CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF SALOV v. UKRAINE

(Application no. 65518/01)

JUDGMENT

STRASBOURG

6 September 2005

FINAL

06/12/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Salov v. Ukraine,

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

Mr J.-P. COSTA, President,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, judges,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 22 March 2005 and on 5 July 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 65518/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Sergey Petrovich Salov ("the applicant"), on 26 January 2000.

2. The applicant was represented by Mr V. Ageyev and Mr A. Fedur, lawyers practising in Ukraine, and by Mr S. Dunikowski, a lawyer practising in Nanterre. The Ukrainian Government ("the Government") were represented by their Agents, Mrs Z. Bortnovska, succeeded by Mrs V. Lutkovska.

3. The applicant alleged under Article 5 § 3 of the Convention that he had not been brought promptly before a judge or other judicial authority in order to have his arrest reviewed. The applicant also complained that his right to a fair trial, including the principles of the "rule of law" and "legal certainty", had been infringed, since the Presidium of the Regional Court had set aside the resolution of the District Court of 7 March 2000 by which his case had been remitted for an additional investigation. He alleged a breach of Article 6 § 1 of the Convention. Relying on Article 10 of the Convention, the applicant complained of an infringement of his right to receive and impart information. In particular, he complained that he did not know whether the information about the death of the candidate Mr Leonid D. Kuchma published in an issue of the *Holos Ukrayiny* newspaper *(газета* "*Голос України*") was genuine as he was not sure about the latter's state of health. He asserted that under no circumstances should the communication of such information to a third party be punishable by five years' imprisonment. He also complained that he had been detained for

eleven days in the Donetsk Pre-Trial Detention Centre and that his licence to practise as a lawyer had been withdrawn.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. In a decision of 27 April 2004 the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 March 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs V. LUTKOVSKA, Deputy Minister of Justice, *Agent*,
Ms O. BARTOVSCHUK, Head of Division, Office of the Government's Agent,
Ms T. TOTSKA, Deputy Head of Division, Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr S. SALOV, *Applicant*,
Mr V. AGEYEV, *Counsel*,
Mr A. FEDUR,
Mr S. DUNIKOWSKI, *Advisers*.

9. The Court heard addresses by the applicant himself, Mr Ageyev and Mrs Lutkovska.

THE FACTS

10. The applicant is a Ukrainian national who was born in 1958 and currently resides in Donetsk. He is a lawyer practising in Ukraine.

I. THE CIRCUMSTANCES OF THE CASE

A. Criminal proceedings in the applicant's case

11. On 31 July 1999 the Central Electoral Commission registered the applicant as the representative of a candidate for the presidency of Ukraine,

Mr Olexander O. Moroz. The latter was the leader of the Socialist Party of Ukraine at the time.

12. On 31 October 1999 the Kyivsky District Prosecution Service of Donetsk (the "Kyivsky Prosecution Service") conducted a criminal investigation into allegations that the applicant had interfered with the citizens' right to vote (Article 127 § 2 of the Criminal Code of Ukraine – "the CC").

13. On 1 November 1999 the applicant was apprehended for having disseminated false information about the alleged death of a presidential candidate, the incumbent President Mr Leonid D. Kuchma. The applicant had allegedly disseminated this information on 30 and 31 October 1999 in the form of a statement by the Speaker of the *Verkhovna Rada* (Parliament) published in a special nationwide issue of the *Verkhovna Rada* newspaper *Holos Ukrayiny* (*газета* "*Голос України*"). The text of the article disseminated by the applicant reads as follows:

> "*Holos Ukrayiny* / newspaper of the *Verkhovna Rada* of Ukraine / Special edition 29 November 1999 / free copy
>
> Appeal of the *Verkhovna Rada* of Ukraine to the Ukrainian citizens
>
> We, members of the *Verkhovna Rada* of Ukraine, are forced to appeal to you in this special edition of the parliamentary newspaper in view of an emergency existing in Ukraine. In fact, a *coup d'état* has taken place in the country, but the truth is carefully concealed from the people. We are being deceived! A person who appeared on TV and travelled around the country during the last week allegedly as the President of Ukraine Mr L.D. Kuchma is not the person he is pretending to be. It is only a clone of the President, who is being used by Mr Kuchma's criminal entourage to deceive people in the course of the presidential elections in order to retain power. The true President of Ukraine Mr Leonid Kuchma died on 24 October 1999 in Kyiv of acute heart deficiency caused by alcohol-related myocardiodystrophy. His body was cremated in strict secrecy and the ashes were taken abroad. Power has in fact been actually seized by the groups of Rabinovyches, Volkovs, Kobzons and Pinchuks.
>
> People are being intimidated, and forced to vote for the false Kuchma. There is a blatant information blockade of the opposition candidates. The *Verkhovna Rada* of Ukraine declares that it assumes control over the presidential elections. Each and every act of unlawful dismissal or other persecutions against people connected with the elections will be seen as a criminal offence. We bring this to the attention of the management of businesses and medical and educational institutions.
>
> The powerful propaganda machine aimed at fooling the people has started its work. Power in Ukraine has been usurped.
>
> The *Verkhovna Rada* declares that the only legitimate source of power in the State is the Ukrainian Parliament.

The *Verkhovna Rada* calls on all citizens of Ukraine not to allow the presidential elections to be hampered or to be declared unlawful in a manner that will lead to the establishment of a fascist regime in Ukraine.

Speaker of the *Verkhovna Rada* of Ukraine

A. Tkachenko"

14. Following the applicant's arrest, the Kyivsky Prosecution Service carried out a formal criminal investigation into the allegations made against him.

15. On 3 November 1999 the Kyivsky Prosecution Service decided to detain the applicant on suspicion of having committed a crime under Article 127 § 2 of the CC (see paragraph 41 below). The applicant was detained in the Temporary Investigative Isolation Unit of the Donetsk Region. He remained there until 10 November 1999.

16. On 5 November 1999 the applicant was formally charged with having committed an offence under Article 127 § 2 of the CC (see paragraph 41 below). The prosecution service classified his actions as having been committed by an official.

17. On 10 November 1999 the applicant lodged an application (dated 6 November 1999) with the Voroshylovsky District Court of Donetsk to be released from detention. On 17 November 1999 the court dismissed his application.

18. On 11 November 1999 the applicant was transferred to the Donetsk Investigative Detention Centre No. 5.

19. On 16 November 1999 the applicant underwent a medical examination. He was found to be suffering from bronchitis and second-degree hypertension. The medical commission recommended that the applicant be hospitalised.

20. On 22 November 1999 the Kyivsky Prosecution Service completed the pre-trial investigation into the applicant's case and committed him for trial.

21. On 25 November 1999 the case file was transferred to the court. On 10 December 1999 the Kuybyshevsky District Court of Donetsk (the District Court") committed the applicant to stand trial on charges of interference with the citizens' right to vote, contrary to Article 127 § 2 of the CC (see paragraph 41 below). It also decided not to release him from detention.

22. In the course of the trial Judge T. of the District Court on 7 March 2000 passed a resolution (*постанову*) ordering an additional investigation into the circumstances of the case. He also requested the prosecution to reconsider the preventive measure of detention applied in respect of the applicant and to reclassify the charges against him. In particular, he stated:

"... in the indictment containing the charges brought against him it was not shown by the prosecution how Mr Sergey P. Salov had influenced the election results or how he wanted to influence them...

From the material in the case file it can be seen that the applicant disseminated a forged copy of the newspaper *Holos Ukrayiny* to only five persons; no other information with regard to the attempts by Mr Sergey P. Salov to influence the election results has been established by the investigation during the judicial consideration of the case...

The investigation has not sufficiently shown that the actions of Mr Sergey P. Salov constituted a criminal offence...

The investigative bodies did not consider the issue of whether [the applicant's] acts could be considered a criminal offence under Article 125 § 2 of the Criminal Code [libel] ... [i.e. whether] the actions of the defendant could be understood as dissemination of untrue information about another person (Mr Leonid D. Kuchma) ... on the basis of motives not directly related to the conduct of the elections. ...

The court considers that the investigative authorities have conducted their preliminary investigation insufficiently and that this cannot be rectified in the course of the trial, ... the court cannot convict Mr Sergey P. Salov of a crime under Article 125 § 2 of the Criminal Code [libel] since it cannot reclassify his actions, and the case must therefore be remitted for additional investigation...

This resolution is not subject to appeal in cassation; however, the prosecutor may lodge a complaint against it within seven days of its adoption."

23. On 30 March 2000 the deputy prosecutor of the Donetsk Region lodged a *protest* with the Presidium of the Donetsk Regional Court ("the Presidium") against the resolution of 7 March 2000 and requested the initiation of supervisory review proceedings in the applicant's case. He also sought to set aside the resolution of 7 March 2000 in which the case had been remitted for additional investigation. The deputy prosecutor considered that there was sufficient evidence to corroborate the applicant's interference with the citizens' right to vote (Article 127 § 2 of the CC). On the same date the registry of the court acknowledged receipt of the *protest.*

24. On 5 April 2000 the Presidium, composed of its President, L.V.I., and the judges R.L.P., P.L.V., R.L.I., M.M.I. and B.A.M., in the presence of a prosecutor, quashed the resolution of 7 March 2000 and remitted the case for further judicial consideration. In particular, the Presidium found that the District Court had remitted the case back for additional investigation without a thorough examination of the indictment and of the requisite *actus rea* and *mens rea* of the offence with which the applicant had been charged. It had also not mentioned which particular investigative measures the prosecution was required to take. The Presidium decided not to release the applicant from detention. In particular, it stated:

"... In finding that Mr Salov's actions had the *mens rea* of a crime provided for by Article 125 § 2 of the Criminal Code of Ukraine, the court, in violation of Article 22 of the Criminal Code, did not examine circumstances essential to this kind of

> conclusion. The court did not rule on the applicant's intent in his actions referred to in the indictment, whereas the bodies responsible for the preliminary investigation found that Mr Salov had intended to commit a completely different offence. The court did not deal with this [argument of the prosecution] and unfoundedly concluded that the applicant's actions might entail the *corpus juris delicti* of a crime provided for by Article 125 § 2 of the Criminal Code of Ukraine."

