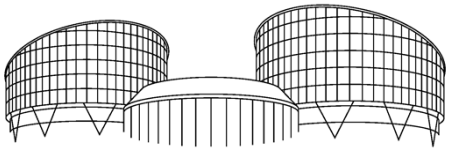

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AVRAIMOV v. UKRAINE

(Application no. 71818/17)

JUDGMENT

STRASBOURG

25 March 2021

This judgment is final but it may be subject to editorial revision.

In the case of Avraimov v. Ukraine,

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

Stéphanie Mourou-Vikström, *President,*
Ganna Yudkivska,
Lado Chanturia, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Ukrainian national, Mr Eduard Volodymyrovych Avraimov ("the applicant"), on 4 October 2017;

the decision to give notice to the Ukrainian Government ("the Government") of the complaints under Article 3 concerning the conditions of the applicant's detention and under Article 5 §§ 3 to 5 of the Convention, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 4 March 2021,

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

INTRODUCTION

1. The case concerns the applicant's complaints that the physical conditions of his detention in the Kyiv pre-trial detention centre were in breach of Article 3 of the Convention and that the Code of Criminal Procedure excluded the use of any preventive measures other than pre-trial detention in his case, thus instituting a system of mandatory detention in breach of Article 5 § 3 of the Convention. The applicant also complained under Article 5 § 4 that the domestic courts had failed to conduct a meaningful review of the lawfulness of his detention, and under Article 5 § 5 that he had no effective and enforceable right to compensation for his alleged unlawful detention.

THE FACTS

2. The applicant was born in 1970 and lives in Kyiv. He was represented by Mr K.K. Doroshenko, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Mr I. Lishchyna.

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

I. BACKGROUND OF THE CASE

5. Prior to 2014 the applicant had been residing in Donetsk. According to him, he owned premises which he rented out to third parties operating currency exchange businesses. According to the authorities, the applicant himself ran those currency exchange businesses. In May 2014 he moved to Kyiv. He has the status of an internally displaced person.

6. On 26 January 2016 the Security Service of Ukraine (the "security service") instituted proceedings on suspicion that a number of individuals and legal entities, including Ukrainian financial institutions, were operating a scheme aimed at financing the so-called "Donetsk People's Republic" ("DPR"), a self-proclaimed entity *de facto* operating in a part of the Donetsk Region of Ukraine, including the city of Donetsk, and considered by the Ukrainian authorities to be a terrorist organisation (see paragraph 41 below). The applicant submitted that in Ukrainian law there was no legally binding classification of the "DPR" as a terrorist organisation.

II. THE APPLICANT'S ARREST AND DETENTION

7. On 24 April 2017 security service officers surprised the applicant in the process of receiving 100,000 United States dollars (USD) in cash from a certain Mr D. in the street in front of the block of flats in Kyiv where the applicant lived. The applicant's flat was searched. A number of items, including considerable amounts of cash and some documents, were seized. Mr D. was questioned. He stated that he had been acting as an intermediary between the applicant and a certain Mr P., who resided in the territory controlled by the "DPR", and had passed the money to the applicant at the request of Mr P. He stated that he regularly transported cash for Mr P. and remarked that some packages bore the label of the "DPR" "central bank".

8. On the same day the applicant was placed under arrest and the next day a security service investigator applied to the Kyiv Pechersky District Court ("the Pechersky Court") for the applicant to be placed in pre-trial detention.

9. The investigator submitted that the applicant was suspected of financing terrorism because his currency exchange business in Donetsk paid "taxes" to the "DPR" and thus participated in financing that organisation. The applicant had previously operated a currency exchange business in Donetsk but that business had stopped operating in May 2014 and the applicant had been forced to move to Kyiv owing to the seizure of Donetsk by the "DPR". However, in early 2015 he had entered into a conspiracy with unidentified individuals who were engaged in the currency exchange business in the territory controlled by the "DPR". He had taken steps to relaunch his business under "DPR" control. As a result he had paid the "DPR" a total of USD 34,000 in "taxes" and other payments.

