



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

FIFTH SECTION

CASE OF KHAYREDINOV v. UKRAINE

(Application no. 38717/04)

JUDGMENT

STRASBOURG

14 October 2010

FINAL

14/01/2011

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

In the case of Khayredinov v. Ukraine,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 21 September 2010,

Delivers the following judgment:

PROCEDURE

1. The case originated in an application (no. 38717/04) 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 Simar Shevketovich Khayredinov (“the applicant”), on 14 October 2004.

2. The applicant was represented by Mr A. Lesovoy, a lawyer practising in Simferopol. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that his detention in 2004 had been contrary to Article 5 §§ 1 and 3 of the Convention.

4. On 14 September 2009 the Court 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).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1984 and lives in Dachne village in Crimea.

A. Events prior to the applicant's detention

6. On 23 March 2004 a massive fight between youngsters took place in the centre of Simferopol in which a number of persons sustained injuries varying from slight to serious.

7. On the same day the applicant was questioned by the police as a witness at the hospital where he had accompanied a friend who had been injured in the fight.

8. In March and April 2004 the applicant was summoned by and appeared before the investigator on a number of occasions.

B. The applicant's detention

1. During the pre-trial investigation

9. On 28 April 2004 the applicant, having been questioned as a witness by the investigator, was detained on police premises on suspicion of armed hooliganism in respect of the events of 23 March 2004.

10. On 1 May 2004 the Kyivskyy District Court of Simferopol ("the Kyivskyy Court"), in allowing the investigator's application, remanded the applicant in custody and rejected a request by him to be placed instead under an undertaking not to abscond. The court gave as grounds for that decision the seriousness of the charges against the applicant, his mediocre character reference from the university where he was studying, his medical fitness for detention, and the risk that he might abscond or impede the investigation if at liberty. Although the management of the school from which he had graduated two years earlier and the authorities of the village where he had been living before his arrest gave the applicant positive character references, the court decided that they "could not provide grounds for the rejection of the [investigator's] application, as law-abiding behaviour is a requisite for life in society, and not an exception to the rule."

11. On 5 May 2004, in the Court of Appeal of the Autonomous Republic of Crimea ("the Crimea Court of Appeal"), the applicant's lawyer challenged the detention of his client, arguing that the applicant had a permanent place of residence, positive character references, suffered from Vitiligo (a chronic disorder which causes depigmentation in patches of skin) which could worsen in detention, and that he had no criminal record. He further noted that the applicant had always appeared voluntarily before the investigator and that his parents could pay bail for his release.

12. On 18 May 2004 the Crimea Court of Appeal rejected the appeal, referring to the seriousness of the charges brought against the applicant.

13. On 15 June 2004 the Kyivskyy Court extended the term of his detention to 28 August 2004 on grounds of the necessity to complete the

investigation, the seriousness of the charges and the inherent risk that the applicant would abscond, influence witnesses or reoffend.

14. On 22 June 2004 the applicant was provided access to the case file.

15. On 16 July 2004 the Crimea Court of Appeal extended his detention to 28 November 2004 following a request by the investigator, who maintained that the other co-accused needed more time to study the case file. The court rejected a request by the applicant to be released under an undertaking not to abscond, on grounds of the seriousness of the charges and the risk that he would abscond.

16. In August 2004 the investigation was completed and the applicant, together with the other co-accused, was committed for trial.

2. During the trial

17. On 13 September 2004 the Tsentralnyy District Court of Simferopol (“the Tsentralnyy Court”) held a preparatory hearing during which the applicant again asked to be released under an undertaking not to abscond. He argued that all the evidence in the case had been collected by that time so there was no risk that he might tamper with it, that he had a permanent place of residence and well-established social networks, and that he had never hindered the investigation or attempted to abscond or reoffend. The court rejected the request with a final ruling, finding the preventive measure to be in compliance with the criminal procedural legislation.

C. The applicant's conviction

18. In a judgment of 29 December 2004 the Tsentralnyy Court found the applicant guilty of armed hooliganism, as well as of deliberately inflicting medium and grievous bodily harm, and sentenced him to eight years' imprisonment.

