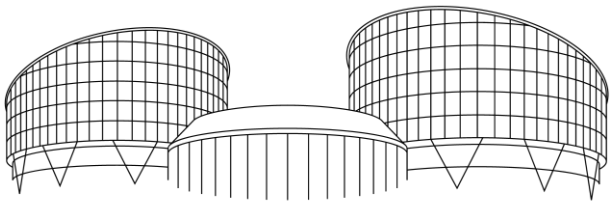

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KHARCHENKO v. UKRAINE

(Application no. 40107/02)

JUDGMENT

STRASBOURG

10 February 2011

FINAL

10/05/2011

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

In the case of Kharchenko v. Ukraine**,**

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

Peer Lorenzen, *President,*
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska,
Julia Laffranque, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 18 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 40107/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Leonid Petrovich Kharchenko ("the applicant"), on 23 October 2002.

2. The applicant, who had been granted legal aid, was represented by Mr S. V. Zakharov, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. On 13 November 2006 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning conditions of his detention and lack of medical treatment and assistance provided to him (Article 3), the length and lawfulness of his continued detention (Article 5 §§ 1(c) and 3), lack of opportunity to complain about unlawfulness and length of his detention (Article 5 § 4) and unreasonable length of the criminal proceedings and lack of effective remedies in that respect (Articles 6 § 1 and 13 of the Convention). It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1958 and lives in Kyiv.

A. Criminal proceedings against the applicant

5. On 21 April 2000 the Prosecutor of the Vatutinsky District of Kyiv ("the Vatutinsky District Prosecutor") instituted proceedings with regard to embezzlement of funds of the company R. The applicant was originally a witness in the case.

6. On 4 April 2001 the Vatutinsky District Prosecutor instituted criminal proceedings against the applicant on suspicion of his involvement in the embezzlement.

7. On 7 April 2001 the Vatutinsky District Prosecutor decided that the applicant should be detained, as he was suspected of a crime punishable by imprisonment.

8. On 17 May 2001 the investigator instituted another criminal case against the applicant on suspicion of his involvement in embezzlement and joined it to the first criminal case against the applicant.

9. On 3 June 2001 the same prosecutor decided that the applicant's detention should be extended to 4 July 2001.

10. Between 27 June and 6 September 2001 and on 14 September 2001 the applicant and his lawyer studied the criminal case file.

11. On 14 September 2001 the applicant was indicted for theft.

12. On 28 September 2001 the indictment was approved by the Vatutinsky District Prosecutor. The case was transferred for examination on its merits to the Vatutinsky District Court of Kyiv ("the Vatutinsky Court").

13. On 26 September 2001 the applicant's advocate lodged a request with the Vatutinsky Court seeking the applicant's immediate release.

14. On 5 October 2001 the Vatutinsky Court received the case file and on 12 October 2001 Judge K. of the Vatutinsky Court held a preparatory hearing in the case.

15. On 15 October 2001 Judge K. decided that the criminal case against the applicant should be remitted for additional investigation. He also rejected the applicant's request for release of 26 September 2001, finding no grounds for changing the preventive measure applied by the prosecutor. In particular, the court stated that the applicant had been detained on the basis of the prosecutor's decision since 7 April 2001 in order to prevent him from avoiding investigation and appearance in court, obstructing the establishment of the truth in the criminal case and continuing with criminal activity, and in order to ensure compliance with procedural decisions in

cases where the law provides for deprivation of liberty for more than three years. No time-limit for detention was fixed.

16. On 29 January 2002 the Kyiv City Court of Appeal ("the Court of Appeal") quashed the resolution of 15 October 2001 and remitted the case for examination on the merits to the Desnyansky District Court, Kyiv (formerly Vatutinsky District, but after changes to the judicial districts in Kyiv "the Desnyansky Court").

17. On 4 March 2002 the Desnyansky Court held a preparatory hearing in the case. It examined the applicant's request to be released on bail and found no reasons for allowing it. It also noted that the applicant had been detained lawfully, given that criminal proceedings against him were pending.

