



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

FIFTH SECTION

CASE OF DOROSHENKO v. UKRAINE

(Application no. 1328/04)

JUDGMENT

STRASBOURG

26 May 2011

FINAL

26/08/2011

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

In the case of Doroshenko v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 12 April 2011,

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

PROCEDURE

1. The case originated in an application (no. 1328/04) 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 Oleg Yuryevich Doroshenko (“the applicant”), on 27 November 2003.

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

3. On 29 May 2007 and 5 November 2009 respectively, the Court decided to communicate to the Government the applicant’s complaints under Article 6 § 1 of the Convention about the length of the criminal proceedings against him and under Article 2 of Protocol No. 4 about the length of the application of the undertaking given by the applicant not to abscond. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

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

4. The applicant was born in 1974 and lives in the Lugansk Region.

A. Background information

5. The applicant is an entrepreneur. Between April 2001 and August 2002, following an inspection of his business activities, the local tax

authorities drew up several reports revealing tax evasion and decided to impose taxes and fines on him.

B. Criminal proceedings against the applicant

6. On 7 May 2001 the local tax police instituted criminal proceedings against the applicant on suspicion of tax evasion based on one of the above reports. Subsequently, the police also instituted criminal proceedings against the applicant on similar charges based on the remainder of the reports, all the proceedings having been joined.

7. In the course of the proceedings the applicant was represented by a lawyer. The applicant's mother also acted as his defence counsel.

8. On 25 June 2001 the applicant was required to give a written undertaking not to abscond implying that he could not leave his place of residence (town of Sverdlovsk) without the investigator's permission. The applicant was explained that in case of a breach of that undertaking a stricter preventive measure could be applied to him.

9. On 4 July 2001 the case was referred to the Sverdlovsk Court for trial.

10. Following a request by the applicant, on 27 September 2001 the court suspended the proceedings pending the outcome of commercial proceedings instituted by the tax authorities against him. Upon the completion of those proceedings, on 30 November 2001 the court resumed the criminal proceedings.

11. On 28 January 2002 the court remitted the case for additional investigation. It stated that the applicant should remain subject to the undertaking not to abscond.

12. On 25 October 2002 the case was referred to the court for trial.

13. Following a request by the applicant, on 16 December 2002 the court suspended the proceedings pending the outcome of proceedings instituted by him against the tax authorities (see paragraphs 27-29 below). On 14 May 2004 the court resumed the proceedings.

14. On 20 July 2004 the court remitted the case for additional investigation. It stated that the applicant should remain subject to the undertaking not to abscond.

15. On 3 November 2004 the case was referred to the court for trial.

16. Following a new request by the applicant, on 17 February 2005 the court suspended the proceedings pending the outcome of the proceedings brought by the applicant against the tax authorities.

17. On 18 and 25 February 2005 the applicant appealed against that decision. He asked, *inter alia*, that the proceedings be resumed in respect of the charges based on one of the tax reports and that the suspension be maintained in respect of the remaining charges. The appeals were returned unexamined as the above-mentioned decision was not subject to appeal.

18. On 6 July 2005 and 21 June 2006 the applicant requested that the court maintain the suspension of the proceedings pending the outcome of the proceedings against the tax authorities.

19. On 3 April 2007 the court resumed the proceedings.

20. By a judgment of 6 June 2007, it found the applicant guilty of large-scale tax evasion (Article 212 § 3 of the Criminal Code) and sentenced him to five years' imprisonment with confiscation of property. The applicant's prison sentence was suspended on probation. The court based its judgment on the statements of several witnesses, an expert examination and the findings of the commercial courts in the related civil case against the applicant. The court also held that the applicant should remain subject to the undertaking not to abscond until the judgment became final.

21. According to the applicant, in the course of the proceedings before the Sverdlovsk Court, the court did not provide his mother with sufficient time to study the case materials and rejected his request to call an expert.

22. On 23 October 2007 the Lugansk Regional Court of Appeal quashed the judgment in part as regards confiscation of property and upheld its remainder.

23. On 23 December 2008 the Supreme Court rejected the applicant's cassation appeal against his conviction and the above-mentioned decision of the Court of Appeal as unsubstantiated.

24. In the course of the proceedings, two hearings were adjourned upon the applicant's request and twenty-three hearings were adjourned for unspecified reasons.

25. The applicant stated that he remains subject to the undertaking not to abscond. The Government disagreed, stating that the preventive measure had been valid until 23 October 2007, when the Court of Appeal had upheld the judgment of 6 June 2007 and it had become final.

26. The applicant also stated, without providing any further details, that he had not been granted parole.

C. Commercial proceedings against the tax authorities

27. In October 2002 the applicant instituted court proceedings against the tax authorities seeking the annulment of one of the tax reports (see paragraph 5 above).

