

**AN ANALYSIS OF THE CASE**  
***GUREPKA v . UKRAINE***

**JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS**  
**ISSUED ON**  
**6 September 2005**  
**(Application 61406/00)**

**May 2006**  
***Legal Guide***  
**<<http://www.legalguide.am>>**

The statements and opinions expressed in the present analysis are the work of Ara Ghazaryan, for the Armenian Non-Governmental Organisation “Legal Guide”, who is solely responsible for its content. Nothing contained in this analysis should be regarded as rendering legal advice for specific cases. This analysis and the opinions provided herein are intended for educational and informational purposes only. The opinions expressed herein are those of the author and do not necessarily represent the views of Legal Guide.

The development of the analysis was supported by the Embassy of the United Kingdom of Great Britain and Northern Ireland in the Republic of Armenia. The analysis was edited by Lucy Claridge, Legal Officer at the Kurdish Human Rights Project in London. KHRP is an independent, non-political human rights organisation and registered charity dedicated to the promotion and protection of the human rights of all persons in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere.

Research performed by the Legal Guide.

©2005 Legal Guide. All rights reserved.

## TABLE OF CONTENTS

<b>1. Foreword.....</b>	<b>5</b>
<b>2. Judgments of the Court interpreting the concept of “criminal charge”.....</b>	<b>5</b>
<b>3. PACE Documents on Stopping the Practice of Administrative Detentions in Armenia.....</b>	<b>5</b>
<b>4. The Basis for Developing the Concept of “Criminal Charge” Autonomously.....</b>	<b>6</b>
<b>5. Interpretation of the concept of “Charge” .....</b>	<b>8</b>
<b>6. Interpretation of the concept of “Criminal” .....</b>	<b>8</b>
<b>6.1 Classification in domestic law.....</b>	<b>9</b>
<b>6.2. The Nature of the Offence.....</b>	<b>9</b>
<b>6.3. The Nature and Severity of Penalty.....</b>	<b>10</b>
<b>7. The Application of Above Principles in the case of <i>Gurepka v Ukraine</i>.....</b>	<b>10</b>

## **Introduction**

This analysis considers the judgment of 6 September 2005 of the European Court of Human Rights (“the Court”) in the case of *Gurepka v. Ukraine*. The case concerns the administrative detention for contempt of court ordered by the Ukrainian domestic court. The applicant argued lack of remedies under Article 13 of the European Convention on Human Rights (the “Convention”) following his detention under administrative charges. In this context, the applicant argued that administrative proceedings against him were in fact criminal in nature. The respondent Government claimed that the rule of law providing seven day deprivation of liberty could not be considered criminal under the Convention.

This analysis aims to review the facts of the case, including a thorough examination of the applicant’s complaints and the Ukrainian Government’s arguments. An overview of the specific approaches of the Court regarding the interpretation of the rights and freedoms in question will also be provided in this analysis. It will not, however, address specifically the issue of just satisfaction. The analysis will be carried out by applying a checklist which the Court uses when examining violations of each Convention right and freedom. The analysis will also highlight the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the Convention.

This analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights - including law students - to identify the criteria and the standards that the Court follows when interpreting the rights and freedoms guaranteed by the Convention.

## **1. Foreword**

In this case the Court again tackled the concept of “criminal charge” under Article 6, but in this instance the Court considered it under the factual basis of administrative detentions. This case should be of significant interest to Armenian readers if it is examined in the context of the widespread practice of administrative detentions by the Government of Armenia in 2003 and 2004. In addition, it provides an important example of how the Court conducts the examination of admissibility and the merits of the case jointly under Article 29(3) of the Convention and the Rule 54A1 of the Court. Rule 54A1 was inserted by the Court in 2002 and was first used in December 2004. It is worthwhile mentioning that the Court applied this rule in most of the cases brought from Armenia. This procedure significantly shortens the length of examination of complaints. Wide references are also made to previous judgments of the Court that deal with the notion of “criminal charge”, specifically those cases in which the Court defined the principles and standards for interpreting this concept.

## **2. Judgments of the Court interpreting the concept of “criminal charge”**

The Court has adopted several judgments in which it interpreted the “criminal charge” under Article 6 of the Convention. The most important of these are where the Court autonomously developed the concept of “criminal charge”, without paying attention to how the given offence was classified under domestic law.