10. The investigator argued in the following terms that detention was needed:

> "Considering the need to prevent the attempts of [the applicant] to [abscond], which may occur in connection with the fact that he is suspected of a serious offence punishable by more than eight years' imprisonment, which suspicion is proven by the case-file material, considering the impossibility of preventing [the applicant's] attempts to abscond, application of a less restrictive preventive measure [sic], the preventive measure of pre-trial detention should be imposed on the applicant (*Поряд із тим, зважаючи на необхідність запобігання спробам Авраімова Е.В. переховуватися від органів досудового розслідування та суду, які можуть мати місце у зв'язку із підозрою його у вчиненні тяжкого злочину, за який законом передбачено покарання у виді позбавлення волі на строк понад вісім років, що підтверджується матеріалами кримінального провадження, зважаючи на необхідність запобігання спробам Авраімова Е.В. переховуватися від органів досудового розслідування та суду, застосування більш м'якого запобіжного заходу, щодо Авраімова Е.В. необхідно застосувати запобіжних захід у вигляді тримання під вартою*).

The investigator went on to quote Article 176 § 5 of the Code of Criminal Procedure, which rules out the use of any preventive measures other than pre-trial detention for certain terrorism and national security-related offences, including terrorism financing, of which the applicant was suspected (hereinafter referred to as "the Bail Exclusion Clause", see paragraphs 35 and 40 below).

11. On 27 April 2017 the Pechersky Court ordered the applicant's pre-trial detention until 22 June 2017. In its decision:

(i) the court concluded, based on its examination of the submitted material, that there was sufficient evidence to support a reasonable suspicion against the applicant;

(ii) the court referred to Article 183 of the Code of Criminal Procedure, in which detention was defined as an "exceptional" preventive measure (see paragraph 38 below);

(iii) the court stated that the investigator had failed to prove that preventive measures other than detention would not be sufficient to prevent the risk of absconding;

(iv) at the same time, the court stated that in determining the preventive measure, it was taking into account the gravity of the offence with which the applicant was charged, his age and state of health, the strength of his social relations, namely the fact that he had a stable place of residence with his family, his financial situation and his procedural conduct;

(v) the court concluded by reproducing verbatim, as part of its own reasoning, the part of the investigator's application for pre-trial detention which contained the quote from the Bail Exclusion Clause (see paragraph 10 above).

12. The applicant appealed. He argued, in particular, that the only risk cited by the investigator and the court as grounds for detention, the risk of flight, had not been proven. Moreover, he had a permanent place of

residence in Kyiv, where he had lived for a long time, had two minor children, had no criminal record and there were no other criminal proceedings pending against him.

13. On 6 June 2017 the Kyiv City Court of Appeal rejected the applicant's appeal and upheld the detention order. It gave in particular the following reasons:

(i) the case-file material was sufficient to show that there was a reasonable suspicion against the applicant;

(ii) the first-instance court had considered that there was a risk of flight which could not be averted by using any preventive measure other than detention. The Court of Appeal agreed with that assessment, observing that the first-instance court had explained why a less restrictive preventive measure could not be imposed; and

(iii) the first-instance court had been correct in not granting bail, having regard to the Bail Exclusion Clause.

14. On 14 June 2017 the investigator applied to have the applicant's detention extended. He cited the same grounds as in his initial application, and again invoked the Bail Exclusion Clause (see paragraph 10 above). He also stated that certain additional investigative actions had to be conducted, in particular covert investigative activities, the collection of banking information and the identification and questioning of possible witnesses.

