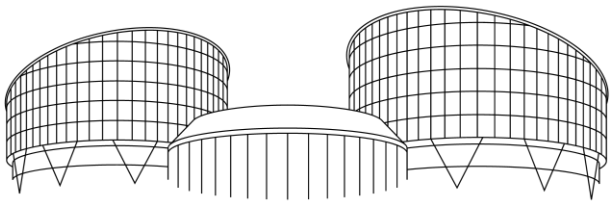

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KORNEV AND KARPENKO v. UKRAINE

(Application no. 17444/04)

JUDGMENT

STRASBOURG

21 October 2010

FINAL

21/01/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kornev and Karpenko v. Ukraine**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 28 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 17444/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ukrainian nationals, Mr Denis Yevgenyevich Kornev and Ms Larisa Ivanovna Karpenko ("the applicants"), on 27 April 2004.

2. The applicants, who had been granted legal aid, were represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicants alleged, in particular, several violations of Articles 5 and 6 of the Convention in their respect.

4. On 14 September 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1984 and 1951 respectively and live in Kharkiv.

A. Criminal proceedings against the first applicant

6. On 16 May 2003 Ms Shch., on the instructions of the police, bought four grams of cannabis from the first applicant. Following this, the first applicant was arrested by the police on suspicion of supplying drugs. The 20-hryvnia (Ukrainian hryvnias, UAH) note given by the police to Shch. to buy the drugs had been found on him. During a search conducted at the applicant's house later the same day another twenty grams of cannabis were revealed.

7. During pre-trial investigation the applicant confessed to selling drugs to Shch., whom he knew by her first name, and to keeping drugs at his house.

8. On 19 May 2003 the applicant was released on an undertaking not to abscond.

9. On 23 July 2003 the criminal case against the applicant was referred to the Chervonozavodsky District Court of Kharkiv (the District Court).

10. At the end of November the first applicant was summoned to appear before the court on 2 December 2003. According to the applicant, he fell ill on 31 November 2003. The next day the doctor gave him a sick note.

11. On 2 December 2003, despite the fact that the second applicant had informed the court of the reasons for the first applicant's absence, the court decided to replace the undertaking not to abscond with detention.

12. On 8 December 2003 the first applicant was arrested, and on 16 December 2003 he was brought before the judge, who rejected his request for release.

13. During the hearing of 16 December 2003 the court rejected the applicant's request for Shch. to be summoned on the ground that in accordance with the law the buyer participating in a police drug test purchase operation should not be summoned to court.

14. On 26 January 2004 the court rejected another request for release lodged by the first applicant.

15. On 19 July 2004 the District Court found the applicant guilty of supplying drugs and sentenced him to five years' imprisonment, with confiscation of his property. The court established that the applicant had bought cannabis from an unknown person on 11 May 2003 and had kept it at home for selling. On 16 May 2003 he sold some cannabis to Shch. and more cannabis was found at his home. The court noted that during the trial the applicant retracted his confession and first claimed that a certain A. had forced him to keep the drugs and that Ms M. had taken them from him. Then the applicant denied completely that any drugs had ever been in his possession and stated that the police had planted money and drugs and forced him to confess. The court considered that despite this retraction the applicant's guilt was confirmed by the body of evidence, including the written statements of Shch., as well as statements made at the hearing by

police officers N. and K., who had conducted the operation, and witnesses K. and E. who had been invited by the police to observe the operation. All of them confirmed that Shch. had gone to the applicant with a banknote and come back with a small packet of a substance later established to be cannabis.

16. The applicant appealed against his conviction, complaining, among other things, that despite numerous requests on his behalf, Ms Shch. had not been summoned and questioned by the court and that it had not been proven that he had sold drugs to Ms Shch.

17. On 29 July 2005 the Kharkiv Regional Court of Appeal changed the applicant's sentence to a suspended one of three years. The court did not reply to the applicant's complaint that witness Shch. had not been questioned in court.

18. The applicant appealed in cassation, further complaining that Shch. had not been questioned in the court hearings.

19. On 25 April 2006 the Supreme Court of Ukraine upheld the decision of the appellate court. No reply had been given to the applicant's complaint that Shch. had not been summoned or questioned in the court hearings.