The following are judgments where the Court interpreted the notion of “criminal charge” under criminal, civil, administrative, and disciplinary proceedings:

*Engel and others v. Netherlands* (1976) 1 EHRR 706

*Ozturk v. Germany* (1984) 6 EHRR 409

*Escoubet v. Belgium* (1999) Application no. 26780/95

*Ezeh and Connors v. United Kingdom* 39665/98;40086/98 ECHR 485 (9 October 2003)

*Lutz v. Germany* (1987) 24 A/123 (1987) 10 EHRR 182

*Weber v. Switzerland* (1990) 12 EHRR 508

*Demicoli v. Malta* (1991) Application no 00013057/87

*Ravnsborg v. Sweden* 14220/88 (1994) ECHR 11

*Deweere v. Belgium* (1980) 2 EHRR 439

Recently the Court made several judgments on cases brought from CIS countries. Detention as a measure of punishment under administrative charges is a legacy of the totalitarian Soviet legal system and is still a widespread practice in the countries of the former Soviet Union.

## **3. PACE Documents on Stopping the Practice of Administrative Detentions in Armenia**

Armenia was first warned about the unacceptability of the use of administrative detentions in a democratic society by PACE in Resolution 1304. The PACE Resolutions are not binding legal documents, but they are binding as political documents. Paragraph 9 of the Resolution provides:

*9. The Assembly further invites the authorities to revise the Administrative Code without delay. It urges them to abolish the provisions concerning administrative detention and to refrain from applying them in the interim. It warns the authorities of*

*the abuses their application leads to, which are seriously at variance with the principles of the Organisation.*

Later, when the Government continued the use of administrative detentions in an even wider form, PACE adopted two new resolutions which expressed concern over the incompatibility of the mentioned practice with the Convention principles. In particular, in paragraph 14 of the Resolution 1361 of 27 January 2004, PACE indicated:

*14. The Assembly is shocked by the scandalous use that continues to be made of the arbitrary procedures concerning administrative detention provided for in the Administrative Code, which is totally incompatible with its strongly-worded statement in Resolution 1304 of September 2002 that the Armenian authorities should no longer make use of these procedures. It firmly condemns the arrest and conviction of over 270 people – members of the opposition parties, sympathisers and office-holders – between the two rounds of the presidential election and at the end of the second round. It expects the Armenian authorities to discuss by February 2004 the issue of administrative detention provided for in the Administrative Code in co-operation with Council of Europe experts and to send the draft amendments for the Council of Europe's expertise by April 2004.*

In the next resolution, Resolution 1374 of 28 April 2004, PACE advanced an ultimatum demanding that the Armenian Government fulfil seven conditions, otherwise PACE warned that Armenia would be deprived of CoE membership in Autumn 2004. Paragraph 4 concerned to administrative detentions in particular:

*iv. immediately release the persons detained for their participation in the demonstrations, immediately end the practice of administrative detention and amend the Administrative Code to this effect;*

It is important to mention that the new Constitution of 27 November 2005 finally stopped the practice of administrative detentions (Article 16) in Armenia. However, in considering that the Court is currently examining (under Rule 54A1) around two dozen Armenian cases where the victims were subjected to administrative detentions, we think the topic of this material is still of interest to Armenian readers.

#### **4. The Basis for Developing the Concept of “Criminal Charge” Autonomously**

**4.1.** Article 6 of the Convention applies only to those cases where authorities brought criminal charges against victims or where the interference amounted to the violation of a victim's “civil rights and obligations”. That means Article 6 does not apply if the charges brought are defined as administrative or disciplinary under domestic law. This significantly narrows the framework of application of Article 6. It is true that the CoE recognises any decriminalisation process in member states. It is also concerned, however, that if the member states are allowed to remove any offence from the framework of the application of Article 6 and thus subject this article to “its sovereign will”, it will narrow the effectiveness of the Convention:

*The Convention is not opposed to the moves towards "decriminalisation" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses*

*of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.<sup>1</sup>*

A similar opinion was expressed in the judgment of the *Engel* case in the context of criminal versus disciplinary charges:

*If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal. In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.*

Under the facts of the *Lutz*<sup>2</sup> and *Ozturk* cases, the applicants were subjected to administrative charges for the violation of traffic rules. The Government argued against the applicability of Article 6 on the basis that the applicants were not charged with a criminal offence. According to the Government, “*Under the legislation of 1968/1975, which "decriminalised" petty offences, including road traffic offences in particular, the charges against Mr. Lutz constituted merely a "regulatory offence" (Ordnungswidrigkeit). Such an offence, the Government claimed, differed from a criminal offence both in its legal characteristics and consequences and in the procedure to be followed*”. Therefore, the Government demanded that the applications be declared inadmissible under Article 6 on the basis that administrative rather than criminal charges were brought against applicants. The Court, therefore, had to decide “*whether this classification is decisive for the purposes of the Convention*” (par 51).

**4.2.** The Court was also concerned that the domestic laws of many member states did not clearly separate between criminal and administrative (or disciplinary) proceedings, or those of formal nature:

*“...it particularly occurs when an act or omission is treated by the domestic law of the respondent State as a mixed offence, that is both criminal and disciplinary, and where there thus exists a possibility of opting between, or even cumulating, criminal proceedings and disciplinary proceedings” (see Engel case, at par 80).*

Such findings were also made by the Court in respect of Germany, in the cases of *Lutz* and *Ozturk*.