15. The applicant lodged a formal objection to the application with the Pechersky Court. He argued, in particular, that the grounds given for his pre-trial detention consisted in stereotyped formulae and quotes from legislation and the Court's case-law, and were not based on the specific circumstances of the case. Citing *Orlovskiy v. Ukraine* (no. 12222/09, §§ 76-84, 2 April 2015), he contended that this perpetuated the type of problem repeatedly found by the Court in a number of judgments. In particular, the risk of flight was unsubstantiated and had not been proven by the investigator with reference to any specific facts or evidence, such as particular connections or other circumstances which would facilitate his flight. He also pointed to the circumstances he had raised in his first appeal (see paragraph 12 above). Lastly, he argued that his poor health, namely the fact that he had suffered a heart attack and had undergone knee surgery, made him unfit for detention.

16. Finally, the applicant submitted that the Bail Exclusion Clause was unconstitutional and contrary to Article 5 § 3 of the Convention and that, under Article 9 § 4 of the Code of Criminal Procedure and the Law on the Execution of Judgments of the European Court of Human Rights (see paragraphs 33 and 34 below), the Convention provision superseded the Bail Exclusion Clause. In this connection, the applicant pointed out that a district court in Kyiv and the Kharkiv Regional Court of Appeal had released defendants charged with offences subject to the Bail Exclusion Clause, and invited the court to do likewise.

17. On 19 June 2017 the Pechersky Court extended the applicant's detention to 17 August. It held that there was a risk that he might abscond, given that he was charged with an offence punishable by up to eight years' imprisonment. It had been proven in the course of the hearing that any other preventive measure would be insufficient to prevent him from fleeing. The fact that he had strong social ties in his place of residence, a flawless reputation and no criminal record did not rule out the possibility that he could abscond, influence witnesses and interfere with the investigation by destroying evidence. Taking into account also the considerable public interest in the results of the investigation and the need to conduct additional investigative actions, and even though detention had to be an exceptional measure, the court remained convinced that no less restrictive preventive measure was appropriate and that detention was proportionate to the interests pursued.

18. On 1 August 2017 the Court of Appeal rejected the applicant's appeal and upheld the extension order. It pointed out that the risk of absconding could not be gauged solely on the basis of the severity of the sentence faced. Citing in particular *Panchenko v. Russia* (no. 45100/98, § 106, 8 February 2005), the court argued that the risk had to be assessed with reference to a number of relevant factors which may confirm the existence of a danger of absconding or make it appear so slight that it could not justify detention pending trial. In view of this, and assessing "the information about the defendant as a person in its entirety", the court considered that the risk justifying detention was proven. The first-instance court, in extending the detention, had taken into account not only the gravity of the offence with which the applicant was charged, but also the presence of a reasonable suspicion, the risk of absconding and the information about the defendant's person.

19. On 15 August 2017 the Pechersky Court granted the investigator's application, worded identically to the previous one, including the reference to the Bail Exclusion Clause (see paragraph 15 above), and extended the applicant's detention to 13 October. It held that it had not been proven that the situation had so changed that there was no longer a reasonable suspicion or that the risks justifying detention, which had been found to exist when detention had initially been imposed, no longer persisted.

20. On 22 September 2017 the Pechersky Court rejected an application for release lodged by the applicant on the same date, on essentially the same grounds, namely that the presence of a reasonable suspicion and of risks justifying detention established in the original detention order had not changed.

21. On 5 October 2017 the Pechersky Court extended the applicant's detention to 24 October. The court noted that time was needed to complete the investigation, that the presence of a reasonable suspicion and of risks justifying detention had been established when the court had initially placed

the applicant in detention and that the risks had not diminished. The court also referred to the Bail Exclusion Clause.

22. On 10 October 2017 the investigation was completed and the case-file material was disclosed to the defence.

23. The investigator applied for a further extension of the applicant's detention on the grounds that the case-file material had to be disclosed to the defence and the case sent to court. He argued that the applicant, being charged with a serious offence, presented the risks set out in Article 177 (i) to (iii) of the Code of Criminal Procedure, that is the risks of absconding, destruction of evidence and suborning of witnesses (see paragraph 36 below).