25. On 24 April 2000 the District Court dismissed a petition filed by the applicant's lawyer requesting that the case be remitted for additional investigation. It also dismissed the applicant's application for release from detention.

26. On 1 June 2000 the District Court dismissed a further application for the applicant's release.

27. On 16 June 2000 the District Court changed the preventive measure applied in respect of the applicant to an undertaking not to abscond.

28. On 6 July 2000 the District Court, chaired by Judge T., who had heard the case on 7 March 2000, convicted the applicant of interfering with the citizens' right to vote for the purpose of influencing election results by means of fraudulent behaviour. The District Court sentenced the applicant to five years' imprisonment, which was suspended for a two-year probationary period as the actions of Mr Salov "in fact entailed no grave consequences". It also ordered the applicant to pay a fine of 170 Ukrainian hryvnyas (UAH)[1]. It held as follows:

> "In October 1999 Mr Sergey P. Salov received, in unidentified places, from persons whose identity was not established in the course of the investigation copies of a forged issue of the *Holos Ukrayiny* newspaper of 29 October 1999. This issue contained information provided by the Speaker of the Parliament (*Verkhovna Rada*) of Ukraine, Mr Oleksandr O. Tkachenko, concerning the death of the incumbent President, Mr Leonid D. Kuchma ... and a *coup d'état* perpetrated by criminal circles surrounding him ... This issue contained an appeal by the Parliament of Ukraine to Ukrainian citizens urging them not to sabotage the presidential elections ... in order to prevent the establishment of a fascist regime...
>
> Notwithstanding the false nature of the information contained in the issue in question ..., Mr Sergey P. Salov decided to disseminate copies of it to voters in the Kyivsky District for the purpose of interfering with their right to vote and in order to influence the results of the presidential elections...
>
> According to a forensic examination, ... the eight issues in question were copies of the original version printed with the use of modern software...
>
> The acts of Mr Sergey P. Salov constituted an interference with the exercise of the citizens' right to vote..., they hindered the voters' right to participate in the elections ... [The] dissemination of false information about Mr Leonid D. Kuchma's death was fraudulent ..., the information could have influenced the results of the elections ... and could have prevented voters from electing that candidate as President..."

1. EUR 32.82.

29. On 15 September 2000 the Donetsk Regional Court, composed of the judges D.A.D., G.G. and D.A.V., upheld the judgment of 6 July 2000.

30. On 3 November 2000 and 9 February 2001 respectively the Regional Court and the Supreme Court of Ukraine dismissed, as being unsubstantiated, the applicant's complaints and his request for a supervisory review of his conviction.

31. On 22 November 2000 the Donetsk Lawyers' Qualifications and Disciplinary Commission annulled the applicant's licence to practise as a lawyer (no. 1051, issued on 17 December 1997). It based its decision on the applicant's conviction of 6 June 2000.

32. On 23 April 2004 the applicant received a new licence to practise as a lawyer (no. 1572), after passing an examination before the Donetsk Lawyers' Qualifications and Disciplinary Commission and paying the sum of UAH 1,200[1]. He was allowed to sit exams after the legal effects of his conviction were annulled (*погашена судимість*).

2. Proceedings concerning compensation for unlawful detention in the Temporary Investigative Isolation Unit

33. In July 2000 the applicant instituted proceedings in the Voroshylovsky District Court of Donetsk against the prosecution service of Donetsk and the Donetsk Regional Department of the Ministry of the Interior, claiming compensation for the non-pecuniary and pecuniary damage resulting from his unlawful 10-day detention in 1999 in the Temporary Investigative Isolation Unit (*Ізолятор Тимчасового Утримання*). In particular, it was contended that he should have been held in the Investigative Detention Centre (*Слідчий Ізолятор*) and not in the Temporary Investigative Isolation Unit, as his status had been that of a suspect in criminal proceedings.

34. On 15 June 2001 the Voroshylovsky District Court of Donetsk allowed his claims in part. It also ordered the prosecution service of Donetsk and the Donetsk Regional Department of the Ministry of the Interior to pay UAH 3,000 (EUR 500) to the applicant.

35. On 22 November 2001 the Donetsk Regional Court of Appeal decided that the State Treasury, and not the prosecution service or the Ministry of the Interior, was liable for compensating the applicant. It therefore ordered the Donetsk Regional State Treasury Department to pay the applicant UAH 3,000 (EUR 500) in compensation for pecuniary and non-pecuniary damage.

36. The applicant alleges that this compensation was not paid to him.

1. EUR 194.73.

B. Relevant domestic law

1. Constitution of Ukraine, 1996

37. The relevant provisions of the Constitution of Ukraine read as follows:

Article 29

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

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

Article 34

"Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right freely to collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, for the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of others, preventing the publication of information received in confidence, or maintaining the authority and impartiality of justice."

Article 121

"The Prosecution of Ukraine constitutes a unified system that is entrusted with:

1) prosecution in court on behalf of the State;

2) representation of the interests of a citizen or of the State in court in cases determined by law;

3) supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation;

4) supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens."

Article 122

"The Prosecutor of Ukraine is headed by the Prosecutor General of Ukraine, who is appointed to office with the consent of the Verkhovna Rada of Ukraine, and dismissed from office by the President of Ukraine. The Verkhovna Rada of Ukraine may express

no confidence in the Prosecutor General of Ukraine that results in his or her resignation from office.

The term of authority of the Prosecutor General of Ukraine is five years."

Article 124

"Justice in Ukraine shall be administered exclusively by the courts. The delegation of the functions of the courts, and also the appropriation of these functions by other bodies or officials, shall not be permitted.

The jurisdiction of the courts shall extend to all legal relations that arise in the State..."

2. The Judiciary Act of 5 June 1981

38. The relevant provisions of the Judiciary Act of 5 June 1981, with subsequent changes and amendments, as in force at the material time, read as follows:

Section 30

Composition of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"The Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall act in the following composition:

(1) the Presidium of the court;

(2) the judicial division in civil matters; and

(3) the judicial division in criminal matters."

Section 31

Powers of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"The Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall:

(1) consider the cases that are within their jurisdiction as a first-instance court and in cassation proceedings, judicial supervision proceedings and proceedings in the light of newly disclosed circumstances;

(2) supervise the judicial activities of the district (or city) and interdistrict (or county) courts, examine and generalise judicial practice and analyse judicial statistics; and

(3) perform other functions entrusted to them in accordance with the law."

Section 32

Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"The Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall be composed of the President, the Vice-Presidents and judges whose number shall be determined by the Presidium of the *Verkhovna Rada* of Ukraine on a proposal by the President of the Supreme Court and the Minister of Justice ...

... The participation of the prosecutor of the Republic of the Crimea, the regional prosecutor, [or the prosecutor] of Kyiv and Sevastopol in the consideration of cases by the Presidium of the relevant court shall be obligatory."

Section 33

Jurisdiction of the Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"The Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall:

(1) consider the cases that are within their jurisdiction in supervisory review proceedings and in the light of new circumstances;

(2) approve, on a proposal by the President of the Court, the composition of the judicial division in civil matters and the judicial division in criminal matters;

(3) examine the standardisation of judicial practice;

(4) hear reports by the presidents of the judicial divisions on the activities of the judicial divisions and examine issues relating to the operation of the registry of the court;

(5) provide assistance to the district (or city) and interdistrict (or county) courts in correct application of the law; and

(6) perform other functions entrusted to them by the law."

Section 34

Functioning of the Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"Sessions of the Presidium of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall be held not less than two times a month.

The quorum for meetings of the Presidium shall be the majority of its judges.

Decisions of the Presidium shall be adopted by an open vote by the majority of the members who take part in the vote.

Decisions of the Presidium shall be signed by the President of the court."

Section 37

President of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts

"The President of the Supreme Court of the Crimea, the regional courts and the Kyiv and Sevastopol City Courts shall:

... (9) manage the activities of the judicial divisions and the registry of the court;

... (11) propose the candidatures of judges for election to positions in the district (or city) courts, in collaboration with the Minister of Justice of the Crimea, the head of the Regional Department of Justice or the Kyiv and Sevastopol City State Administration, and with the approval of the President of the Supreme Court and the Minister of Justice; ..."

3. The Status of Judges Act of 15 December 1992 (in force at the material time)

39. Section 7 of this Act provides that any citizen of Ukraine who has attained the age of twenty-one and has a minimum of two years' legal experience may become a judge. By section 9(3), judges are appointed for a maximum initial period of five years, following an examination by the judicial qualifications commission and a decision of the relevant local authority. In accordance with sections 33 and 34 of the Act, a judge of the district court may be subject to disciplinary investigation on the basis of a request by the President of the regional court.

