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

FIFTH SECTION

CASE OF SVETLORUSOV v. UKRAINE

(Application no. 2929/05)

JUDGMENT

STRASBOURG

12 March 2009

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 Svetlorusov v. Ukraine,

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

Peer Lorenzen, *President*,
Rait Maruste,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
Stanislav Shevchuk, ad hoc *judge*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 2929/05) 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 Belarus national, Mr Grigoriy Valentinovich Svetlorusov ("the applicant"), on 20 January 2005.

2. The applicant was represented by Ms Z. K. Shevchenko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska and Mrs I. Shevchuk, of the Ministry of Justice.

3. The applicant alleged, in particular, that in the event of his extradition to Belarus he would face the risk of torture and of an unfair trial, that his detention was unlawful, that his applications for release were not examined promptly and effectively by a court and he had no right to compensation for his detention.

4. On 31 May 2005 the Court declared the application partly inadmissible and decided to communicate the complaints under Articles 3 and 6 § 1, as well as under Article 5 §§ 1, 3, 4, and 5 of the Convention, to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966. He lives in Kyiv.

6. In November 2000 a criminal investigation was opened against the applicant in Belarus.

7. On 5 December 2003 Grodno Prosecutor's Office decided that the applicant's undertaking not to abscond be replaced by remand in custody.

8. On 9 March 2004 the applicant was placed on an international wanted list.

9. On 29 December 2004 the Lidsky District Police Department of the Republic of Belarus sent a letter to the Ministry of Interior of Ukraine informing it that according to their data the applicant, who was wanted for swindling and whose arrest had been ordered on 5 December 2003 by the Grodno Prosecutor's Office, was living in Kyiv. Therefore, they requested that the applicant be found and arrested. They further stated that his extradition would be requested in accordance with the Minsk Convention 1993.

10. On 29 December 2004 the applicant was arrested by the Kyiv Pechersky District Police Department on the basis of the arrest warrant of the Grodno Prosecutor's Office of 5 December 2003.

11. On 31 December 2004 a department of the Belarus Ministry of the Interior applied to the President of the Pechersky District Court of Kyiv ("the Pechersky Court"), seeking that the applicant be placed in detention.

12. On 5 January 2005 the Pechersky District Police Department requested from the Lidsky District Police Department of the Republic of Belarus the originals of documents needed to order the applicant's arrest by a Ukrainian court.

13. On 6 January 2005 the Deputy Prosecutor General of Belarus applied to the General Prosecutor's Office of Ukraine, requesting that the applicant be placed in detention until the request for his extradition had been submitted.

14. On 11 January 2005 the Pechersky Court ordered that the applicant be placed in detention for one month.

15. The applicant appealed against this decision on 13 January 2005, referring to the allegedly unlawful nature of the Belarus authorities' decision of 5 December 2003 ordering that he be detained. In addition, the applicant complained that his detention prior to 11 January 2005 had been unlawful. By a judgment of 20 January 2005, the Kyiv City Court of Appeal upheld the decision of 11 January 2005, noting that the decision was well-founded and in accordance with procedural law.

16. On 19 January 2005 the applicant's lawyer complained to the Pechersky Court, seeking a declaration that the applicant's detention without judicial supervision during the period between 29 December 2004 and 11 January 2005 had been unlawful.

17. On 19 January 2005 the Deputy Prosecutor General of Belarus submitted an official extradition request to the Deputy Prosecutor General of Ukraine.

18. On 20 January 2005 the applicant asked the European Court of Human Rights to prohibit the Ukrainian Government from extraditing him to Belarus, alleging that there was a risk that he would be subjected to torture by the officers conducting the investigation and would not enjoy the benefit of a fair trial.

19. On 21 January 2005 the President of the Chamber indicated to the Ukrainian Government, under Rule 39 of the Rules of Court, not to extradite the applicant to Belarus until 21 February 2005 and invited the parties to submit additional information.

20. On 22 January 2005 the applicant's extradition was suspended.

21. On 27 January 2005 the Deputy Prosecutor General of Ukraine informed the Deputy Prosecutor General of Belarus of the interim measure indicated to the Ukrainian Government by the Court and requested guarantees that the applicant would be tried only for the offence which had given rise to the extradition request, that he would not be subjected to capital punishment or to inhuman and degrading treatment and that he would be allowed to leave Belarus freely after having served his sentence.

