



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

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 65518/01
by Sergey Petrovich SALOV
against Ukraine

The European Court of Human Rights (Second Section), sitting on 27 April 2004 as a Chamber composed of:

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

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 26 January 2000,

Having regard to the partial inadmissibility decision of 27 September 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Sergey Petrovich Salov, is a Ukrainian national, who was born in 1958 and currently resides in Donetsk, Ukraine. The applicant is a lawyer practising in Ukraine.

A. The circumstances of the case

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

1. Criminal proceedings in the applicant's case

On 31 July 1999 the Central Electoral Committee 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.

On 31 October 1999 the prosecution service of Kyivsky District of Donetsk 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: hereinafter the "CC").

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 allegedly disseminated this information on 30 and 31 October 1999 in the form of a statement of the Speaker of the Verkhovna Rada (the Parliament) published in a special nationwide issue of the Verkhovna Rada newspaper - *Holos Ukrayiny* (газета "Голос України"). Following the applicant's apprehension, the Kyivsky District Prosecution Service of Donetsk carried out a formal criminal investigation into the allegations made against the applicant.

On 3 November 1999 the Kyivsky District Prosecution Service decided to detain the applicant on suspicion of having committed a crime under Article 127 § 2 of the CC. The applicant was detained in the Investigative Detention Centre of the Donetsk Region. He remained there until 10 November 1999.

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

On 10 November 1999 the applicant lodged a petition with the Voroshylovsky District Court of Donetsk seeking his release from detention. On 17 November 1999 the court dismissed his petition.

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

On 16 November 2000 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.

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

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. It also decided not to release him from detention.

In the course of the trial the District Court, on 7 March 2000, ordered an additional investigation to be undertaken into the circumstances of the case. It also requested the prosecution to re-consider the preventive measure of detention applied to the applicant and to re-classify the charges against him. In particular, it found that:

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

From the materials in the case file it can be seen that the applicant disseminated a false copy of the newspaper *Holos Ukrayiny* to only five persons; there was no other information with regard to the attempts of Mr Sergey P. Salov to influence the election results established by the investigation in the course of 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 acts of the applicant 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 re-classify his actions and the case must therefore be remitted for additional investigation...”

On 30 March 2000 the deputy prosecutor of the Donetsk Region lodged a *protest* with the Presidium of the Donetsk Regional Court (“the Regional Court”) against the decision of 7 March 2000 and requested the initiation of supervisory review proceedings in the applicant's case. It also sought to quash the ruling of 7 March 2000 by which the case was 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*.

On 5 April 2000 the Presidium of the Regional Court quashed the ruling 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 for an additional investigation without a thorough examination of the indictment and of the requisite *actus rea* and *mens rea* of the crime with

which the applicant had been charged. The Presidium also decided not to release the applicant from detention.

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

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

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

On 6 July 2000 the District Court convicted the applicant of interfering with the citizens' right to vote with 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 two years. It also ordered the applicant to pay a fine of UAH 170. It held as follows:

“In October 1999, Mr Sergey P. Salov received from persons, whose identity was not established in the course of the investigation, in unidentified places, 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 (the 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 address of 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' rights 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...”

On 15 September 2000 the Regional Court upheld the judgment of 6 July 2000.

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

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

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 moral and material 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 the criminal proceedings. 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 to the applicant.

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 in compensation for pecuniary and non-pecuniary damage.

B. Relevant domestic law

1. Constitution of Ukraine, 1996

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.”

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

Article 127

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

“Interference with the exercise by a Ukrainian citizen of his electoral right, or interference with the activity of an electoral committee, 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 in conjunction with damage to the property of or physical violence against a citizen who exercises his right to vote, or a member of an electoral committee or their close relatives, or with the threat of using force or damaging property, or conducted in 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.”

3. *Chapter 15 of the Code of Administrative Offences of 7 December 1984*

Article 186-2

**Infringements of the legislation on the elections of the President of
Ukraine and Members of Parliament**

“Public appeals or incitement to boycott elections for the presidency of Ukraine or membership of the Ukrainian Parliament, the publication or dissemination of untrue information about a presidential candidate or a parliamentary candidate by any other means, as well as 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' wages before tax.” [These sums are approximately UAH 51 to UAH 102, or 10-20 euros]

4. *The Law on “Elections of the President of Ukraine”, 1999*

Article 50

Liability for an infringement of electoral legislation

“1. Persons who interfered through deceit, threats, bribery or by other means with the free exercise by a citizen of Ukraine of his right to elect and to be elected, to conduct pre-election campaigning, or where the chairman, the deputy chairman, secretary and members of electoral committees, officials or other persons representing State bodies, bodies of local self-government, non-governmental organisations

fraudulently substituted documents, intentionally counted the number of votes incorrectly, violated the right to vote by secret ballot, or have committed any other violation of this Law, shall be liable in accordance with the legislation.