4. The Judicial Qualifications Commissions Act of 2 February 1994 (in force at the material time)

40. By sections 6 and 7 of this Act, the qualifications commissions had the power to institute disciplinary proceedings, and to submit conclusions on the feasibility of appointing a candidate for a position as a district-court judge and on the renewal of the judicial term of a judge elected for an initial period of five years. They could also request an attestation for a judge proposed for a promotion in judicial or administrative rank within the court, or an assessment of his legal knowledge. The presidents of the regional courts could request the qualifications commissions to certify or assess judges' knowledge and qualifications. In accordance with sections 32 and 33

of the Act, the presidents of the higher courts were allowed to request the institution of disciplinary proceedings against judges of the district courts.

5. Chapter IV of the Criminal Code of Ukraine (extracts): offences against electoral, labour and other personal rights and freedoms of the individual and citizens

41. The relevant provisions of Article 127 of the Criminal Code read as follows:

Interference with the exercise of citizens' electoral rights or with the activity of an electoral commission

"Interference with the exercise by a Ukrainian citizen of his electoral rights, or interference with the activity of an electoral commission, for the purpose of influencing election results, shall be punishable by 3 to 5 years' imprisonment.

The same actions perpetrated by means of bribery, deceit, or together with damage to the property of or physical violence against a citizen who exercises his right to vote, or against a member of an electoral committee or his close relatives, or with the threat of using force or damaging property, or through a conspiracy by a group of persons, or by a member of an electoral commission or other official abusing his powers or acting in his official capacity, shall be punishable by 5 to 8 years' imprisonment."

6. Chapter 15 of the Code of Administrative Offences of 7 December 1984

42. The relevant provisions of the Code of Administrative Offences read as follows:

Article 186-2

Infringements of the legislation on the election of the President of Ukraine and Members of Parliament

"Public appeals or incitement to boycott elections for the presidency of Ukraine or for membership of the Ukrainian Parliament, the publication or dissemination of untrue information about a presidential candidate or a parliamentary candidate by any other means, and any campaigning for or against a candidate on the day of the election, shall be punishable by a fine equivalent to three to six times the minimum citizens' wage before tax."[1]

7. Code of Criminal Procedure, 1960 (in relation to remitting a case back for additional investigation)

43. The relevant provisions of Section III, Chapter 23, of the Code of Criminal Procedure read as follows:

1. Approximately UAH 51 to UAH 102, or 10-20 euros.

Article 242

Issues to be taken into consideration when the accused is committed for trial

"Judges individually, or the court in the course of the directions hearing, are obliged to clarify the following issues with respect to each accused:

... whether the actions of the accused have been correctly classified ...;

... whether a preventive measure has been applied correctly to the accused ..."

Article 244

Decisions delivered by the court or a judge in the course of the preliminary hearing

"The court or a judge, in the course of the preliminary hearing, shall be entitled to deliver decisions on the following:

... (2) remittal of the case for additional investigation; ..."

Article 246

Remittal of a case for additional investigation at the preliminary court hearing

"The court shall be entitled to remit the case for additional investigation in the following circumstances:

(1) substantial incompleteness or incorrectness of the inquiry or the preliminary investigation undertaken which cannot be rectified at the trial;

(2) a fundamental breach of the requirements of criminal procedure;

(3) existence of grounds for bringing charges against the accused which have not been brought against him before; ...

... The court shall rule on the particular facts that are to be ascertained in the course of the additional investigation and the investigative measures that are to be taken.

... The court shall rule on the applicable preventive measure ..."

Article 252

Lodging of a separate application and complaint against rulings and resolution of a judge given at the preliminary court hearing

"The public prosecutor shall be allowed to lodge a separate application against a ruling of the court or resolution of the judge given in the course of the preliminary court hearing with a higher court within 7 days after its adoption ..."

Article 273

Procedure for adopting a ruling in the course of the court hearing

"The court shall give a ruling on all issues decided by it in the course of the hearing. Resolutions remitting the case back for additional investigation; instituting an investigation into the new charges or concerning a person who failed to appear before the court; discontinuing the proceedings in the case; determining, changing or annulling the applicable preventive measure; applying witness protection measures or appointing an expert, as well as any separate resolutions, shall be adopted by the court in the deliberations room and shall be set out in the form of a separate document that shall be signed by all members of the court ...

A judge examining a case may issue a decision on issues referred to in this Article."

Article 274

Application, annulment or change of a preventive measure by the court

"The court may decide in a ruling to ... change, annul or apply a different preventive measure to the accused if it finds grounds for doing so."

Article 281

Remittal of the case for additional investigation

"The court, on its own initiative or on an application by the parties to the proceedings, may refer the case back for additional investigation on account of the incompleteness or incorrectness of the preliminary investigation only where such incompleteness or incorrectness cannot be rectified in the course of the hearing.

After an additional investigation the case shall be referred to the court under the ordinary procedure.

The ruling (or resolution) on remittal of the case for additional investigation cannot be appealed against, but the public prosecutor may lodge a separate application against it."

Article 354

Applications by the public prosecutor and complaints against court rulings and judges' resolutions

"The public prosecutor shall be allowed to lodge a separate application against a ruling by the court or resolution by the judge.

... the defendant, his defence counsel and his representative, as well as the victim and his representative, shall have the right to lodge complaints against the ruling of the court or resolution of the judge within seven days after its adoption.

... The lodging of a separate complaint or prosecutor's application shall suspend the enforcement of the ruling."

44. The relevant provisions of Chapter 31 of the Code of Criminal Procedure provide as follows:

Article 384

Persons entitled to lodge a *protest* against an enforceable judgment, ruling or resolution of a court

"Supervisory review of an enforceable court judgment, ruling or resolution shall be allowed only on the basis of a *protest* lodged by the public prosecutor ...

The following persons are entitled to lodge a *protest*:

... (2) ... the public prosecutor of the region ... – against judgments, resolutions and rulings of city (or district) courts ..."

Article 385

Time-limits for supervisory review of judgments, rulings and resolutions of a court

"Supervisory review of a conviction, ruling or resolution of the court on account of the need to apply the law on a more serious offence, or to review the leniency of the sanction imposed, or on the basis of other grounds resulting in deterioration of the convicted person's situation, and of an acquittal, ruling or resolution of the court terminating the proceedings in the case shall be allowed only within one year of its becoming final.

There shall be no time-limit for initiating the supervisory review of a conviction, ruling or resolution of the court on any other grounds."

Article 391

Supervisory review proceedings

"The court considering the case in supervisory review proceedings shall have the right to summon the defendant, ... the defence counsel, ... in order to hear their statements. The above persons shall have the right to familiarise themselves with the application for supervisory review..."

Article 393

The outcome of consideration of applications for supervisory review

"... the court shall have the right, by means of a ruling or resolution, to: ... quash a judgment and remit the case for fresh consideration ..."

Article 395

Obligatory character of the supervisory court's instructions

"The instructions of the supervisory review court shall be binding in the course of the additional investigation and fresh consideration of the case ..."

6. The Presidential Elections Act, 1999

45. The relevant provisions of the Presidential Elections Act read as follows:

Section 50

Liability for an infringement of electoral legislation

"1. Persons who have interfered through deceit, threats, bribery or other means with the free exercise by a citizen of Ukraine of his right to vote, to be elected and to conduct pre-election campaigning, and chairmen, deputy chairmen, secretaries and members of electoral commissions, officials or other persons representing State bodies, bodies of local self-government or non-governmental organisations who have fraudulently substituted documents, intentionally counted the number of votes incorrectly, violated the right to vote by secret ballot, or committed any other violation of this Act, shall be held liable in accordance with the law.

2. Persons who have intentionally published or disseminated untrue information about a candidate for the presidency shall be held liable in accordance with the law."

7. Reservation contained in the instrument of ratification deposited on 11 September 1997 (period covering 11 September 1997 – 28 June 2001)

46. The relevant provisions of the reservation contained in the instrument of ratification are set out in the judgment of *Nevmerzhitsky v. Ukraine* (no. 54825/00, § 56, 5 April 2005).

8. Appendix to the reservation handed to the Secretary General at the time of depositing the instrument of ratification on 11 September 1997

47. The relevant transitional provisions of the Constitution of Ukraine are set out in the *Nevmerzhitsky* judgment cited above.

9. Resolution of the Plenary Supreme Court of Ukraine (no. 10) of 30 September 1994 on issues relating to the application by the courts of the legislation on lodging complaints with the courts against an arrest warrant issued by a prosecutor

48. The relevant resolution of the Plenary Supreme Court of Ukraine reads as follows:

> "... in accordance with Article 236-6 of the Code of Criminal Procedure of Ukraine, only a warrant issued by the prosecutor for the arrest of the suspect or accused, and also the resolution of the court (or judge) concerning the application of preventive measures, may be appealed against to the courts, but not the resolution of the investigator or body of inquiry to apply the preventive measure of taking the suspect or accused into custody or to continue their detention..."

