



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

FIFTH SECTION

CASE OF SHULGIN v. UKRAINE

(Application no. 29912/05)

JUDGMENT

STRASBOURG

8 December 2011

FINAL

08/03/2012

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

In the case of Shulgin v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Mark Villiger,

Ann Power-Forde,

Ganna Yudkivska,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 29912/05) 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 Ruslan Vyacheslavovich Shulgin (“the applicant”), on 5 August 2005.

2. The applicant was represented by Mr A.L. Dovbush, a lawyer practising in Vinnytsya. The Ukrainian Government (“the Government”) were represented by their Agent Mr Yuriy Zaytsev, succeeded by Ms Valeria Lutkovska.

3. The applicant alleged, in particular, that the State had failed to compensate him for his two-year detention resulting from a conviction recognised as unlawful after the sentence had been served in full.

4. On 29 June 2010 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 1978 and lives in Vinnytsya.

A. The applicant's conviction and related events

6. In November 1995 criminal investigations were launched in respect of the applicant on suspicion of fraud and extortion.

7. On 17 December 1996 a first-instance court (presumably the Leninskyy District Court of Vinnytsya – “the Leninskyy Court”) delivered a judgment on the case. In its reasoning it held that the applicant was to be acquitted of the extortion charge as not corroborated by any evidence. The court did not however mention anything about the acquittal in the operative part of the judgment.

8. On 29 January 1997 a court of cassation (the name is not specified) upheld, in substance, the applicant's acquittal as regards the charge of extortion. It noted that, even though the first-instance court had failed to indicate the acquittal in the operative part of the judgment, it had correctly assessed the evidence regarding that part of the accusation and had reached the well grounded conclusion about the lack of any proof of the applicant's guilt. The court of cassation made the aforementioned finding in the reasoning of its ruling. By its operative part, it however quashed the above judgment in its entirety for some procedural shortcomings and remitted the case for additional investigation.

9. The additional investigation resumed both the fraud and the extortion charges against the applicant and added some other episodes, such as theft coupled with burglary and causing damage to others' property.

10. From 17 (or 18) December 1996 to 1 June 1999 the applicant was detained in Vinnytsya SIZO-1.

11. By a judgment of the Leninskyy Court of 8 April 1999, upheld by a ruling of the Vinnytsya Regional Court of 12 May 1999, the applicant was found guilty of: theft coupled with burglary (with a sentence of five years' imprisonment with confiscation of property); fraud (ditto); extortion that led to particularly grave consequences (seven years' imprisonment and confiscation of property); and causing damage to others' property (two years' imprisonment). As a final penalty defined by absorption of less severe punishment by more severe, the court sentenced the applicant to seven years' imprisonment with confiscation of property. He was considered to have started serving his sentence from 18 December 1996. The applicant pleaded guilty to all the charges, except for extortion of which he considered himself to have already been acquitted.

12. On 28 December 1999 the applicant introduced an application with the Court registered under no. 57065/00, in which he complained, in particular, of the unfairness of the criminal proceedings completed with the aforementioned ruling of 12 May 1999.

13. On 13 June 2000 the Court, sitting as a Committee of three judges, declared application no. 57065/00 inadmissible for the applicant's failure to comply with the six-month time-limit.

14. On 18 December 2003 the applicant was released, having served his sentence in full.

B. Partial quashing of the applicant's conviction

15. On 12 November 2004 the Supreme Court allowed the applicant's request for review of the decisions of 8 April and 12 May 1999 under exceptional circumstances. It quashed them in the part concerning the applicant's conviction for extortion and discontinued the proceedings in that part for lack of proof of his guilt. As a result, the total penalty was reduced from seven to five years, without confiscation of property.

16. The Supreme Court noted, in particular, that on 17 December 1996 the applicant had been acquitted of extortion by the first-instance court which had however failed to indicate that in the operative part of the judgment. It next observed that while the cassation court had upheld that acquittal in the ruling of 29 January 1997, it had wrongly quashed the judgment in its entirety and had remitted the case for additional investigation without having specified the omission of the first-instance court nor indicated ways of its remedying.

17. The Supreme Court further criticised the subsequent investigation and the applicant's retrial for their failure to give due regard to the substance of the aforementioned judicial decisions.