22. In the light of the parties' observations, on 21 February 2005 the President of the Chamber decided to extend the application of the interim measure so that the Chamber could rule on it on 8 March 2005.

23. On 21 February 2005 the applicant submitted a request for refugee status, referring to the persecution of businessmen in Belarus and the risk of torture and degrading treatment by the Belarus authorities responsible for the investigation.

24. By a decision of 1 March 2005 the Kyiv Migration Service accepted, for examination on the merits, the applicant's request to be granted refugee status, having noted that the request had contained fully-reasoned grounds. The Service also noted that the decisions submitted by the Belarusian authorities in connection with the use of preventive measures against the applicant and the charge against him gave rise to doubts, on account of their vague and unsupported nature and the failure to recognise the principle of the presumption of innocence. In addition, the Belarus authorities had not supplied information regarding the expiry of the statute of limitations, given that the offences with which the applicant was charged dated back to 1995. Referring to the observations of the Belarus Helsinki Committee, the Service noted that the applicant's friends, Y. Kravtsov and A. Klimov, businessmen linked to the opposition, had had an unfair trial and had been

subjected to torture. The Service also took into account a letter from Mr Stanislav Shushkevich[1], in which the latter had stated that the applicant's extradition to Belarus, as a businessman connected with the opposition, would constitute a violation of his fundamental rights, given that a fair and impartial trial was impossible in that country, and that torture was used against those who were associated with the political opposition.

25. On 8 March 2005 the Court extended the interim measure indicated under Rule 39 until further notice.

26. On 9 March 2005 the Pechersky Court considered the applicant's complaint that his detention between 29 December 2004 and 11 January 2005 had been unlawful. During the hearing, the applicant's lawyer submitted an additional complaint that the applicant's detention from 12 February 2005, when the one month detention ordered on 11 January 2005 expired but no order on further detention had been made, was unlawful. By a decision of 9 March 2005 the Pechersky Court recognised that the applicant had been unlawfully detained between 29 December 2004 and 11 January 2005 and dismissed the remainder of the application, without ruling on the applicant's detention subsequent to 12 February 2005. In this connection, the court noted that the request for release could not be examined in the context of the proceedings to challenge the lawfulness of the detention.

27. The applicant appealed against this decision to the Kyiv City Court of Appeal. In his submissions, the applicant criticised the Pechersky Court's refusal to examine the lawfulness of his detention after 12 February 2005. In addition, he noted that on 11 January 2005 the court had ordered his detention in order to guarantee his extradition to Belarus should such a measure be ordered by the relevant authorities. However, in view of the interim measure indicated by the Court and the ongoing asylum proceedings, the authorities had suspended examination of his possible extradition. Consequently, he requested that he be released immediately. The prosecutor also appealed against the decision of 9 March 2005.

28. By a judgment of 4 May 2005, the Kyiv Court of Appeal dismissed the applicant's appeal, allowed the prosecutor's appeal and set aside the decision of 9 March 2005 in its entirety, on the ground that the complaints about unlawfulness of the applicant's detention could not be dealt with under the procedure on challenging arrest under Article 106 of the Code of Criminal Procedure.

29. On 14 September 2005 the applicant was granted refugee status by the State Migration Committee upon submission of the Kyiv Migration Service.

30. On 9 November 2005 the applicant was released.

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1. Member of Parliament, Speaker of the Belarus Parliament (*Verkhovny Sovet*) from 1991-1994, and a signatory, along with Boris Yeltsin and Leonid Kravchuk, to the document setting up the CIS.

31. By a letter of 15 November 2005, the General Prosecutor's Office of Ukraine informed the General Prosecutor's Office of Belarus that the applicant would not be extradited.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant international and domestic law

1. The CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 ("the Minsk Convention") with amendments

32. The Convention was ratified by the Ukrainian Parliament on 10 November 1994. It entered into force in respect of Ukraine on 14 April 1995 and in respect of Belarus on 19 May 1994. The Convention was amended by a Protocol of 1997, to which both parties have acceded and which entered into force in respect of them on 17 September 1999. The relevant provisions of the Convention, as amended by the 1997 Protocol, read as follows:

Article 13: Validity of documents

"2. The documents that are accepted as official in any Contracting State shall enjoy the evidentiary force of official documents also in the other Contracting States."

Article 61: Arrest or detention before the receipt of a request for extradition

"1. A person whose extradition is sought may also be arrested before receipt of a request for extradition, if there is a related petition (*ходатайство*). The petition shall contain a reference to a detention order ... and shall indicate that a request for extradition will follow. A request for arrest ... may be sent by post, wire, telex or fax.