18. On 11 March 2002 the applicant's lawyer requested the Desnyansky Court to order the applicant's release. This request was refused the same day. The court considered that the applicant might evade and obstruct justice and, given his age, state of health, family status and economic status there were no grounds for replacing the detention with another preventive measure. On 14 March 2002 the court rejected a similar request by the applicant on the same grounds, adding that the seriousness of the charges had also been taken into account. Two more similar requests by the applicant were rejected by the court on 4 and 19 April 2002 on the same grounds.

19. On 29 April 2002 the Desnyansky Court ordered that the case be again remitted for additional investigation. The court also upheld the applicant's detention, noting without further elaboration that there were no grounds for changing the preventive measure. No time-limit for detention was fixed.

20. On 23 July 2002 the Court of Appeal quashed the resolution and remitted the case for re-examination on the merits. The court also noted that it had no legal basis for deciding on the applicant's request for release and considered that the conclusions of the first-instance court on the matter were lawful, reasoned and corresponded to the case file materials. Therefore, it left the preventive measure unchanged.

21. In August 2002 the Court of Appeal ordered the transfer of the criminal case from the Desnyansky Court to the Golosiyevsky District Court of Kyiv ("the Golosiyevsky Court").

22. On 28 August 2002 the Golosiyevsky Court ordered a hearing on the merits on 13 September 2002.

23. On 14 October 2002 Judge C. resumed examination of the case on the merits and informed the applicant's lawyer that she had decided not to remit the case for additional investigation. The court also rejected the applicant's request for release, on the ground that he might avoid and obstruct justice.

24. On 17 October 2002 the defence challenged Judge C.

25. On 24 December 2002 Judge C. of the Golosiyevsky Court decided to remit the case for additional investigation. It also decided that there were no grounds for changing the preventive measure in respect of the applicant.

26. On 13 March 2003 the Court of Appeal quashed the decision of 24 December 2002 and returned the case to the Golosiyevsky Court for examination on the merits. It also decided again that the applicant should remain in custody, as he had been charged with serious offences which would warrant deprivation of liberty after conviction.

27. On 13 May 2003 the Golosiyevsky Court decided that the case should be remitted for additional investigation to the Vatutinsky District Prosecutor. It also ordered the applicant's continued detention, without giving any particular reasons for it. The court also rejected the applicant's request for termination of the proceedings in the case.

28. On 28 July 2003 the Supreme Court rejected the applicant's request for leave to appeal on points of law lodged against the decision not to terminate the proceedings, as the applicant had failed to comply with procedural formalities.

29. On 4 August 2003 the Desnyansky District Prosecutor released the applicant from detention. The applicant signed an undertaking not to abscond.

30. On 30 August 2003 the applicant's advocate unsuccessfully requested the prosecution to amnesty the applicant, in view of the nature of the charges brought against him and his poor state of health.

31. On 24 October 2003 the criminal investigation was adjourned because one of the suspects was being searched for.

32. On 30 December 2003 the investigator of the Desnyanskiy Distirct Prosecutor's Office terminated the criminal proceedings against the applicant on all but two of the charges, for lack of evidence of his involvement in the crime. The criminal case concerning the remaining charges was transferred to the Desnyanskiy District Police Department.

33. On 18 September 2004 the investigator of the Desnyanskiy District Police Department terminated the criminal proceedings against the applicant concerning the remaining charges for lack of evidence of crime and initiated criminal proceedings in respect of crimes committed by an unknown person. This decision appears to have been mistakenly dated 18 September 2003 instead of 18 September 2004. Next day the criminal proceedings were suspended for failure to establish the identity of the suspected offender.

B. Conditions of detention

34. Between 20 April 2001 and 4 August 2003 the applicant was held in the Kyiv SIZO no. 13, a detention facility with, according to the applicant, poor prison conditions and insufficient medical treatment.