19. On 22 June 2006 the Crimea Court of Appeal upheld that judgment.

20. On 17 May 2007 the Supreme Court changed it, finding the applicant guilty of hooliganism without the use of arms and of deliberately inflicting medium bodily harm, and reduced the sentence to three years and two months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant provisions of the Code of Criminal Procedure (“the CCP”), as worded at the material time, read as follows:

Article 156. Duration of pre-trial detention.

“Pre-trial detention during pre-trial investigations shall not last more than two months.

When it is impossible to complete the investigation within the period provided for in paragraph 1 of this Article and there are no grounds for discontinuing the preventive measure or substituting it with a less restrictive measure, [the pre-trial detention] may be extended:

up to four months – upon a request of or approved by the prosecutor supervising the compliance with law by the bodies of inquiry and investigation, by a judge of the court which applied the respective preventive measure; ...

The term of pre-trial detention shall end on the day the court receives the case file.

... After the completion of the investigation the case file shall be presented to the detained accused and his defence not later than a month before the expiry of the pre-trial detention time-limit set under paragraph 2 of this Article.

... If the accused and his defence received access to the case file [in due time as noted above], but that time appeared insufficient, the respective term may be extended by a judge of an appellate court at the request of the investigator approved by the Prosecutor General of Ukraine or his deputy, or at the request coming directly from the [aforementioned prosecutorial officials]. Where there are several co-accused held in pre-trial detention and if at least one of them finds [the term for the case file study] insufficient, a request [for its extension] may also be applicable to the other co-accused who has/have completed his/their study of the case file, if his/their pre-trial detention remains necessary and there are no grounds for changing that preventive measure. ...”

THE LAW

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

22. The applicant complained that his pre-trial detention had been arbitrary. He relied on Article 5 § 1 (c) of the Convention, which reads as follows in the relevant part:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ...”

A. Admissibility

23. The Court notes that the application 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

24. The applicant maintained that under the circumstances his placement into custody had been an unjustified and excessive measure.

25. The Government disagreed submitting that the applicant's detention could not be regarded as unlawful or arbitrary, because it had been based on judicial decisions taken in compliance with the domestic law.

26. The Court emphasises that Article 5 of the Convention guarantees the fundamental right to liberty and security, which is of primary importance in a “democratic society” within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33). 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, save in accordance with the conditions specified in Article 5 § 1 (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114). The list of exceptions set out in the aforementioned provision 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 *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV).

27. In order for deprivation of liberty to be considered free from such arbitrariness, it does not suffice that this measure is executed in conformity with national law; it must also be necessary in the circumstances (see *Nešťák v. Slovakia*, no. 65559/01, § 74, 27 February 2007).

28. Thus, for the Court, detention pursuant to Article 5 § 1 (c) must embody a proportionality requirement (see *Ladent v. Poland*, no. 11036/03, § 55, ECHR 2008-... (extracts)). For example, in the case of *Ambruszkiewicz v. Poland* (no. 38797/03, §§ 29-32, 4 May 2006) the Court examined whether the applicant's placement in custody was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose.

29. Turning to the present case, the Court notes that at the time of his arrest the applicant was about twenty years old, had no previous convictions and a permanent place of residence, where – as confirmed by the local authorities – he was well-integrated socially. As it transpires from the respective judicial decisions (see paragraphs 10 and 11 above), none of those factors was taken into consideration by the domestic courts when deciding about his placement into pre-trial detention. Moreover, in assessing the applicant's personality, the domestic courts chose to rely exclusively on his unfavourable character reference and to disregard those in his favour

(see paragraph 10 above). While relying on the gravity of the charges and the inherent risk that he would abscond, they failed to give any assessment to the applicant's undisputed compliance with the investigator's summonses for more than a month prior to his arrest, as well as the absence of any attempts from his side to influence the course of the investigation in any manner (see, conversely, *Pavlik v. Slovakia*, no. 74827/01, § 95, 30 January 2007). Neither was any consideration given to less stringent measures, such as an undertaking not to abscond or bail, which could have ensured the applicant's availability for the investigations and the trial.

30. In the light of the foregoing, the Court considers that under the circumstances of the present case the domestic authorities failed to advance comprehensive reasoning in justification of the applicant's deprivation of liberty, which therefore cannot be regarded as being free from arbitrariness.