2. Persons who intentionally published or disseminated untrue information about a candidate for the presidency shall be liable in accordance with the legislation.”

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

“... 2. The provisions of Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution of Ukraine and Articles 106 and 157 of the Code of Criminal Procedure of Ukraine concerning the detention of a person and the issue of an arrest warrant by a public prosecutor.

Such reservations shall be in force until appropriate amendments to the Code of Criminal Procedure of Ukraine are introduced or until the adoption of the new Code of Criminal Procedure of Ukraine, but not later than 28 June 2001.”

“The provisions of Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene Articles 48, 49, 50 and 51 of the Disciplinary Statute of the Armed Forces of Ukraine concerning the imposition of arrest as a disciplinary sanction.”

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

(a) Transitional Provisions in the Constitution of Ukraine

“13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an inspection and search of a person's home and other property, shall be retained for five years after the entry into force of the present Constitution.”

(b) Article 106 of the Code of Criminal Procedure: detention by a body of inquiry of a person suspected of committing an offence

“A body of inquiry shall be entitled to detain a person suspected of committing an offence for which a penalty in the form of deprivation of freedom could be imposed, subject to the existence of one of the following grounds:

1. if the person is discovered whilst committing an offence or immediately after committing one;

2. if eye-witnesses, including victims, directly identify this person as the one who committed the offence;

3. if clear traces of the offence are found on the body of the suspect or on the clothing which he is wearing or which is kept at his home.

If there are other data which constitute grounds for suspecting the person of committing an offence, he may be detained only if he attempts to escape, or if he has no permanent place of residence, or if the identity of the suspect has not been established.

For each case of detention of a person suspected of committing an offence, the body of inquiry shall be required to draw up a record mentioning the grounds, the motives, the day, time, year and months, the place of detention, the explanations of the person detained and the time when it was recorded that the suspect was informed of his right to have a meeting with the defence counsel before his first questioning, in accordance with the procedure provided for in Part 2 of Article 21 of the present Code. The body of inquiry shall also be required to notify the public prosecutor of the detention in writing within twenty-four hours and, at his request, give him the documents constituting the grounds for detention. The record of detention shall be signed by the person who drew it up and by the detained person. Within forty-eight hours of the receipt of the notification of detention, the public prosecutor shall be required to authorise the person detained to be taken into custody or order his release.

The body of inquiry shall inform the suspected person's family of his detention if his place of residence is known.”

(c) Article 157 of the Code of Criminal Procedure: the duties of a Public Prosecutor when issuing a warrant for arrest

“The public prosecutor shall issue a warrant for the arrest of a suspect or accused subject to the existence of the grounds prescribed by law. When deciding whether to issue a warrant for arrest, the public prosecutor shall be required to study conscientiously all the relevant documents and, where necessary, question the suspect or accused personally. In the case of a suspect or accused under the age of majority, such questioning shall be mandatory.

The right to issue a warrant for arrest of a person shall be vested in the Prosecutor General of Ukraine, public prosecutors of the Republic of the Crimea, regional, the cities of Kyiv and Sevastopol, and prosecutors equated thereto. The same right shall also be vested in the deputy public prosecutors of towns and districts with a population exceeding 150,000, unless otherwise stipulated in a special order of the Prosecutor General of Ukraine.”

7. Resolution of the Plenary Supreme Court of Ukraine No. 10 of 30 September 1994 on Issues Related to the Application by the Courts of the Legislation that Regulates Lodging Complaints with the Courts Against an Arrest Sanction Issued by a Prosecutor

“... To explain that, in accordance with Article 236-6 of the Code of Criminal Procedure of Ukraine, only the warrant of the prosecutor authorising the arrest of the suspect or accused, and also the decision of the court (judge) concerning the application of the preventive measures, can be appealed against to the courts, but not

the decision of the investigator or body of inquiry to apply the preventive measure of taking into custody or to continue the term of the detention...”

COMPLAINTS

1. 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.

2. 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 quashed the ruling 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.

