until that judgment became final, ceased to exist. Moreover, that period of the applicant's detention was not related to the enforcement of the prison sentence imposed on him, because it had already expired.

68. The Court reiterates that some delay in implementing a decision to release a detainee is understandable, and often inevitable, in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep this to a minimum (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311; *Giulia Manzoni v. Italy*, 1 July 1997, § 25 *in fine*, Reports 1997-IV; *K.-F. v. Germany*, 27 November 1997, § 71, Reports 1997-VII; and *Mancini v. Italy*, no. 44955/98, § 24, ECHR 2001-IX). Administrative formalities connected with release cannot justify a delay of more than a few hours (see *Nikolov v. Bulgaria*, no. 38884/97, § 82, 30 January 2003). It is for the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty (see, for example, *Shukhardin v. Russia*, no. 65734/01, § 93, 28 June 2007, and *Mokallal v. Ukraine*, no. 19246/10, § 44, 10 November 2011).

69. In the present case it took the domestic authorities two days to arrange for the applicant's release once the grounds for his detention had ceased to exist after the judgment of 12 July 2010 became final. Given the prominent place which the right to liberty holds in a democratic society, the respondent State should have deployed all modern means of communication of information to minimise the delay in implementing the decision to release the applicant, as required by the relevant case-law (see *Mokallal*, cited

above, § 44). The Court is not satisfied that the Ukrainian authorities complied with that requirement in the present case.

70. It follows that the applicant's detention during this period was not justified under Article 5 § 1 of the Convention.

(c) Conclusion

71. In the light of all the foregoing considerations, the Court concludes that there has been a violation of Article 5 § 1 of the Convention in respect of the entire period of the applicant's detention complained of (from 15 to 29 July 2010).

II. ALLEGED VIOLATION OF ARTICLE 2 § 1 OF PROTOCOL NO. 7

72. The applicant also complained under Article 2 of Protocol No. 7 that he had been effectively deprived of the right to appeal against the judgment in his criminal case. The provision relied on reads as follows:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

A. Admissibility

73. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

74. The applicant submitted that he had effectively been obliged to choose between exercising his right to appeal against the judgment in his criminal case, on the one hand, and his liberty, on the other hand. In other words, had he decided to appeal, this would have considerably delayed his release.

75. The Government did not comment on the applicant's argument. They observed that, under the domestic legislation, he had had the right to lodge an appeal against the judgment of 12 July 2010, but that he had chosen not to do so. Accordingly, the Government submitted that the applicant's rights under Article 2 of Protocol No. 7 had not been violated.

76. The Court notes that the Contracting States in principle enjoy a wide margin of appreciation in determining how the right secured by Article 2 of

Protocol No. 7 to the Convention is to be exercised (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II).

77. As is apparent from the Court's case-law, this provision mostly regulates institutional matters, such as accessibility of the court of appeal or the scope of review in appellate proceedings (see, for example, *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, 18 January 2000).

78. In so far as the accessibility issue is concerned, the Court has considered it acceptable that in certain countries a defendant wishing to appeal may sometimes be required to seek permission to do so. However, it is a well-established case-law principle that any restrictions contained in domestic legislation on the right to a review secured in Article 2 of Protocol No. 7 must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach*, cited above, § 96; *Gurepka v. Ukraine*, no. 61406/00, § 59, 6 September 2005; and *Galstyan v. Armenia*, no. 26986/03, § 125, 15 November 2007).

79. The Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, and *García Manibardo v. Spain*, no. 38695/97, § 43, ECHR 2000-II). Bearing the above principle in mind, the Court has also held in its case-law that hindrance in fact can contravene the Convention just like a legal impediment (see *Golder v. the United Kingdom*, 21 February 1975, § 26, Series A no. 18, and, for a more recent reference, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 113, ECHR 2014).

80. Turning to the present case, the Court observes that there was a clear procedure envisaged in the Ukrainian legislation for appealing against a judgment in criminal proceedings. The Court will assess whether the applicant was, however, hindered in his right to lodge an appeal and, if so, whether that hindrance could be regarded as having infringed the very essence of his right embodied in Article 2 of Protocol No. 7.

81. The Court notes that the domestic courts considered it necessary to keep the applicant in detention as a preventive measure until the first-instance court's judgment became final, even after the prison sentence imposed on him by that judgment had already expired. In the absence of an appeal, the period in question lasted for twelve days. Had the applicant decided to appeal, this would have delayed for an unspecified period of time the point at which the judgment became final.

82. Accordingly, the Court agrees with the applicant's argument that the exercise of his right to appeal would have been at the price of his liberty, especially given that the length of his detention would have been uncertain.

The Court therefore finds that this circumstance infringed the very essence of his right under Article 2 of Protocol No. 7.

83. There has therefore been a violation of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

86. The Government contested that claim as unsubstantiated and excessive.

87. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant's claim in full.

