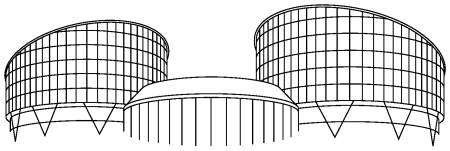

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF IGNATOV v. UKRAINE

(Application no. 40583/15)

JUDGMENT

STRASBOURG

15 December 2016

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 Ignatov v. Ukraine,

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

Angelika Nußberger, *President,*
Erik Møse,
Ganna Yudkivska,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 22 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 40583/15) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Oleksandr Anatoliyovych Ignatov ("the applicant"), on 25 July 2015.

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna from the Ministry of Justice.

3. The applicant alleged, in particular, that in the course of his pre-trial detention his rights guaranteed by Article 5 §§ 1 (c), 3 and 4 of the Convention had been breached.

4. On 2 December 2015 the complaints concerning the lawfulness, length and speediness of review of the applicant's detention under Article 5 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1989 and lives in Nyzhni Sirogozy.

6. On 31 May 2013 the Solonyansky district police department in Dnipropetrovsk Region instituted criminal proceedings in respect of a carjacking.

7. On 4 June 2013 the applicant was arrested as a suspect in connection with the incident.

8. On 5 June 2013 the investigating judge of the Solonyansky District Court remanded the applicant in pre-trial detention until 4 August 2013 on the grounds that he was suspected of a serious crime, was unemployed, had no funds, did not live in the area and was not living at his official registered address. It was also considered that he might evade his procedural obligations and abscond to avoid investigation and trial.

9. On 21 June 2013 the applicant was charged with the robbery of G., committed together with V.

10. On 21 June 2013 the pre-trial investigation ended and the case against the applicant and V. was referred to the Solonyansky District Court. The case was then transferred to the Krasnogvardiysk District Court in Dnipropetrovsk ("the District Court").

11. On 2 August 2013 the District Court remitted the case for further investigation and remanded the applicant in custody until 1 October 2013, noting that he had been suspected of a serious crime and might continue his criminal activities.

12. On 1 October 2013 the District Court held a preliminary hearing in the case and extended the detention of the applicant and V. until 29 November 2013. It noted, without going into any detail or indication to which of the co-accused it referred, that "other preventive measures will not ensure the appropriate behaviour of the accused" during the trial.

13. On 26 November 2013 the District Court extended the applicant's detention until 24 January 2014, noting that he and V. had been charged with serious crimes, did not live in the area and were unemployed. It was also considered that they might influence witnesses and other participants in the proceedings or otherwise obstruct criminal proceedings, given that the trial had not yet started.

14. On 27 December 2013 the applicant applied for release to the District Court complaining about, among other things, his state of health.

15. On 21 January 2014 the District Court examined and rejected that application. The court extended the applicant's detention until 21 March 2014 on the same grounds as those given in its previous decision of 26 November 2013. As to his health problems, the court noted that he had been treated successfully for renal colic and was fit for trial.

16. On 19 March 2014 the District Court rejected a further application for release lodged on 26 February 2014 and extended the applicant's detention until 19 May 2014 on the same grounds as those given on the two previous occasions, adding that he was aware of the punishment for the crime he had been charged with and thus might obstruct the criminal proceedings to avoid criminal liability.

17. On 22 April, 17 June and 15 July 2014 the District Court extended the applicant's detention until 20 June, 15 August, and 12 September 2014

respectively, on the same grounds as those given in its decisions of 26 November 2013 and 21 January 2014.

18. On 15 August 2014 the applicant lodged another application for release with the District Court.

19. On 4 September 2014 the District Court examined and rejected that application, extending the applicant's detention until 2 November 2014. It repeated its previous reasoning, adding that he was aware of the punishment for the crime he had been charged with and thus might obstruct the criminal proceedings to avoid criminal liability. It also added that he and his co-accused V. had no strong social ties.

20. On 30 September 2014 the applicant lodged another application for release, which was rejected on 9 October 2014. The District Court repeated its previous reasoning, noting in addition as grounds for his detention that he was not studying.

21. On 31 October 2014 the District Court rejected that application and extended the applicant's detention until 29 December 2014, giving reasons similar to those given on 4 September 2014.