Thus, the Court provides two reasons for developing the concept of “criminal charge” autonomously: First, the Convention principles must be interpreted effectively to widen Convention rights rather than narrow them. Second, the interpretation of this concept must not be left to the discretion of member states because, very often, disciplinary or administrative charges brought against certain actions amount to criminal charges by its nature, in particular when there is no clear “*partition*” between criminal and administrative proceedings under domestic law. In considering the above, the Court chose to develop the

---

<sup>1</sup> *Ozturk v. Germany* (1984) 6 EHRR 409, par 49

<sup>2</sup> *Lutz v. Germany* 24 A/123 (187) 10 EHRR

concept of criminal charge under Article 6 autonomously – regardless of how the certain offence is defined under national law or domestic practice.

## 5. Interpretation of the concept of “Charge”

“Charge” is an **autonomous concept** under the Convention. In *Deweere v. Belgium*, the Court ruled that the term “charge” should be given a substantive rather than a formal meaning. In this case the Court defined “charge” as: (i) *an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, or, (ii) a situation where [the suspect] has been substantially affected [by an action of the authorities against him/her]* (See *Deweere v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 22, at paras 44 and 46)

The following are examples from the Court’s case law of what constitutes a “charge”:

- 1) When a person’s arrest for a criminal offence is ordered (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 25)
- 2) When a person is officially informed of the prosecution against him (*Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, p. 3)
- 3) When authorities investigating custom offences require a person to produce evidence and freeze his bank account (*Funke v. France*, judgment of 25 February 1993, Series A no. 256-A)
- 4) When a person has appointed a defence lawyer after the opening of a file by the public prosecutor’s office following a police report against him (*Angelucci v. Italy*, No 12666/87, Judgment of 19 February 1991)
- 5) When a prosecutor ordered the provisional closure of a shop of the applicant following a report that the applicant had breached certain price regulations (see the above-mentioned case *Deweere v. Belgium*)

## 6. Interpretation of the concept of “Criminal”

The determination of whether a charge is to be deemed “criminal” does not solely depend on its definitions in the national legal systems of the State. In *Engel and others v. the Netherlands* the Court noted that state parties are free to designate matters in their domestic law as either criminal, disciplinary or administrative, as long as this distinction does not in itself contravene the Convention (see, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, p. 25, § 81). In that case the Court **established three criteria** for deciding whether a charge is “criminal” for the purpose of Article 6:

- (i) The classification in domestic law;
- (ii) The nature of the offence, and
- (iii) The nature and the severity of the penalty.

The above was defined in the *Engel* judgment:

*“The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States” (para. 82).*

The three tests mentioned apply separately rather than cumulatively. Consequently, if the applicant is successful in arguing one of the above three tests, the Court will decide that the disputed action is criminal.

### 6.1 Classification in domestic law

If the offence is criminal under domestic law, Article 6 automatically applies. If the offence is administrative or disciplinary, the Court applies the second and the third criteria mentioned above. To do this, the Court first determines whether the domestic law provides clear “*partition*” between the criminal and administrative proceedings and that such partition is not formal.

In the case of *Ozturk*, the impugned conduct was regulated under administrative law. The victim was involved in a car accident and was fined by police for violating traffic rules. Before this incident, Germany had decriminalized its traffic laws. The Government argued that the offence differs from a criminal offence both in its nature and in its legal consequences, including the proceedings under which the case was examined. However, the Court’s task was to find out whether the very fact that the offence was not criminal but administrative under German domestic law had any significance for the purposes of the Convention and whether its classification complied with the aims of the Convention.

In closely examining the proceedings under which the applicant’s case was examined by domestic bodies, the Court found that the proceedings in question could at any phase be turned into criminal. For example, when a person refused to pay a fine and appealed to a higher court, the appeal court had discretion to change the administrative penalty into a criminal charge. The administrative bodies also had the discretion to make recommendations to the prosecutor to initiate criminal proceedings if they found the offence was criminal in nature. The prosecutor’s decision to change the administrative proceedings into criminal was obligatory. The Court found many other instances where domestic laws provided the opportunity of easily “jumping” from administrative into criminal law. Thus, both administrative and criminal proceedings were open for use for the same offence. The respondent Government did not object to this finding of the Court. Thus, the Court found that German law provided “*no absolute partition*” separating the criminal law from administrative law. Even if such partition existed, which was disputed by the Government, it was only conditional rather than absolute.

