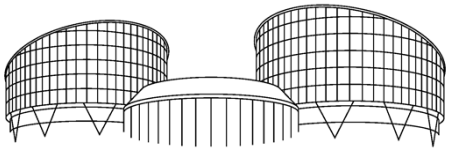

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MELNIKOV v. UKRAINE

(Application no. 66753/11)

JUDGMENT

Art 6 § 1 (criminal) • Reasonable time • Excessive length of criminal proceedings

STRASBOURG

22 October 2020

FINAL

22/01/2021

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

In the case of Melnikov v. Ukraine,

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

Síofra O'Leary, *President,*
Ganna Yudkivska,
Mārtiņš Mits,
Latif Hüseynov,
Lado Chanturia,
Anja Seibert-Fohr,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *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 a Ukrainian national, Mr Valeriy Stanislavovich Melnikov ("the applicant"), on 12 October 2011;

the decision to give notice to the Ukrainian Government ("the Government") of the complaints concerning the conditions of the applicant's detention in the Kyiv pre-trial detention centre, the length of the criminal proceedings against him and the compliance of his penalty with the requirements of Article 7 of the Convention, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 29 September 2020,

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

INTRODUCTION

1. The applicant complained under Article 3 of the Convention about the conditions of his detention in the Kyiv pre-trial detention centre ("the Kyiv SIZO") and under Article 6 § 1 of the Convention about the length of the criminal proceedings against him. Furthermore, he complained that there had been a breach of his rights under Article 7 of the Convention on account of the failure of the domestic courts to deduct the duration of his pre-trial detention from the fifteen-year prison sentence imposed on him.

THE FACTS

2. The applicant was born in 1967 and is currently serving a life sentence.

3. He was granted legal aid and was represented by Mr M. Tarakhkalo, Ms V. Lebid and Ms I. Boykova, lawyers practising in Kyiv.

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

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

I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

6. On 28 December 2000 criminal proceedings were instituted against the applicant in respect of one charge of kidnapping for ransom committed earlier in 2000. Those proceedings were assigned case no. 62-2222. Subsequently, various other charges were added to the proceedings: kidnapping, murder, robbery, theft, extortion, police impersonation and illegal arms possession committed in 1996 and later by an organised gang.

7. On 26 June 2002 the applicant was arrested as a suspect within proceedings no. 62-2222.

8. On 28 June 2002 he was remanded in custody as a preventive measure pending trial. At that time all the charges against him came under the above-mentioned case no. 62-2222. His pre-trial detention within those proceedings was extended on many occasions.

9. In October 2003 certain charges were severed into a separate set of proceedings (no. 49-1205). The issue of a preventive measure in respect of the applicant was never examined within this set of proceedings, given that his pre-trial detention was maintained in case no. 62-2222. According to the applicant, he was the only one in such a situation, whereas all the other co-accused had the preventive measures in their respect determined within both sets of proceedings.

10. On 17 October 2006 the Prosecutor General's Office of Ukraine approved the bill of indictment in case no. 49-1205 and sent it for trial.

11. On 21 November 2006 the Kyiv City Court of Appeal ("the Kyiv City Court"), sitting as a court of first instance, started the trial in those proceedings.

12. On 21 May 2010 it found the applicant guilty of the following criminal offences committed in 1996 and 1997: double murder for profit, kidnapping, several counts of robbery, illegal arms possession and police impersonation. He was sentenced to fifteen years' imprisonment. The judgment stated that the applicant's sentence started running on 21 May 2010. The court ordered his detention as a preventive measure until the judgment became enforceable. The judgment did not mention the period of the applicant's pre-trial detention and did not order that it should be counted towards the sentence. Five other persons were also convicted by the same judgment, including Mr Dubovoy, one of the applicants in *Volchkova and Others v. Ukraine* ([Committee], nos. 14062/05 and 5 others, 8 June 2017; see paragraphs 35 and 40 below). One of the co-defendants, M., was sentenced to eight years' imprisonment. The trial court held that his pre-trial detention starting from 24 March 2006 was to be counted towards that sentence. Another co-defendant, O., was given a sentence of six years

and six months' imprisonment and also had his pre-trial detention, starting from 17 May 2005, set off against the sentence. The remaining two co-defendants had not been detained as a preventive measure prior to the judgment pronouncement.