18. In sum, it recognised the decisions of 8 April and 12 May 1999, by which the applicant had been convicted, as unlawful and unfounded in the part pertaining to the extortion charge.

C. Civil compensation proceedings instituted by the applicant

19. In February 2005 the applicant lodged a civil claim with the Pecherskyy District Court of Kyiv against the State Treasury, seeking compensation for pecuniary and non-pecuniary damage caused to him by the allegedly unlawful actions of the prosecution and judicial authorities that had resulted in his deprivation of liberty for two years and one day (the applicant alleged that he had been arrested one day earlier than officially reported). He relied on the aforementioned ruling of the Supreme Court of 12 November 2004, which had recognised the miscarriage of justice.

20. On 15 March 2005, following a hearing with the participation of the applicant's father as his representative, the court rejected the claim as unsubstantiated. Relying on Section 1176 of the Civil Code and Sections 1-3 of the Compensation Act (see paragraphs 32-33 below), it found that the applicant's situation did not satisfy the eligibility criteria for compensation to be awarded, as his conviction had been quashed not fully, but only in the part regarding the charge of extortion, while he had been lawfully convicted of some other offences.

21. The applicant appealed.

22. On 19 April 2005 the Kyiv City Court of Appeal notified the parties that a hearing had been scheduled for 10 May 2005. The applicant's representative did not attend, expecting it to be postponed because of a public holiday declared on that date.

23. On 10 May 2005 the appellate court upheld the findings and the reasoning of the first-instance court's judgment.

24. The applicant appealed in cassation. He submitted that none of the legal acts, on which the lower courts had relied for rejecting his claim, required quashing of a verdict in its entirety in order to be eligible for compensation in respect of unlawful conviction and the ensuing imprisonment. The applicant assumed that the courts might have been guided by the 1996 Regulation on Application of the Compensation Act, which provided for "a complete rehabilitation" as a prerequisite for compensation in respect of unlawful conviction. He contended that it was an obsolete by-law narrowing the safeguards of the primary legislation and running contrary to the Convention, while having been adopted prior to its ratification by Ukraine on 11 September 1997.

25. On 16 August 2007 the Donetsk Regional Court of Appeal, sitting as a cassation instance, rejected the applicant's cassation appeal with succinct reasoning that the lower courts had acted in compliance with law and that there were no grounds for reviewing their decisions.

D. Other facts

26. On 13 November 2003 the Shepetivka Town Court ordered that applicant be supervised by the police for one and a half years following his release, the date of which was approaching. It referred to submissions of the prison administration criticising the applicant's behaviour during his sentence. The court considered this an indication that the applicant was reluctant to improve and remained a danger to society.

27. It was noted in the above ruling that it could be challenged on appeal before the Khmelnytsky Regional Court of Appeal.

28. After his release on 18 December 2003, the applicant was placed under police supervision as ordered.

29. At some point he unsuccessfully asked the police to lift that measure.

30. According to the applicant, the police continued to visit his house after the expiry of the supervision order, of which he complained to the local police station on several occasions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine (1996)

31. Articles 56 and 62 of the Constitution, which are relevant to the case, read as follows:

Article 56

“Everyone shall be entitled to compensation, payable by the State or local self-government bodies, for pecuniary and non-pecuniary damage inflicted by unlawful decisions, actions or omissions of State authorities and local self-government bodies, as well as their officials and officers, committed in the course of their exercise of duty.”

Article 62

“... If a verdict is quashed as wrongful, the State shall pay compensation for the pecuniary and non-pecuniary damage inflicted by the groundless conviction.”

B. Civil Code (2003), as worded at the material time

32. Section 1176 read as follows in its relevant part:

Compensation for damage caused by unlawful decisions, actions or omissions of bodies of the inquiry, pre-trial investigation, prosecution or judiciary

“1. The State shall fully compensate an individual for the damage caused to him or her by unlawful conviction, unlawful imposition of criminal liability ... regardless of the guilt of officials of the bodies of inquiry, pre-trial investigation, prosecution or courts.