### 6.2. The Nature of the Offence

In examining the nature of the offence, the Court applies two tests:

- a. *the sphere of application of the violated norm*
- b. *the purpose of the penalty*

If the norm is used against certain group of people but not universally, then it is a disciplinary rather than a criminal norm. In the *Engel* case, the offence was committed by a group of

soldiers who were subjected to disciplinary punishment. If the norm in question is applied universally, the Court will, as it has tended to in the past, rule that “*the norm in question belongs to criminal law. It means the Article 6 in the given case is applicable*”.<sup>3</sup> In the *Ozturk* case, the Court determined that the disputed norm was directed not against a certain group of people, as in the case of disciplinary norms, but against all people using traffic means. Thus, the norm in question was deemed as potentially affecting the whole population.

The second criterion is the purpose of using the norm. The purpose of application of criminal norms is punitive and deterrent. Usually states impose fines or imprisonment as a form of punishment. In the *Ozturk* case, the Government did not object to the decision that the rule of law applied against the applicant was punitive and deterrent in nature, even though Germany had decriminalised the careless driving norms. The Court found that the norm in dispute still had the characteristics of criminal offence since “*the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature*” (par 53). .

### 6.3. The Nature and Severity of Penalty

This criterion was decisive in the *Engel* case. The Applicants argued before the Court that detention as a form of penalty, including detention conditions, makes the norm criminal rather than disciplinary. The Court decided to examine whether the norm provided deprivation of liberty and, if it did, to further examine the conditions of the detention. According to the Court, in a rule of law society, deprivation of liberty belongs in the criminal sphere, except deprivations which by their nature, duration or manner of execution cannot be appreciably detrimental.

Five soldiers were subjected to detention. The first one was subjected to a four day “light arrest”, the second soldier to a two day “strict arrest” and the other three to a three to four month detention in a special detention facility. The last incident was the most severe measure of punishment under Netherlands’s military code. According to the Court, the light arrest for of the first soldier was a very short period to be determined criminal under Convention. Besides, the Court considered whether the nature of the norm subjected the individual to a danger of potential punishment. It found that no such danger existed against the first soldier since he had been under a two day detention before the trial. As for the other soldiers, the Court found that the severity and conditions of detention involved elements of criminal norms. The Court considered, among other things that the soldiers were not separated from others who were being deprived of their liberty under criminal charges, including the fact that the soldiers were also not allowed to leave the detention facility and they had to stay under such conditions from three to six months. Even though the domestic court decreased the length of detention to twelve days in respect of one of the soldiers on the basis of his appeal, the Court found it was immaterial since the mere existence of the norm in question caused potential danger to the applicants of being deprived for the mentioned period.

## **7. The Application of Above Principles in the case of *Gurepka v Ukraine***

The applicant in this case was deprived of liberty for 7 days under administrative charges for “contempt of court”. The applicant challenged Article 13 of the Convention pertaining to the lack of an effective remedy in regards to the decision ordering his administrative arrest and

---

<sup>3</sup> Nula Mode, Katarine Harry, L.B. Alekseyeve. “Right to Fair Trial”, page 20

detention. The Court ruled that Article 13 of the Convention did not guarantee a right of appeal or a right to a second level of jurisdiction. However, the Court showed initiative by ruling that if the impugned proceedings were characterised as “criminal” for Convention purposes (see *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B), the applicant's complaint would be examined under Article 2 of Protocol No. 7. This article provides:

*“Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.*

*2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”*

The Government maintained that the proceedings in the subject case were not criminal and that the domestic law made a clear distinction between a criminal offence and an administrative offence. In particular, it argued that the seven day detention for an administrative offence, taking into account the fact that the maximum punishment could have been a fifteen day detention, could not be considered to have been a criminal penalty. The central question for the Court was therefore to establish whether the administrative proceedings were criminal under the “object and purpose” of the Convention.

The Court did not accept the arguments of the Government. It applied the above three part test to determine whether the Ukrainian norms in question were criminal in nature. It found that the rule of law stipulating a seven day detention under administrative charges was criminal rather than administrative. Therefore, the Court declared the application admissible and “*immediately*” took decision in the merits under Article 29(3) of the Convention.

The above principles are applicable on those cases from Armenia where the applicants were charged for committing an administrative offence and were detained for five to fifteen days. At the time of writing this text, the Court had already taken its first admissibility decision against Armenia (*Mkrtchyan v. Armenia, application 6562/03*) where the facts relate to imposition of administrative fines rather than subjecting to detention. However, there are around two dozen cases pending at the moment in the Court relating to the concern over administrative detentions from five to fifteen days. Among other things, the applicants also dispute the conditions of detention in these cases. In taking the above principles as a basis, the applicants from Armenia may quite fairly ask the Court whether those detentions were indeed criminal “by nature and severity of the penalty”. If they indeed were, the Court will declare them admissible under Article 6 and Article 2 of Protocol 7.