10. Decision of the Constitutional Court of Ukraine of 24 July 1999 (No. 6-pn)

49. In its decision the Constitutional Court found that the Cabinet of Ministers had acted unconstitutionally in passing the resolution of 22 March 1999 (no. 432) that reduced the expenditure of the 1999 State budget on the needs of: the Supreme Court by 40%, the regional courts by 7.5%, the district (and city) courts by 6.8%, the Higher Arbitration Court by 26.4%, the arbitration courts by 19.4%, and the military courts by 15.5%. According to the information issued by the Ministry of Justice (responsible for the courts' administration at the material time), this expenditure covered 51.6% of the needs of the first-instance courts and 62.8% of the needs of the regional courts. The Constitutional Court found that Resolution no. 432 exerted financial influence on the courts and infringed the citizens' right to judicial protection.

11. Relevant decisions of the Council of Judges of Ukraine (in relation to the appointment and selection of judges)

50. The Council of Judges, in its Decision no. 13 of 12 December 2000, found that the existing procedure for the selection and appointment of candidates for judicial posts, as established by the Ministry of Justice, Higher Council of Justice and the judicial qualifications commissions, was not compatible with the need to form a highly qualified judiciary able to administer justice effectively and independently.

51. On 12 December 2000 the Council of Judges adopted Resolution no. 10, finding that the decisions of the Cabinet of Ministers to lower judicial salaries were contrary to the principle of the independence of the judiciary.

THE LAW

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

A. The parties' submissions

52. The applicant complained that he had been detained unlawfully for a period of 18 days without any judicial review of his detention. This period had lasted from 1 November 1999, the date when the applicant was arrested, to 17 November 1999, the date on which the Voroshylovsky District Court of Donetsk had reviewed his complaints about his detention. He alleged an infringement of Article 5 § 3 of the Convention, which provides:

> "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."

1. The Government's submissions

53. The Government maintained that the applicant had been detained in accordance with the decision of the prosecutor. They stressed that the prosecutor, pursuant to the reservation made by Ukraine in respect of Article 5 of the Convention, could be considered "... another officer authorised by law to exercise judicial power..." (see paragraphs 46-47 above). In this capacity, the prosecutor who had authorised the applicant's detention had acted promptly in reviewing it. They further stressed that the public prosecutor's warrant for the applicant's arrest was subject to strict judicial control, which could be, and in fact had been, initiated by the applicant. The judicial control provided for in the Ukrainian legislation required complaints against detention orders to be considered urgently, and the courts had the power to decide on the detainee's release. The Government concluded, therefore, that the Ukrainian criminal procedure in force at the time of the applicant's arrest fully complied with the requirements of Article 5 § 3 of the Convention. They therefore concluded that there had been no infringement of Article 5 in this respect.

54. Considering the requirement of Article 5 § 3 of the Convention to be brought promptly before a judicial body, the Government maintained that the period of time before the applicant's detention was reviewed had not been lengthy. They stated that, according to Ukrainian legislation, an appeal against an arrest warrant could be lodged even on the day it was issued. They further maintained that the legislation had established strict time-limits for dealing with complaints against detention and the periods involved were not excessive. However, possible delays could occur if a detainee or his

lawyer delayed in appealing against the detention order. In particular, the Government mentioned that on 3 November 1999 the public prosecutor had approved the warrant for the applicant's arrest. The complaint against the warrant had been dated 6 November 1999 and, according to the court resolution, had been submitted only on 10 November 1999. On 17 November 1999 the court had considered the complaint and confirmed the lawfulness of the arrest warrant. They noted that on 8 November 1999 the applicant had asked for his lawyer to be replaced, which had led to a delay in the consideration of his appeal.

55. The Government stressed that the delay in lodging the appeal against the arrest warrant had been attributable to the applicant. In particular, the appeal had been lodged seven days after the warrant was approved. In view of the above, the Government concluded that there had been no violation of Article 5 § 3 of the Convention in the present case in respect of the promptness of the judicial review of the applicant's detention.

2. The applicant's submissions

56. The applicant maintained that under Ukrainian law, a prosecutor belonged to the law-enforcement authorities and could not by any means be considered an officer authorised by law to exercise judicial power. In particular, in accordance with Article 124 § 1 of the Constitution, judicial functions in Ukraine were exercised exclusively by the courts and it is prohibited to delegate judicial powers to other bodies or officials (see paragraph 37 above). The applicant therefore concluded that in Ukraine a prosecutor could not be considered a person "authorised by law to exercise judicial power". The sole function entrusted to the prosecutor by Articles 121-122 of the Constitution was to conduct the prosecution on behalf of the State in court. Furthermore, Ukrainian prosecutors were not independent and impartial as far as criminal cases were concerned (he cited *Huber v. Switzerland*, judgment of 23 October 1990, Series A no. 188, p. 18, § 42, and *Niedbała v. Poland*, no. 27915/95, §§ 48-50, 4 July 2000) as they were a prosecuting party to the criminal proceedings (here, he cited *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3298, § 146, and *Nikolova v. Bulgaria* [GC], no. 31195/96, §§ 49-50, ECHR 1999-II).

57. The applicant therefore concluded that his detention had not been lawful and that he had not been brought promptly before a judicial officer to review his arrest and detention. He added that no delays had been attributable to him.

B. The Court's assessment

58. The Court notes at the outset that the Government's reference to the reservation in respect of Article 5 § 3 of the Convention should be

disregarded (see *Salov v. Ukraine* (dec.), no. 65518/01, 27 April 2004; and for the validity of the reservation made under Article 5 of the Convention, *Falkovych v. Ukraine* (dec.), no. 64200/00, 29 June 2004). As to the Government's arguments with regard to the status of a prosecutor (see paragraph 53 above), the Court observes that under Ukrainian legislation, a prosecutor cannot be regarded as an officer exercising "judicial power" within the meaning of Article 5 § 3 of the Convention (see *Merit v. Ukraine*, no. 66561/01, §§ 62-63, 30 March 2004, and *Nevmerzhitsky*, cited above, § 125). Moreover, his status cannot offer guarantees against any arbitrary or unjustified deprivation of liberty (see *Niedbała,* cited above, §§ 48-57) as he is not endowed with the attributes of "independence" and "impartiality" required by Article 5 § 3 (see *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, pp. 12-17, §§ 27-41). Furthermore, the prosecution authorities not only belong to the executive branch of the State, but they also concurrently perform investigative and prosecution functions in criminal proceedings and are party to those proceedings. The Court therefore reiterates its position as to the status of the prosecutor, who cannot be regarded as "an officer authorised by law to exercise judicial power" and rejects the Government's arguments in this respect.

59. The Court must therefore examine whether the length of time which passed before the applicant was brought before a judge or other officer within the meaning of Article 5 § 3 was compatible with the requirements of that provision. In that respect, it notes that the applicant was apprehended by the police on 1 November 1999 but that his detention was not reviewed by a court until 17 November 1999, sixteen days after his arrest. The Court considers that the Government's explanations as to the delay in reviewing the applicant's arrest are immaterial as they presuppose that there was no automatic judicial review of detention and that such a review depends only on whether the detainee has complained to the court about the lawfulness of his or her detention (see *Niedbała,* cited above, § 50). Even assuming that the Government's arguments as to the applicant's responsibility for the delay in lodging his complaint against his detention are justified, the Court is nevertheless of the opinion that his detention for seven days without any judicial control fell outside the strict constraints of time laid down by Article 5 § 3 of the Convention (see *Brogan and Others v. the United Kingdom,* judgment of 29 November 1988, Series A no. 145-B, pp. 30-35, §§ 55-62).

60. In the light of the above, the Court concludes that there has been a violation of Article 5 § 3 of the Convention.

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

61. The applicant complained about the unfairness of the criminal proceedings instituted against him. He alleged, in particular, that the

domestic courts had failed to observe the principles of the rule of law and legal certainty, given that the Presidium of the Regional Court had quashed a final and binding resolution of the District Court in which his case had been remitted for additional investigation, thereby putting in issue the lawfulness of the initial charges brought by the prosecution against him under Article 127 § 2 of the CC. He relied in this connection on Article 6 § 1 of the Convention, which, in so far as relevant, provides:

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

A. Applicability of Article 6 § 1 of the Convention

1. The parties' submissions

62. The Government maintained that the applicant's complaint should be dismissed since Article 6 did not apply either to the remittal of a case for additional investigation or to the institution of supervisory review proceedings. They stressed that Article 6 concerned judicial decisions determining civil rights and obligations or criminal charges against an individual. The District Court's resolution of 7 March 2000 had not determined the criminal case against the applicant. The resolution had only concerned procedural issues and had been aimed at giving instructions to the investigating authorities as regards the additional investigative measures required in the case. The resolution had not resulted in the applicant's acquittal on the charges brought against him under Article 127 § 2 of the CC. It had been intended to rectify errors which had been made, in the court's opinion, by the investigating authorities during the investigation and which had prevented the court from examining objectively the merits of the case. Consequently, this procedure did not fall within the scope of Article 6.

63. The applicant contested the Government's submissions. He stated that the remittal of his case for additional investigation had directly affected his rights. As to the District Court's resolution of 7 March 2000, he noted that, by virtue of that decision, the District Court had found that the indictment, as initially filed, was groundless. He maintained that the assessment of evidence could not be regarded as a matter of a purely procedural nature. He submitted that the lack of corroborating evidence of a person's guilt should in principle lead to acquittal. He therefore concluded that Article 6 was applicable.