2. A person may also be detained without the request referred to in point 1 above if there are legal grounds to suspect that he has committed, in the territory of the other Contracting Party, an offence entailing extradition.

3. In case of [the person's] arrest or detention before receipt of the request for extradition, the other Contracting Party shall be informed immediately."

Article 62: Release of an arrested or detained person

"1. A person arrested pursuant to Article 61 § 1 shall be released if no request for extradition is received within forty days of the arrest.

2. A person arrested pursuant to Article 61 § 2 shall be released if no request for extradition is received within the time established by the law concerning arrest."

2. Code of Civil Procedure (in force at the material time)

33. Article 248[1] of the Code provided in so far as relevant:

> "Every citizen has the right to apply to court ... with an application, should he consider that a decision, action or inactivity of a public authority, legal person or official during their exercise of administrative functions has violated his rights or freedoms"

B. Relevant domestic practice

Resolution no. 4 of the Plenary Supreme Court of 25 April 2003 on judicial practice on application of preventive measures in the form of detention and extension of detention during the inquiry and pre-trial investigation.

34. The relevant extracts from the Resolution of the Plenary Supreme Court read as follows:

> "11. ... Finding arrest unlawful is not a ground for refusal of a request for a preventive measure in the form of detention."

35. Other relevant domestic law and practice is summarised in the judgment *Soldatenko v. Ukraine* (2440/07, §§ 21-29 and 31, 23 October 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 6 § 1 OF THE CONVENTION

36. The applicant complained that, if extradited, he would face a risk of being subjected to ill-treatment and an unfair trial by the Belarus authorities, which would constitute a violation of Articles 3 and 6 § 1 of the Convention, which read, in so far as relevant, as follows:

Article 3

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

Article 6 § 1

> "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..."

37. The Court notes that the applicant's extradition to Belarus was refused by the Ukrainian authorities and the extradition proceedings against him were discontinued. There is nothing in the case file to suggest that he still faces a risk of being extradited to Belarus.

38. Accordingly, the applicant cannot claim to be a victim of a violation of his rights under Articles 3 and 6 § 1 of the Convention as required by Article 34 of the Convention. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention..

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

39. The applicant complained that he was detained in violation of Article 5 §§ 1 and 3. He maintained that from 29 December 2004 until 6 January 2005, when the General Prosecutor's Office of Belarus confirmed that they would submit the official request for his extradition, his detention had fallen within the ambit of Article 5 § 1 (c). Only after that date, in his view, could the detention be qualified as being "with a view to extradition".

The relevant parts of Article 5 read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> (f) the lawful arrest or detention of ... a person against whom action is being taken with a view to ... extradition.
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

40. The applicant maintained that his detention between 29 December 2004 and 6 January 2005 fell within the ambit of Article 5 § 1 (c) of the Convention because there had been no request for his extradition to Belarus; therefore he considered himself arrested on the basis of Article 61 § 2. He considered that only from 6 January 2005 when that request had been received by the Ukrainian authorities did his detention fall within the ambit of Article 5 § 1 (f). For the Government, the detention fell within Article 5 § 1 (f) throughout.

41. The Court notes that the applicant was arrested on the basis of the international search warrant issued by the Belarus authorities and he had been so informed on the day of his arrest. He was also informed that the criminal procedure against him was pending in Belarus and not in Ukraine. The same day the Kyiv Pechersky Police Department received an official request from the Belarus authorities for the applicant's arrest, with indication that a request for extradition would be submitted under the Minsk Convention. On 11 January 2005 the Pechersky Court ordered the applicant's detention for one month pending the extradition proceedings against him. On 19 January 2005 the General Prosecutor's Office of Ukraine received an official request from the General Prosecutor's Office of Belarus for the applicant's extradition with a view to criminal prosecution. The Court further notes that the Minsk Convention, which is part of the domestic law in Ukraine, provides for provisional arrest of the wanted person with a view to his possible extradition to the requested State even prior to the official request for extradition. From the facts described above the Court considers that the Ukrainian authorities arrested and detained the applicant in order to take action with a view to his extradition. There were no criminal proceedings against the applicant in Ukraine. Moreover, no other reason but extradition was ever advanced by the authorities for the applicant's detention during the period in question and there is no evidence in the case file to suggest that any such other reason has ever existed. Therefore, notwithstanding the applicant's submissions to the contrary, his detention had always been with a view to extradition and his above complaint falls to be considered under Article 5 § 1 (f) of the Convention (see *Novik v. Ukraine* (dec.), no. 48068/06, 13 March 2007). Therefore, Article 5 § 1 (c) and, accordingly, Article 5 § 3 of the Convention are not applicable in the present case (see *Quinn v. France*, judgment of 22 March 1995, Series A no. 311, § 53).