35. According to the Government, in that facility the applicant was held in the following cells:

- cell No. 30, measuring nine square metres and designed for three inmates;
- cell No. 64, measuring 52.36 sq. m and designed for twenty inmates;
- cell No. 66, measuring 53.07 sq. m and designed for twenty-one inmates;
- cell No. 68, measuring 61.19 sq. m and designed for twenty-four inmates;
- cell No. 72, measuring 10.21 sq. m and designed for four inmates;
- cell No. 76, measuring 9.92 sq. m and designed for three inmates;
- cell No. 116, measuring 10 sq. m and designed for four inmates;
- cell No. 117, measuring 9.96 sq. m and designed for three inmates;
- cell No. 128, measuring 15.95 sq. m and designed for six inmates;
- cell No. 195, measuring 22.44 sq. m and designed for eight inmates;
- cell No. 258, measuring 23.38 sq. m and designed for five inmates;
- cell No. 263, measuring 24.9 sq. m and designed for six inmates;
- cell No. 326, measuring 12.9 sq. m and designed for five inmates;
- cell No. 328, measuring 12.9 sq. m and designed for five inmates;
- cell No. 333, measuring 12.9 sq. m and designed for eight inmates;
- cell No. 336, measuring 12.9 sq. m and designed for five inmates.

All the cells had a constant supply of cold water, natural and artificial light, a separated toilet and ventilation. The number of detainees did not exceed the number of places in each cell.

36. According to the applicant, he was not held in cells 333 and 336. Cells 64, 66 and 68 had 40 bunks each. Cell 72, measuring 9 sq. m, was damp and very cold in winter. In this latter cell he spent in total about 18 months. In cell no. 195, which had very poor ventilation, he spent about six months in total.

C. Medical assistance in detention

37. According to the Government, the applicant had a full medical examination on arrival at the SIZO on 20 April 2001. He did not make any complaints about his health and was registered for follow-up (диспансерний облік) in respect of his chronic illnesses.

38. On 16 November 2001, 24 April 2002 and 15 April 2003 the applicant had regular medical check-ups and was X-rayed. The examination revealed no lung problems.

39. According to a medical certificate issued on 6 December 2001, the applicant had a mild form of diabetes and required a special diet but not medical treatment.

40. According to a medical certificate issued on 10 July 2002 the applicant had been diagnosed with ischaemic heart disease, stenocardia and diabetes.

41. On 15 January 2003 the applicant was examined by a cardiologist, who found him to be suffering from ischaemic heart disease and stenocardia.

42. On 27 January 2003 the applicant asked for medical assistance, complaining of chest pain and dizziness. Following a medical examination it was decided to place the applicant in the medical wing of the SIZO. From 28 January 2003 the applicant was treated in the medical wing of the SIZO, with a diagnosis of neurocirculatory dystonia and cervical osteochondrosis. The applicant was prescribed several different types of medication. Every third day he was examined by a general doctor. On 29 January 2003 he was examined by the cardiologist who found that the applicant had no heart problems. On 30 January 2003 the applicant was examined by a neuropathologist. On 11 March 2003 the applicant left the medical wing of the SIZO in a satisfactory state of health. Following this treatment, and until his release from detention, the applicant did not consult doctors with any health-related complaints.

43. Following his release, the applicant underwent medical treatment in Kyiv Hospital no. 15 for arrhythmogenic cardiomyopathy and ciliary arrhythmia from 7 to 27 August 2003.

II. RELEVANT DOMESTIC LAW

44. Article 253 of the Code of Criminal Procedure provides that having decided to commit an accused for trial, the judge should resolve, among other things the issue concerning the change, discontinuation or application of a preventive measure. Other relevant domestic law is summarised in the judgments of *Nevmerzhitsky v. Ukraine* (no. 54825/00, §§ 53-61, ECHR 2005-II (extracts)), and *Shalimov v. Ukraine* (no. 20808/02, §§ 39-42, 4 March 2010).

THE LAW

I. SCOPE OF THE CASE

45. In his reply to the Government's observations, the applicant submitted new complaints under Article 3 of the Convention, alleging that the conditions of his detention at the police station prior to his transfer to the SIZO were poor, as were the conditions of his detention in the court building during the court hearings. The Court notes that these new, belated

complaints are not an elaboration of the applicant's original complaints, on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Vitruk v. Ukraine*, no. 26127/03, § 49, 16 September 2010).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained that he had been subjected to inhuman and degrading treatment, since he was detained despite suffering from a number of chronic illnesses. He also complained about the prison conditions and of a lack of adequate medical treatment and assistance in detention, referring to Article 3 of the Convention, which reads:

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

A. Overcrowding and physical conditions of detention

1. Admissibility

47. The Government maintained that the applicant's complaints were not specific and gave no particular details about the prison conditions. They maintained that the conditions of the applicant's detention complied with sanitary standards, the nutrition was appropriate and there had been no occasions when there was an excessive number of detainees in the cells.

