



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

FIFTH SECTION

CASE OF MUSTAFAYEV v. UKRAINE

(Application no. 36433/05)

JUDGMENT

STRASBOURG

13 October 2011

FINAL

13/01/2012

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

In the case of Mustafayev v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 36433/05) 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 Ayder Khalilovich Mustafayev (“the applicant”), on 20 September 2005.

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

3. The applicant alleged, in particular, that the conditions of his detention had been degrading and that he had been unlawfully deprived of his liberty.

4. On 9 November 2009 the President of the Fifth Section decided to give notice of the application to the Government. 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

5. The applicant was born in 1982 and lives in Sary Krym.

A. Criminal proceedings against the applicant

6. In February 2005 the Prosecutor's Office of the Autonomous Republic of Crimea (ARC) instituted criminal proceedings against several police officers, including the applicant, on charges of abuse of authority. The applicant and his co-defendants were suspected, in particular, of ill-treating suspects and their relatives on various occasions (in particular, beating them up, shutting one of them in a car boot, hitting one of them with a car bumper, etc.) as well as of unlawful entry into premises and expropriation of belongings.

7. On 28 February 2005 the applicant was arrested in connection with these proceedings.

8. On 3 March 2005 the applicant was brought before the Central District Court of Simferopol (the "District Court") which, having regard to the submissions of the prosecutor and the applicant's lawyer, decided to extend the applicant's detention until 10 March 2005. The District Court further ordered that more information on the applicant be obtained to decide on his further detention.

9. On 10 March 2005 the District Court extended the applicant's detention for two months, stating that, regard being had to the nature and repetitive character of the criminal acts imputed to him, there was a high likelihood that he would engage in further criminal activity and would use his position to obstruct the investigation and pressure witnesses.

10. On 22 March 2005 the Court of Appeal of the ARC ("the Court of Appeal"), following an appeal by the applicant, upheld the decision of 10 March 2005, stating that the District Court had duly considered all the circumstances of the case.

11. On 26 April 2005 the District Court extended the applicant's detention until 28 June 2005, stating that there was a need for more investigation and that the applicant's personal situation had not changed.

12. On 17 May 2005 the Court of Appeal, having considered an appeal by the applicant against the decision of 26 April 2005, dismissed it, finding that the charges against the applicant were particularly serious ones and that there was a high risk that he would obstruct the investigation or abscond. That court did however rectify the District Court decision by ordering the applicant's detention until 26 June 2005.

13. On 24 June 2005 the prosecutors' office referred the case to the Chairman of the Court of Appeal to determine which trial court would consider it.

14. On 4 July 2005 the Chairman of the Court of Appeal referred the case to the Feodosiya Town Court (hereafter "the Town Court") for trial.

15. On 10 August 2005 the Town Court committed the applicant for trial. The court ordered that the applicant remain in detention, without specifying the period or providing any reasoning.

16. On 4 January 2006 the Town Court, having examined the case in the course of proceedings in which the applicant was represented by an advocate of his choice, found the applicant guilty of abuse of position as charged, and sentenced him to three years' imprisonment. The court also prohibited the applicant from occupying a law-enforcement post for three years.

17. On 25 May 2006 the Court of Appeal upheld the judgment of 4 January 2006.

18. On 30 November 2006 the Supreme Court dismissed a cassation appeal by the applicant as unsubstantiated.

19. The applicant did not raise, either in his appeal or his subsequent cassation appeal, the complaint that he had not been provided with sufficient time and facilities to prepare his defence.

B. The conditions of the applicant's detention

20. For some unspecified periods of time the applicant was detained in the Simferopol SIZO. From 25 August 2005 to 5 January 2006 and from 25 January to 5 February 2006 the applicant was held in the Feodosiya Temporary Detention Centre ("the Feodosiya ITT").

21. According to the applicant, during this period he shared a five-square-metre cell with four to eight other detainees. The toilet and the washstand in the cell were not separated from the living quarters. The cell had no windows, no table, and no chairs, and the ventilation was unsatisfactory. In terms of sleeping arrangements, the cell had a single wooden board. Once every ten to twelve days the detainees were taken out for about half an hour's exercise. At other times they remained confined to their cell. On several occasions the applicant complained to various authorities about the conditions of his detention, but his complaints were to no avail.

22. According to the Government, the Feodosiya ITT had seventeen cells and was capable of accommodating thirty-seven inmates. All the cells were located in the basement and were well lit by electric light, enabling the detainees to read. The cells were equipped with a ventilating system ensuring circulation of air. They were also furnished with wooden planks for sleeping, tables, toilets and wash-stands. The detainees were provided with pillows and mattresses. During his stay in detention, the applicant was provided with meals, time for outdoor exercise, medical assistance and access to bathing facilities.

II. RELEVANT DOMESTIC LAW AND OTHER MATERIALS

23. The text of Article 29 of the Constitution of Ukraine and the relevant provisions of the Code of Criminal Procedure of Ukraine can be found in

the judgment in the case of *Molodorych v. Ukraine*, no. 2161/02, §§ 57-59, 28 October 2010).

24. The relevant international material concerning the conditions of detention is summarised in the judgment in the case of *Melnik v. Ukraine* (no. 72286/01, § 47-49, 28 March 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

25. The applicant complained that the conditions of his detention in the Feodosiya ITT had been degrading. He referred to Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

26. The Government presented no comments on the admissibility of this complaint.

27. The Court notes 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

28. The applicant alleged that the conditions of his detention in the Feodosiya ITT had been degrading.

29. The Government disagreed. They maintained that the conditions of the applicant’s detention had been satisfactory and sufficient to meet his basic needs.

