



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

FIFTH SECTION

CASE OF MURUKIN v. UKRAINE

(Application no. 15816/04)

JUDGMENT

STRASBOURG

2 September 2010

FINAL

02/12/2010

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

In the case of Murukin 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 29 June 2010,

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

PROCEDURE

1. The case originated in an application (no. 15816/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Valentin Borisovich Murukin (“the applicant”), on 31 March 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that his detention in custody had been unlawful.

4. On 8 June 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 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in Dnipropetrovsk.

6. On 3 July 2002 the applicant manoeuvred his car negligently in the street and crashed into another car which was being driven by a Ms Kh. As a result of the incident, Ms Kh. sustained concussion and injuries of medium severity.

7. Following the incident, the applicant was charged with the crime, set out in Article 286 § 1 of the Criminal Code, of breaching traffic rules resulting in injuries of medium severity to the victim. As a preventive measure, the applicant signed a written undertaking not to abscond.

8. On 5 June 2003 the Dnipropetrovskyy District Court (“the District Court”), taking note of the fact that the applicant had failed to appear at the hearing of his case, scheduled for that day, replaced the written undertaking by the applicant for his detention in custody.

9. Between 19 and 23 June 2003, the applicant was undergoing medical treatment in Dnipropetrovsk no. 7 City Hospital. According to the applicant, he was visited there by police officers who handcuffed him and guarded him until the end of the medical treatment. The officers allegedly did not allow him to use the toilet and prevented him from seeing his relatives and friends. The applicant did not complain to the investigating authorities on account of the conduct of the police officers.

10. On 23 June 2003 the applicant was arrested and placed in a cell at the Dnipropetrovsk District Police Department.

11. On 25 June 2003 the Dnipropetrovsk Regional Court of Appeal (the “Court of Appeal”) rejected the applicant's appeal against the decision of 5 June 2003 of the District Court, stating that, under domestic law, the decision was not subject to appeal.

12. On 27 June 2003 the applicant was transferred to the Dnipropetrovsk no. 3 Pre-Trial Detention Centre (“the Dnipropetrovsk SIZO”).

13. On 3 July 2003 the District Court found the applicant guilty of a crime under Article 286 § 1 of the Criminal Code and sentenced him to two years' “restriction of liberty” and a one-year driving ban. It further stated that the sentence should be calculated from 23 June 2003 and maintained the preventive measure (detention in custody) in respect of the applicant.

14. On 14 and 15 July 2003 the applicant complained to the President of the Court of Appeal and the President of the Supreme Court, alleging that his detention in custody had been unlawful. The complaints were unsuccessful.

15. On 21 July 2003 the applicant appealed against the judgment of 3 July 2003, alleging specifically that his detention had been unlawful since, first, under the provisions of Article 155 of the Code of Criminal Procedure the crime he was charged with did not entail the possibility of pre-trial detention, and, secondly, Article 342 of the same Code provided that he should have been released immediately after the court hearing of 3 July 2003.

16. On 6 October 2003 the Court of Appeal dismissed the applicant's appeal as unfounded and upheld the judgment of 3 July 2003, which then came into effect. The Court of Appeal ordered that the period of the applicant's detention in custody should be reckoned as a part of the applicant's sentence.

17. On 19 December 2003 the applicant was released from the Dnipropetrovsk SIZO, and moved to no. 133 Correctional Centre to serve his sentence.

18. On an unspecified date the applicant lodged a cassation appeal against the judgment of 3 July 2003, contending, in particular, that his detention in custody had been contrary to Articles 155 and 342 of the Code of Criminal Procedure and Article 107 of the Correctional Labour Code.

19. On 23 December 2004 the Supreme Court dismissed the applicant's cassation appeal as unfounded. It noted, *inter alia*, that the period of the applicant's detention in custody had been reckoned as a part of his sentence and therefore the procedural shortcomings complained of, namely, the application of the preventive measure of detention did not necessitate the quashing of the judgments of the lower courts.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of Ukraine, 5 April 2001

20. The relevant provisions of the Code read as follows:

Article 51: Types of punishment

“The following types of punishment may be imposed on persons who are found guilty of crimes:

...

8) arrest;

9) restriction of liberty; ...

11) imprisonment for a defined term;

12) life imprisonment.”

Article 61: Restriction of liberty

“Restriction of liberty is a type of punishment which consists in holding a person under supervision in an open-prison-type establishment without isolating such a person from society and including an obligation on him or her to work. ...”

Article 286: Violation of traffic safety rules or misuse of vehicles by drivers

“1. Violation of traffic safety rules or misuse of a vehicle by a driver, if this results in injuries of medium severity to the victim, –

shall be punished either by a fine in an amount of up to one hundred times the tax - free monthly income, or by correctional work for up to two years, or by arrest for up to six months, or by restriction of liberty for up to three years, combined, if required, with a driving ban for up to three years. ...”