28. Following two reconsiderations of the case, on 10 May 2005 the Lugansk Regional Commercial Court rejected the applicant's claim as unsubstantiated. On 18 July 2005 and 18 May 2006 respectively, the Lugansk Commercial Court of Appeal and the Higher Administrative Court upheld the aforementioned judgment.

29. On 12 September and 31 October 2006 the Supreme Court rejected as unsubstantiated the applicant's requests for review of the ruling of 18 May 2006 in the light of newly-discovered circumstances.

D. Other proceedings

30. On several occasions between July 2004 and November 2007 local prosecutors rejected as unsubstantiated the applicant's requests for the institution of criminal proceedings against several officials from the tax authorities.

31. On 3 July 2006 the Lugansk Commercial Court allowed the claim lodged by the tax authorities in November 2004 against the applicant for the recovery of tax arrears and fines. On 30 October 2006 the Lugansk Commercial Court of Appeal upheld the aforementioned judgment. The applicant lodged a cassation appeal. He provided no information as to the outcome of this appeal.

II. RELEVANT DOMESTIC LAW

32. The provisions of domestic law concerning the application of preventive measures in criminal proceedings were cited or summarized in *Merit v. Ukraine* (dec.), no. 66561/01, 22 October 2002, and *Ivanov v. Ukraine*, no. 15007/02, § 57, 7 December 2006.

33. According to Article 401 § 1 of the Code, a judgment of a first-instance court shall become final after the examination of the case by a court of appeal, if it was appealed against and if it was not quashed.

34. According to Article 212 § 3 of the Criminal Code, large-scale tax evasion shall be punishable by imprisonment from five to ten years with confiscation of property and deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.

THE LAW

I. COMPLAINT ABOUT THE LENGTH OF THE CRIMINAL PROCEEDINGS

35. The applicant complained about the length of the criminal proceedings against him. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, 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. Admissibility

36. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

37. The applicant complained that the criminal proceedings against him had been excessively lengthy.

38. The Government submitted that there had been no violation of the Convention as the case had been complex and the applicant had contributed to the length of the proceedings by having requested their suspension on three occasions, while the domestic courts had had to grant his requests in order to ensure the objective and comprehensive examination of the case.

39. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case; and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

40. Turning to the circumstances of the case, the Court notes that the period to be taken into consideration began on 7 May 2001 and ended on 23 December 2008. Between 27 September and 30 November 2001, 16 December 2002 and 14 May 2004, and 17 February 2005 and 3 April 2007, the proceedings were formally suspended, the overall period of suspension amounting to three years and eight-and-a-half months. Although the proceedings formally lasted for about three years and eleven months, the Court, in assessing the reasonableness of their length, will also take into account the period of their suspension for the following reasons.

41. Although it is for domestic courts to interpret and apply their rules of procedure, the Court is of the view that such application of the rules should not compromise their duty to administer justice expeditiously (see *Smirnova v. Ukraine*, no. 36655/02, § 69, 8 November 2005). In this context, the Court reiterates that an accused in criminal proceedings should be entitled to have his case conducted with special diligence, having a particular regard to any restrictions on liberty imposed pending the conclusion of the proceedings (see *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006, and *Ivanov*, cited above, § 71). Article 6 of the Convention requires the courts to employ available procedural remedies in order to determine a person's guilt or innocence without undue delay. This requirement is aimed at removing as soon as practicable the uncertainty concerning the accused's legal position which remains throughout the entire duration of the proceedings, irrespective of whether they are pending or suspended. In the light of the foregoing, the Court finds that, despite the fact that it was the applicant who requested the suspension of the proceedings, the primary responsibility for the delay caused by the suspensions, which in turn were

caused by the pending commercial proceedings, rested with the domestic courts.

42. The Court further notes that the case was not particularly complex and that the applicant's requests for the adjournment of two hearings (see paragraph 24 above) did not significantly delay the proceedings. On the other hand, it notes that twenty-three adjournments of the hearings, for which the Government did not provide any explanation (see paragraph 24 above), must be attributable to the domestic courts.

43. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Pélissier and Sassi*, cited above).

44. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 4

45. The applicant further complained about the length of his undertaking not to abscond. He relied on Article 2 of Protocol No. 4 to the Convention, which reads, insofar as relevant, as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence ...

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

A. Admissibility

46. The Government submitted that the applicant could not be regarded as a victim within the meaning of Article 34 of the Convention as he had not demonstrated any interest in having the above-mentioned measure of restraint lifted or suspended.