30. The Court observes that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). The Court has consistently stressed that the suffering and humiliation involved in any

treatment or punishment must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

31. Turning to the facts of the present case, the Court notes that the applicant was detained in the Feodosiya ITT for some five months. According to the applicant, most of the time he was confined in a cell allowing no more than 1.25 square metres per detainee. The Government did not present any arguments to rebut these submissions. Having regard to its case-law concerning overcrowding in detention facilities and the relevant standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (which are quoted, for example, in the judgment in the case of *Kalashnikov*, cited above, § 97, and *Melnik*, cited above, § 47), the Court considers that the applicant was held in severely overcrowded conditions, which in itself discloses a serious issue under Article 3 of the Convention.

32. The Court also notes that the Government failed to refute the applicant's assertions that the toilet in the applicant's cell was not separated from the living area, which means that he had no privacy when using it. Likewise, there is no evidence in support of the Government's assertion that the applicant had adequate sleeping arrangements, that his cell was equipped with the necessary furniture and that the ventilation and lighting systems worked properly. The Court further notes that if, as suggested by the applicant and not contested by the Government, the cells had no windows – then the problem of access to daylight and fresh air was particularly serious.

33. The Court notes that it has already found the conditions of detention in the Feodosiya ITT in 2005 degrading in its judgment in the case of *Znaykin v. Ukraine* (no. 37538/05, §§ 49-53, 7 October 2010). Regard being had to its jurisprudence and to the circumstances complained about in the present case, the Court finds that the physical conditions of the applicant's detention in the Feodosiya ITT, which lasted for some five months, amounted to degrading treatment in breach of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 (C) OF THE CONVENTION

34. The applicant next complained that his detention after 26 June 2005 to the date of his conviction by the first-instance court had been unlawful. He relied on Article 5 § 1 (c) of the Convention, which reads 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: ...

(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

35. The Government did not comment on the admissibility of this complaint.

36. The Court notes 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 contended that his detention in the period at issue had been unlawful.

38. The Government maintained that the applicant's detention had been in compliance with applicable domestic law. In particular, in the period between 27 June and 10 August 2005 the applicant had been held in detention because he was awaiting committal to trial. That period of detention was therefore based on the legal procedure provided for by the Code of Criminal Procedure of Ukraine. Between 10 August 2005 and 4 January 2006 the applicant's detention had been based on the court decision of 10 August 2005 by which the Town Court upheld the detention measure, among other things, in his respect.

39. The Court reiterates that, in proclaiming the right to liberty, Article 5 § 1 deals with the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see *Doronin v. Ukraine*, no. 16505/02, § 52, 19 February 2009, with further references).

40. Turning to the facts of the present case, the Court notes that between 27 June and 10 August 2005 the applicant's detention was not covered by any court decision and was justified merely by the fact that the file was being transferred from the investigator to the court and the applicant had been awaiting committal for trial. The Court has previously found that such practice, which is recurrent in Ukraine, is not compatible with the principles of legal certainty and protection from arbitrariness (see *Kharchenko v. Ukraine*, no. 40107/02, § 98, 10 February 2011). The Court does not see a reason to depart from its previous findings in the present case. Accordingly, the applicant's detention between 27 June and 10 August 2005 was not lawful.

41. As regards the period between 10 August 2005 and 4 January 2006, it was formally covered by the decision of the Town Court upholding the applicant's detention. However, the Court notes that the Town Court neither specified the time-limit for this measure nor provided any reasons to justify the applicant's continued detention.

42. The Court has already found a violation of Article 5 § 1 (c) of the Convention in circumstances where Ukrainian courts extended detention for an indefinite period of time and without any particular grounds (see *Kharchenko*, cited above, § 98). The Court does not see a reason to reach a different conclusion in the present case. Accordingly, the applicant's detention with respect to the period between 10 August 2005 and 4 January 2006 was not lawful for the purposes of Article 5 § 1 (c).

43. Regard being had to its findings in paragraphs 40 and 42 above, the Court concludes that there has been a violation of Article 5 § 1 (c) of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. The applicant also complained under Article 3 of the Convention that the conditions of his detention in the Simferopol SIZO had been degrading; under Article 5 § 1 (c) of the Convention that his arrest and detention between 28 February and 26 June 2005 had not been based on relevant and sufficient reasons; under Article 5 § 3 of the Convention that the length of his detention before conviction had been excessive; and under Article 6 § 3 (b) of the Convention that the conditions of his detention had impeded his ability to prepare his defence properly in the criminal proceedings.

45. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, 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.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant asked the Court to award fair compensation for the violations found. He did not specify his claim.

49. The Government submitted that the claim should be rejected as unsubstantiated.

50. The Court considers that the applicant must have suffered anxiety and distress as a result of the violations of the Convention that cannot be compensated for adequately by the Court’s findings of violations alone. Making its assessment on an equitable basis, the Court awards the applicant the sum of 6,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

51. The applicant did not submit any claims for costs and expenses within the time-limit fixed. Consequently, the Court does not make any award under this head.

C. Default interest

52. 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 complaints under Article 3 of the Convention (physical conditions of the applicant’s detention in the Feodosiya ITT) and Article 5 § 1 (c) of the Convention (lawfulness of the applicant’s

detention between 27 June 2005 and 4 January 2006) admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 1 (c) 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, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of Ukraine at the rate applicable on 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.

Done in English, and notified in writing on 13 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President