48. The applicant disagreed. He complained of overcrowding, poor ventilation and inadequate heating in cold weather.

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

2. Merits

50. The Court observes that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity 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 state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it has adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a

purpose cannot conclusively rule out a finding of a violation of this provision (see *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR 2001-III, and *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII,).

51. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

52. In the present case the parties submitted various figures as to the living space per detainee during the applicant's detention in the Kyiv SIZO. The figures submitted by the Government suggest that in most of the applicant's cells there was on average from 2.55 to 4.67 sq. m of living space per detainee. On the other hand, the applicant's submissions suggest that he had living space in that facility which was one-third of that suggested by the Government.

53. The Court notes that the Government failed to adduce any evidence in support of their estimate of the living space per detainee in the Kyiv SIZO despite the fact that the relevant information and evidence was at their disposal. In any event, in the light of the Court's established case-law on this issue and the relevant standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (which are quoted, for example, in *Kalashnikov,* cited above, § 97, and *Melnik v. Ukraine*, no. 72286/01, § 47, 28 March 2006), even the Government figures suggest that the applicant was held in overcrowded cells.

54. The Court further notes that the Government failed to substantiate in any way their submissions as to the adequacy of the ventilation system. In these circumstances it is inclined to give weight to the applicant's submissions on this matter (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004). The Court therefore finds that the applicant's detention in overcrowded conditions, which lasted for two years, three months and fifteen days, was further aggravated by inadequate ventilation. This conclusion is further corroborated by the Court's findings in the case of Koval (see *Koval v. Ukraine*, no. 65550/01, § 76, 19 October 2006), which concerns the same pre-trial detention facility.

55. The foregoing considerations are sufficient for the Court to conclude that the physical conditions of detention of the applicant in the Kyiv SIZO no. 13 amounted to degrading treatment in breach of Article 3 of the Convention.

B. Lack of medical assistance to the applicant

56. The Government maintained that the medical assistance to the applicant had been adequate. He had undergone regular medical checks and his health-related complaints had been adequately responded to.

57. The applicant considered the medical assistance inappropriate. He maintained that he had had a heart attack while in detention and had not received any medical treatment. He also noted that in January 2003 the cardiologist had given two contradictory conclusions as to his heart problems (see paragraphs 41 and 42 above). He further considered that one of his medical certificates had been falsified, since the biometric data in it had been incorrect and although the prison authorities had hospitalised him they had not recognised that he had heart problems. He further pointed out that after his release he had received in-patient medical treatment for heart disease because of the poor prison conditions.

58. The Court notes that Article 3 imposes an obligation on the States to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be of the same standard as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Hurtado v. Switzerland*, 28 January 1994, Series A no. 280-A).

59. The mere fact that a detainee was seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and the treatment he underwent while in detention (see, for example, *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)), and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's illnesses or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109, 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006).

60. In the present case, the Court notes that the applicant had been diagnosed with heart disease on 15 January 2003 and hospitalised on 28 January 2003 with chest pain. The diagnosis on the latter occasion was not related to any heart disease. The Court is not in a position to decide which of the said diagnoses was correct and whether the applicant's allegations that the authorities had failed to acknowledge the existence of the heart disease during his stay in the medical wing of the SIZO had any substance. In these circumstances, it will examine whether the medical treatment had been adequate for the applicant's state of health. In this connection it observes that the applicant was placed in the medical wing of the SIZO the day after he had complained of chest pain. He was prescribed medication and regularly examined by a doctor. On 11 March 2003 he was discharged in a satisfactory state of health and had no further health-related complaints until his release from the SIZO some five months later. This latter point is not contested by the applicant. Furthermore, his hospitalisation in August 2003 after his release does not appear to have had any causal link to his medical treatment between January and March 2003. His allegation that he had had a heart attack is not supported by sufficient details, including the date of the incident. Finally, his state of health does not appear to be so poor as to make it as such incompatible with the detention.