2. The right to compensation for damage caused to an individual by unlawful actions of a body of the inquiry, pre-trial investigation, prosecution or judiciary shall arise in case of the person’s acquittal by the court, quashing of an unlawful verdict, or discontinuation of a criminal case by a pre-trial investigation authority”

C. Act “On the Procedure for the Compensation of Damage Caused by Unlawful Actions of Bodies of the Inquiry, Pre-Trial Investigation, Prosecution and Courts” of 1 December 1994, as worded following the amendments of 11 July 2003 (“the Compensation Act”)

33. The relevant provisions read as follows:

Section 1

“Under the provisions of this Law a person is entitled to compensation for damage caused by:

1) unlawful conviction, unlawful advancement of criminal charges, unlawful placement and holding in detention ...

In the cases referred to in subsection 1 of this section, the damage caused shall be compensated fully regardless of the guilt of officials of the bodies of inquiry, pre-trial investigation, prosecution and courts.”

Section 2

“The right to compensation for damage in the amount of and in accordance with the procedure established by this Law shall arise in cases of:

acquittal by a court;

the termination of a criminal case on grounds of the absence of proof of the committal of a crime, the absence of *corpus delicti* or a lack of evidence of the involvement of the accused in the committal of the crime;

the refusal to initiate criminal proceedings or the termination of criminal proceedings on the grounds stipulated in paragraph 2 of subsection 1 of this section ...”

Section 3

“In the cases referred to in section 1 of this Act the applicant shall be compensated for:

1) earnings and other income lost as a result of the unlawful actions; ... and

5) moral damage.”

D. Regulation “On Application of the [Compensation Act]” approved by the Ministry of Justice, the General Prosecutor’s Office and the Ministry of the Finance on 4 March 1996 (with the only amendment of 3 April 1998)

34. Paragraph 3 reads as follows:

“A person who was unlawfully convicted by a court shall have the right to compensation of damages only in case of his or her complete rehabilitation”.

There is no definition of the “rehabilitation” term in the Ukrainian legislation.

THE LAW

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

35. The applicant complained that he had not been compensated for his unlawful two years' detention in breach of Article 3 of Protocol No. 7.

36. It is a common rule in the Court's practice that the Court is master of the characterisation to be given in law to the facts of the case, and is not bound by the characterisation given by the applicant or the Government (see *Sutyagin v. Russia*, no. 30024/02, § 206, 3 May 2011). A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, ECHR 2010-...). Having regard to the essence of the applicant's complaint in the present case, the Court finds it appropriate to examine it under Article 5 § 5 of the Convention, which reads, together with its other relevant parts, 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; ...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

37. 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

1. The parties' submissions

(a) The applicant

38. The applicant submitted that he had been imprisoned for two years through the fault of the State and was therefore entitled to compensation in that regard.

39. He noted that this period of his detention had ensued from his conviction for extortion, which was found to be unlawful by the Supreme Court after he had already served his sentence in full.

40. The applicant considered that he did not have an enforceable right to compensation for his unlawful detention given the formalistic approach of the domestic courts, according to which he could claim such compensation only if the verdict had been quashed as unlawful in its entirety, but not in part, as in his case.

(b) The Government

41. The Government maintained that Article 5 § 5 of the Convention was not applicable to the applicant's situation, for his detention had resulted from the conviction by a competent court in compliance with the procedure prescribed by law.

42. In their view, the domestic courts had made a mistake in convicting the applicant of extortion, this fact alone did not render the ensuing detention unlawful *ab initio*.

43. The Government further noted that the applicant had never alleged any bad faith on the part of the courts convicting him. Accordingly, there were no grounds to consider his detention arbitrary.

44. In sum, the Government contended that the applicant's detention had been lawful within the meaning of Article 5 § 1 (a) and did not give rise to any issues under Article 5 § 5 of the Convention.

2. The Court's assessment

(a) Applicability of Article 5 § 5

45. The Court notes that the right to compensation under Article 5 § 5 of the Convention arises only if a breach of one of its other four paragraphs – Article 5 § 1 (a) in the present case – has been established, directly or in substance, by the Court or by the domestic courts (see, for example, *Svetoslav Dimitrov v. Bulgaria*, no. 55861/00, § 76, 7 February 2008, and *Çağdaş Şahin v. Turkey*, no. 28137/02, § 34, 11 April 2006).