24. On 23 October 2017 the Pechersky Court extended the applicant's detention to 5 November. The court stated that it found no grounds to replace detention with a less restrictive preventive measure. Considering the gravity of the offence with which the applicant was charged and the public interest in the investigation, the court concluded that there were the risks set out in Article 177 (i) to (iii) of the Code of Criminal Procedure (see paragraph 36 below). Therefore, a non-custodial preventive measure would be insufficient.

25. On 26 October 2017 the bill of indictment was drawn up and the case submitted for trial.

26. On 3 November 2017 a panel of the Kyiv City Court of Appeal, sitting in camera, designated the Kyiv Holosiyivsky District Court ("the Holosiyivsky Court") as the trial court. At the same sitting it decided of its own motion to extend the applicant's detention to 18 December 2017. The court stated that it had taken into account "the gravity of the offence with which the applicant was charged, his age and state of health, the strength of his social connections, [and his] marital and financial situation". It had also had regard to the need to prevent attempts to abscond which could occur due to the fact that [the defendant] was charged with a serious offence punishable by more than eight years' imprisonment, and had concluded that the circumstances had not changed. The court held that the risks set out in Article 177 of the Code of Criminal Procedure continued to exist.

27. On 11 December 2017 the Holosiyivsky Court extended the applicant's detention to 9 February 2018. It stated that the charges brought against the applicant, "taken together with other circumstances", increased the risk of his absconding to a degree that it was not possible to prevent it through other means. Citing the Court's case-law in *Ilijkov v. Bulgaria* (no. 33977/96, § 80, 26 July 2001), the court noted that the severity of the sentence faced was a relevant element in assessing the risk of absconding. The court therefore considered that it had not been shown that detention was disproportionate.

28. On 29 January 2018 the Holosiyivsky Court extended the applicant's detention to 30 March 2018. It noted that the applicant was charged with a

serious offence against public safety, the risks justifying detention had not been diminished, and under the Bail Exclusion Clause a less restrictive preventive measure could not be applied. The witnesses had not been examined and there was a risk that the applicant might influence them if released. Assessing the situation in its totality, the severity of the sentence faced, the age and state of health of the applicant, the strength of his social relations and his criminal record (sic, *наявність судимостей*), the court considered that the risks justifying detention had not disappeared. The court then reiterated the reasoning in its previous order of 11 December 2017 (see paragraph 27 above).

29. At the trial court hearing of 12 March 2018 the prosecutor applied for the applicant's detention to be further extended. The applicant objected, arguing that the charges against him were unfounded, that he had caught pneumonia in prison, that he was married and had minor children and an elderly mother dependent on him for support.

30. At the close of the hearing the court rejected the prosecutor's application and released the applicant, binding him over to appear when summoned. The court found that the prosecution had failed to prove that he represented any of the risks set out under Article 177 of the Code of Criminal Procedure (see paragraph 36 below). It stated that the applicant rented accommodation in Kyiv and had strong social ties, namely minor children and an elderly mother dependent on him. It also took into account the fact that the applicant had no criminal record, as well as his age and state of health. While the persistence of reasonable suspicion that the person arrested had committed an offence was a condition *sine qua non* for the lawfulness of the continued detention, after a certain lapse of time it no longer sufficed. It also pointed out that deprivation of liberty had to remain exceptional.

III. CONDITIONS OF DETENTION

31. The applicant was detained at the Kyiv pre-trial detention centre ("SIZO").

32. From 4 May to 13 August 2017 the applicant was held in cell no. 14 of that centre. According to a certificate from the prison authorities he submitted, the cell measured 31.6 sq.m, of which 2 sq.m were taken up by sanitary facilities, and had sixteen beds. According to a certificate submitted by the Government, the cell was designed for eleven people. According to the applicant, at the time he was held there the cell had held twenty-one to twenty-eight people.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ACT 2006

33. Section 17 of the Act provides that the courts, when deciding cases, must apply the Convention and the Protocols thereto, and the Court's case-law as a source of law.