61. In view of the above, the Court considers that this part of the application has not been properly substantiated and developed by the applicant (see, *mutatis mutandis*, *Visloguzov v. Ukraine*, no. 32362/02, § 49, 20 May 2010). Therefore it should be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

62. The applicant alleged that his detention had been unlawful and that its overall length had been unreasonable. He relied on Article 5 §§ 1 (c) and 3 of the Convention. The applicant further complained under Articles 6 § 1 and 13 of the Convention of a lack of effective remedies for his complaints in relation to his detention. The Court decided to examine this latter complaint under Article 5 § 4 of the Convention. The relevant provisions of Article 5 read as follows:

Article 5

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

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

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

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

63. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 5 § 1 (c)

64. The applicant considered his detention unlawful.

65. The Government maintained that the applicant's detention had been lawful. It had originally been ordered by the prosecutor, who was empowered under the law to order detention under such circumstances and that the procedure had been covered by a reservation to Article 5 § 1 (c) of the Convention which had been entered into by Ukraine in accordance with Article 57 of the Convention with the intention of preserving the procedure governing arrest and detention in force at the material time until 29 June 2001. They further noted that the domestic courts had on numerous occasions reviewed the lawfulness of the applicant's detention and confirmed it. The Government submitted that given the applicant's failure to appear for questioning as a witness prior to his arrest, the domestic authorities had taken into consideration the risk of absconding and the seriousness of the charges against the applicant.

66. The Court notes that the applicant's pre-trial detention can be divided into three periods. The first period, covered by the detention orders issued by the prosecutors, lasted from the day of the applicant's arrest on 4 April until 4 July 2001, when the last extension of his detention ordered by the prosecutor expired (see paragraph 9 above). The second period, which was not covered by any decision, lasted from 4 July until 15 October 2001, when the judge ordered the applicant's detention pending trial. Finally, the third period, which was covered by the above-mentioned court decision of 15

October 2001 and several consecutive court orders, started on 15 October 2001 and finished with the applicant's release on 4 August 2003.

(a) Lawfulness of the applicant's detention from 4 April to 4 July 2001

67. The Court notes that the applicant's detention was initially authorised by the Kharkiv Vatutinskiy District Prosecutor on 7 April 2001. Detention under this procedure was covered by a reservation to Article 5 § 1 (c) of the Convention, which had been entered into by Ukraine in accordance with Article 57 of the Convention with the intention of preserving the procedure governing arrest and detention in force at the material time until 29 June 2001. The Court refers to its findings in the *Nevmerzhitsky* case that under the terms of the above reservation; Ukraine was under no Convention obligation to guarantee that the initial arrest and detention of persons such as the applicant had been ordered by a judge. The Court further found in that case, however, that the issue of continued detention was not covered by the reservation (see *Nevmerzhitsky*, cited above, §§ 112-114).

68. The applicant's detention was extended on one subsequent occasion by the relevant prosecutor, for one month. That decision to extend the applicant's detention was given on 3 June 2001 by the same prosecutor, to cover the period between 4 June and 4 July 2001.

69. The Court notes that no court decision was taken as to the applicant's continued detention from 4 June to 4 July 2001. The decision to extend the applicant's detention was taken by a prosecutor, who was a party to the proceedings, and cannot in principle be regarded as "an independent officer authorised by law to exercise judicial power" (see *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004). In these circumstances, the Court concludes that the applicant's continued detention from 4 June to 4 July 2001 was not lawful within the meaning of Article 5 § 1 (c) of the Convention. Therefore, it is not necessary to examine the issue of compliance with the domestic law of part in respect of the above period, between 29 June and 4 July 2001, when the amendments to the Code of Criminal Procedure entered into force.

(b) Lawfulness of the applicant's detention from 4 July to 15 October 2001

70. The Court notes that, in accordance with Article 156 of the Code of Criminal Procedure as then in force, no domestic decision was required to validate a period of detention during which a person had been given access to the case file. In the present case, the final order by the prosecutor for the applicant's continued detention expired on 4 July 2001. The applicant remained in custody between 4 July and 15 October 2001 without any decision being taken as to his detention while he studied the case file and while the investigating authorities were completing the preparation of the bill of indictment and the case file was being transmitted to the court for examination.

71. The Court has already examined and found a violation of Article 5 § 1 of the Convention in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment has been submitted to the trial court. It has held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Yeloyev v. Ukraine*, no. 17283/02, § 50, 6 November 2008).