47. The applicant did not comment on the above argument.

48. The Court considers that the Government's argument concerns the merits of the case. It does not, therefore, consider that it is necessary to examine the issue of the applicant's victim status as such.

49. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

50. The applicant stated that the impugned measure of restraint had not pursued a legitimate aim. He also stated that he had voluntarily attended court hearings and that he had never been brought to the investigators' office by force.

51. In admitting that the above measure had constituted an interference with the applicant's freedom of movement, the Government stated that it had been in accordance with the law, had pursued a legitimate aim and had been proportionate, given that the applicant had not sought that the measure be lifted and that he had never sought to leave his place of residence.

52. The Court considers that the applicant's undertaking not to abscond constituted an interference with his freedom of movement, which was in accordance with the law and pursued a legitimate aim (see, for example, *Ivanov*, cited above, §§ 85 and 87-89, and *Nikiforenko v. Ukraine*, no. 14613/03, § 55, 18 February 2010). Accordingly, it must determine whether the interference was "necessary in a democratic society", having a particular regard to the duration of the measure in question (see *Ivanov*, cited above, § 90, and *Nikiforenko*, cited above, § 56).

53. In this connection, the Court notes that the applicant gave an undertaking not to abscond on 25 June 2001. Though he alleged that the measure has remained in force, the Court notes that, according to the relevant domestic legislation (see paragraph 33 above), it was valid only until 23 October 2007 – that is to say, when the judgment of 6 June 2007 was upheld on appeal and became final. Furthermore, the applicant did not provide evidence that the measure has remained in force. The Court concludes, therefore, that the applicant remained subject to the undertaking not to abscond between 25 June 2001 and 23 October 2007, that is, for a period of six years and four months.

54. The Court observes that the above preventive measure was applied in respect of the applicant in the context of his prosecution for a serious offence, large-scale tax evasion, for which a term up to ten years' imprisonment is provided for by domestic law (compare and contrast, *Nikiforenko*, cited above, § 59, and *Ivanov*, cited above, § 96). In this respect, the Court notes that, being the subject of the criminal proceedings, the applicant was only required not to leave his place of residence, a limited

intrusive measure involving a restriction of one's liberty (see, *mutatis mutandis*, *Nagy v. Hungary* (dec.), no. 6437/02, 6 July 2004, and *Fedorov and Fedorova v. Russia*, no. 31008/02, § 41, 13 October 2005).

55. The Court further notes that, even though the applicant stated in general terms that he had not been able to leave his area of residence while he had been subject to the undertaking not to abscond, there is no evidence in the case file that he had actually sought to leave the area and, if so, that such permission had been refused (see *Fedorov and Fedorova*, cited above, § 46, and *Komarova v. Russia*, no. 19126/02, § 55, 2 November 2006). Nor did he seek that the measure be lifted (see, *a contrario*, *Hajibeyli v. Azerbaijan*, no. 16528/05, § 65, 10 July 2008).

56. In these circumstances, the Court finds that the measure applied to the applicant was not disproportionate and thus that there has been no violation of Article 2 of Protocol No. 4.

III. REMAINDER OF THE APPLICATION

57. The applicant complained under Article 6 §§ 1 and 3 (b) and (d) and Article 13 of the Convention of the outcome and unfairness of the criminal proceedings against him, stating that the courts had not provided his mother with sufficient time to study the case materials and had not called an expert that he proposed; and under Articles 6 and 13 of the Convention of the outcome, unfairness and length of the proceedings against the tax authorities, of the commercial proceedings instituted by the tax authorities against him, and about the authorities' refusal to institute criminal proceedings against several tax officers. Lastly, the applicant complained, without relying upon any provision of the Convention or providing any further details, that he had not been granted parole.

58. Having carefully examined the applicant's submissions in the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

59. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 (a) and 4 of the Convention.

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 certain amounts for pecuniary damage and 532,500¹ Ukrainian hryvnias (UAH) for non-pecuniary damage in respect of his complaint of the length of the criminal proceedings under Article 6 § 1 of the Convention.

62. The Government contested these claims.

63. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. On the other hand, it considers that the applicant must have sustained non-pecuniary damage and, ruling on an equitable basis, awards him EUR 1,200 under this head.

B. Costs and expenses

64. The applicant claimed certain amounts (correspondence and travel expenses, court and legal fees) incurred in the domestic proceedings. He also claimed correspondence expenses incurred in the proceedings before the Court, having provided receipts to the amount of UAH 562².

65. The Government did not comment on these claims.

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. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses incurred in the domestic proceedings and considers it reasonable to award the applicant the sum of EUR 74 for correspondence expenses incurred in the proceedings before it.