B. Administrative proceedings against the second applicant

20. On 2 December 2003 the second applicant attended the District Court and informed Judge O. that the first applicant was ill. She was accompanied by five other persons. According to the second applicant they were all invited to the judge's office but he later asked them to leave his office, which they could not do because police officers were barring the exit. The same day the judge's secretary drew up an administrative offence report on the second applicant. The report was passed to Judge Shch., who questioned the applicant, found her guilty of contempt of court and ordered her administrative arrest for fifteen days. In his decision Judge Shch. noted that at around 10 a.m. that day the second applicant entered the office of Judge O. with a "support group" consisting of Ms M., Ms I., Ms G., Mr K. and Mr P. in order to put pressure on the above judge in the criminal case against her son (the first applicant) and refused to leave the office when requested to do so by the judge, his secretary and the judicial police. The court found that the applicant had stayed in the office of Judge O. for forty minutes and prevented him from commencing the court hearings.

21. After the above decision the second applicant became unwell and was taken to hospital.

22. On 17 January 2004 the Deputy President of the Kharkiv Regional Court dismissed an extraordinary appeal by the second applicant against the decision of 2 December 2003 ordering her administrative arrest.

23. On 27 January 2004 the prosecutor of the Chervonozavodsky District requested the court to reduce the second applicant's sentence on account of her state of health. This request was granted and the administrative arrest was replaced by a fine of UAH 136.

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure

24. The relevant provisions of the Code read, in so far as relevant, as follows:

Article 52-1. Security measures for persons participating in criminal trials

"Where there is a real threat to life, health, home, or property of those participating in criminal trials, such persons shall have the right to be protected by security measures

The right to be protected by security measures, where there are relevant grounds, shall be vested in:

a person who has reported a crime to a law-enforcement authority or otherwise participated in or contributed to actions to detect, prevent, stop, or solve a crime ..."

Article 52-3. Non-disclosure of information on a person being protected by security measures

"Non-disclosure of information on a person in respect of whom security measures have been taken may be ensured by restricting the availability of any data on the person in the materials (in petitions, statements and so on) and also in reports on the investigative actions or records of the court hearings. Having decided to take security measures, the body of inquiry, investigator, prosecutor, or court (judge) shall make a reasoned decision to replace by a pseudonym the surname, name and patronymic of the person taken under protection. Afterwards, the procedural documents shall only refer to the pseudonym of the person, while his or her real surname, name and patronymic (the year, month, and place of his or her birth, his or her family situation, place of work, occupation or position, place of residence, and other personal details characterising the person concerned) shall only be stated in the decision on the replacement of his or her personal details. A decision to that effect, which is not to be added to the case file, shall be kept separately by the authority in charge of the criminal case in question. If the surname of the person taken under protection is replaced by a pseudonym, the reports on investigative actions and other documents referring to real personal details of the person shall be replaced in the case file by copies in which his or her real surname is replaced by the pseudonym.

Information on security measures as well as on persons taken under protection thereby shall be restricted-access information. The rules laid down in paragraph 2 of Article 48, Articles 217 - 219 and 255 of this Code shall not apply to documents containing such information."

B. Code on Administrative Offences, 1984

25. Paragraph 1 of Article 185-3 of the Code provides as follows:

> "Contempt of court, which is defined as malicious avoidance of summons by a witness, victim, plaintiff or defendant; or as a failure by the above persons or others to comply with the orders of the presiding judge; or a violation of public order during a court hearing, or the committal by any person of acts which indicate blatant disrespect for the court or for the rules of court, shall be punishable by a fine of six to twelve times the monthly minimum income of citizens or by administrative arrest for up to fifteen days."

26. Paragraph 1 of Article 268 of the Code provides, among others, the following rights of a person who is brought to administrative liability:

> "A person placed under administrative liability shall be entitled to study case materials, to give explanations, to present evidence, to make requests; to have the assistance of a lawyer ... during the examination of the case..."