72. Therefore, the period of the applicant's detention between 4 July and 15 October 2001 was not in accordance with Article 5 § 1 of the Convention.

(c) Lawfulness of the applicant's detention from 15 October 2001 until 4 August 2003

73. The Court further observes that under Article 253 of the Code of Criminal Procedure, a domestic court, when committing a person for trial, must decide on change, discontinuation or application of a preventive measure. It does not appear that the court is required to give reasons for continuing the accused's detention or to fix any time-limit when maintaining the detention.

74. The Court considers that the absence of any precise provisions laying down whether, and under what conditions, detention ordered for a limited period at the investigation stage can properly be extended at the stage of the court proceedings, does not satisfy the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention. It also reiterates that the practice which developed in response to the statutory lacuna whereby a person may be detained for an unlimited and unpredictable time without the detention being based on a specific legal provision or on any judicial decision, is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law (see *Baranowski v. Poland*, no. 28358/95, §§ 55-56, ECHR 2000-III, and *Kawka v. Poland*, no. 25874/94, § 51, 9 January 2001, *Feldman v. Ukraine*, nos. 76556/01 and 38779/04, § 73, 8 April 2010).

75. The Court observes that, although the court upheld the pre-trial detention measure in respect of the applicant on 15 October 2001, it did not set a time-limit for his continued detention and did not give any reasons for its decision (see paragraph 15 above). This left the applicant in a state of uncertainty as to the grounds for his detention after that date. In this connection the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of protection from

arbitrariness enshrined in Article 5 § 1 (see *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, § 76, 27 November 2008). In these circumstances, the Court considers that the District Court decision of 15 October 2001 did not afford the applicant the adequate protection from arbitrariness which is an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1 of the Convention, and that therefore the applicant's detention after 15 October 2001 was likewise not in accordance with Article 5 § 1 of the Convention.

76. There has accordingly been a violation of Article 5 § 1 of the Convention.

2. Article 5 § 3

77. The applicant considered his pre-trial detention to have been unreasonably long.

78. The Government maintained that the domestic authorities had grounds for holding the applicant in custody, given that he was suspected of a serious crime, had failed to appear before the investigator on a number of occasions, and might abscond from justice and obstruct the investigation. They considered that the domestic authorities had conducted the investigation with due diligence, given the complexity of the case and the number of investigative actions to be conducted. They further pointed to the fact that two months and ten days of the period of the applicant's detention were attributable to the applicant, who had taken this time to study the case file.

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

80. The Court notes that the applicant's pre-trial detention lasted for two years and four months. It observes that the seriousness of the charges against the applicant and the risk of his absconding had been advanced in the initial order on the applicant's detention. Thereafter, the prosecutors and the courts did not advance any grounds whatsoever for maintaining the applicant's detention, simply stating that the previously chosen preventive measure was correct. However, Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty, and the judicial authorities should give other grounds for continued detention. Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Yeloyev v. Ukraine*, cited

above, § 60). No such reasons were given by the courts in the present case. Furthermore, at no stage did the domestic authorities consider any other preventive measures as an alternative to detention.

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

3. Article 5 § 4

82. The applicant complained about a lack of review proceedings during the trial stage.

83. The Government maintained that the applicant's requests for release had been examined on 12 October 2001, 29 January, 28 February, 4, 11 and 14 March, 19 and 29 April, 23 July, 14 October and 24 December 2002, and 13 March 2003. Taking into account the seriousness of the charges and the risk of absconding, the domestic courts rejected those requests. They noted that the applicant's lack of success in securing his release did not mean that these domestic remedies were ineffective. The Government considered that the applicant and his lawyer had the opportunity to challenge the lawfulness of the applicant's detention and had taken this up. They concluded that there had been no violation of Article 5 § 4.

84. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. This means that the court with jurisdiction has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest, and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Butkevičius v. Lithuania*, no. 48297/99, § 43, ECHR 2002-II).

85. The Court notes that in the circumstances of the present case the lawfulness of the applicant's detention was considered by the domestic courts on many occasions. However, the court decisions on the applicant's detention do not fully satisfy the requirements of Article 5 § 4. The decisions in question seem to reiterate a standard set of grounds for the applicant's detention without any examination of the plausibility of such grounds in the circumstances of the applicant's particular situation (see, *mutatis mutandis*, *Belevitskiy v. Russia*, no. 72967/01, §§ 111-112, 1 March 2007).