22. On 9 December 2014 the District Court extended the applicant's detention until 6 February 2015, repeating the reasoning given in its previous decisions.

23. On 27 January 2015 the applicant and V. were convicted by the Krasnogvardiysk District Court of robbery and carjacking and sentenced to five years' imprisonment. The court also decided to reduce the remainder of the prison sentence (namely the part not covered by the pre-trial detention) by half under the Amnesty Act.

24. On 12 June 2015 the Mensky District Court in Chernigiv Region allowed the applicant's application for early release.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure 2012

25. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 176

General provisions on preventive measures

"1. Preventive measures are:

...

(5) detention on remand.

...

4. Preventive measures shall be applied during the investigation by the investigating judge at the request of the investigator following agreement with the prosecutor, or at the request of the prosecutor; during the trial, they shall be applied by the court at the request of the prosecutor."

Article 197

Term of validity of the ruling on detention or continued detention

"1. The term of validity of the ruling by the investigating judge or the court ordering an accused's detention or continued detention may not exceed sixty days..."

Article 315

Resolution of issues related to preparation for trial

"...

3. During the preliminary court hearing the court shall be entitled, at the request of participants in the trial, to impose, alter or revoke measures to ensure the conduct of the criminal proceedings, including any preventive measures imposed on the accused. When considering such requests, the court shall follow the rules set forth in Chapter II of this Code [Measures to Ensure the Conduct of Criminal Proceedings]. In the absence of such a request from the parties to the trial, the measures to ensure the conduct of the criminal proceedings that were selected at the pre-trial investigation stage shall be deemed to be extended."

Article 331

Imposing, revoking or altering a preventive measure in court

"1. During the trial the court, at the request of the prosecution or the defence, may issue a ruling altering, revoking or imposing a preventive measure against the accused.

...

3. Regardless of whether such requests have been made, the court shall be obliged to examine the reasonableness of the accused's continued detention within two months from the date of receipt of the indictment by the court ... or from the date of the court ruling ordering the accused's detention as a preventive measure..."

III. RELEVANT COUNCIL OF EUROPE MATERIALS

26. The Council of Europe's Committee of Ministers, which under Article 46 § 2 of the Convention has the duty to supervise the execution of the Court's judgments, is currently examining the execution by Ukraine of the Court's judgment in *Kharchenko v. Ukraine* (no. 40107/02, 10 February 2011), which summarised shortcomings identified in the Ukrainian system of detention on remand. One of the issues highlighted in that judgment was the detention of persons without any judicial decision during the period between the end of the investigation and the beginning of the trial.

According to information published on the Committee's website, the case is currently under "enhanced supervision".

27. In that context on 21 February 2013 the Ukrainian Government submitted a Revised Action Plan in which they reiterated that Parliament had adopted a new Code of Criminal Procedure which had come into force and had largely eliminated the legislative shortcomings underlying recurrent violations of Article 5 of the Convention. At its 1164th meeting (5-7 March 2013) the Committee of Ministers noted, among other things, that further clarifications were required from the Ukrainian authorities regarding the legislative changes in question.

28. At its 1265th meeting (20-21 September 2016) the Committee of Ministers noted that the Code of Criminal Procedure largely improved the procedure for detention on remand, however, certain violations of Article 5 were not resolved by the new Code. They referred in particular to the Chanyev case, which concerned the applicant's detention without a court order during the period between the end of the investigation and the beginning of the trial (see *Chanyev v. Ukraine*, no. 46193/13, 9 October 2014). The Committee of Ministers insisted on the urgency of rapidly bringing the remaining necessary legislative reforms and on the necessity of ensuring in the meantime that all possible practical measures are taken by courts and prosecutors to prevent further violations of Article 5 with regard to detention on remand.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

29. The applicant complained under Article 5 § 1 (c) of the Convention that on 1 October 2013 the court deciding on his pre-trial detention had not given any proper reasons, and that the domestic legislation did not require the domestic courts to give such reasons or to set time-limits. Relying on Article 5 § 3, he complained that his pre-trial detention had been extended by the court numerous times on identical grounds. He also complained that his application for release lodged with his local court on 27 December 2013 had not been examined until 21 January 2014, and that his similar request lodged on 15 August 2014 had not been examined until 4 September 2014, which did not comply with the requirements of speediness of review under Article 5 § 4.

The relevant provisions 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;

...