C. Default interest

67. The Court considers it appropriate that 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

1. *Declares* by five votes to two the complaints under Article 6 § 1 of the Convention about the length of the criminal proceedings and Article 2 of Protocol No. 4 about the length of the application of the undertaking

1. About 70,060 euros (EUR)

2. About EUR 74

given by the applicant not to abscond admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 2 of Protocol No. 4;
4. *Holds* by five votes to two
 - (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 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable and EUR 74 (seventy-four euros) for costs and expenses plus any tax that may be chargeable to the applicant, to be converted into the national currency of the respondent State 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Yudkivska joined by Judge Zupančič is annexed to this judgment.

D.S.
S.P.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA
JOINED BY JUDGE ZUPANČIČ

To my regret, I am unable to follow the conclusion that the length of proceedings in the present case was in breach of Article 6 requirements.

Although the criminal proceedings against the applicant were pending over a period of seven years and seven months, three years and eight months of that period were suspended at the applicant's requests, in view of the then pending related commercial proceedings. Thus, the criminal proceedings lasted formally three years and eleven months – a period which included the pre-trial investigation stage and three court instances.

The majority considered that “despite the fact that it was the applicant who requested the suspension of the proceedings, the primary responsibility for the delay caused by the pending commercial proceedings, rested with the domestic courts” (§ 41). I cannot share this finding for the following reasons.

The criminal proceedings against the applicant were instituted on charges of large-scale tax evasion on the basis of relevant reports of the tax authorities. The applicant challenged these reports in parallel commercial proceedings and on three occasions he requested the Sverdlovsk Court to suspend the criminal proceedings (see §§ 10, 12 and 16). Moreover, he later insisted on this suspension (see § 18).

These requests were more than reasonable as the commercial courts are certainly better placed to decide on complicated matters of taxation law. The suspension, therefore, was clearly in the applicant's own best interests. Had the commercial court found the tax reports erroneous, then the *corpus delicti* in the charges against the applicant would have been lacking. In these circumstances to have denied the applicant's requests for adjournment would have constituted undue haste which in itself would be incompatible with the requirements of a fair trial.

It is true that Article 6 requires that judicial proceedings should be expeditious. However, it also lays down the more general principle of the proper administration of justice (see *Boddaert v. Belgium*, 12 October 1992, § 39, Series A no. 235-D). Justice delayed may be justice denied, but one should not overlook the other side of the coin - justice hurried is justice buried: the due process of law must not be sacrificed in an effort to provide a speedy system of criminal justice. “A concern for speed cannot dispense ... judges in the system of criminal procedure ... from taking every measure likely to throw light on the truth or falsehood of the charges” (see *Neumeister v. Austria*, 27 June 1968, p. 43, § 21, Series A no. 8).

A fair trial pursues an objective search for truth and the highest degree of certainty necessary in criminal cases was required in order to establish criminal culpability against the applicant. This required the national judicial authorities to assure a thorough and elaborate examination of the applicant's

tax evasion charges. Thus, they should not be reproached for their decision to await a final resolution of the commercial court concerning the lawfulness of the tax reports in order to satisfy the fundamental requirement of fairness in the criminal proceedings.

On that subject, I also refer to the dissenting opinion of my colleague Judge David Thór Björgvinsson in the recent case of *Veljkov v. Serbia* (judgment of 19 April 2011): "... [S]ince the Convention protects fundamental human rights, a violation of Article 6 § 1 on the basis of the length of proceedings should only be found in cases which reveal obvious and serious deficiencies in the workings of the domestic courts in question that amount to a denial of justice and where it can thus truly be said that the applicant's fundamental procedural rights have been breached".

Allowing the applicant's request for suspension in the circumstances of the present case did not amount to a denial of justice; on the contrary, it struck a fair balance between efficiency and quality.

Furthermore, the applicant never indicated to the Sverdlovsk Court that he would have preferred the suspension to be lifted; he only insisted, at one stage, on the separation of the charges and the lifting of the suspension with respect to one report (§ 17), which was not feasible. Neither did he submit any proof that he had tried to accelerate the commercial proceedings which, on their own, were not lengthy having regard to the complexity of the tax matters – three and half years before three levels of jurisdiction.

Finally, at no stage of the proceedings was the applicant detained (see, *a contrario*, *Nakhmanovich v. Russia*, § 96, cited in the judgment). He was under an undertaking not to abscond and I do not see a sufficient logic in finding no violation of Article 2 of Protocol No. 4 on the length of imposed restriction on liberty of movement, with a view of its proportionality in the circumstances, whilst the length of proceedings was still found disproportionate.

In sum, I remain convinced that in the special circumstances of this case the length of the criminal proceedings against the applicant was not excessive and the fair balance between the various fundamental requirements of Article 6 was not upset.