3. Invoking Article 7 § 1 of the Convention, the applicant complained that the domestic authorities erroneously applied national law, with the result that he was convicted and sentenced for an act that at the time did not constitute a criminal offence in Ukrainian law. In particular, he alleged that the impugned acts did not constitute a “crime”, but an “administrative offence” envisaged by the Code on Administrative Offences (Article 180-2), punishable by an administrative penalty. He claimed that, having regard to the text of Article 127 of the CC, he could not have reasonably foreseen that he would be convicted of an interference with the exercise of citizens' electoral rights. He further noted that, in substance, he was convicted of disseminating false information (defamation) about a candidate for the presidency, the incumbent President Mr Leonid D. Kuchma, which was an offence envisaged by Article 125 of the former CC.

4. Invoking Article 10 of the Convention, the applicant complained about the alleged 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 the issue of *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 was detained for eleven days in the Pre-Trial Detention Centre of Donetsk and his licence to practice as a lawyer was withdrawn.

THE LAW

1. Complaints concerning Article 5 § 3 of the Convention

(a) The Government's preliminary objection

The applicant complained that he was detained unlawfully for a period of 18 days without any judicial review of his detention (from 31 October 1999 to 17 November 1999, the date on which the Voroshylovsky District Court of Donetsk reviewed his complaints). 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 ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

The Government contested this allegation. They stated that Ukraine had lodged a reservation to Article 5 of the Convention in accordance with Article 57 of the Convention. This was because the provisions of the Code of Criminal Procedure and the Transitional Provisions of the Constitution of Ukraine, which provided for an arrest warrant to be issued by a public prosecutor, did not comply with Article 5 of the Convention at the time of the deposit of the instrument of ratification.

The Government maintained that Ukraine's reservation to Article 5 was intended to preserve the procedure governing arrest in force at the material time (detention on remand). Under that procedure, all arrests (detention) had to be authorised by a public prosecutor pending the expiry of the Transitional Provisions of the Constitution, namely on 28 June 2001. The reservation clearly indicated the provisions of the domestic law providing for a temporary derogation from the guarantees of Article 29 of the Ukrainian Constitution concerning the courts' powers to authorise detention. The Government further noted that the second paragraph of the Law of Ukraine on the Ratification of the Convention was applicable in the part that did not contravene paragraph 13 of Chapter XV on “Transitional Provisions” of the Constitution of Ukraine, and Articles 106 and 157 of the Code of Criminal Procedure, which authorised detention and the issue of an arrest warrant by a prosecutor. Moreover, all the domestic law provisions relied on in this connection had been in force at the time of Ukraine's ratification of the Convention (see *Chorherr v. Austria*, judgment of 25 August 1993, Series A, no. 266, p. 34).

The Government maintained that, when making the reservation, Ukraine expressly referred to the provisions of domestic law that provided for the procedure for detention and arrest of a person in the course of a pre-trial investigation, as well as to the specific provision which formed the focus of the reservation, namely “the detention and arrest warrant issued by the public prosecutor”. Ukraine thus clearly intended to exclude arrest

authorised by a judicial officer in the course of a pre-trial investigation from the scope of their obligations under Article 5 of the Convention and to preserve this situation until the amendments to the Code of Criminal Procedure had been introduced. The arrest and detention procedure has since been changed, and decisions to arrest and detain can now be made only by a court.

The Government observed that Article 5 § 3 of the Convention requires that the lawfulness of a person's detention in accordance with Article 5 § 1 (c) must be decided by a court. They therefore concluded that Article 5 § 3 was only applicable in the part that did not contravene Ukraine's temporary reservation to Article 5 § 1 of the Convention.

The Government further maintained that Article 5 §§ 1(c) and 3 of the Convention refer to the same process – the detention and arrest of a person suspected of committing a crime. They emphasised that since Ukraine had indicated in its reservation the relevant provisions of the national legislation concerning the detention and arrest of a person by a public prosecutor, this confirmed the Government's intention to extend the legal force of the reservation to the relevant provisions of both Article 5 §§ 1(c) and 3 of the Convention.

The Government stated, with reference to the aforementioned considerations, that the applicant's detention was in full compliance with Article 5 § 1(c) of the Convention. They recalled that the applicant was detained on 1 November 1999, on suspicion of having committed a crime under Article 127 § 1 of the CC, by an investigator of the Kyiv District Prosecution Service of Donetsk. The applicant's detention was based on the statements of eyewitnesses who had indicated that the applicant had distributed a special issue of the newspaper *Holos Ukrayiny* containing information about the alleged death of Mr Leonid D. Kuchma. During the search of the applicant's apartment and office, the investigator seized five copies of the newspaper. Consequently, the grounds for detention enshrined in Articles 106-1 §§ 1 and 3 of the Code of Criminal Procedure had been complied with. The Government concluded that the applicant's detention was based on a reasonable suspicion of his having been involved in a crime, and that the detention was in full compliance with Article 5 § 1 of the Convention. On 3 November 1999 a public prosecutor authorised the applicant's further two-month detention on remand on the basis of Articles 148, 150, 155 and 157 of the Code of Criminal Procedure.