13. The applicant lodged an appeal on points of law, in which he argued, *inter alia*, that the duration of his pre-trial detention, since his arrest on 26 June 2002 (see paragraph 7 above) until the pronouncement of the verdict, should have been deducted from the term of his sentence.

14. On 19 April 2011 the Supreme Court upheld the judgment in general. It dismissed the above-mentioned argument of the applicant on the grounds that no custodial preventive measure had been applied to him in that set of criminal proceedings.

15. On 25 January 2012 the Kyiv City Court delivered its judgment in case no. 62-2222 (see paragraphs 6, 8 and 9 above), which was 776 pages long. The court found the applicant guilty of banditry, eleven counts of murder for profit and numerous counts of kidnapping for ransom, extortion, robbery, theft, police impersonation and illegal arms possession committed on various dates between 1997 and 2002. The applicant was sentenced to life imprisonment. Twelve other persons were also convicted (M. and O. who had earlier been convicted by the judgment of 21 May 2010 (see paragraph 12 above) were not among them). It was specified in the judgment that the applicant's sentence had started running on 26 June 2002 (see paragraph 7 above).

16. On 23 April 2013 the Higher Specialised Court for Civil and Criminal Matters ("the Higher Specialised Court") upheld that judgment.

II. CONDITIONS OF THE APPLICANT'S DETENTION IN THE KYIV SIZO

17. From 26 June 2002 to 27 June 2013 the applicant was detained in the Kyiv SIZO.

18. He alleged that the conditions of his detention there had been unacceptable. The applicant referred to a severe lack of personal space (about 2.5 sq. m per inmate) and poor ventilation. No further factual details were provided.

19. The Government submitted that they were not in a position to provide any information about the conditions of the applicant's detention in the Kyiv SIZO, given that the relevant documents had been destroyed at the end of the mandatory five-year storage period.

RELEVANT LEGAL FRAMEWORK

I. CRIMINAL CODE 1960 (REPEALED WITH EFFECT FROM 1 SEPTEMBER 2001)

20. Article 47 provided that the duration of pre-trial detention was to be deducted from the term of the prison sentence on the basis of the "one day for one day" rule.

21. Pursuant to paragraphs (a) and (d) of Article 93 (as worded before 22 February 2000), murder of two or more persons and/or committed for profit was punishable by imprisonment of eight to fifteen years, or by the death penalty. Under the 22 February 2000 amendments, the death penalty was replaced with a life sentence.

II. CODE OF CRIMINAL PROCEDURE 1960 (REPEALED WITH EFFECT FROM 20 NOVEMBER 2012)

22. The relevant part of Article 338 read as follows:

> "If the defendant was not detained prior to the verdict pronouncement, his or her sentence shall start running from the beginning of its enforcement.
>
> If the defendant was detained in the framework of the proceedings in question [*в цій справі*] prior to the verdict pronouncement, the duration of that detention shall count towards his or her sentence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF DETENTION IN THE KYIV SIZO

23. The applicant complained that the physical conditions of his detention in the Kyiv SIZO had been inadequate. He relied on Article 3 of the Convention, which reads as follows:

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

24. Referring to the lack of relevant documents (see paragraph 19 above), the Government submitted that they were not in a position to comment on the applicant's complaint.

25. The applicant maintained his complaint in broad terms.

26. The Court reiterates that it adopts conclusions after evaluating all the evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant

inferences or of similar unrebutted presumptions of fact (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 121, 10 January 2012).