2. The Court's assessment

64. The Court notes at the outset that the criminal proceedings against the applicant concerned the "determination of a criminal charge" as they

involved all three elements necessary for such an assessment: qualification in domestic law, the nature of the offence, and the nature and degree of severity of the penalty that the person concerned risked incurring (see, among other authorities, *Garyfallou AEBE v. Greece*, judgment of 24 September 1997, *Reports* 1997-V, p. 1830, § 32, and *Koval v. Ukraine* (dec.), no. 65550/01, 30 March 2004). Nevertheless, in the instant case the Court must examine whether the applicant, whose criminal case was remitted for additional investigation at the trial stage of the proceedings, was nevertheless the subject of a "charge" for the purposes of Article 6 § 1.

65. The concept of "charge" is "autonomous"; it has to be understood within the meaning of the Convention and not solely within its meaning in domestic law. It may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see, for example, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 22, § 42, and p. 24, § 46, and *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 33, § 73). Moreover, as the Court stated in *Imbrioscia v. Switzerland* (judgment of 24 November 1993, Series A no. 275, p. 13, § 36), the words "determination of [any] criminal charge" in Article 6 § 1 do not imply that that Article has no application to pre-trial proceedings (see *Tejedor García v. Spain*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2794-95, § 27).

66. In this connection, the Court notes that on 31 October 1999 the Kyivsky District Prosecution Service of Donetsk instituted criminal proceedings against the applicant on charges of interfering with voters' rights. Those proceedings ended on 15 September 2000 with the ruling of the Donetsk Regional Court upholding the applicant's conviction on the initial charges brought by the prosecution under Article 127 § 2 of the Criminal Code. As to the remittal of the case for additional investigation on 7 March 2000 by the Kuybyshevsky District Court of Donetsk and the subsequent quashing of that resolution by the Presidium of the Donetsk Regional Court on 5 April 2000, the Court does not consider it necessary to separate this part of the applicant's criminal trial from the remainder of the criminal proceedings in their entirety as such a separation would be artificial. From the Court's point of view, the remittal of the case for additional investigation marked a procedural step which was a precondition to a new determination of the criminal charge (see *Nikitin v. Russia*, no. 50178/99, § 58, ECHR 2004-...), even though it contained no elements of a final judicial decision in a criminal case and did not constitute the final determination of the charges against the applicant, an issue that should be considered in more detail in the examination of the merits of the applicant's complaints under Article 6 § 1 of the Convention. Taking into account the importance of these procedural decisions of the Kuybyshevsky District

Court of Donetsk and the Presidium of the Donetsk Regional Court and their influence on the outcome of the proceedings as a whole, the Court considers that the guarantees of Article 6 § 1 must be applicable to these procedural steps.

67. In these circumstances, the Court accepts that when the applicant's case was remitted for additional investigation on 7 March 2000 and that resolution was quashed on 5 April 2000 he could be considered the subject of a "charge" within the autonomous meaning of Article 6 § 1. Accordingly, this provision is applicable in the instant case.

B. Compliance with Article 6 § 1 of the Convention

1. Submissions of the parties

a. The Government's submissions

68. The Government maintained that, when the District Court had remitted the criminal case against the applicant for additional investigation, the procedure governing the introduction of the prosecutor's application against this resolution had been clearly regulated by procedural legislation. Article 281 of the Code of Criminal Procedure had provided at the material time that the resolution of a court to remit a case for additional investigation could not be appealed against in cassation (see paragraph 43 above). However, the public prosecutor could lodge a separate application against it. Under Articles 252 and 281 of the Code of Criminal Procedure (see paragraph 43 above), a decision by a judge could be challenged by lodging an application to set it aside with a higher court within seven days of the resolution. Thus, the domestic legislation set a clear time-limit for the public prosecutor to lodge a separate application (*окреме подання*) against a judge's resolution. Accordingly, any possibility of amending a final court judgment to the detriment of the accused without any time-limit was excluded.

69. The Government maintained that, by lodging a *protest* against the resolution of 7 March 2000, the deputy prosecutor had not violated the applicant's rights and had not harmed the interests of justice. The Government were of the opinion that the length of the proceedings was the only factor that could have been affected by the remittal of the case for additional investigation. However, there had been no delay in the examination of the applicant's case.

70. The Government stated that, in his *protest* of 30 March 2000, the deputy prosecutor had objected to the carrying out of an additional investigation and had maintained, in that connection, that the pre-trial investigation had disclosed sufficient evidence for the case to be examined on the merits. The deputy prosecutor had also stated that the resolution of

7 March 2000 was groundless. The Government contended that any delay in the lodging of the prosecutor's *protest* had been attributable to the fact that the court's resolution was unsubstantiated and contained no clear instructions as to the particular investigative actions to be taken. The resolution had thus caused a delay in the examination of the case and a prolongation of the applicant's detention on remand. By lodging a *protest* against the resolution of 7 March 2000, the deputy prosecutor had in fact prevented a protracted examination of the applicant's case and had shortened the length of his detention on remand. Furthermore, the Government maintained that the complaint lodged with the Presidium by the prosecutor had not affected the applicant as it had concerned a dispute between a prosecutor and the court and the applicant had not been a party to it.

71. The Government referred to the *Brumărescu v. Romania* judgment ([GC], no. 28342/95, § 62, ECHR 1999-VII), submitting, *inter alia,* that the Court had found a violation of the principle of legal certainty in that case because the Procurator-General of Romania had been entitled to lodge an application with a court to have a final judgment overturned. Moreover, the exercise of this power had not been limited in time. These factors had led the Court to find a violation of the principle of legal certainty. However, the circumstances of the applicant's case, in particular, the nature of the *protest*, were different. In particular, in the Government's submission, the resolution of 7 March 2000 had not been final.

72. They noted that the Presidium of the Regional Court had accepted the prosecutor's arguments and had found the resolution of 7 March 2000 to be unsubstantiated. The Presidium had also found that the resolution contravened the law. The court had allowed the prosecutor's *protest* and had set aside the resolution remitting the case for additional investigation, thereby preventing the further protraction of the proceedings.

b. The applicant's submissions

73. The applicant maintained that the principle of “legal certainty” had been infringed as a final and binding court resolution had been set aside in his case. He emphasised that the District Court's resolution of 7 March 2000 had become final but had subsequently been set aside, even though no application to set it aside had been lodged by the prosecution within the seven-day time-limit laid down in Article 252 of the Code of Criminal Procedure (see paragraph 43 above): the *protest* had been lodged only on 30 March 2000. The applicant reiterated that, in substance, the resolution to remit the case for additional investigation had amounted to his acquittal on the charges initially filed by the prosecution under Article 127 § 2 of the Criminal Code (see paragraph 41 above).

74. The applicant noted, in particular, that the lodging of the *protest* had contributed to the length of the proceedings, since it had been lodged in

breach of the procedural time-limits prescribed by domestic law. Moreover, the lodging of the *protest* itself had been aimed at delaying the proceedings. According to the resolution of 7 March 2000, the prosecution had failed to prove that he was guilty of an offence under Article 127 § 2 of the Criminal Code (see paragraph 41 above) and consideration needed to be given to the reclassification of the offence under either Article 186-2 of the Code of Administrative Offences or Article 125 of the CC. Under Article 186-2 of the Code of Administrative Offences, the maximum sanction following his conviction would have been a fine amounting to between UAH 51 and UAH 102, not eight years' imprisonment (see paragraph 42 above). The applicant therefore concluded that the lodging of a *protest* against the District Court's resolution, and the subsequent resolution of 5 April 2000 by the Presidium of the Regional Court, had infringed the principle of the independence and impartiality of a tribunal as enshrined in Article 6 § 1. He further noted that the domestic legislation and the state of financing of the courts did not provide sufficient guarantees to prevent outside pressure on the judges, as was shown in his particular case by the alleged instructions given by the Head of the Regional Administration, a State body responsible for the financing of the courts from regional budgets, to the President of the Donetsk Regional Court. The applicant also referred to the resolution of the Constitutional Court of Ukraine on that matter (see paragraph 49 above).

75. He further maintained that, following the instructions of the Presidium of the Regional Court, the District Court had had to convict him. The judge of the Kuybyshevsky District Court had in effect been obliged to alter his previous opinion expressed in the resolution of 7 March 2000 as to the lack of corroborating evidence of the applicant's guilt and to adopt a completely different opinion. For the applicant, the lodging of a *protest* outside the time allowed and the subsequent setting aside of the resolution remitting the case for additional investigation had upset the balance between his defence rights and the rights of the prosecution.

76. The applicant further contended that the failure to comply with the time-limits for lodging the application to set aside the resolution had been designed to prolong the proceedings in his case. Moreover, the *protest* had not been aimed at reducing his term of detention. If the prosecutor had so wished, he could have changed the preventive measure applied to him or even have released him from detention. He also observed that the length of the proceedings in the criminal case was not related to the issue of detention.

77. The applicant claimed that his situation was similar to that criticised by the Court in the *Brumărescu* case. In particular, he alleged that, even though the time-limit for a prosecutor to lodge a separate application (*окреме подання*) to set aside the resolution had existed in domestic law, it had not been complied with by the prosecution and the Presidium of the Regional Court. He also noted that the judge who had previously remitted the case for additional investigation had later tried him. The judge had thus

ignored his own previous procedural decision. The applicant concluded that the guarantees of a fair trial, in particular the guarantees of independence and impartiality of the tribunal, had been breached in his case.

2. The Court's assessment

(a). Preliminary considerations

78. Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II). In deciding whether there has been a violation of Article 6, the Court must consider whether the proceedings in their entirety, including the appeal proceedings, as well as the way in which evidence was taken, were fair (see *Edwards v. the United Kingdom,* judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34).