II. CODE OF CRIMINAL PROCEDURE 2012

34. Article 9 § 4 of the Code provides that in the event of a contradiction between a provision of the Code and an international treaty, the court must apply the latter.

35. Article 176 of the Code, as amended by Law no. 1689-VII of 7 October 2014, reads:

Article 176. General provisions on preventive measures

"1. The preventive measures are as follows:

(1) a personal undertaking;

(2) a personal warranty;

(3) bail;

(4) house arrest; and

(5) pre-trial detention.

...

5. The preventive measures of a personal undertaking, a personal warranty, bail and house arrest may not be imposed on people who are suspected of or charged with offences under Articles ... 258-5 ... of the Criminal Code of Ukraine."

36. Article 177 § 1 provides that the purpose of preventive measures is to ensure compliance with procedural obligations and prevent the risk of the suspect or accused:

(i) absconding from the pre-trial investigation authorities and/or the court;

(ii) destroying, concealing or spoiling any of the items or documents that are essential for establishing the circumstances of the criminal offence;

(iii) exerting unlawful influence on the victim, witnesses, other suspects, the accused, experts ...;

(iv) obstructing the criminal proceedings in any other way;

(v) committing another criminal offence or continuing the criminal offence of which he or she is suspected or accused.

Article 177 § 2 provides that a preventive measure can be applied provided that there is a reasonable suspicion that the person has committed a criminal offence and he or she presented risks specified in § 1.

37. Article 178 provides that, when deciding on a preventive measure, the court, in addition to considering the risks defined in Article 177, must assess the totality of the circumstances, including:

(i) the weight of evidence against the defendant;

(ii) the severity of the sentence faced;

(iii) the defendant's age and state of health;

(iv) the strength of the defendant's social connections in his place of permanent residence, including any family and dependants;

(v) whether the defendant has stable employment or is pursuing studies;

(vi) the defendant's reputation and his assets;

(vii) whether the defendant has a criminal record;

(viii) the defendant's compliance with previously imposed measures;

(ix) any concurrent charges against the defendant; and

(x) the amount of pecuniary damage caused by the suspected offence or of gain from the suspected offence.

38. Article 183 defines pre-trial detention as an "exceptional" preventive measure which can only be applied where the prosecutor has proven that a less restrictive preventive measure would not prevent the risks set out in Article 177 of the Code (see paragraph 36 above). Moreover, it provides that only the categories of defendants explicitly mentioned in paragraph 2 of that Article can be subjected to pre-trial detention. Among those are certain defendants with prior convictions and defendants without prior convictions accused of offences punishable by more than five years' imprisonment.

39. Article 194 § 1 provides that, in examining an application for a preventive measure, the court must consider whether the existence of the following circumstances has been proven:

(i) there is a reasonable suspicion against the suspect or accused;

(ii) the prosecutor has asserted in the application for a preventive measure, and there are sufficient grounds to believe, that there is at least one of the risks specified in Article 177; and

(iii) less severe preventive measures would be insufficient to prevent the relevant risks identified in the application.

Article 194 § 2 provides that the court must refuse to apply a preventive measure if the prosecutor has failed to prove the existence of all the circumstances specified in Article 194 § 1.

III. CRIMINAL CODE 2001

40. Under Article 258-5 of the Code, terrorism financing is punishable by imprisonment for five to eight years with confiscation of assets. Under paragraph 2 of the same Article, the punishment is increased to

imprisonment for a term of eight to ten years, combined with confiscation, where the same offence was committed (i) for the second time; or (ii) for a venal motive; or (iii) in a group or involved a certain number of other aggravating circumstances.

IV. "DPR" AS A TERRORIST ORGANISATION IN DOMESTIC LAW

41. The Ukrainian Parliament has labelled the "DPR" a terrorist organisation in a number of documents. Those documents include some of its official declarations: the declaration of 27 January 2015 calling on international organisations and States to recognise Russia as an aggressor; its declaration of 4 February 2015 concerning recognition of the jurisdiction of the International Criminal Court.