27. The Court is mindful of the objective difficulties experienced by applicants in collecting evidence to substantiate their claims about the conditions of their detention. Still, in such cases applicants must provide a detailed and consistent account of the facts complained of (ibid., § 122). In certain cases applicants are able to provide at least some evidence in support of their complaints. The Court has considered as evidence, for example, written statements by fellow inmates or, if possible, photographs provided by applicants in support of their allegations (see, for example, *Golubenko v. Ukraine* (dec.), no. 36327/06, § 52, 5 November 2013, and the cases cited therein).

28. Once a credible and reasonably detailed description of allegedly degrading conditions of detention, constituting a prima facie case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government, who alone have access to information capable of corroborating or refuting those allegations (see, among other authorities, *Muršić v. Croatia* [GC], no. 7334/13, § 128, 20 October 2016).

29. Turning to the present case, the Court notes that, although the applicant alleged that overcrowding had been a major problem, he did not provide any factual details in support of that allegation. His only relevant submission was that each inmate had about 2.5 sq. m of personal space (see paragraph 18 above). The applicant did not specify which cells he was referring to, for how long he had been detained there and with how many persons, whether he had been afforded an individual sleeping place, whether his allegation of overcrowding concerned one or more cells, and so on. His allegation concerning ventilation was equally vague.

30. The Court observes that it has found a violation of Article 3 of the Convention in many other Ukrainian conditions-of-detention cases (see, for example, *Sukachov v. Ukraine*, no. 14057/17, § 135, 30 January 2020, with further references). Furthermore, in many of those judgments the Court held that the problem of conditions of detention in Ukraine was of a structural nature (see *Sukachov*, cited above, § 136). However, in the present case, as noted in the preceding paragraph, the applicant has not provided even most basic substantiation of his complaint.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

32. The applicant also complained that the length of the criminal proceedings against him had been unreasonable. The relevant part of Article 6 § 1 of the Convention provides as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. The parties' submissions

33. The Government contended that the length of the criminal proceedings against the applicant had been reasonable. According to them, the period to be taken into account had started running on 13 May 2005, "when criminal proceedings were instituted against the applicant in case no. 49-1205" and had ended on 19 April 2011, when the Supreme Court had delivered its final ruling. Therefore, according to the Government's calculation, the proceedings in question had lasted for five years, eleven months and six days, which they considered reasonable.

34. The applicant contested that argument. He observed that in *Gayday and Others v. Ukraine* ((dec.) [Committee], nos. 654/07 and 5 others, 26 August 2014) the Government had already acknowledged the excessive length of the criminal proceedings in question in respect of a co-defendant, Mr Gayday, who had been convicted by the Higher Specialised Court in a final ruling of 23 April 2013. In *Gayday and Others* the Government had submitted a unilateral declaration, under which they undertook to pay 3,240 euros to the applicant. The Court struck the case out of its list of cases on that ground.

35. Furthermore, the applicant referred to *Volchkova and Others v. Ukraine* (see paragraph 12 above), in which the Court had found a violation of Article 6 § 1 of the Convention on account of the excessive length of the same criminal proceedings in respect of one of the applicants, Mr Dubovoy. In *Volchkova and Others* the proceedings in respect of Mr Dubovoy had been instituted on 13 August 2002 and had been completed by the ruling of the Higher Specialised Court of 23 April 2013, as in the present case (see paragraph 16 above).

B. The Court's assessment

1. Admissibility

36. 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.

2. Merits

37. The Court does not share the Government's approach to the definition of the period to be taken into consideration (see paragraph 33 above). Their reference to 13 May 2005 as the *dies a quo* lacks any justification. It is an established fact that on 26 June 2002 the applicant was arrested in the context of criminal proceedings concerning charges that were

at least partly the subject of the proceedings complained of (see paragraph 7 above). That being so, the Court considers 26 June 2002 to be the starting-point of the period to be taken into consideration. Nor does the Court agree with the Government as regards the *dies ad quem* in the proceedings. It considers that they lasted until 23 April 2013, when the Higher Specialised Court delivered its final ruling on the charges not covered by the final ruling of 19 April 2011 (see paragraph 16 above).