3. 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.

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

A. Admissibility

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

B. Merits

1. Article 5 § 1 of the Convention

31. The applicant maintained that under Article 315 of the Code of Criminal Procedure, at a preliminary hearing the courts could decide to impose, alter or revoke any preventive measures previously imposed on an accused, but that provision did not require them to give any reasons for continued detention or to set a time-limit for it.

32. The Government agreed that deprivation of liberty was a preventive measure for use in exceptional circumstances, but maintained that in the present case it had been justified. They submitted that the applicant's detention had been lawful and thus there had been no violation of his rights guaranteed by Article 5 § 1 of the Convention.

33. The Court notes that the applicant's complaint under this head is limited to the court decision rendered on 1 October 2013 committing him for trial.

34. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the

repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law. One of the most common types of deprivation of liberty in connection with criminal proceedings is detention pending trial. Such detention constitutes one of the exceptions to the general rule stipulated in Article 5 § 1 that everyone has the right to liberty and is provided for in sub-paragraph (c) of Article 5 § 1 of the Convention. The period to be taken into consideration starts when the person is or remanded in custody, and ends when he or she is released and/or the charge is determined, even if only by a court of first instance (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84 and 85, ECHR 2016, with further references).

35. The Court observes that under Article 315 of the Code of Criminal Procedure, when committing a person for trial the courts may decide to change, discontinue or apply a preventive measure. Article 331 further obliges the courts to decide on further preventive measure upon request of the prosecution or the defence, and in some circumstances even on the court's own motion (see paragraph 25 above). It does not appear that they are required by that provision to give reasons for continuing the accused's detention or to fix any time-limit when extending it. It further notes, however, that there is a general provision in Article 197 suggesting that decisions ordering detention are valid for a maximum of sixty days at any stage of the investigation and trial, and that was the case in the decision of 1 October 2013 criticised by the applicant. Indeed, the court upheld the applicant's detention until 29 November 2013 (see paragraph 12 above). It follows that this part of the applicant's complaint is not based on the factual circumstances of his case and the Court is not called upon to decide as a purely theoretical exercise whether Article 315 should contain specific reference to the courts' obligation to fix time-limits when extending pre-trial detention.

36. At the same time, the Court notes that, despite the criminal case being at a new procedural stage, with two co-accused, the domestic court gave no reasons for its decision neither did it indicate to which of the co-accused it referred in particular (see paragraph 12 above). That left the applicant in a state of uncertainty as to the grounds for his detention after that date. In this connection, the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see *Yeloyev v. Ukraine*, no. 17283/02, § 54, 6 November 2008; *Nakhmanovich v. Russia*, no. 55669/00, §§ 70-71, 2 March 2006; and *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002). In these circumstances, the Court considers that the District Court's decision of 1 October 2013 did not afford the applicant adequate protection from arbitrariness, which is an essential

element of the "lawfulness" of detention within the meaning of Article 5 § 1 of the Convention.

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

2. Article 5 § 3 of the Convention

38. The applicant submitted that in their decisions ordering his continued detention, the domestic courts had mainly referred to the seriousness of the charges against him and had failed to give convincing reasons for holding him in custody.

39. The Government maintained that the applicant's detention from the time of his arrest until his conviction by the court had been under the constant control of the judicial authorities and had been reviewed every two months. They noted that the parties' arguments had always been taken into account by the domestic courts. The Government submitted that the applicant's detention on remand had been necessary and justified and that there had been no violation of his rights under that head either.

40. The Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. It must be assessed according to the particular features of each case, the reasons given in the domestic decisions and the well-documented matters referred to by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV; and *Buzadji v. the Republic of Moldova* [GC], cited above, § 90).