V. OTHER PROVISIONS OF DOMESTIC LAW

42. Other relevant provisions of the Code are set out in *Grubnyk v. Ukraine* (no. 58444/15, §§ 39-56, 17 September 2020).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The applicant complained that from 4 May to 13 August 2017 he had been held in an overcrowded cell in the Kyiv SIZO, amounting to treatment contrary to Article 3 of the Convention, which reads:

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

A. Submissions by the parties

44. The applicant made the submissions set out in paragraph 32 above.

45. The Government submitted that cell no. 14, where the applicant had been held in the relevant period, had been designed for eleven people. The condition of the cells at the Kyiv SIZO had been satisfactory, there had been sufficient ventilation, the artificial lighting had been in good repair, there had been sufficient natural light and the premises had been cleaned regularly.

B. Admissibility

46. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

47. The Court reiterates that a serious lack of space in a prison cell weighs heavily as a factor to be taken into account for the purpose of establishing whether the detention conditions described are "degrading" from the point of view of Article 3 and may disclose a violation, both alone or taken together with other shortcomings (see *Muršić v. Croatia* [GC], no. 7334/13, §§ 96-101 and 136-41, ECHR 2016).

48. In the present case the Government did not specify how many inmates had actually occupied the cell with the applicant and did not rebut his allegations in that respect or in respect of the cell's size (see paragraph 32 above). In these circumstances, the Court cannot but give weight to the applicant's submissions and concludes that, from 4 May to 13 August 2017, he was confined in a cell that allowed him about 1.4 sq.m of personal space, which is significantly below the minimum standard of 3 sq.m in multi-occupancy accommodation (see *Muršić*, cited above, § 110).

49. A strong presumption of a violation of Article 3 thus arises (ibid., § 137) and the Government have not rebutted that presumption by showing that there were factors capable of adequately compensating for the scarce allocation of personal space.

50. There has accordingly been a violation of Article 3 of the Convention.

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

51. The applicant complained that the application in his case of the Bail Exclusion Clause, which precluded the application of non-custodial preventive measures to terrorism suspects, had resulted in a violation of Article 5 § 3 of the Convention, which reads:

> "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. Submissions by the parties

52. The Government submitted that the domestic court had ordered the applicant's detention based on a reasonable suspicion against him, as supported by diverse evidence, and having taken into account, as required by the Code of Criminal Procedure (see paragraph 37 above), all the relevant circumstances related to the strength of his social and family ties and conduct. They had concluded that there had been a risk of the applicant absconding, and influencing witnesses and the co-accused. The courts had extended the detention on the grounds that those factors had persisted and

they had found no reasons to change the preventive measure. In doing so, they had examined the case-file material and heard arguments from the parties. They had not been guided by abstract considerations but had taken into account specific evidence and the facts. The courts had not applied the Bail Exclusion Clause automatically, as was evidenced by the fact that they had eventually released him, having found relevant grounds for it.

53. The applicant submitted that the domestic courts had not subjected evidence provided by the investigator to scrutiny in order to verify whether there had been a reasonable suspicion against him. They had failed to show in their decisions that his detention had been necessary.

54. Despite the fact that the domestic courts had formally referred to reasons other than the Bail Exclusion Clause in their pre-trial detention decisions, in fact that provision limited their choice of preventive measures to detention only. The courts had expressly referred to that provision in their decisions of 27 April, 6 June, 5 October 2017 and 29 January 2018 (see paragraphs 11, 13 (iii), 21 and 28 above).

55. The applicant considered that the reason for his eventual release on 12 March 2018 (see paragraph 29 above) had been that the Court had communicated the case on 5 January 2018.

B. Admissibility

56. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. Relevant general principles

57. The persistence of a reasonable suspicion that a detainee has committed an offence is a condition *sine qua non* for the validity of his or her continued detention. But when the national judicial authorities first examine, "promptly" after the arrest, whether to place an arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention. Those other grounds may be a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to protect the detainee. Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017).