38. It follows that the criminal proceedings against the applicant in the present case lasted from 26 June 2002 until 23 April 2013 at two levels of jurisdiction, that is, for ten years and almost ten months.

39. The reasonableness of the length of proceedings must be assessed in the light of all the circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

40. As pointed out by the applicant in the present case, the Court has already analysed the reasonableness of the length of the criminal proceedings in which he was one of the defendants (see paragraph 35 above). In *Volchkova and Others* the Court held that the length of the criminal proceedings in respect of Mr Dubovoy (from 13 August 2002 to 23 April 2013 at two levels of jurisdiction) had been excessive and thus in breach of Article 6 § 1 of the Convention. In the present case the period to be taken into account was even slightly longer (see paragraph 38 above). No factual or legal particularities of the criminal proceedings analysed in the present case have been brought to the Court's attention that would allow it to distinguish the assessment of their reasonableness from those in *Volchkova and Others*. Accordingly, there is no reason for the Court to reach a different conclusion in the present case.

41. It follows that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the criminal proceedings.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

42. Lastly, the applicant complained that the refusal of the domestic courts to deduct the duration of his pre-trial detention from the term of his fifteen-year prison sentence had amounted to a violation of his rights under Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

43. The Government submitted that the applicant was no longer a victim given that the term of his pre-trial detention had been duly taken into account in the proceedings in case no. 62-2222, in which he had been sentenced to life imprisonment (see paragraph 15 above).

44. The applicant disagreed. He observed that he had been sentenced to life imprisonment two years after the imposition of the fifteen-year prison sentence. The applicant emphasised that the fixed-term sentence in question had been the only one imposed on him during the above-mentioned two-year period and that the failure to include almost eight years of his pre-trial detention in the calculation of that sentence had considerably affected him.

45. The applicant further noted that he would become entitled to apply for presidential clemency after serving twenty years of his life sentence (that is, in 2022). In his opinion, the existence of an unserved part of the fifteen-year sentence when doing so would decrease his chances of obtaining clemency.

46. The applicant observed that he had been charged with particularly serious crimes in proceedings no. 49-1205 and that placing him in pre-trial detention in the context of those proceedings had been mandatory. However, no such preventive measure had been ordered owing to the fact that he had already been detained in concomitant proceedings no. 62-2222. The applicant drew the Court's attention to the fact that he was the only one of all the co-accused, in respect of whom the issue of preventive measure had not been decided in the context of case no. 49-1205 (see paragraph 9 above). According to the applicant, that omission had eventually been used against him, given that the eight-year period which he had spent in pre-trial detention had counted towards the life sentence imposed in case no. 62-2222, whereas it should have counted towards the fifteen-year sentence imposed in case no. 49-1205. The applicant observed that at the early stages of the pre-trial investigation all the charges against him had been covered by one criminal case, no. 62-2222, in the context of which he had been arrested and detained. He therefore argued that, even though eventually some charges had been severed into a different case, no. 49-1205, this did not mean that he had not been detained within that case.

47. The applicant emphasised that, had his pre-trial detention been included in his fixed-term sentence, he would have finished serving it in 2017. In reality, however, the sentence would only end in 2025. Accordingly, the applicant argued that his sentence of fifteen years'

imprisonment had effectively become a twenty-three years' prison sentence. He therefore alleged that a heavier penalty had been imposed on him than the one provided by law.

B. The Court's assessment

1. General principles

48. The guarantee enshrined in Article 7 is an essential element of the rule of law. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013).

49. Article 7 of the Convention is not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Del Río Prada*, cited above § 78).

50. It follows that offences and the relevant penalties must be clearly defined by law (see, among other authorities, *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015). The term "law" implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008).

51. The Court's case-law draws a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". Article 7 of the Convention applies only to the former (see *Del Río Prada*, cited above, § 83).