41. In the instant case, the Court notes that the applicant's pre-trial detention lasted for nearly a year and eight months. It observes that the seriousness of the charges against him and the risk of his absconding had been mentioned in the initial decision ordering his detention. Those reasons, as well as the risk of him influencing the course of investigation, which was added soon after (see paragraphs 8 and 13), remained the same grounds for his detention until his conviction, with the exception of the decision of 1 October 2013, which contained no grounds whatsoever (see paragraphs 12 and 34 above). Thereafter, the courts used the same grounds for extending the applicant's detention. However, under Article 5 § 3, justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. The arguments for and against release, including a risk that the accused might hinder the proper conduct of the proceedings, must not be taken *in abstracto*, but must be supported by factual evidence. The danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either

confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see *Strogan v. Ukraine*, no. 30198/11, § 97, 6 October 2016). The Court notes that decisions on the applicant's detention were couched in general terms and contained repetitive phrases. They do not suggest that the courts made an appropriate assessment of the facts relevant to the question of whether such a preventive measure was necessary in the circumstances at the respective stage of proceedings. Moreover, with the passage of time the applicant's continued detention required more justification, but the courts did not provide any further reasoning. Furthermore, at no stage did the domestic authorities consider any other preventive measures as an alternative to detention (see *Osypenko v. Ukraine*, no. 4634/04, §§ 77 and 79, 9 November 2010).

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

3. Article 5 § 4 of the Convention

43. The applicant maintained that on two occasions it had taken the domestic courts twenty-five and nineteen days respectively to examine his requests for release, which had not been sufficiently expeditious to comply with the requirements of Article 5 § 4 of the Convention.

44. The Government noted that all of the applicant's requests for release had been examined by the domestic courts, with those of 27 December 2013 and 15 August 2014 having been examined on 24 January and 4 September 2014 respectively. According to the Government, that demonstrated that the domestic courts had not ignored the applicant's requests, but had actually considered them in detail. They concluded that there had been no violation of the applicant's rights guaranteed by Article 5 § 4 of the Convention.

45. The Court reiterates that Article 5 § 4 of the Convention provides that "the lawfulness of the detention shall be decided speedily". There are two aspects to this requirement: first, the opportunity for legal review must be provided soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter. Second, the review proceedings must be conducted with due diligence (see *Khudobin v. Russia*, no. 59696/00, § 115, ECHR 2006-XII (extracts)).

46. The Court notes that the applicant's requests for release of 27 December 2013 and 15 August 2014 were not examined by the court until 24 January and 4 September 2014 respectively, which does not meet the requirement for a speedy review (see, *mutatis mutandis*, *Rehbock v. Slovenia*, no. 29462/95, §§ 85-86, ECHR 2000-XII*;* and *Kadem v. Malta*, no. 55263/00, §§ 44 and 45, 9 January 2003).

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

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

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

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

49. The Court reiterates that Article 46, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court has found to have been violated. Such measures must also be taken in respect of other individuals in the applicant's position, notably by solving the problems that have led to the Court's findings (see, among many other authorities, *Vyerentsov v. Ukraine*, no. 20372/11, § 94, 11 April 2013). This obligation has been consistently emphasised by the Committee of Ministers in the supervision of the execution of the Court's judgments. Whilst it is not for the Court to determine what measures of redress may be appropriate for a respondent State, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national system of protection of human rights (see *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-XII (extracts)).

50. The applicant submitted that he had been subjected to recurrent violations of his rights.

51. The Government considered that there had been no violation of the applicant's rights or systemic problems in the present case.

52. In the present case the Court has found a violation of Article 5 of the Convention, which can be said to be recurrent in the case-law concerning Ukraine. In the case of *Kharchenko*, the Court noted that it regularly found violations of Article 5 § 1 (c), 3 and 4 of the Convention, in particular with respect to situations similar to those in the present case (see *Kharchenko v. Ukraine*, no. 40107/02, §§ 98-100, 10 February 2011). The issues were considered to stem from legislative lacunae (ibid.), and the respondent State was invited to take urgent action to bring its legislation and administrative practice into line with the Court's conclusions in respect of Article 5 of the Convention (ibid, § 101). Having examined the circumstances of the present case, the Court is not convinced that the new legislation is sufficient insofar as the relevant requirements for pre-trial detention are concerned (see also conclusions of the Committee of Ministers mentioned in paragraph 28 above).

53. In view of the above, the Court considers that the most appropriate way to address the above-mentioned violation is to bring the reform of legislation and/or practice forward, in order to ensure that domestic criminal procedure complies with the requirements of Article 5.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

56. The Government considered that claim to be unsubstantiated as there had been no violation of the applicant's rights, and, in any event, excessive.

57. Having regard to the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 6,000 plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant made no claim under this head, so the Court makes no award.

C. Default interest

59. 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 5 § 1 of the Convention;

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

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

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 15 December 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President