86. The Court further notes that the applicant's request for release of 26 September 2001 was examined by the court only on 15 October 2001, which does not meet the requirement for speedy review. It appears that the above request was lodged before the applicant's criminal case file had been referred to the court. It took nine days to send the case-file to the court. It took the court seven days to set a preparatory hearing and another three days to examine the applicant's request (see paragraphs 13 to 15 above). It

appears that the speediness of the review of the lawfulness of the applicant's detention depended on the date set for the hearing in the case against him, which has been to the applicant's detriment in the circumstances of the present case and which appears to be a recurring problem in the cases against Ukraine (see, *mutatis mutandis*, *Sergey Volosyuk v. Ukraine*, no. 1291/03, § 57, 12 March 2009) due to lack of clear and foreseeable provisions that would provide for the procedure during the trial stage which is compatible with requirements of Article 5 § 4 of the Convention (see *Molodorych v. Ukraine*, no. 2161/02, § 108, 28 October 2010, not final).

87. The Court considers that there has accordingly been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

88. The applicant complained under Article 6 § 1 that the length of the criminal proceedings in his case was unreasonable and that he had no effective remedies in respect of length of the proceedings in his case contrary to Article 13 of the Convention. These provisions, in so far as relevant, read as follows:

Article 6 § 1

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

Article 13

"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."

89. The Government contested these arguments. They maintained that the proceedings had ended on 30 December 2003.

90. The applicant maintained that, according to the latest information he had received in May 2007, the criminal proceedings were still pending.

91. The Court notes that the criminal proceedings in respect of embezzlement had been instituted on 21 April 2000 and seemed to have been indefinitely suspended in September 2004. It observes, however, that the applicant was a suspect in the above case from 4 April 2001. On 30 December 2003 and 18 September 2004 the criminal proceedings against the applicant personally were terminated on exonerative grounds and the further proceedings were conducted against an unknown person. The Court is not persuaded that the further proceedings had any bearing on the applicant's rights under Article 6 of the Convention after 18 September 2004. It concludes therefore that the period to be taken into consideration began on 4 April 2001 and ended on 18 September 2004 at the latest. It thus

lasted three years, five months and sixteen days for investigation at one level of jurisdiction.

92. The Court reiterates that, in assessing the reasonableness of the length of the proceedings in question, it is necessary to have regard to the particular circumstances of the case and the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicants and of the relevant authorities, and what was at stake for the applicants (see, for instance, *Kudla v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

93. The Court notes that during the criminal proceedings in question the case was remitted several times for additional investigation. At the same time, all the domestic courts examined the case, as well as the applicant's appeals, without any delays which would be in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention.

94. Regard being had to all the circumstances, the Court concludes that in the present case the overall length of the proceedings was not excessive and cannot be considered unreasonable (see, for example, *Shavrov v. Ukraine* (dec.), no. 11098/03, 11 March 2008, and *Solovey and Zozulya v. Ukraine*, cited above, § 89-90).

95. It follows that this complaint under Article 6 § 1 is manifestly ill-founded. In the absence of any arguable claim under Article 6 of the Convention, the Court is not required to consider whether there were effective domestic remedies, as required by Article 13, for the above complaints. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 46 OF THE CONVENTION

96. Before examining the claims for just satisfaction submitted by the applicant under Article 41 of the Convention, and having regard to the circumstances of the case, the Court considers it necessary to determine what consequences may be drawn from Article 46 of the Convention for the respondent State. Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

97. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court has found to have been violated. Such measures must also be taken in respect of other persons in the applicant's position,

notably by solving the problems that have led to the Court's findings (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002-VI; *Lukenda v. Slovenia*, no. 23032/02, § 94, ECHR 2005-X; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, ECHR 2008-...). This obligation has been consistently emphasised by the Committee of Ministers in the supervision of the execution of the Court's judgments (see, for example, ResDH(97)336, IntResDH(99)434, IntResDH(2001)65 and ResDH(2006)1). In theory it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention. However, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national system of protection of human rights (see *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-XII (extracts)).