2. Application of the above principles to the present case

52. In the present case the following penalties were imposed on the applicant: under the judgment of 21 May 2010 (case no. 49-1205) -a sentence of fifteen years' imprisonment in respect of double murder for profit, kidnapping and a number of other crimes; and under the judgment of 25 January 2012 (case no. 62-2222) – a sentence of life imprisonment in

respect of banditry, eleven counts of murder for profit, kidnapping for ransom and numerous other offences (see paragraphs 12 and 15 above).

53. The Court notes that the applicant contested neither the compliance of those penalties with criminal law nor the accessibility and foreseeability of the substantive legal provisions applied. The gist of his complaint is that by having refused to count the duration of his pre-trial detention (for almost eight years) towards the fifteen years' prison sentence and by having instead set it off against his life sentence, the domestic courts effectively altered to his disadvantage, in an unlawful manner, his penalty imposed under the judgment of 21 May 2010.

54. In so far as the applicant can be understood as implying that the domestic law was extensively construed to his detriment, it is noteworthy that his grievance does not concern the interpretation and application of substantive criminal law as such, but is confined to the allegation of incorrect application of the rules of criminal procedure towards the calculation of a prison sentence imposed.

55. Bearing in mind that the distinction between the scope of a sentence and the manner of its execution may sometimes be not immediately apparent and may depend on the particularities of the domestic legal system concerned (see, for example, *Kafkaris*, cited above, § 148), the Court does not exclude that the manner in which the procedural rules such as those at issue in the present case are applied might, under different circumstances, lead to a finding that a penalty harsher than that provided by law has been imposed. However, looking behind appearances and assessing the reality of the situation complained of in the present case, the Court sees no indication of a breach of the applicant's rights under Article 7 of the Convention.

56. As regards the applicant's argument that he was treated differently from the other co-defendants, the Court notes that, firstly, this allegation does not appear clear and substantiated, having regard to the fact that, unlike the applicant, the two co-defendants whose pre-trial detention had been counted towards their sentence in the judgment of 21 May 2010, were not additionally convicted by the judgment of 25 January 2012 (see paragraphs 12 and 15 above) and the applicant has not explained why he considered that he was in a comparable situation despite this difference. Secondly, in the Court's view, this argument is of little relevance as regards the lawfulness of the applicant's penalty, within the meaning of Article 7 of the Convention.

57. For the same reason, the Court finds irrelevant the applicant's argument – which in any event appears confused and unsubstantiated - that his chances of obtaining presidential clemency would be damaged as a result of the domestic courts' approach to the calculation of his fifteen years' prison sentence (see paragraphs 45 and 46 above).

58. In the Court's view, in the present case the applicant has failed to show convincingly that the domestic courts' approach to the calculation of

his sentence of fifteen years' imprisonment in case no. 49-1205 had the effect of increasing the severity of his punishment or, indeed, any practical effect on his situation.

59. In sum, the Court considers that the applicant has not substantiated his complaint and rejects it under Article 35 §§ 3 (a) and 4 of the Convention as being manifestly ill-founded.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

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

62. The Government contested that claim as exorbitant and unsubstantiated.

63. The Court considers it appropriate in the circumstances of the case to award the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

64. The applicant also claimed EUR 12,600 for the costs and expenses incurred before the Court.

65. The Government contested the above claim.

66. 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. Furthermore, costs and expenses are only recoverable to the extent that they relate to the violation found (see *Denisov v. Ukraine* [GC], no. 76639/11, § 146, 25 September 2018). In this regard the Court notes that only the applicant's complaint regarding the length of proceedings was successful (see paragraph 41 above). In such circumstances, and bearing in mind that one of the applicant's representative has already been paid EUR 850 under the Court's legal aid scheme (see paragraph 3 above), the Court rejects the applicant's claim.

C. Default interest

67. 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 complaint concerning the excessive length of the criminal proceedings against the applicant admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the criminal proceedings against the applicant;

3. *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 3,000 (three thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 22 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President