27. The right to a lawyer in administrative offence proceedings is further guaranteed by Article 271 of the Code.

28. Under Article 277 of the Code, cases concerning administrative offences set forth in the first paragraph of Article 185-3 shall be decided within one day.

THE LAW

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

29. The first applicant complained under Article 5 § 3 that he was not brought before the judge for six days after his arrest. Article 5, in so far as relevant, reads 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:
>
> ...
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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 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...”

30. The Government contested that argument.

A. Admissibility

31. 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. Whether the deprivation of liberty was justified under sub-paragraphs (b) or (c) of Article 5 § 1

32. The first applicant maintained that the domestic court's decision on his detention had clearly indicated that he had to be detained as an accused person under the relevant articles of the Code of Criminal Procedure.

33. The Government contended that Article 5 § 1 (c) of the Convention related directly to the pre-trial detention, that is when a person was taken into custody prior to the referral of his or her criminal case file to a court for examination on the merits. In the applicant's case, he had been arrested at the moment when the criminal investigation had been completed and the case had been examined by the court. Therefore, in their opinion, the purpose of the applicant's detention had been different from that set forth in Article 5 § 1 (c) of the Convention.

34. The Government observed that from 19 May 2003 the applicant had been on an obligation not to abscond, which implied, among other things, an undertaking on his part to appear before the court when summoned. On 2 December 2003 the applicant failed to do so and therefore he had been arrested for the purpose of ensuring his compliance with the undertaking to appear before the court at its first request. The Government considered that the applicant had been detained under Article 5 § 1 (b) of the Convention and accordingly Article 5 § 3 did not apply in his case.

35. The Court reiterates that Article 5 § 1 of the Convention requires that the detention be “lawful”, which includes the condition of compliance with “a procedure prescribed by law”. The Convention here essentially refers back to national law and states the obligation to conform to the substantive

and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Moreover, it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, pp. 752-53, §§ 40-41).

36. Article 5 § 1 contains an exhaustive list of permissible grounds of deprivation of liberty. However, the applicability of one ground does not necessarily preclude that of another; detention may, depending on the circumstances, be justified under more than one sub-paragraph (see, for example, *Eriksen v. Norway*, judgment of 27 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 861-62, § 76, and *Enhorn v. Sweden*, no. 56529/00, § 34, ECHR 2005-...). Taking into account that the applicability of sub-paragraph (c) of Article 5 § 1 also triggers the protection provided by Article 5 § 3, which constitutes an important additional guarantee for an arrested person, the Court considers it appropriate to analyse first whether this sub-paragraph is applicable to the present case.

37. The Court observes that in the present case the first applicant was obliged under domestic law to appear before the District Court where criminal charges against him had to be dealt with. However, he failed to appear. Subsequently, he was remanded in custody by the above court on 2 December 2003 on the basis of relevant provisions of the Code of Criminal Procedure. There is nothing to indicate that the procedure prescribed by domestic law was not followed.

38. The Court notes that the first applicant was summoned by the District Court in the context of criminal proceedings against him. Moreover, he was taken into custody on the basis of provisions of the Code of Criminal Procedure, which authorise the taking into custody of a defendant on trial. In fact, there was no other reason for the authorities to compel the applicant to appear before the District Court than the criminal proceedings against him. The Court concludes that his detention falls within the ambit of sub-paragraph (c) of Article 5 § 1 of the Convention.

39. The Court sees no reason not to agree with the Government's argument that sub-paragraph (b) of Article 5 § 1 is also applicable to the present case. However, having found that sub-paragraph (c) is applicable, the Court will proceed to examine whether the more stringent guarantees provided by Article 5 § 3 were complied with.

2. Whether the guarantees provided by Article 5 § 3 were complied with

40. The first applicant noted that he had not been brought promptly before the court. In his opinion, the fact that his detention had been ordered by the court could not dispense the authorities from their obligation under

Article 5 § 3 of the Convention to bring him promptly before the judge once he had been detained.

41. The Government stated, without any further elaboration, that the applicant had been brought promptly before the judge.

42. The Court reiterates that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see, for example, *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III).

43. Article 5 § 3 is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5 § 1 (c) (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, p. 24, § 51 and *Aquilina*, cited above, §§ 48-49).