79. The Court notes that the applicant's complaints under Article 6 § 1 of the Convention mainly concern four issues, which it will address in turn in examining the alleged defects of the proceedings in the instant case:

(a) *firstly*, whether the courts acted independently and impartially in the instant case;

(b) *secondly*, whether the principle of equality of arms was observed;

(c) *thirdly*, whether a judgment convicting the applicant of interference with electoral rights (Article 127 § 2 of the Criminal Code) was sufficiently substantiated; and

(d) *fourthly*, whether the resolution to remit the case for additional investigation and the applicant's further conviction contravened the principles of the rule of law and legal certainty.

(b). Independence and impartiality of the courts dealing with the case

80. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

81. The Court further reiterates that the existence of "impartiality", for the purposes of Article 6 § 1, must be determined according to a subjective test, on the basis of the personal conviction and behaviour of a particular judge in a given case – that is, no member of the tribunal should hold any personal prejudice or bias – and also according to an objective test – that is,

ascertaining whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect (see, among many other authorities, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 356, § 31, and *Thomann v. Switzerland*, judgment of 10 June 1996, *Reports* 1996-III, p. 815, § 30). Under the objective test, it must be determined whether there are ascertainable facts which may nevertheless raise doubts as to the courts' impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.

82. In the present case it appears difficult to dissociate the question of impartiality from that of independence, as the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations. The Court will accordingly consider both issues together (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32). It notes that the applicant's submissions that Judge T. of the Kuybyshevsky District Court of Donetsk was influenced by political motives and instructed by the Head of the Regional State Administration are of little assistance in assessing his complaints as to the lack of independence and impartiality of the courts dealing with the case.

83. The Court notes that the Presidium of the Donetsk Regional Court that examined the prosecution's *protest* on 5 April 2000 (see paragraph 24 above) and the chamber of the Regional Court that heard the applicant's appeal on 15 September 2000 against his conviction were composed of different judges (see paragraph 29 above). However, it notes that under the Judiciary Act, as in force at the material time, the powers of the Presidiums of the regional courts in managing lower courts and the judicial divisions of the lower courts were fairly wide-ranging. In particular, the Presidium approved the composition of the civil and criminal divisions of the regional court and supervised the administration of justice by the district courts (see paragraph 38 above). Furthermore, the Presidium of the Regional Court was presided over by the President, who at the material time had influence over the appointment of judges of the lower courts, the assessment of their work, the initiation of disciplinary proceedings and their career development (see paragraphs 38-40 above). The Court also notes that domestic legislation did not lay down clear criteria and procedures for the promotion, disciplinary liability, appraisal and career development of judges, or limits to the discretionary powers vested in the presidents of the higher courts and the qualifications commissions in that regard (see paragraphs 38-40 above). However, such criteria as the number of cases considered, the failure to observe time-limits for examining cases and the number of decisions quashed and appealed against were usually taken into account when deciding whether a particular judge should be promoted to another rank or appointed to an administrative position within the court. The Court also

takes note of the Constitutional Court's decision of 24 July 1999 and the relevant resolutions of the Council of Judges of Ukraine which criticised the lack of financial and legislative guarantees for the functioning of the judicial bodies (see paragraphs 49-51 above).

84. As to the impartiality of the judge hearing the case, the Court further observes that pursuant to Article 395 § 1 of the Code of Criminal Procedure (see paragraph 44 above), the judge hearing a case is legally bound by the instructions of the Presidium of the Regional Court that quashed the previous resolution and remitted the case for consideration on its merits. He is therefore under an obligation to consider the case on the merits. Furthermore, the judge's failure to comply with the requirements of Article 395 § 1 of the Code of Criminal Procedure may result in the quashing of the judgment given in the course of the fresh consideration of the case by the higher court.

85. Furthermore, the Court notes that any procedural decision given by a judge must be carefully worded in order to be neutral and to avoid any possible interference with the principle of presumption of innocence enshrined in Article 6 § 2 of the Convention. By recommending that a particular case be remitted for additional investigation or by instructing a lower court to hear the case on the merits, the judge does not necessarily become the defendant's ally or opponent (see, *mutatis mutandis, Borgers v. Belgium*, judgment of 30 October 1991, Series A no. 214-B, pp. 31-32, § 26), but he does express a particular point of view on the case and therefore additional safeguards should be put in place in order to ensure that there is no appearance of prejudice of the judge and the court in hearing a particular case. In that respect, the Court notes that the Presidium of the Donetsk Regional Court, in its resolution of 5 April 2000 remitting the case to the Kuybyshevsky District Court for further judicial consideration, found that the latter had failed to deal with the prosecution's submission that the applicant had committed an offence under Article 127 § 2 of the Criminal Code (see paragraph 24 above). Subsequently, Judge T. of the Kuybyshevsky District Court, in a judgment of 6 July 2000, convicted the applicant of the offences as originally charged by the prosecution, on the basis of the same evidentiary material and legal submissions which he had examined when he previously remitted the case for further investigation (see paragraph 28 above). On that occasion, the court in its resolution of 7 March 2000 had found that "... it [had not been] shown by the prosecution how Mr Sergey P. Salov had influenced the election results or how he wanted to influence them", that "...the investigation [had] not sufficiently shown that the actions of Mr Sergey P. Salov constituted a criminal offence..." and that "...the authorities [had] conducted their preliminary investigation insufficiently..."

86. Taking into account the aforementioned considerations as to the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in

respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case, the Court finds that the applicant's doubts as to the impartiality of the judge of the Kuybyshevsky District Court of Donetsk may be said to have been objectively justified.

(c). Equality of arms

87. The Court reiterates that the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial (see *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, p. 25, § 63). Furthermore, the principle of equality of arms – in the sense of a "fair balance" between the parties – requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33, and *Ankerl v. Switzerland*, judgment of 23 October 1996, *Reports* 1996-V, pp. 1567-68, § 38). The right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (see *Ruiz-Mateos*, cited above, p. 25, § 63).

88. In the instant case the principle of equality of arms dictated that the public prosecutor's *protest* lodged with the Presidium of the Donetsk Regional Court should have been communicated to the applicant and/or his advocate who should have had a reasonable opportunity to comment on it before it was considered by the Presidium. Furthermore, he should have been provided with a copy of the resolution of the Presidium of the Donetsk Regional Court quashing the resolution by which Kuybyshevsky District Court of Donetsk had remitted the case back for fresh consideration, so as to give him the opportunity to prepare his defence in advance of the trial. As that did not happen and neither the applicant nor his lawyers were present when the *protest* was considered by the Presidium, the applicant found himself at a substantial disadvantage *vis-à-vis* his opponent, the State prosecution service.

(d). Lack of reasons for a judicial decision

89. The Court further reiterates that, in accordance with Article 6 § 1 of the Convention, judgments of courts and tribunals should adequately state the reasons on which they are based in order to show that the parties were heard and to ensure public scrutiny of the administration of justice (see *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001). However, Article 6 § 1 cannot be understood as requiring a detailed answer to every argument raised by the parties. Accordingly, the question whether a court

has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of the particular case (see *Ruiz Torija v. Spain*, judgment of 9 December 1994, Series A no. 303-A, p. 12, § 29).

90. The Court notes that in the present case the Kuybyshevsky District Court of Donetsk, having reviewed essentially the same evidentiary material at the trial stage of the proceedings, came to two completely different conclusions on 7 March and 6 July 2000 as to the need to investigate the matter further and as to the applicant's conviction (see paragraph 85 above).

91. The Court is not satisfied with the Government's explanations as to why the applicant was convicted, after his case had been heard for the second time, on the basis of the evidence and indictment as initially submitted by the prosecution and the instructions given by the Presidium of the Donetsk Regional Court, while the evidence presented by the prosecution had not changed, and considers that the District Court's reasons for departing from its previous findings were not sufficiently explained in the judgment of 6 July 2000 (see paragraph 28 above). In particular, the court did not address the doubts it had raised on 7 March 2000, when the case was remitted for additional investigation, in relation to the applicant's administrative liability and the charges of criminal libel (see paragraph 22 above). Furthermore, it was assumed in the judgment convicting the applicant that he had been sure that the information contained in the forged *Holos Ukrayiny* newspaper was false; however, this element of the case was not sufficiently examined in the judgment's reasoning. Moreover, the court did not examine its previous consideration as to whether there was evidence that the applicant had actively tried to disseminate the newspaper, which he had not produced himself, as truthful information or whether he had substantially impeded the voters' judgment as to the need to participate in the elections and not to vote for Mr Kuchma.

92. In the light of the foregoing considerations, the Court considers that the applicant did not have the benefit of fair proceedings in so far as the domestic courts gave no reasoned answer as to why the Kuybyshevsky District Court of Donetsk had originally found no evidence to convict the applicant of the offences with which he was charged and remitted the case for additional investigation on 7 March 2000 and yet, on 6 July 2000, found the applicant guilty of interfering with voters' rights. The lack of a reasoned decision also hindered the applicant from raising these issues at the appeal stage (see *Suominen v. Finland*, no. 37801/97, § 37, judgment of 1 July 2003).