42. The Court notes that the complaint under Article 5 § 1 (f) is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. The applicant's complaints under Article 5 §§ 1 (c) and 3 of the Convention are manifestly ill-founded and

must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Merits

1. Parties's submissions

(a) The Government

43. The Government maintained that the extradition of individuals from Ukraine to Belarus was regulated by the Minsk Convention 1993, which had been ratified by the Ukrainian Parliament and had become part of Ukrainian legislation under Article 9 of the Constitution. They further noted that under the Minsk Convention, a Contracting State had to recognise official documents issued by the other Contracting State. The Government maintained that by detaining the applicant the Ukrainian authorities had acted in accordance with their international obligations under the Minsk Convention and that his detention from the day of his arrest was for the purpose of extradition.

44. On 29 December 2004 the applicant was arrested and the same day the Belarus authorities confirmed that he was wanted for committing the crime, submitted supporting documents and informed about preparation of official request for extradition. On 11 January 2005 the court ordered the applicant's detention with a view to extradition and on 19 January 2005 the General Prosecutor's Office of Belarus sent the necessary documents and official request for the applicant's extradition within the time-limits set forth in the Minsk Convention.

(b) The applicant

45. The applicant maintained that the Minsk Convention did not provide for any procedure of detention pending extradition and referred in this respect back to the domestic law. He maintained that Ukraine as a sovereign State could not advance the argument about lack of responsibility for the actions taken upon request and on the basis of the documents emanating from a foreign country. He maintained that the Government bore responsibility for their decisions even if these decisions were to obey a decision of a foreign authority.

46. The applicant further maintained that the major part of his detention was not covered by any judicial order, which he found unlawful. He considered that even the period between 11 January and 11 February 2005, when his detention was covered by a decision of the Pechersk Court, was unlawful, given the lack of clear and foreseeable procedure in Ukrainian legislation for detention pending extradition.

2. Court's assessment

47. The Court has previously noted that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. The requirement of "quality of law" in relation to Article 5 § 1 implies that where a national law authorises a deprivation of liberty it must be sufficiently accessible, precise and foreseeable in application, in order to avoid all risk of arbitrariness (see *Baranowski v. Poland*, no. 28358/95, § 50-52, ECHR 2000-III, and *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-... (extracts)).

48. In so far as the question concerns the quality of national law governing detention pending extradition, the Court reiterates that it has already faced a similar issue in the case of *Soldatenko v. Ukraine* (cited above, §§ 112-114) and found that Ukrainian legislation did not provide for a procedure that was sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition. In the present case, the applicant was brought to the court with significant delay, his detention was ordered for one month and never extended by the court. Furthermore, the domestic courts ultimately acknowledged that his detention could not be challenged under the Code of Criminal Procedure, without suggesting however any other procedure which could apply in the applicant's case. In such circumstances the Court does not find any reasons to deviate from the conclusions reached in the *Soldatenko* judgment and confirms that the relevant domestic legislation failed to protect the applicant from arbitrariness. In these circumstances, the Court does not need to consider separately whether the extradition proceedings were conducted with due diligence (see *Ismoilov and Others v. Russia*, no. 2947/06, § 140, 24 April 2008).

49. There has therefore been a violation of Article 5 § 1 (f) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

50. The applicant further complained of the lack of sufficient procedural guarantees in domestic legislation for review of the lawfulness of his detention, and of the delay in the initial review of his detention by the domestic court, given that he had been brought before a court on the seventh day of his detention. He relied on Article 5 § 4 of the Convention, which reads as follows:

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

A. Admissibility

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

B. Merits

1. Parties' submissions

(a) The Government

52. The Government maintained that the applicant had at his disposal an effective procedure to challenge the lawfulness of his detention. According to the Government, this procedure was defined in Articles 106, 165-2 and 382 of the Code of Criminal Procedure, and in the Resolution of the Plenary Supreme Court of 8 October 2004.