46. Given the time frame of the events in question, as well as the scope of the present case, the Court will not undertake to give its own assessment of the compliance of the applicant's detention with Article 5 § 1 (a) of the Convention.

47. It remains to be seen whether a violation of this provision has been found by the domestic courts for Article 5 § 5 to come into play.

48. The Court notes that in the present case it was established by the Supreme Court in its ruling of 12 November 2004 that the applicant had unlawfully been convicted for extortion which had resulted for him in additional two years' imprisonment, already served by that time.

49. The Court will examine whether this finding can be regarded as recognition of the unlawfulness of the applicant's detention following his conviction. In doing so, it will look at the substance of the Supreme Court's conclusions which might reveal unlawfulness of detention even without an explicit reference to any of the provisions of Article 5 itself (see, *mutatis mutandis*, *Danev v. Bulgaria*, no. 9411/05, § 30, 2 September 2010).

50. The Court observes that the Supreme Court identified a number of omissions undermining, in its view, the lawfulness of the applicant's conviction for extortion. It established that while having acquitted the applicant, as regards the extortion charge, in the reasoning of the judgment of 17 December 1996, the first-instance court had erroneously failed to reflect that finding in the operative part of its judgment. The cassation court pointed out the aforementioned mistake, but committed a similar one. Namely, it upheld the applicant's acquittal in the reasoning part of its ruling of 29 January 1997, but failed to make that clear in the operative part, having quashed the verdict in its entirety and having remitted the case for additional investigation (see paragraphs 7-8 and 16 above).

51. The Court does not lose sight of the fact that, after those flawed decisions, the applicant had a re-trial, during which the mentioned mistakes could still be remedied. Neither did the Supreme Court overlook that. Even more, it was the lawfulness of the applicant's conviction resulting from his re-trial that it was assessing. Having noted that the applicant's actual acquittal by the courts of two levels of jurisdiction remained ignored by the subsequent additional investigation and the re-trial, the Supreme Court held that his conviction in respect of the extortion charge by the judicial decisions of 8 April and 12 May 1999 could not be regarded as lawful or founded, quashed them in that part and terminated the criminal proceedings for want of proof of the applicant's guilt (see paragraphs 15-18 above).

52. As argued by the Government in their observations and admitted by the Court in its case-law, it may well happen that a Contracting State's agents conduct themselves unlawfully but in good faith. In such cases, a subsequent finding by the courts that there has been a failure to comply with domestic law may not necessarily retrospectively affect the validity, under domestic law, of any implementing measures taken in the meantime (see *Bozano v. France*, 18 December 1986, § 55, Series A no. 111).

53. Thus, flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 of the Convention (see *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX). Similarly, a conviction which has been imposed by judgment following a breach of substantive provisions of domestic law in the criminal proceedings does not automatically render the detention by virtue of that judgment unlawful (see *Gruber v. Germany* (dec.), no. 45198/04, 20 November 2007).

54. At the same time, it is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 of the Convention (*Mooren v. Germany* [GC], no. 11364/03, § 77, 9 July 2009).

55. In this connection, mere mistakes are to be distinguished from a flagrant denial of justice undermining not only the fairness of a person's trial, but also the lawfulness of the ensuing detention. According to the Court's case-law, detention following a conviction imposed in manifestly unfair proceedings amounting to a flagrant denial of justice is unlawful and automatically implies a breach of Article 5 § 1 of the Convention (see *Gruber*, cited above; *Ilaşcu and Others v. Moldova* [GC], no. 48787/99, § 461, ECHR 2004-VII; and *Stoichkov v. Bulgaria*, no. 9808/02, §§ 51 and 58-59, 24 March 2005).

56. Turning back to the present case, the Court considers that all the mistakes and omissions established by the Supreme Court as having led to the unlawful conviction of the applicant for extortion, which cost him two years of liberty, can only be regarded as a flagrant denial of justice automatically undermining the lawfulness of the ensuing detention.