44. The Court has pointed out that under Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of himself hearing the individual brought before him; the substantive requirement imposes on him the obligations to review the circumstances militating for or against detention, to decide, by reference to legal criteria, whether there are reasons to justify detention, and to order release if there are no such reasons (see *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, pp. 13-14, § 31, with further references).

45. The detention of the applicant in the present case was from the outset ordered by a court. Thus, the Court is called upon to determine whether the judicial involvement in the applicant's arrest was sufficient to meet the requirements of Article 5 § 3.

46. The Court observes, first, that the text of Article 5 § 3 requires that a person shall be brought promptly before a judge or other judicial officer after being arrested or detained. The text of the provision does not provide for any possible exceptions from that requirement, not even on grounds of prior judicial involvement. To conclude otherwise would run counter to the plain meaning of the text of the provision. Moreover, the Court reiterates that, according to its case-law, the judicial control foreseen by Article 5 § 3 must meet certain requirements, one of those being that the judicial officer must himself or herself actually hear the detained person before taking the appropriate decision (see *De Jong, Baljet and Van den Brink*, cited above, § 51, and *Aquilina*, cited above, § 50). The Court notes that in the present case the first applicant failed to appear before the court when the decision concerning his arrest was taken. This fact in itself does not give rise to an issue under Article 5 § 3, as a requirement cannot be derived from the Convention to the effect that a person who is evading court proceedings should be present at the court hearing where authorisation for his or her arrest is dealt with (see *Harkmann v. Estonia* (dec.), no. 2192/03, 1 March

2005). However, the Court observes that the first applicant had no chance to present the court with possible personal or other reasons militating against his detention after his actual arrest on 8 December 2003, despite the authorities' obligation under Article 5 § 3 to give him the opportunity to be heard.

47. The Court notes that the first applicant had been kept in custody for eight days before 16 December 2003 when he was brought to the court which examined the lawfulness of his detention. The Court finds that such a period is incompatible with the requirement of "promptness" under Article 5 § 3 (see, for example, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

49. The first applicant further complained that the criminal proceedings against him were unfair, in particular that he could not question witness Shch. He referred to Article 6 § 3 (d), which read as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. Admissibility

50. 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

51. The first applicant maintained that his conviction for selling drugs, as opposed to being in possession of drugs, had been mainly based on statements by witness Shch., which she had given at the stage of investigation. The only other proof had been his own confession that he had been at the scene of the crime, but it could not be taken into account since he had retracted it at the judicial examination stage and claimed that the confession had been received under coercion from the investigation. He

considered that without the statements by witness Shch. the authorities would not be able to secure his conviction for selling drugs, as no other person had been present at the scene of the crime. Moreover, all other witnesses were police officers, who were not impartial and were not eyewitnesses to the alleged crime.

52. The first applicant further noted that he had admitted in his testimony that at the relevant time and place he had met with his classmate Ms M., whom he knew well. He had not met any other person; therefore he concluded that it was Ms M. who had acted under the fictitious name of Shch. as a principal witness. The fact that Ms M. had not been questioned during the proceedings despite the applicant's explicit request confirmed his suspicions. The applicant therefore challenged the reasonableness of the security measures taken in respect of witness Shch. if she indeed was Ms M, whom he knew well. In the event that Ms Shch. and Ms M. were indeed two different persons, the questioning of Ms M. was equally important, since she could corroborate his alibi. However, as mentioned above, neither Ms Shch. nor Ms M. had ever been questioned by the domestic courts. He concluded that such a failure irreparably damaged the fairness of the proceedings against him.

53. The Government agreed that the first applicant had had no opportunity to question witness Shch. in the court hearings, given that the latter had been under the witness protection programme set forth in articles 52-1 and 52-3 of the Code of Criminal Procedure. They noted, however, that witness Shch. had been one of six witnesses in the criminal case against the first applicant and that her statements, given at the pre-trial stage, were consistent with the statements made by five other witnesses whom the applicant was able to, and did, question in court. Furthermore, the conviction of the first applicant had been based on the body of evidence and not solely or decisively on the statements by witness Shch. The Government contended that if there were any procedural violation in the criminal case the higher courts could rectify it; they found no procedural violations and confirmed that the decision of the first-instance court had been correct. They concluded that there had been no violation of the applicant's right under Article 6 § 3 (d) of the Convention.