B. Costs and expenses

88. The applicant also claimed EUR 1,330 for the costs and expenses incurred before the Court. He requested the Court to transfer this amount to his representative's bank account.

89. The Government contested the above claim as excessive.

90. 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 allows the applicant's claim in full and awards him EUR 1,330 for costs and expenses.

C. Default interest

91. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 2 of Protocol No. 7;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,330 (one thousand three hundred and thirty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be transferred to his representative's bank account;
 - (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.

Done in English, and notified in writing on 4 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Mark Villiger
President

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

M.V.
M.B.

CONCURRING OPINION OF JUDGE ZUPANČIČ

This case presents us with a genuine “prisoner’s dilemma”. Due to the peculiar nature of Ukrainian criminal procedure, the applicant spent his entire time in prison in “pre-trial detention” although that detention had *de facto* been post-trial and pre-sentencing. In the end, the trial court calculated the sentence by including all the “pre-trial” time spent in detention. Accordingly, the applicant was due to be released immediately after the subsequent pronouncement of the sentence.

A dilemma thus arose for the applicant. If he accepted the judgment and sentence as final, he was free to walk out of prison. However, if he chose to exercise his right of appeal guaranteed by the Convention, the Constitution and the criminal procedure, he was destined to remain in what was dubbed “pre-trial” detention.

In other words, by a quirk of the system he was prevented, or at the very least seriously discouraged, from exercising his right of appeal as per Article 2, paragraph 1, of Protocol No. 7:

Right of appeal in criminal matters

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

...”

I agree with the outcome in this case, of course, but propose to draw an analogy here with the well-known precept of criminal procedure concerning the so-called “prohibition of *reformatio in peius*”. Some legal authors maintain that this is a right of constitutional rank, namely, that the defendant, where he is the sole appellant, must have the assurance that his sentence on appeal will not be harsher than the sentence pronounced by the lower-instance court.¹

However, no such guarantee is enshrined in the Convention or its Protocols; neither do we believe that the prohibition of *reformatio in peius* is *per se* of constitutional importance.

What is of constitutional importance, on the other hand, is the defendant’s right of appeal. The latter is, as per H.L.A. Hart, a *prescriptive*

1. See, for example, Herke and Toth, *Theoretical and Practical Issues of the Prohibition of Reformatio in Peius in Hungary*, Issue of Business and Law, Volume 3 (2011), at <http://www.herke.hu/tan/11litv.pdf>

norm, whereas the prohibition of *reformatio in peius* is an *instrumental* rule *vis-à-vis* the prescriptive norm.

On the other hand, the immediate *ratio legis* of the prohibition of *reformatio in peius* is also very pragmatic. If the appellate courts are to have access to certain kinds of cases in order to be able to streamline the criminal case-law, appellants convicted in the lower-instance courts are not to be discouraged from lodging their appeals.

Nevertheless, even from this down-to-earth perspective, the prohibition of *reformatio in peius* is perceived as a traditional right of defendants who have been convicted in a non-final judgment in continental criminal proceedings; it is a legitimate appendage to their post-trial procedural position, irrespective of the narrower *ratio legis* enunciated above. Even if only tangentially, therefore, these defendants are supposed to benefit from this guarantee. Thus, from their own point of view, as well as from the point of view of the rule of law, criminal defendants must not be seriously discouraged from appealing against their convictions.

However, this is precisely what happened in the case before us. If the defendant had appealed against his conviction, his “pre-trial” detention would have been extended for the period it would have taken the appellate court to decide the case. Thus, he was barred from appealing against the judgment of the first-instance court. Accordingly, his right of appeal guaranteed under Article 2, paragraph 1, of Protocol No. 7 (*supra*) was in fact violated.

If we were to consider *in abstracto* the prohibition of *reformatio in peius* as a procedural right appended to the right of appeal, the discouragement inherent in this case regarding the defendant’s right to appeal would have been deemed to infringe the same *ratio legis*. For this reason, his case never reached the appellate court. It would, however, unquestionably have been in his interest *as well as* in the interest of the rule of law for the appellate court to have had the opportunity to adjudicate the case.

However, the Convention does not yet directly recognise the prohibition of *reformatio in peius* as a right of the defendant. Moreover, there is no case-law of the European Court of Human Rights on the matter. But the idea of not discouraging appellants does apply even within the Strasbourg system. As was pointed out by Judge Wojtyczek in point 11 of his separate opinion in the case of *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, ECHR 2013), “[it] should be noted that the instant case was referred to the Grand Chamber at the request of the applicants. While the Convention does not set out a prohibition of *reformatio in peius*, the

situation is paradoxical, in that a remedy provided for by Article 43 of the Convention and used by the applicants with a view to ensuring protection of [their] human rights has ultimately led to a Grand Chamber judgment which is much less favourable to them than the Chamber judgment.”