98. In the present case the Court found violations under Article 5 of the Convention, which can be said to be recurrent in the case-law against Ukraine. Although two of the issues raised in the present case no longer appear in cases concerning pre-trial detention in Ukraine due to legislative changes (ordering and extending pre-trial detention by the prosecutor and the time for studying the case file not being included in the calculation period of pre-trial detention), other issues persist. The Court thus regularly finds violations of Article 5 § 1 (c) of the Convention as to the periods of detention not covered by any court order, namely for the period between the end of the investigation and the beginning of the trial and the court orders made during the trial stage which fix no time-limits for further detention, therefore upholding rather than extending detention, which is not compatible with the requirements of Article 5 (see, among many other authorities, *Yeloyev*, cited above, §§ 49-55). Both issues seem to stem from legislative lacunae.

99. Furthermore, the Court often finds a violation of Article 5 § 3 of the Convention on the ground that even for lengthy periods of detention the domestic courts often refer to the same set of grounds, if any, throughout the period of the applicant's detention, although Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention, which should be expressly mentioned by the domestic courts (see, among many other authorities, *Yeloyev*, cited above, §§ 59-61, and *Svershov v. Ukraine*, no. 35231/02, §§ 63-65, 27 November 2008). The Court is not in a position to advise on specific measures to be taken in this context, but it notes that the issue should be addressed by the domestic authorities, to avoid further repetitive complaints under this head.

100. As to the right to review of the lawfulness of the detention guaranteed by Article 5 § 4, the Court notes that in this and other similar cases previously decided it faced an issue of the domestic courts' failure to provide an adequate response to the applicants' arguments as to the necessity of their release. Despite the existence of the domestic judicial authorities competent to examine such cases and to order release, it appears that without a clear procedure for review of the lawfulness of the detention the above authorities often remain a theoretical rather than practical remedy for the purposes of Article 5 § 4 (see *Molodorych v. Ukraine*, cited above, § 108, not final). Moreover, speediness of review of the lawfulness of the detention seems to be compromised by the fact that such a review is linked to other procedural steps in the criminal case against the applicant during the investigation and trial, while such procedural steps might not necessarily coincide with the need to decide on the applicant's further detention promptly and with reasonable intervals (see, among many other authorities, *Svershov*, cited above, §§ 70-72, and *Sergey Volosyuk*, cited above, §§ 52-59). Finally, the current legislation does not protect the applicants from arbitrariness, when, like in Yeloyev case, the domestic court refused to look again into the reasonableness of the applicant's detention on the ground that it had ruled on the lawfulness of his detention on several previous occasions, therefore denying the applicant's right to a review of the lawfulness of his detention as guaranteed by Article 5 § 4 (see *Yeloyev v. Ukraine*, cited above, § 65). The Court considers that these issues should be addressed by the domestic authorities, to avoid further repetitive complaints under this head.

101. It has been the Court's practice, when discovering a shortcoming in the national legal system, to identify its source in order to assist the Contracting States in finding an appropriate solution and the Committee of Ministers in supervising the execution of judgments (see, for example, *Maria Violeta Lăzărescu v. Romania*, no. 10636/06, § 27, 23 February 2010; *Driza*, cited above, §§ 122-126; and *Ürper and Others v. Turkey*, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, §§ 51 and 52, 20 October 2009). Having regard to the structural nature of the problem disclosed in the present case, the Court stresses that specific reforms in Ukraine's legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court's conclusions in the present judgment to ensure their compliance with the requirements of Article 5. The Court leaves it to the State, under the supervision of the Committee of Ministers, to determine what would be the most appropriate way to address the problems and requests the Government to submit the strategy adopted in this respect within six months from the date on which the present judgment becomes final at the latest..

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicant alleged that he had suffered non-pecuniary damage, but did not indicate any amount. He left the matter to the Court's discretion.

104. The Government noted that the claim for damages should be specific and supported by the documents.

105. The Court considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards EUR 20,000 under this head.

B. Costs and expenses

106. The applicant made no claim. The Court therefore makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicant's conditions of detention under Article 3, as well as his complaints under Article 5 §§ 1 (c), 3 and 4 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention on account of the physical conditions of detention in the Kyiv SIZO;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

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

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

6. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;

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

Done in English, and notified in writing on 10 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President