57. The Court emphasises in this connection that the ruling of the Supreme Court in question was not a part of the ordinary criminal proceedings, but was delivered under the extraordinary review procedure. By that time not only had the applicant's trial been a *fait accompli*, but he had already served his sentence in full. Accordingly, this situation is not comparable to a verdict's reversal by an appellate court, where any unlawfulness found to have existed at first instance would be beyond the Court's scrutiny (see, in substance, *Benham v. the United Kingdom*, 10 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III).

58. In the light of all the foregoing, bearing in mind that the Convention is intended to guarantee rights that are "practical and effective", looking beyond appearances and investigating the realities of the situation complained of, the Court considers that there was a sufficient finding by the domestic courts of unlawfulness of the applicant's two years' detention ensuing from his conviction for extortion.

59. The Court therefore concludes that Article 5 § 5 of the Convention is applicable in the present case.

(b) Compliance with Article 5 § 5

60. The Court reiterates that the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Lobanov v. Russia*, no. 16159/03, § 54, 16 October 2008, with further references).

61. In the present case the Court observes that the Ukrainian legislation provided for the possibility to claim compensation for anyone who became a victim of unlawful criminal prosecution, detention and/or conviction (see paragraphs 31-33 above). The applicable legal provisions specified that the

right to such compensation arose when the person had been acquitted or when his criminal prosecution had been terminated for lack of proof of his guilt. In these circumstances, the compensation the applicant claimed for his unlawful conviction for extortion was legally and factually indissociable from the one he could claim under Article 5 § 5 of the Convention in respect of his ensuing detention (see and compare with *N.C. v. Italy* [GC], no. 24952/94, § 57, ECHR 2002-X).

62. The Court further notes that while the relevant Ukrainian laws provided that the quashing of a verdict as being unlawful was among the grounds for claiming compensation for damages, they did not specify whether the quashing of an unlawful part of the verdict would bear the same effect. The only indication to the contrary flowed from the rather ambiguous “complete rehabilitation” clause in the bylaw of 1996, which was in any event not relied on by the courts in the present case (see paragraph 34 above).

63. While in itself this is not an issue to be analysed by the Court *in abstracto*, the manner in which this legislation was applied by domestic courts and affected the applicant calls for consideration.

64. The Court notes that the domestic courts rejected the applicant’s compensation claim on the ground that his conviction had been quashed as unlawful only in part, but not in its entirety. Namely, they held that, while his conviction for extortion had been found to be unlawful, he had been lawfully convicted of some other criminal offences (see paragraphs 20, 23 and 25 above). No consideration was given to the fact that it was the conviction for extortion which had resulted in the applicant’s detention for two years in addition to the penalty for the lawful parts of his sentence.

65. The Court considers such approach to be excessively formalistic. It therefore concludes that, having rejected the applicant’s compensation claim in respect of the two years of his detention found by the Supreme Court to be unlawful, the Ukrainian courts did not interpret and apply the domestic law in the spirit of Article 5 of the Convention (see, *mutatis mutandis*, *Houtman and Meeus v. Belgium*, no. 22945/07, §§ 45-47, 17 March 2009).

66. There has accordingly been a violation of Article 5 § 5 of the Convention.

II. REMAINDER OF THE APPLICATION

67. The applicant complained under Article 5 § 3 of the Convention that he had been detained in Vinnytsya SIZO-1 for an unreasonably long period and in poor conditions. Relying on Article 5 §§ 1 and 5, he complained that following his release from prison, after he had served his sentence, his liberty continued to be restrained by his placement under police supervision. He further complained of an interference by the police with his private life both during and after the expiry of the aforementioned period of

supervision. The applicant also complained under Article 6 §§ 1 and 3 (d) that the criminal proceedings against him had been unfair and unreasonably long. Lastly, he complained about the civil compensation proceedings, referring to the fact that the hearing of the Kyiv City Court of Appeal had taken place in the absence of his representative.

68. 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 or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 16,680 and 796,584 Ukrainian hryvnias in respect of pecuniary and non-pecuniary damage respectively.

71. The Government contested these claims as unsubstantiated and, in any event, excessive.

72. 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 16,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

73. The applicant did not submit any claims for legal costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

74. The Court considers it appropriate that the default interest rate 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 concerning the failure of the State to compensate the applicant for his unlawful detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 5 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 16,000 (sixteen 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 8 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President