B. Code of Criminal Procedure, 28 December 1960

21. Chapter 13 of the Code deals with preventive measures that can be applied in the course of criminal proceedings. The relevant provisions of that Chapter of the Code read as follows:

Article 149: Preventive measures

“The preventive measures are as follows:

- (1) a written undertaking not to abscond;
- (2) a personal guarantee;
- (3) the guarantee of a public organisation or labour collective;
- (3-1) bail;
- (4) detention in custody;
- (5) supervision by the command of a military unit.

As a temporary preventive measure, a suspect may be detained on the grounds and pursuant to the procedure provided for by Articles 106, 115 and 165-2 of this Code.”

Article 155: Detention in custody

“Detention in custody as a preventive measure shall be applied in cases concerning crimes for which the law envisages a punishment of more than three years' imprisonment. In exceptional circumstances this preventive measure can be applied in cases concerning crimes for which the law envisages a punishment of up to three years' imprisonment. ...”

Article 288: Consequences of a defendant's failure to appear

“If a defendant fails to appear at a court hearing in a case in which his appearance is obligatory, without a valid reason, ... the court shall adjourn consideration of the case ...

In addition, the court ... may order the defendant's compulsory appearance and apply a more severe preventive measure ...”

Article 342: Release of a defendant from custody under the court's judgment

“Upon the acquittal of the defendant, or his release from sentence, or the imposition on him of a punishment other than imprisonment, the court shall immediately release the defendant from custody in the courtroom if he or she is in detention.”

Article 343: Application of preventive measures for the period before the court's judgment comes into effect

“When adopting a judgment by which the defendant is sentenced to a certain type of punishment, the court should consider the question of applying the preventive measure for the period before the judgment comes into effect, and has the right to apply new preventive measures, or quash, change, or maintain the preventive measures that have been applied earlier.

Application of such a preventive measure as detention in custody shall be permissible only on the grounds set out in relevant Articles of Chapter 13 of this Code.”

C. Correctional Labour Code, 23 December 1970 (in force at the relevant time)

22. The relevant provisions of the Code read as follows:

Article 106: Places of punishment by restriction of liberty

“Persons sentenced to restriction of liberty shall undergo their punishment in open-prison-type establishments (“correctional centres”) ...”

Article 107: Movement of persons sentenced to restriction of liberty to the places where they are to serve their sentences

“Persons sentenced to restriction of liberty shall personally relocate to the places in which they are to serve their sentences. ... If a person sentenced to restriction of liberty is detained, he or she shall be released from the detention centre when the sentence comes into effect. ...

Having regard to the personality of the sentenced person and to the other circumstances of the case the court may order that the sentenced person, who is detained in custody until the judgment comes into effect, be moved to the place where they must serve their sentence in accordance with the procedure for persons sentenced to imprisonment. In the latter case the sentenced person shall be released from custody upon his or her arrival at the place of serving the sentence. ...”

Article 107-2: Order and conditions of undergoing punishment by restriction of liberty

“Persons sentenced to restriction of liberty shall be entitled:

...to have unlimited short-term visits and long-term visits (of up to three days) once a month;

to leave the correctional centre for short periods of time, with appropriate permission ...

Persons sentenced to restriction of liberty shall be obliged:

...to work diligently at the designated place;

to remain under supervision in the correctional centre and to leave it only by special permission issued by the administration of the correctional centre...

to live, as a rule, in special dormitories ...

After six months of the sentence has been served, those persons who have not violated disciplinary rules may be allowed to live outside the dormitories with their families ...

Those persons shall appear at the correctional centre for registration not more than four times a week. ...”

D. Pre-Trial Detention Act, 30 June 1993

23. Section 7 of the Act reads as follows:

Section 7: Pre-trial detention regime

“... The basic requirements of the pre-trial detention regime are the isolation of detainees, the full supervision of them and separation from each other, as provided by Section 8 of this Act ...”

24. The other relevant provisions of this Act describing the pre-trial detention regime can be found in the judgment in the case of *Dvoynykh v. Ukraine* (no. 72277/01, §§ 33-36, 12 October 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

25. The applicant complained that his detention in custody had been unlawful. He relied on Article 7 of the Convention.

26. The Court considers that the matters complained of fall under Article 5 § 1 of the Convention, which reads, in so far as relevant, 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:

(a) the lawful detention of a person after conviction by a competent court; ...

(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; ...”

A. Admissibility

27. The Court notes that until 3 July 2003 the applicant was detained for the purpose of bringing him to justice for the crime he had committed. On 3 July 2003 the applicant was convicted by the first-instance court on account of that crime. Accordingly, the period of the applicant's detention preceding 3 July 2003 should be examined under Article 5 § 1 (c) of the Convention. Given that the application was submitted to the Court on 31 March 2004, the applicant's complaint concerning the alleged unlawfulness of his detention in that period has been submitted too late (see, for example, *Nadrosov v. Russia*, no. 9297/02, § 48, 31 July 2008). The Court therefore rejects this part of the application in accordance with Article 35 §§ 1 and 4 of the Convention.