For the above reasons, the Government requested the Court to declare this part of the application inadmissible.

(b) The Court's assessment

The Court considers it necessary to examine the following issues: firstly, whether the reservation made by Ukraine to Article 5 § 1(c) was, as alleged by the Government, also related to Article 5 § 3 of the

Convention; secondly, whether the prosecutor could be considered, as claimed by the Government, “...another officer authorised by law to exercise judicial power”, within the meaning of Article 5 § 3 of the Convention; thirdly, whether the applicant was brought “promptly” before a judicial officer in order to have his arrest and detention reviewed.

The Court observes that the reservation refers, *inter alia*, to Articles 106 and 157 of the Code of Criminal Procedure, according to which a person may be arrested or detained on the basis of a public prosecutor's decision, without there being any requirement for the judicial supervision of the detention. However, the Court, does not share the Government's view that the reservation covered both Article 5 § 1(c) and Article 5 § 3 of the Convention. It recalls that, in accordance with Article 57 of the Convention, a reservation may be made in respect of “any particular provision of the Convention”. In the instant case the reservation made by Ukraine to Article 5 § 3 referred only to arrests constituting disciplinary sanctions imposed on military personnel. No reference was made in the reservation to Article 5 § 3 and to the arrest and detention of a person suspected of committing a crime. The reservation was made only in respect of Article 5 § 1. The Court also notes that the validity of the reservation made to Article 5 § 1 is not contested by the parties and, therefore, it is not necessary to investigate this matter.

The Court points out that Article 5 § 3 is not a constituent element of Article 5 § 1, neither is it the *lex specialis* in relation to Article 5 § 1(c), as the Government have suggested. This latter provision must be read in conjunction with Article 5 § 3, which together form a whole (see *Ciulla v. Italy*, judgment of 22 February 1989, Series A no. 148, § 38). It further reiterates that Article 5 § 3 enshrines a specific right, the object and purpose thereof being “a right to be brought promptly before a judge in case of detention effected in accordance with Article 5 § 1(c)” (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, §§ 44 and 51).

The Court finds, having regard to the above-mentioned considerations, that no reservation was made to Article 5 § 3 of the Convention in so far as it guarantees the right to the judicial review of detention. It concludes therefore that the Government's preliminary objection must be dismissed.

(c) As to whether the prosecutor could be considered an officer authorised to exercise judicial power, and whether the applicant was brought before a court promptly to have his arrest reviewed

The Government maintained that, taking into account Ukraine's reservation to Article 5 of the Convention, the applicant was detained in accordance with the decision of the prosecutor. They stressed that the prosecutor within the meaning of the reservation could be considered “... another officer authorised by law to exercise judicial power...” In this

capacity, the prosecutor of the Donetsk Region who authorised the applicant's detention had acted promptly in reviewing his detention.

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

2. Complaints under Article 6 § 1 of the Convention

(a) The parties' submissions on applicability

The applicant complained about the unfairness of the criminal proceedings instituted against him. He alleged, in particular, that the domestic courts failed to respect the principles of the rule of law and legal certainty, given that the Presidium of the Regional Court quashed a final and binding resolution of the District Court whereby his case had been remitted for additional investigation, thereby putting in issue the lawfulness of the initial charges brought by the prosecution 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...”

The Government maintained that the applicant's complaint should be rejected 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 a criminal charge against an individual. The resolution of the District Court of 7 March 2000 did not determine the criminal case against the applicant. The resolution only concerned procedural issues and was aimed at giving instructions to the investigating authorities as regards the additional investigative measures required in the case. The resolution did not result in the applicant's acquittal of the charges brought against him under Article 127 § 2 of the CC. It was intended to rectify errors which had been made, in the court's opinion, by the investigating authorities during the investigation and which prevented the court from examining the merits of the case. Consequently, this procedure did not fall within the scope of Article 6.

The applicant contested the Government's views. He stated that the remittal of his case for additional investigation directly influenced his rights and legal interests. As to the resolution of the District Court 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 issue of proof or lack of proof cannot be considered a purely procedural issue. He submitted that the lack of proof of a person's guilt should in principle lead a court to find that person innocent. He therefore concluded that Article 6 was applicable.