31. Accordingly, the Court finds that there has been a violation of Article 5 § 1 of the Convention.

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

32. The applicant complained that his continued detention had not been based on sufficient and relevant grounds. He relied on Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

33. Although the applicant additionally relied on Article 13 in respect of the allegedly flawed reasoning behind the refusals by the authorities to his requests for release pending trial, the Court considers this complaint to be covered by that raised under Article 5 § 3 of the Convention and will examine it only under that provision.

A. Admissibility

34. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Neither is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

35. The applicant maintained his complaint. He contended that the period to be taken into consideration was from 28 April 2004 to 17 May 2007.

36. The Government submitted that the overall length of the applicant's pre-trial detention had not been unreasonable given the seriousness of the

charges against him and the due diligence demonstrated by the investigation authorities in dealing with the case.

37. The Court notes that the period to be taken into consideration in the present case commenced on 28 April 2004 – the date of the applicant's arrest, and terminated on 29 December that same year – the date of his conviction by the first-instance court (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI). It follows that the applicant was held in pre-trial detention for eight months.

38. Although such duration might appear shorter than that in most length-of-detention cases, the Court emphasises that the reasonableness of a period of detention is never assessed *in abstracto*. In other words, Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)).

39. The presumption is in favour of release. As the Court has consistently held in its case-law, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (see *Vlasov v. Russia*, no. 78146/01, § 104, 12 June 2008, with further references).

40. It is incumbent on the domestic authorities to establish the existence of specific facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005, and *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, 26 July 2001).

41. The Court notes that in the present case the domestic courts justified the applicant's continued detention essentially by the gravity of the charges against him. In rejecting his requests for release and extending his detention, without referring to any concrete facts, they considered that that sole ground was sufficient for there to be a presumption that he could abscond or otherwise upset the course of the investigation (see paragraphs 12 and 13 above). Moreover, a three-month extension was mainly justified by the need of the other co-defendants to study the case file (see paragraph 15 above). As to the applicant's detention during the trial, until the pronouncement of the verdict, the only ground relied on by the trial court was that the preventive measure was considered to be justified, without any re-assessment of its justification with the passage of time and the progress in

the examination of the case (see paragraph 17 above). The Court does not consider those grounds for the applicant's continued detention to be "relevant and sufficient".

42. Furthermore, it does not lose sight of the fact that during the entire period under consideration the authorities never considered the possibility of ensuring the applicant's attendance by the use of alternative "preventive measures" – such as a written undertaking or bail – which were explicitly requested by the applicant (see paragraphs 11, 15, 17 and 29 above, and – for the case-law – see *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000).

43. These considerations are sufficient for the Court to find a violation of Article 5 § 3 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 5,000 euros (EUR) in respect of non-pecuniary damage.

46. The Government contested that claim.

47. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated by the mere finding of a violation of his Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him the claimed amount.

B. Costs and expenses

48. The applicant also claimed EUR 1,000 for legal fees. In support of his claim, he submitted a contract of legal services rendered in the proceedings before the Court of 1 October 2004, according to which he was to pay his representative, Mr Lesovoy, 10,000 Ukrainian hryvnias (UAH). As it was further stipulated by the contract and confirmed by a handwritten receipt, the applicant paid to Mr Lesovoy UAH 1,000 in advance and was bound to pay the remaining amount upon the completion of the proceedings in Strasbourg.

49. The Government considered that the applicant had failed to demonstrate that the claimed costs had been reasonable and had actually occurred.

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 are reasonable as to quantum. The Court notes that, although the applicant has not yet actually paid the legal fees in full, he was bound to pay them pursuant to a contractual obligation. As it transpires from the case file materials, Mr Lesovoy has been representing the applicant throughout the proceedings before the Court and is therefore entitled to seek payment of his fees under the contract, which, according to the present currency exchange rate, are equal to about EUR 1,000. Accordingly, the Court considers those fees to have been "actually incurred" (see *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, § 106, ECHR 2009-...). Furthermore, taking into account the legal work done in the present case, the Court does not consider that the claim is excessive and awards it in full.

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 application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) 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.

Done in English, and notified in writing on 14 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President