(e). Legal certainty, rule of law and presumption of innocence

93. The right to a fair hearing under Article 6 § 1 of the Convention presumes respect for the principle of the rule of law. One of the fundamental aspects of the rule of law is legal certainty, which requires that where the courts' judgment has become final their ruling should not be called into

question (see *Brumărescu*, cited above, § 61). This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX).

94. The Court notes, however, that this case differs from *Brumărescu v. Romania* (cited above) as the resolution of 7 March 2000 did not concern the applicant's final acquittal. It reaffirms its position that that resolution was of a procedural nature and a precondition to the determination of the criminal charges against the applicant (see paragraph 66 above).

95. As to compliance with procedural time-limits, the Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness (see, *mutatis mutandis*, *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B, p. 29, § 33, and *Bulut*, cited above, pp. 355–56, § 29). This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals. Although time-limits and procedural rules governing appeals by the prosecution must be adhered to as part of the concept of a fair procedure, in principle it is for the national courts to police the conduct of their own proceedings.

96. The Court further notes that the procedural resolution of 7 March 2000 (see paragraph 22 above) was not appealed against under the ordinary procedure provided for by Article 252 of the Code of Criminal Procedure (see paragraph 43 above). The only remedy used was an application for supervisory review. Under Article 385 of the Code of Criminal Procedure, there was no time-limit for lodging such an application (see paragraph 44 above). The application for supervisory review of the resolution of 7 March 2000 was received by the Presidium of the Donetsk Regional Court on 30 March 2000, when the resolution had already become final under the ordinary procedure of review. An unlimited time-frame for lodging an application for supervisory review against a procedural decision that had become final, as permitted by Article 385 of the Code of Criminal Procedure (see paragraph 44 above), cannot be considered normal from the point of view of observance of procedural time-limits, compliance with the requirements of procedural clarity, and foreseeability of the conduct of the proceedings in the criminal cases, which are matters of major importance under Article 6 § 1 of the Convention.

97. In the Court's view, the resolution by the Presidium of the Donetsk Regional Court to consider the prosecution's late request to review the

resolution of 7 March 2000 and to set it aside a month after it had been adopted can be described as arbitrary, and as capable of undermining the fairness of the proceedings.

(f). Conclusions

98. Taking into account the conclusions it has reached with regard to the four aforementioned elements of the criminal proceedings at issue (see paragraphs 86, 88, 92 and 97 above), the Court considers that the criminal proceedings in their entirety were unfair. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

99. The applicant complained that, as a result of the judgment of 6 July 2000 of the Kuybyshevsky District Court of Donetsk, his right to freedom of expression guaranteed by Article 10 of the Convention had been violated. This provision reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the prevention of disorder or crime, ... [or] for the protection of the reputation or rights of others ..."

100. The Court notes that it was common ground between the parties that the applicant's conviction constituted an interference with his right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. However, the parties differed as to whether the interference had been prescribed by law and had pursued a legitimate aim, namely the "protection of the reputation or rights of others" within the meaning of Article 10 § 2. The dispute in the case therefore relates to the question whether the interference was prescribed by law, pursued a legitimate aim and was "necessary in a democratic society."

A. The parties' submissions

101. The Government acknowledged that the applicant's conviction and sentence constituted an interference with the applicant's freedom of expression under Article 10 § 1. However, that interference was justified under Article 10 § 2. It was "prescribed by law" (Article 127 of the CC) and had pursued a legitimate aim (the protection of the rights of others to elect the President of Ukraine on the basis of free and fair voting arrangements). The interference had also been "necessary in a democratic society". As to the last point, they stated that the Court's case-law (*Ahmed and Others v. the*

United Kingdom, judgment of 2 September 1998, *Reports* 1998-VI, p. 2376, § 52) stressed the importance of ensuring the free will of the people during elections and the need to protect democratic society from interferences, such as the one at issue, with that process. The dissemination of information about a presidential candidate was in the interests of the electorate. However, where false information was imparted, this could have a damaging effect on a candidate's reputation and effectively prevent him from conducting an efficient electoral campaign.

102. The Government reiterated that the applicant, acting as a representative of another presidential candidate, had imparted false information about the death of the latter's rival. He had thus participated in a dishonest electoral campaign and had damaged the interests of Ukrainian society in having fair elections. By convicting the applicant of the offence provided for in Article 127 of the CC (see paragraph 41 above), the Ukrainian courts had acted strictly within their margin of appreciation. Furthermore, the applicant had been given a probationary sentence, which could not be considered disproportionate in the circumstances of the case. They concluded that there had been no violation of Article 10 of the Convention in respect of the interference with the applicant's right to disseminate information in the course of the elections.

103. The applicant disagreed. He reiterated that Article 127 § 2 of the CC could not apply to his actions. That provision was so imprecise that he could not have reasonably foreseen that he might be imprisoned for his act. Article 186-2 of the Code of Administrative Offences should have been applied to his act and he should not have been punished for the dissemination of information (see paragraph 42 above). Furthermore, these sanctions had been applied only with reference to the candidate Mr Leonid D. Kuchma. As far as the other candidates were concerned, much false information had been disseminated about them. However, no one had been punished. As to his having been given a probationary sentence, the applicant noted that this proved that even the court realised the absurdity of the allegations against him.

B. Compliance with Article 10 of the Convention

1. The Court's case-law

104. According to the Court's well-established case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *mutatis mutandis*, among many other authorities, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42, and *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, p. 23, § 43). This freedom is subject to the

exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.

105. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/95, § 88, ECHR 2004-XI).

106. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see *Bergens Tidende and Others v. Norway*, no. 26132/95, § 50, ECHR 2000-IV). When doing so, the Court must look at the impugned interference in the light of the case as a whole, including the content of the article and the context in which it was disseminated (see *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, p. 12, § 28).

107. Lastly, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

2. Whether the interference was prescribed by law

108. The Court observes that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – 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 (see, for example, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III, and *Feldek v. Slovakia*, no. 29032/95, § 56, ECHR 2001-VIII). The degree of precision depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68).

109. The Court does not find convincing the applicant's arguments concerning the failure of the domestic courts to apply the Code on Administrative Offences in his case and not the Criminal Code (see paragraphs 41-42 above). It therefore dismisses them. Having regard to its own case-law on the requirements of clarity and foreseeability (see *Markt Intern Verlag GmbH and Klaus Beermann v. Germany,* judgment of 20 November 1989, Series A no. 165, p. 18, § 30, and *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133 p. 20, § 29), and to the fact that Article 127 of the Criminal Code complied with these requirements, the Court considers that the interference with the applicant's rights was prescribed by law within the meaning of Article 10 § 2 of the Convention.

3. Whether the interference pursued a legitimate aim

110. The Court agrees with the Government that the interference at issue was intended to pursue a legitimate aim – providing the voters with true information in the course of the presidential campaign of 1999. The question remains, however, whether it was necessary and proportionate to the legitimate aim pursued.

4. Whether the interference was necessary in a democratic society and proportionate to the legitimate aim pursued

111. The Court is of the view that the impugned article, disseminated in a copy of a forged newspaper, concerned issues of public interest and concern, namely the personality of a particular candidate in the presidential elections and his alleged death from alcohol-related *myocardiodystrophy* and the subsequent *coup d'état* by the criminal entourage of the allegedly deceased Mr Kuchma (see paragraph 13 above). The issues mentioned in the article concerned the elections as such and the ability of the electorate to support a particular candidate. In the Court's opinion, these are important issues which may give rise to a serious public discussion in the course of the elections. Consequently, the principles concerning the scope of political debate should also apply to the present case (see *Ukrainian Media Group v. Ukraine*, no. 72713/01, §§ 39-41, 29 March 2005).

112. As to whether the impugned article was a statement of fact or a value judgment, the Court observes that the domestic courts qualified the statements in the impugned article as an assertion of fact, that is, of Mr Kuchma's death and his substitution by a similar-looking person, and therefore impeded the voters' ability to elect him as President (see paragraph 28 above). The Court considers that this article should also be described as a false statement of fact (see *Harlanova v. Latvia* (dec.), no. 57313/00, 3 April 2003).

113. However, from the domestic courts' findings it can be seen that this statement of fact was not produced or published by the applicant himself

and was referred to by him in conversations with others as a personalised assessment of factual information, the veracity of which he doubted. The domestic courts failed to prove that he was intentionally trying to deceive other voters and to impede their ability to vote during the 1999 presidential elections. Furthermore, Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.

114. The Court notes that the applicant emphasised that he had not known whether this information was true or false while he was discussing it with others. He alleged that he was trying to verify it. Moreover, the impact of the information contained in the newspaper was minor as he only had eight copies of the forged *Holos Ukrayiny* newspaper and spoke to a limited number of persons about it, a fact that should have been taken into account by the domestic courts (see paragraph 28 above). The requirements of free expression and free discussion of information enshrined in Article 10 of the Convention, bearing in mind the particular context of the presidential elections, should have also been taken into account by the domestic courts in considering the applicant's case.

115. The Court reiterates that when assessing the proportionality of an interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 49, ECHR 1999-IV; *Skałka v. Poland*, no. 43425/98, § 41-42, 27 May 2003; *Cumpănă and Mazăre*, cited above, §§ 111-124). In the applicant's case, the sentence of five years, which was suspended for two years, the fine of UAH 170[1] and the resulting annulment by the Bar Association of the applicant's licence to practise law constituted a very severe penalty.