The Court considers that the parties' submissions on the issue of the applicability of Article 6 are closely linked to the merits of the applicant's complaints and should therefore be joined to the merits.

(b) The parties' submissions on the merits

(i) Compliance with the fair hearing guarantees

The Government maintained that, when the District Court remitted the criminal case against the applicant for additional investigation, the procedure governing the introduction of the prosecutor's motion against this decision was clearly regulated by procedural legislation. Article 281 of the Code of Criminal Procedure provided at the material time that the decision of a court to remit a case for additional investigation could not be appealed against. However, the public prosecutor could file a separate motion against it. Pursuant to Article 252 of the Code of Criminal Procedure, a ruling of a judge could be challenged by lodging a motion to quash it with a higher court within seven days of the ruling. Thus, the domestic legislation set a clear time-limit for the public prosecutor to lodge a separate motion (*окреме подання*) against a judge's ruling. Accordingly, any possibility of changing a final court judgment to the detriment of the accused without limit of time was excluded.

The applicant maintained that the principle of "legal certainty" had been infringed as a final and binding ruling had been quashed in his case. Moreover, he emphasised that the District Court's ruling of 7 March 2000 had become final but was subsequently quashed, even though no petition to quash the ruling had been lodged by the prosecution within the seven-day time-limit laid down in Article 252 of the Code of Criminal Procedure: the protest was lodged only on 30 March 2000. The applicant reiterated that, in substance, the decision to remit the case for additional investigation amounted to his acquittal of the charges initially filed by the prosecution under Article 127 § 2 of the CC.

The Government maintained that, by lodging a protest against the ruling of 7 March 2000, the deputy prosecutor did not violate the applicant's rights and did not cause any harm to 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. However, there had been no delay in the examination of the applicant's case.

The applicant disagreed. In particular, he noted that the lodging of the protest 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 was aimed at delaying the proceedings. According to the ruling of 7 March 2000, the prosecution had failed to prove that he was guilty of an offence under Article 127 § 2 of the CC and that consideration needed to be given to the reclassification of the offence under either the Code of Administrative Offences or Article 125 of the CC. Under the Code of Administrative Offences, the maximum sanction following his conviction would have been a fine amounting to UAH 51, not 8 years' imprisonment. The applicant concluded therefore that the lodging of the protest against the District Court's decision, and the subsequent resolution of the Presidium of Regional Court of 5 April 2000, infringed the principle of the independence of a tribunal enshrined in Article 6 § 1.

He further maintained that, following the instructions of the Presidium of the Regional Court, the District Court had to convict him. The judge was in effect obliged to alter his opinion expressed in the ruling of 7 March 2000 about the lack of corroborating evidence of his guilt and to adopt a completely different opinion. For the applicant, the quashing of the ruling upset the balance between his defence rights and the rights of the prosecution.

The Government replied that, in his protest of 30 March 2000, the deputy prosecutor objected to the carrying out of an additional investigation and maintained, in this connection, that the pre-trial investigation had disclosed sufficient evidence for the case to be examined on the merits. The deputy prosecutor 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 was attributable to the fact that the court's ruling was unsubstantiated and contained no clear instructions as to the particular investigative actions to be taken. The ruling 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 ruling of 7 March 2000, the deputy prosecutor had in fact prevented a protracted examination of the applicant's case and shortened his length of detention on remand.

The applicant disagreed. In particular, he maintained that the failure to comply with the time-limits for lodging the petition to quash the ruling was aimed at prolonging the proceedings in his case. Furthermore, the protest was not aimed at reducing his term of detention. If the prosecutor had so wished, he could have changed the preventive measure applied to him. He also observed that the length of the proceedings in the criminal case was not related to the issue of detention. The applicant concluded that the fair trial guarantees, in particular the guarantees of independence and impartiality of the tribunal, were breached in this case.

(ii) *Compliance with the principles of the rule of law and legal certainty*

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 General Public Prosecutor of Romania had been entitled to file a request with a court to have a final judgment overturned. Moreover, the exercise of this power had not been limited in time. These factors 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.

They noted that the Presidium of the Regional Court had accepted the prosecutor's argument and found the resolution of 7 March 2000 unsubstantiated. The Presidium had also found that the resolution contravened the law. The court allowed the prosecutor's protest and quashed the ruling remitting the case for additional investigation, thereby preventing further protraction of the proceedings.