53. The Government noted that the issue of the lawfulness of the applicant's detention had been examined in two sets of proceedings.

54. In the first set of proceedings the domestic courts examined the lawfulness of the selection of the preventive measure for the applicant in the form of remand in custody. The judicial order of 11 January 2005 on the applicant's detention was appealed against by the applicant's representative and on 20 January 2005 the Kyiv City Court dismissed the appeal. The Government maintained that the domestic courts examined the claim of the applicant's representative without delays and in terms prescribed by the law.

55. In the second set of proceedings the applicant's representative challenged the lawfulness of the applicant's detention between 29 December 2004 and 11 January 2005. The relevant complaint was lodged on 19 January 2005 and was received by the Pechersky Court on 24 January 2005. The hearings in the case were twice postponed, once on 10 February 2005 due to failure of the applicant's representative to appear and the second time on 18 February 2005 due to the judge's illness. On 9 March 2005 the Pechersky Court held the hearing and found in part for the applicant, having declared his detention during the impugned period illegal. On 4 May 2005 Kyiv City Court overruled the decision of the first-instance court and found against the applicant. Therefore, in the Government's opinion, the domestic courts examined the complaint of the applicant's representative without delay and also in terms prescribed by the law.

(b) The applicant

56. The applicant maintained that the delay in bringing him to court confirmed the lack of any procedure for the review of lawfulness in case of detention pending extradition. He further maintained that the provisions of the Code of Criminal Procedure referred to by the Government were not relevant to his situation, as they concerned criminal investigation and not extradition proceedings. He also submitted that in the light of the Resolution no. 4 of the Plenary Supreme Court of 25 April 2003 (see paragraph 34 above) which advised the courts that "finding arrest unlawful is not a ground for refusal of a request for a preventive measure in the form of detention" the courts would not release him even if they found his detention unlawful.

2. Court's assessment

57. The Court reiterates that the purpose of Article 5 § 4 is to secure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 76). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII (extracts)). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka*, cited above, §§ 46 and 55).

58. The Court refers to its findings under Article 5 § 1 of the Convention about the lack of legal provisions governing the procedure for detention in Ukraine pending extradition. It considers that in the circumstances of the case, these findings are equally pertinent to the applicant's complaint under Article 5 § 4 of the Convention, as the Government failed to demonstrate that the applicant had at his disposal any procedure through which the lawfulness of his detention could have been examined by a court. The Court also reiterates that the provisions of the Code of Criminal Procedure referred to by the Government were analysed by the Court in the *Soldatenko* judgment and were found to refer to the situations of and parties to domestic criminal proceedings and not specifically to extradition proceedings (see *Soldatenko*, cited above, § 126). As in the *Soldatenko* case, in the instant case the Government have not indicated how Articles 106, 165-2 and 382 of

the Code of Criminal Procedure could provide the review required by Article 5 § 4. Furthermore, the Court notes the Resolution of the Supreme Court referred to by the applicant (see paragraphs 34 and 56 above) and the circumstances of the present case, in which, having recognised the applicant's detention as unlawful on one occasion, the domestic court refused to release the applicant (see paragraph 26 above).

59. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

Relying on Article 5 § 5 of the Convention, the applicant alleged that Ukrainian legislation did not provide compensation for persons who had been the victim of unlawful detention in the context of extradition proceedings.

> "5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

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

B. Merits

1. Parties' submissions

(a) The Government

61. In the Government's opinion, there was no purpose in examining the responsibility of Ukraine under Article 5 § 5 of the Convention, since the applicant's arrest and detention were conducted at the request of the Belarus authorities and Ukraine in this situation acted solely as an executor of the foreign State's request. They considered that after extradition the applicant would be able to claim his innocence and seek appropriate redress in Belarus.

62. They further contended that, even assuming responsibility of Ukraine for the applicant's unlawful detention, he had an effective compensatory remedy under Ukrainian law. They referred to Article 248[1] of

the Code of Civil Procedure[1], which enabled every person to challenge in the courts decisions, acts or omissions of the authorities during their exercise of administrative functions, if the person considered that they violated his rights and freedoms.

63. The Government noted that the applicant had never applied to any court with such complaint. They reiterated, however, that they considered the Belarus authorities responsible for the applicant's detention and that the applicant's complaint should be considered most appropriately by the Belarus courts.