116. In short, the reasons relied on by the respondent State were neither relevant nor sufficient to show that the interference complained of was "necessary in a democratic society". Furthermore, the decision to convict the applicant for discussing information disseminated in the forged copy of a newspaper about the death of President Kuchma was manifestly disproportionate to the legitimate aim pursued.

117. Accordingly, there has been a violation of Article 10 of the Convention.

1. EUR 32.82.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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

119. The applicant sought compensation for the pecuniary damage incurred through his loss of income amounting to EUR 31,500, a UAH 1,200[1] fee he had paid for the renewal of his licence to practise as a lawyer, the legal costs incurred in the course of the domestic proceedings (EUR 1,000 allegedly paid to the lawyer Mr V. Filippenko), the fine paid by him, as ordered by the judgment of 6 July 2000 (UAH 170[2]) and expenditure relating to his detention. He claimed a total of EUR 150,000 for pecuniary and non-pecuniary damage. He alleged that his unlawful conviction had resulted in severe mental suffering for him and his family, and the loss of his business reputation, among other things.

120. The Government were of the view that there was no causal link between the violation complained of and the amounts claimed by the applicant. They further submitted that the applicant's claims were excessive and unsubstantiated and should therefore be rejected. They added that, in any event, the finding of a violation would in itself afford sufficient just satisfaction to the applicant.

121. The Court finds that in the circumstances of the case no causal link has been established by the applicant between the violations found and the pecuniary damage alleged in so far as the applicant claimed for the costs he had incurred in connection with the domestic proceedings, his loss of income, expenditure relating to his detention, etc. Consequently, there is no justification for making an award to the applicant in relation to those claims. Taking into account all the circumstances of the case, the Court considers that the only substantiated claims for pecuniary damage are those relating to the withdrawal of the applicant's licence to practise law (EUR 194.73) and the fine paid by him as a result of his conviction (EUR 32.82). It therefore awards the applicant a total sum of EUR 227.55 under this head.

122. The Court accepts that the applicant has also suffered non-pecuniary damage – such as distress and frustration resulting from not being brought promptly before a judge to review the lawfulness of his detention (Article 5 § 3 of the Convention), from the lack of fair proceedings in his

1. EUR 194.73.
2. EUR 32.82.

case (Article 6 § 1 of the Convention) and from his conviction and sentence for discussing politically sensitive information in the course of the elections (Article 10 of the Convention) – which cannot be sufficiently compensated by the mere finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,000 under this head.

B. Costs and expenses

123. The applicant, who was not granted legal aid for the purpose of the proceedings before the Court, claimed EUR 1,000 as reimbursement for the costs he had borne in connection with the domestic proceedings. He claimed no specific expenses for the proceedings before the Court.

124. The Government submitted that those costs were irrelevant to the case at hand. They also argued that the applicant had not submitted any documents to show that he had actually incurred them.

125. The Court observes that the applicant has not lodged any particular evidence in support of his claims for costs and expenses. Neither has he substantiated or broken down his claims for costs and expenses incurred before the Court. It therefore decides not to award any sum under this head.

C. Default interest

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

2. *Decides* that Article 6 § 1 is applicable to the criminal proceedings at issue;

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

4. *Holds* that there has been a violation of Article 10 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 227.55 (two hundred and twenty-

seven euros and fifty-five cents) in respect of pecuniary damage and EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable on the date of payment, plus any tax that may be chargeable on these amounts;
(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;

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

Done in English, and notified in writing on 6 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH — DEPUTY REGISTRAR

J.-P. COSTA — PRESIDENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the partly concurring opinions of Mr Cabral Barreto and Ms Mularoni are annexed to this judgment.

J.-P.C.

S.H.N.

PARTLY CONCURRING OPINION OF JUDGE CABRAL BARRETO

With much regret I have to dissociate myself from the majority's reasoning concerning the violation of Article 6 of the Convention.

If I agree with the majority who found a violation of Article 6 with respect to equality of arms, lack of legal certainty, rule of law and presumption of innocence, I shall disagree with their reasoning and the conclusion that the article 6 § 1 of the Convention was violated with respect to independence and impartiality of the courts dealing with the case and the lack of reasons for a judicial decision because I share the reasons developed by my colleague judge Antonella Mularoni in her concurring opinion.

PARTLY CONCURRING OPINION OF JUDGE MULARONI

While I am in agreement with the operative provision of the judgment holding that there has been a violation of Article 6 § 1 of the Convention, I do not completely agree with the reasoning followed by the majority, nor with all aspects of its analysis.

I agree with the reasoning and the finding of a violation of Article 6 § 1 of the Convention with respect to the equality of arms (see paragraphs 87-88 of the judgment) and to legal certainty, rule of law and presumption of innocence (see paragraphs 93-97 of the judgment). However, I disagree with the reasoning and the conclusion that Article 6 § 1 was violated with respect to independence and impartiality of the courts dealing with the case (see paragraphs 80-86 of the judgment) and the lack of reasons for a judicial decision (see paragraphs 89-92 of the judgment).

1. As to independence and impartiality of the courts dealing with the case, the majority correctly points out that the applicant's submissions of Judge T. of the Kuybyshevsky District Court of Donetsk being influenced by political motives and instructed by the Head of the Regional State Administration are of little assistance in assessing his complaints as to the lack of independence and impartiality of the courts dealing with the case (see paragraph 82 of the judgment). However, having said that, the majority embarks on a reasoning of general character concerning the insufficiency of domestic legislation, which I consider of little help in examining the case and which leaves room to considerable doubts as to the possibility of finding a violation of Article 6 § 1 (see paragraph 83 of the judgment).

The majority examines afterwards the issue of impartiality of the judge hearing the case, underlying that he was legally bound by the instructions of the Presidium of the Regional Court that quashed the previous resolution and remitted the case for consideration on its merits. It furthermore develops a series of statements that I have great difficulties to follow (see paragraphs 84-85 of the judgment). I consider that the system in force in Ukraine (at least at the material time) could be, *mutatis mutandis*, compared to the cassation procedure and to such a well-known institution in a considerable number of contracting States as remittal of the case to lower courts for consideration on the merits. Following the reasoning adopted by the majority as to the applicant's doubts with respect to the impartiality of the judge of the Kuybyshevsky District Court of Donetsk (see paragraph 86 of the judgment), I am afraid that more serious doubts could be raised by future applicants as to impartiality of the judges called to examine the culpability of the accused after a decision by Cassation Courts on remittal of the case for consideration on the merits. It seems to me that the conclusion that “the applicant's doubts as to the impartiality of the judge of the Kuybyshevsky District Court of Donetsk may be said to have been objectively justified” is not only a far-reaching one, but could have undesired consequences for the future.

As to "insufficient legislative and financial guarantees against outside pressure on the judge hearing the case" and, in particular, "the lack of such guarantees in respect of possible pressure from the President of the Regional Court", I consider such argument very weak to justify the finding of a violation of Article 6 § 1, partly for the reasons stated above, partly because it could *inter alia* and in the absence of any evidence give the idea that the judge was corrupt.

For all these reasons I cannot follow the majority when it concludes that a violation of Article 6 § 1 of the Convention should be found as to independence and impartiality of the courts dealing with the case.

2. As to lack of reasons for a judicial decision (see paragraphs 89 – 92 of the judgment), it seems to me that the majority draws its conclusions as a consequence of the analysis developed with respect to the issue of independence and impartiality of the courts dealing with the case. Reading the judgment of the District Court of 6 July 2000 (see paragraph 28 of the judgment), I cannot conclude that such a judgment was insufficiently reasoned. It is at least as much reasoned as lots of other judgments where the Court has considered that no problem arose under Article 6 § 1 in this respect. In the light of the considerations expressed at first paragraph above, I am not convinced that the District Court should have stated why it had originally found no evidence to convict the applicant and remitted the case for additional investigation and yet, on 6 July 2000, following the Presidium of the Donetsk Regional Court resolution of 5 April 2000 (see paragraph 24 of the judgment), had found the applicant guilty of interfering with voters' rights.

As a consequence, I cannot conclude that a violation of Article 6 § 1 of the Convention should be found as to lack of reasons for a judicial decision.

***

As to Article 10, I agree with the majority who found a violation. However, the only reason for me to find a violation is that the interference with the applicant's rights was disproportionate, as the penalty was extremely severe (see paragraph 115 of the judgment).

I do not underestimate the gravity of what the applicant did. The Court states – and I completely agree – that the article should be described as a false statement of fact. The information was no doubt false, Mr Kuchma being alive. It was a clear dissemination of false information with respect to an important aspect of life of the country, namely the election of its president. Even assuming that the article could be considered as contributing to a discussion of a general interest or on political issues, I am not satisfied that the applicant was acting in good faith in order to provide accurate and reliable information to the other persons (see, among many authorities, *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V). The applicant could have tried to verify if the information was true or false before (and not after) disseminating an article that leaves no doubt as to the alleged truth of the information. I am not ready to

consider that freedom of expression entails the right to disseminate false information, maybe for the purpose of advantaging a different presidential candidate.

The Court repeatedly stated that the press must not overstep the bounds set, *inter alia*, for the protection of the reputation of others (see *Colombani* judgment cited above, § 56). Everyone's freedoms and rights encounter limits when freedoms and rights of others exist.

If, according to our case-law, even a value judgment can be considered not protected by Article 10 of the Convention when it is devoid of factual basis, I consider that the false statement of fact disseminated by the applicant should not get better protection.