The applicant claimed that his situation was similar to that impugned by the Court in the *Brumărescu* case. In particular, he alleged that, even though the deadline for the lodging of a petition to quash existed in domestic law, it was not respected by the prosecution and the Presidium of the Regional Court. He also noted that the judge who had previously remitted the case for an additional investigation, later tried him. The judge thus ignored his own previous procedural decision.

(c) The Court's assessment

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

3. Complaint under Article 7 § 1 of the Convention

(a) The parties' submissions

The applicant complained that, as a result of the judgment of 6 November 2000 of the District Court, he was found guilty of the wrong offence, contrary to Article 7 § 1 of the Convention, which provides:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

The Government emphasised that, according to the judgment of 6 July 2000, the applicant was convicted of the criminal offence of interfering with the exercise by Ukrainian citizens of their voting rights.

The applicant maintained that he should have been convicted of an administrative offence under Article 186 § 2 of the Code of Administrative

Offences for having disseminated false information about a presidential candidate. Article 127 § 2 of the CC was not applicable to all information disseminated by a person, only to information that created obstacles to citizens' participation in elections. He referred to the commentaries on the Criminal Code in this connection, which clearly defined the offence under Article 127 § 2 of the CC as an act directed at the participation in elections or the creation of physical obstacles to voting. He alleged that the court thus misapplied Article 127 § 2 of the CC.

The Government maintained that it was not for the Court to interpret and apply the domestic law. This was the task of the national authorities. They referred to Article 127 of the CC which established liability for interfering with the exercise of electoral rights where the impugned interference was effected by an official, like the applicant, with the aim of influencing election results by deceit. The Government concluded that the applicant's acts fell within the description of the crime envisaged under Article 127 § 2 of the CC.

(b) The Court's case-law under Article 7 of the Convention

Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law. It implies qualitative requirements, notably those of "accessibility" and "foreseeability" (see, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, § 37).

The Court notes that the "law" must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case. Moreover, a norm cannot be regarded as "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, *among other authorities*, *Tolstoy Miloslavsky v. the United Kingdom*, cited above, § 37).

Those consequences need not be "foreseeable" with absolute certainty; experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be

able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 49). However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation, as there will always be a need for elucidation of disputable points and for adjustment to the changing circumstances.

(b) The Court's assessment

The Court finds that the applicable law in the instant case was sufficiently accessible. As to the foreseeability of the law, the Court considers that, with the benefit of appropriate legal advice, or on the basis of his own knowledge, the applicant, being a practising lawyer, could reasonably be expected to be able to appreciate at the material time that he ran a real risk of being found guilty of an offence under Article 127 of the CC if he disseminated a forged issue of a newspaper containing false information about a candidate for the presidency of Ukraine.

The Court does not find any support for the contention that a term of imprisonment could not have been foreseen. Once it had been established by the domestic court that Article 127 of the CC was applicable, the sanctions provided for in that provision, including imprisonment, could be brought to bear. The Court is satisfied that the interpretation of the relevant law by the Kuybyshevsky District Court of Donetsk, as upheld by the Donetsk Regional Court, did not go beyond what could be reasonably foreseen in the circumstances.

It follows that this complaint is manifestly ill-founded and must therefore be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. Complaint under Article 10 of the Convention

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 was violated. The relevant part of Article 10 of the Convention provides 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, ...”

The Government acknowledged that the applicant's conviction and sentence constituted an interference under Article 8 § 1 with the applicant's freedom of expression. However, that interference was justified under

Article 10 § 2. It was “prescribed by law” (Article 127 of the CC) and 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 was also “necessary in a democratic society”. As to the last point, they stated that the Court's case-law (see *Ahmed and others v. the United Kingdom*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 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 may have a damaging effect on a candidate's reputation and effectively prevent him from conducting an efficient electoral campaign.

The Government reiterated that the applicant, acting as a representative of another presidential candidate, imparted false information about the death of the latter's rival. He thus participated in a dishonest electoral campaign and 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, the Ukrainian courts acted strictly within their margin of appreciation. Furthermore, the applicant was given a probationary sentence, which cannot be considered disproportionate in the circumstances of the case.

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. The Code of Administrative Offences should have been applied to his act and he should not have been punished for the dissemination of information. Furthermore, these sanctions were 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 was 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.

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

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the alleged infringement of Articles 5 § 3 and 10 of the Convention;

Decides to join to the merits the Government's objection as to the admissibility of the applicant's complaints under Article 6 § 1 of the Convention and also *declares* those complaints admissible;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President