28. The Court further notes that the complaint concerning the alleged unlawfulness of the applicant's detention in custody in the subsequent period is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The applicant contended that after the District Court's judgment of 3 July 2003, he had been unlawfully detained in custody. He insisted that on the date of that judgment he should have been released in accordance with the requirements of Article 342 of the Code of Criminal Procedure. He further claimed that as from 6 October 2003, that is, when the District Court's judgment of 3 July 2003 came into effect, his detention was also in contravention of Article 107 of the Correctional Labour Code.

30. The Government reminded the Court of its subsidiary role regarding the interpretation of domestic legislation and maintained that the applicant's detention from 3 July to 19 December 2003 had been based on court orders and had been justified under Article 5 § 1 (a) of the Convention. In particular, they contended that the sentencing court had expressly ordered

that the preventive measure applied to the applicant on 5 June 2003 should remain in force.

31. The Court reiterates that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a “democratic society” within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, § 65, and *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37). Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-...).

32. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 22, § 40), save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions set out in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely, to ensure that no one is arbitrarily deprived of his or her liberty (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 848, § 42; *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV; and *Assanidze v. Georgia* [GC], no. 71503/01, § 170, ECHR 2004-II).

33. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to the substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 753, § 41, and *Assanidze*, cited above, § 171).

34. However, the “lawfulness” of detention under domestic law is the primary but not always the decisive element. The Court must, in addition, be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among many other authorities, *Winterwerp*, cited above, pp. 19-20, § 45, and *Baranowski v. Poland*, no. 28358/95, § 51, ECHR 2000-III).

35. On this last point, the Court stresses that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law

itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention - a standard which requires that all legislation be sufficiently precise to allow an individual – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VII, p. 2735, § 54).

36. Turning to the instant case, the Court notes that on 3 July 2003 the District Court sentenced the applicant to “restriction of liberty” and decided to maintain the applicant's detention in custody as a preventive measure. As a result, the applicant was held in custody until 19 December 2003.

37. However, by virtue of Article 342 of the Code of Criminal Procedure, the District Court was under an unconditional obligation to release the applicant from custody immediately on the date of judgment since it had imposed a punishment other than imprisonment on the applicant. Accordingly, the court order, authorising the applicant's detention after 3 July 2003, was not adopted in line with the above provision of the domestic law.

38. Even assuming that the applicant's detention between 3 July and 6 October 2003 (the date when the sentence entered into force) could be justified under Article 107 § 1 of the Correctional Labour Code, which admitted a possibility of detaining the applicant between the date of sentence and the date of its entrance into force, then the domestic law was not sufficiently clear as to the moment when the applicant had to be released. In that case the applicant's detention in that particular period was not based on a law complying with the standard of “foreseeability” for the purpose of Article 5 § 1 of the Convention.

39. As to the period from 6 October 2003, the Court notes that the domestic courts did not make an order under the second paragraph of Article 107 of the Correctional Labour Code, with the result that for that period Article 107 cannot, even by way of assumption, have justified the applicant's detention. As the applicant's detention was otherwise not in accordance with domestic law (see paragraph 37 above), there was therefore an unequivocal obligation from 6 October 2003 to release the applicant. Nevertheless, the applicant remained in custody till 19 December 2003. The Court cannot find any justification for the detention beyond 6 October 2003.

40. In view of the above considerations the Court holds that the applicant's detention in custody from 3 July to 19 December 2003 was not “lawful” within the meaning of Article 5 § 1 of the Convention. Accordingly, that period of detention was not justified under the subparagraph (a) of Article 5 § 1, as contended by the Government, or under any other subparagraph of that provision.

41. There has therefore been a violation of Article 5 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant complained under Article 3 of the Convention that from 19 to 23 June 2003 he was ill-treated by the police officers who visited him in hospital. He further complained under Article 7 of the Convention that the period of his stay in the hospital from 19 to 23 June 2003 was not included in the overall length of his sentence.

43. The Court has examined those complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage and EUR15,000 in respect of non-pecuniary damage.

46. The Government considered these claims unsubstantiated.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

48. The applicant also claimed EUR 1,770 for the costs and expenses incurred before the domestic courts and the Court.

49. The Government contended that this claim was not supported by any documents.

50. 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 were reasonable as to quantum. In the present case, having taken into account the

information in its possession and the above criteria, the Court rejects the applicant's claim under this head.

C. Default interest

51. 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 complaint under Article 5 § 1 of the Convention concerning the applicant's detention between 3 July to 19 December 2003 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
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, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Claudia Westerdiek
Registrar

Peer Lorenzen
President