54. The Court reiterates that all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see, *mutatis mutandis*, *Doorson*

v. the Netherlands, judgment of 26 March 1996, *Reports* 1996-II, p. 472, § 76).

55. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov*, cited above, § 57).

56. The Court notes that in the present case the principal witness for the prosecution had been placed under the witness protection programme and did not appear before the domestic courts at all. It does not consider it necessary to examine the applicant's arguments that the witness protection was unjustified as he knew the true identity of witness Shch. What is important is that her statements were essential for the proceedings in question, given that she was the only person who had directly participated in buying drugs from the first applicant and could testify that he sold the drugs to her. It is not the task of this Court to substitute for the domestic courts in the assessment of evidence or in proposing a concrete solution to balance the interests of the parties. It observes, however, that the applicant and his lawyer had been given no opportunity to cross-examine this witness at any stage of the proceedings, even as an anonymous witness, and the domestic courts themselves based their conclusions in the case on her written statements given at the pre-trial investigation stage. Moreover, it has not been claimed by the authorities that there was a need to balance the interests of various persons concerned, in particular, of witness Shch.

57. The Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based. There has accordingly been a violation of Article 6 § 3 (d) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION IN RESPECT OF THE SECOND APPLICANT

58. The second applicant complained under Article 6 § 3 (b) that she had had no time to prepare her defence, under Article 6 § 3 (c) that she had not

been represented and had not been given time to arrange for such representation, and under Article 6 § 3 (d) that she could not question any witnesses. The relevant provisions of Article 6 § 3 read as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. Admissibility

59. The Government challenged the applicability of Article 6 in its criminal limb to the administrative offence proceedings against the second applicant. They maintained that the proceedings in respect of the second applicant were administrative and not criminal under the domestic law. They further contended that the applicant had been ultimately punished with a fine of UAH 136, which brought the offence committed by the second applicant into the category of minor offences.

60. The second applicant disagreed. She noted that the maximum penalty envisaged by Article 185-3 was fifteen days' imprisonment and therefore the severity of this penalty brought it with the criminal limb of Article 6. Furthermore, she had originally been sentenced to that maximum penalty and it was only because of her hospitalisation that her administrative detention had not been enforced.

61. The Court observes that in some other Ukrainian cases it has examined similar issues concerning the same type of proceedings and under the same article of the Code on Administrative Offences, and has found that given the severity of the sanction envisaged the offence foreseen by Article 185-3 was not a minor offence (see *Gurepka v. Ukraine (no. 2)*, no. 38789/04, § 33, 8 April 2010) and the administrative proceedings had to be considered criminal in nature, attracting the full guarantees of Article 6 of the Convention (see *Gurepka v. Ukraine*, no. 61406/00, § 55, 6 September 2005). The Court sees no reason to depart from its reasoning in the present case and concludes that Article 6 is applicable to the impugned proceedings against the second applicant.

62. The Court further 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

63. The Court reiterates that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. The Court will therefore examine the relevant complaints under both provisions taken together (see, among many other authorities, *F.C.B. v. Italy*, judgment of 28 August 1991, Series A no. 208-B, p. 20, § 29, and *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, p. 13, § 29).

1. The right to adequate time and facilities to prepare her defence

64. The second applicant maintained that the period between the alleged offence and the trial was too short to enable her to prepare her defence properly. She noted that under the relevant law her administrative case had to be examined within one day and there was no exception to this rule. Furthermore, the Code on Administrative Offences did not contain a provision explicitly entitling her to seek adjournment of the proceedings in her case in order to prepare her defence.

65. The Government made no observations on the merits considering Article 6 inapplicable.

66. The Court reiterates that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the opportunity to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, Series A no. 96, § 53; *Connolly v. the United Kingdom* (dec.), no. 27245/95, 26 June 1996; and *Mayzit v. Russia*, no. 63378/00, § 78, 20 January 2005). Furthermore, the facilities available to everyone charged with a criminal offence should include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see *C.G.P. v. the Netherlands*, (dec.), no. 29835/96, 15 January 1997, and *Foucher v. France*, judgment of 18 March 1997, *Reports* 1997-II, §§ 26-38). The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.