58. It is essentially on the basis of the reasons set out in the decisions of the national judicial authorities relating to the applicant's pre-trial detention

and of the arguments made by the applicant in his requests for release or appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (ibid., § 225).

59. The other relevant principles of the Court's case-law are set out in *Grubnyk v. Ukraine* (no. 58444/15, §§ 110-16, 17 September 2020).

2. Application of the above principles to the present case

60. As explained in *Grubnyk* (cited above, §§ 119 and 120), the Bail Exclusion Clause did not deprive the domestic courts of the power to release a defendant where they considered that the prosecution had failed to prove that the defendant presented a risk of absconding or other risks which could justify detention (see paragraph 36 above).

61. This is illustrated by the domestic court's decision of 12 March 2018 in the present case (see paragraph 29 above), by which the applicant was released despite the fact that he remained charged with an offence subject to the Bail Exclusion Clause and the court did not cast doubt on the presence of reasonable suspicion against him. Moreover, even while maintaining the applicant in detention, the domestic courts attempted to reason their decisions with reference to factors other than the Bail Exclusion Clause. They noted that under domestic law and the Court's case-law, detention had to remain exceptional and that its necessity had to be shown in the circumstances of a particular case (see paragraphs 17 and 38 above).

62. The Constitutional Court, however, held that the Bail Exclusion Clause had the potential of distorting the courts' decision-making process and of leading them to issue pre-trial detention decisions which were not sufficiently reasoned (see *Grubnyk*, cited above, §§ 117 and 119).

63. Therefore, the Court must submit the domestic courts' decisions to scrutiny to establish whether the Bail Exclusion Clause did in fact distort their reasoning so that they failed to give "relevant and sufficient" reasons for their decisions.

64. The first-instance court, in ordering the applicant's pre-trial detention, found that he presented a risk of flight. Only one reason was cited for that assessment: the sentence the applicant faced. In this context the Court reiterates the well-established principle of its case-law that the risk of flight cannot be gauged solely on the basis of the severity of the possible sentence (see *Merabishvili*, cited above, § 223). No other fact or reason specific to the applicant's case was given for the court's belief that the applicant actually presented that risk.

65. Moreover, in ordering the applicant's detention, the first-instance court reached contradictory conclusions as to the appropriate means of addressing the risk of flight. On the one hand, the court held that the investigator had failed to prove that preventive measures other than detention would be insufficient to avert that risk. On the other hand, it proceeded to reproduce verbatim, as a key part of its own reasoning, the part

of the pre-trial detention application quoting the Bail Exclusion Clause (see paragraphs 10 and 11 (iii) above).

66. The fact that the court, despite appearing to find that the investigator had failed to prove that other preventive measures were inadequate, still ordered the applicant's detention, indicates that it was the fact that the authority had invoked the Bail Exclusion Clause, which the court repeated, that was decisive for the court's decision. The Court of Appeal, in clarifying the first-instance court's decision, appears to have implicitly acknowledged and endorsed the key role that the Bail Exclusion Clause had played in the lower court's decision (see paragraph 13 (iii) above).

67. That flawed reasoning in the original detention order persisted in the court orders extending the applicant's detention. The domestic courts continued invoking the Bail Exclusion Clause as grounds for their refusal to release the applicant, notably in the detention extension orders of 5 October 2017 and 29 January 2018 (see paragraphs 21 and 28 above). They also mentioned that the assessment of the risks made in the original detention order remained valid (see notably the orders of 15 August and 5 October 2017, in paragraphs 19 and 21 above). However, like in the original order, they failed to cite any specific facts or circumstances in support of those conclusions.

68. Moreover, the lack of coherence in the reasoning, which characterised the initial detention order, persisted in the extension orders: although the risks of destruction of evidence and suborning of witnesses were not mentioned at the beginning of the investigation, they appeared later, without specific reasons for their invocation being given, and continued to be mentioned even after the investigation had been completed (see paragraphs 17 and 23 above).