(b) The applicant

64. The applicant reiterated his position as regards the responsibility of the State authorities for their actions and decisions, even if the authorities had acted in compliance with the decisions of a foreign country (see paragraph 45 above). He also contended that Ukrainian legislation did not provide for compensation for persons who had been the victim of unlawful detention in the context of extradition proceedings.

65. As to the remedy suggested by the Government, the applicant submitted an example of the domestic courts' case-law. In that case, the administrative law complaint against the actions of the prosecutor in extradition proceedings had been dismissed on the ground that extradition issues belonged to the sphere of criminal law and should be determined on the basis of the Code of Criminal Procedure.

2. Court's assessment

66. The Court reiterates that Article 5 § 5 of the Convention is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 14, § 38, and *Vachev v. Bulgaria*, no. 42987/98, § 79, ECHR 2004-... (extracts)). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court.

67. In so far as the Court has found that there have been violations of Article 5 §§ 1 and 4 of the Convention, Article 5 § 5 of the Convention is also applicable (see *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2740, § 81). The Court must therefore establish whether or not Ukrainian law afforded the applicant an enforceable right to compensation for the breaches of Article 5 of the Convention.

[1] At the material time the administrative procedure was part of the Code of Civil Procedure.

68. The Court notes that the Government do not submit any decisions in which the remedy they referred to has been used, while the applicant submitted court decisions to the contrary. In the applicant's case the Kyiv Court of Appeal ultimately decided that the lawfulness of the applicant's detention could not be assessed under the Code of Criminal Procedure, while the applicant presented an example of the decision of the same court in which it stated that the Code of Criminal Procedure and not the Code of Civil Procedure should apply to issues of detention awaiting extradition. Therefore, the Court concludes that the remedy invoked by the Government is not sufficiently certain to satisfy requirements of Article 5 § 5 of the Convention.

69. Furthermore, it appears that the domestic courts did not consider the applicant's deprivation of liberty as being in breach of domestic law, although, as mentioned above, the Government have not shown that a law exists which would satisfy the requirements of Article 5 §§ 1 (f) and 4 of the Convention (see paragraphs 48 and 58 above). In such a situation, the applicant does not appear to have had even a theoretical opportunity to claim compensation in the domestic proceedings.

70. The Court thus finds that Ukrainian law does not afford the applicant an enforceable right to compensation, as required by Article 5 § 5 of the Convention. There has therefore been a violation of that provision.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

73. The Government maintained that the finding of a violation would constitute sufficient just satisfaction.

74. The Court considers that the applicant suffered non-pecuniary damage on account of his unlawful detention, damage which cannot be compensated by the mere finding of a violation of his Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him EUR 3,000 under this head.

B. Costs and expenses

75. The applicant also claimed EUR 4,000 for the costs and expenses incurred before the Court.

76. The Government maintained that the applicant's costs supported by the documents constituted only 650 Ukrainian hryvnias (UAH) (EUR 94.30) and even this amount had not actually been paid by the applicant.

77. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 100 covering costs under all heads.

C. Default interest

78. 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

1. *Declares* unanimously the complaints under Article 5 §§ 1 (f), 4 and 5 of the Convention concerning the detention pending extradition admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 5 § 1 (f) of the Convention;

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

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

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 100 (one hundred euros) in respect of costs and

expenses, plus any tax that may be chargeable to the applicant, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above 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* by a majority the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Kalaydjieva is annexed to this judgment.

P.L.
C.W.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

Rule 60 § 2 gives a Chamber discretion to decide whether the itemised evidence submitted by an applicant is sufficient to establish the costs claimed and to reject unsubstantiated claims in whole or in part. In my view this Rule may not be interpreted as an absolute condition or a ground to reject claims in cases where a considerable amount of necessary work is objectively demonstrated.

To reach conclusions in this regard in the past the Court has considered (i) whether the claimed costs and expenses in a case were "actually and necessarily incurred in order to ... obtain redress for the matter found to constitute a violation of the Convention" and (ii) whether the amounts of these costs were "reasonable as to quantum" (see, for instance, *Tolstoy Miloslavsky v. the United Kingdom*, § 77, and *Nilsen and Johnsen v. Norway* [GC], § 62).

The applicant's representative prepared and submitted 17 pages of relevant observations and legal analysis, which appear to be helpful for the Court's conclusions as to the admissibility and the merits of the applicant's complaints. I see no reason why this document may not serve as objective evidence to establish actually incurred costs, which should justify an award higher than 100 euros.