67. In the present case, the Court notes that despite the lack of a clear indication of the exact lapse of time between the offence committed by the second applicant and the examination of her administrative case in this respect, it is evident that this period was not longer than a few hours. Even if it is accepted that the applicant's case was not a complex one, the Court doubts that the circumstances in which the applicant's trial was conducted

were such as to enable her to familiarise herself properly with and to assess adequately the charge and evidence against her and to develop a viable legal strategy for her defence.

68. The Court concludes that the applicant was not afforded adequate time and facilities for the preparation of her defence. There has accordingly been a violation of Article 6 § 3 of the Convention taken together with Article 6 § 1 of the Convention.

2. The right to defend herself in person or through legal assistance of her own choosing and the right to examine or have examined witnesses

69. The second applicant claimed that despite the fact that she had not requested legal representation or the attendance of witnesses, she could not be reproached for this, since, as mentioned above, she had had no time to assess the situation and realise the necessity and importance of such requests in the examination of her case. Therefore, she considered that her omissions did not exempt the State from responsibility for violation of her procedural rights.

70. The Government made no observations on the merits, considering Article 6 inapplicable.

71. In view of the finding made with respect of the applicant's right to adequate time and facilities for the preparation of her defence, the Court does not consider it necessary also to examine the other alleged violations of Article 6 § 3 of the Convention (see, *mutatis mutandis*, *Ashughyan v. Armenia*, no. 33268/03, §§ 67-68, 17 July 2008).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

72. The first applicant also complained under Article 5 § 1 (c) of the Convention that his pre-trial detention was arbitrary and unlawful, under Article 5 § 3 about the length of his detention and under Article 5 § 4 that there had not been periodic reviews of his detention. He further complained under Article 6 of the Convention that the court was not impartial and the proceedings were excessively long, that he was not immediately provided with detailed information concerning the allegations against him, and that he had insufficient time to prepare his defence. The second applicant complains that the judge was aggressive and accusational and therefore lacked the impartiality required by Article 6 § 1 of the Convention.

73. Having carefully examined the applicants' submissions in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be declared

inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicants claimed 500,000 euros (EUR) each in respect of non-pecuniary damage.

76. The Government considered the claim ill-founded and the amount excessive.

77. The Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Nadtochiy v. Ukraine*, no. 7460/03, § 55, 15 May 2008). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction for the violation of Article 6 in respect of both applicants. The Court further takes the view that the first applicant has suffered non-pecuniary damage as a result of the violations of Article 5. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the first applicant EUR 800 in respect of non-pecuniary damage.

B. Costs and expenses

78. The applicants also claimed UAH 30 (around EUR 3) for travel expenses, UAH 1,176.81 (around EUR 118) for postal expenses, UAH 2,700 (around EUR 270) for legal fees for the domestic proceedings and EUR 4,256 for legal fees incurred before the Court.

79. The Government considered that not all the expenses were related to the present application. Furthermore, they noted that the applicants had been granted legal aid, therefore their claims for costs and expenses had to be rejected.

80. 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 documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 2,000 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints of the first applicant under Article 5 § 3 and Article 6 § 3 (d) of the Convention and complaints of the second applicant under Article 6 §§ 1 and 3 concerning fairness of the administrative offence proceedings and procedural violations therein admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention in respect of the first applicant;

3. *Holds* that there has been a violation of Article 6 § 3 (d) of the Convention in respect of the first applicant;

4. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (b) of the Convention in that the second applicant did not have a fair hearing, on account of the fact that she was not afforded adequate time and facilities for the preparation of her defence;

5. *Holds* that there is no need to examine the other complaints of the second applicant under Article 6 § 3 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 800 (eight hundred euros), plus any tax that may be chargeable to him, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement;

(b) that the respondent State is to pay the applicants jointly, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement;

(c) 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President