69. As with the risk of flight, no specific fact or element of evidence was cited to show the actual existence of such a risk. In extending the applicant's detention on 3 November 2017, the Court of Appeal stated that the risk that the applicant might continue his criminal activity "continued to exist" (see paragraph 26 above), even though it had not been discussed before. One further illustration of this lack of coherence is that, in the order of 29 January 2018, the domestic court stated that it had regard to the applicant's "criminal record" (see paragraph 28 above), even though it is uncontested that the applicant did not have one.

70. All of this reinforces the impression that the domestic courts simply quoted from various relevant legislative provisions relating to pre-trial detention – most notably Article 178 of the Code of Criminal Procedure, and the Court's case-law setting out the range of circumstances to be taken into account in taking pre-trial detention decisions (see paragraphs 18 and 37 above) – while failing to demonstrate how those statutory provisions and the case-law principles translated into the actual facts and circumstances of the applicant's case.

71. In such circumstances the Court finds that the domestic courts' decisions extending the applicant's detention were not based on sufficient reasons.

72. There has accordingly been a violation of Article 5 § 3 of the Convention.

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

73. The applicant complained that the domestic courts had failed to conduct a meaningful review of the lawfulness of his detention, contrary to Article 5 § 4 of the Convention, which reads:

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

74. The Government submitted that the applicant had had the right, under domestic law, to apply for release and to appeal against any court orders in that respect. He had used that right repeatedly and the courts had duly examined his applications. They contended that his complaint had more to do with his dissatisfaction with the fact that his applications had been unsuccessful than with any flaw in the procedure.

75. The applicant submitted that the pre-trial detention decisions delivered in his case had not met the requirements of Article 5 § 4 in view of the courts' failure effectively to exercise judicial control over the lawfulness of his detention.

76. This complaint is closely linked to the applicant's complaint under Article 5 § 3 and must, therefore, be declared admissible. The Court finds, however, that there is no need to examine it separately.

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

77. The applicant complained that he had no effective and enforceable right to compensation for his detention, in breach of the requirements of Article 5. He invoked Article 5 § 5 of the Convention, which reads:

> "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. Submissions by the parties

78. The Government submitted that Article 1176 § 1 of the Civil Code and the legislation on compensation for damage caused by law-enforcement authorities ("the Compensation Act") provided the applicant with a right to lodge a claim for damage caused by unlawful prosecution. The text of the relevant legislative provisions could be found in *Korban v. Ukraine* (no. 26744/16, §§ 99 and 100, 4 July 2019).

79. The applicant submitted that under the above-mentioned legislation, which was *lex specialis* in this case, compensation was payable only in the event of acquittal, discontinuation on exonerating grounds or certain other grounds that were absent in his case, and that domestic law did not provide for redress based on the direct operation of the Convention.

B. Admissibility

80. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

81. The Court observes that the applicant's complaint in this regard is similar to complaints it has examined in a number of other cases against Ukraine (see, for example, *Korban*, cited above, §§ 201 and 202, with further references). The Court sees no grounds to reach a different conclusion in this case and finds that the applicant did not have an enforceable right to compensation for his detention in contravention of Article 5 § 3.

82. There has therefore been a violation of Article 5 § 5 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

85. The Government contested that claim. They submitted that there was no causal link between the alleged violation and the amount claimed by the applicant in respect of non-pecuniary damage, and that the amount claimed was excessive.

86. The Court awards the applicant EUR 3,900 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

87. The applicant also claimed EUR 19,710 for the costs and expenses incurred before the domestic courts and the Court.

88. The Government considered the amount claimed to be unsubstantiated and excessive.

89. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 4,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

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

4. *Holds* that there is no need to examine separately the complaint under Article 5 § 4 of the Convention;

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

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,900 (three thousand nine hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

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

Done in English, and notified in writing on 25 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Stéphanie Mourou-Vikström President