



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

FIFTH SECTION

CASE OF SLYUSAR v. UKRAINE

(Application no. 34361/06)

JUDGMENT

STRASBOURG

8 March 2012

FINAL

08/06/2012

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

In the case of Slyusar 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 Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 34361/06) 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 Dmytro Sergiyovych Slyusar (“the applicant”), on 1 August 2006.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Ms Valeria Lutkovska.

3. The applicant alleged that the principle of equality of arms had not been respected in the proceedings brought by him concerning the lawfulness of his detention.

4. On 2 November 2010 the application was communicated to the Government. It was also decided to rule on its admissibility and merits at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Hurstville, Australia.

6. On 24 February 2006 the applicant, who lived in Ukraine at the time, was detained by the Kyiv police on suspicion of murder. On 27 February 2006 he was released.

7. On 1 March 2006 the applicant complained to the Pechersky District Court of Kyiv (“the Pechersky Court”) that his detention had been unlawful.

8. On 20 March 2006 the Pechersky Court rejected his complaint. Its ruling was delivered following a hearing with the participation of the applicant and his lawyer on one side and the prosecutor on the other. The prosecutor advocated rejecting the complaint on the ground that the applicant’s detention had been in compliance with the criminal procedural legislation.

9. The applicant appealed.

10. On 17 April 2006 the Kyiv City Court of Appeal informed him that the hearing in his case would take place on 8 June 2006.

11. However, when the applicant appeared in court on that date, he found out that the hearing had already been conducted, on 18 May 2006, and that his appeal had been rejected. As noted in the appellate court’s ruling of 18 May 2006, the prosecutor had been present and had pleaded the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

12. The applicant complained that his appeal in the proceedings concerning the lawfulness of his detention had been considered in his absence, whereas the prosecutor had been in attendance. He relied on Articles 5 § 4 and 6 § 1 of the Convention which read as follows in their relevant part:

“Article 5 § 4

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ...

Article 6 § 1

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...”

A. Admissibility

13. The Court notes at the outset that the proceedings in question were conducted after the applicant's release, which means that Article 5 § 4 was no longer applicable (see *Reinprecht v. Austria*, no. 67175/01, § 51, ECHR 2005-XII). This circumstance in itself is however not an obstacle to the examination of the application under Article 6 § 1 of the Convention also relied on by the applicant (see *Lazoroski v. "the former Yugoslav Republic of Macedonia"*, no. 4922/04, § 66, 8 October 2009).

14. The Government considered that Article 6 § 1 of the Convention was not applicable either, be it under its civil or criminal head. They argued that the application was therefore incompatible *ratione materiae* with the Convention.

15. As regards the criminal head of Article 6, the Government referred to the judgment in the case of *Reinprecht* (cited above), in which the Court held that "applying Article 6 to the proceedings reviewing the lawfulness of pre-trial detention would be against its wording as their subject matter is not the "determination of a criminal charge" (§ 48). The Government contended that the proceedings in the present case similarly did not concern the determination of a criminal charge against the applicant.

16. As to the civil head of Article 6, the Government argued that the present case had to be distinguished from *Aerts v. Belgium* (judgment of 30 July 1998, *Reports* 1998-V) in that the present proceedings exclusively concerned the lawfulness of the applicant's detention and did not involve any claim for damages.

17. The applicant did not comment on the Government's objection as to the admissibility of the application within the set time-limit.

18. The Court agrees with the Government's objection as to the applicability of Article 6 § 1 of the Convention under the criminal head. It remains to be seen however whether the proceedings fall under its civil head.

19. The Court notes that, in its judgment on the case of *Aerts* cited by the Government, it found that Article 6 § 1 applied under its civil head to proceedings concerning the lawfulness of deprivation of liberty, as "the right to liberty is a civil right" (§ 59). In the cited case the applicant had been detained as a person of unsound mind. Following his release, he had requested legal aid in order to challenge the courts' assessment of the lawfulness of his detention and to seek compensation.

20. The Court does not accept the Government's proposal to distinguish the present case and to interpret *Aerts*, despite the general wording, as only meaning that the civil head of Article 6 applied to proceedings concerning compensation for allegedly unlawful detention. Thus, in two cases subsequent to *Aerts*, which also concerned proceedings relating to the lawfulness of detention, the Court found Article 6 to be applicable under its

civil head with reference to *Aerts* (see *Vermeersch v. France* (dec.), no. 39277/98, 30 January 2001, and *Laidin v. France* (no. 2), no. 39282/98, §§ 73-76, 7 January 2003). In both those cases the Court explicitly dismissed the Government's objection of incompatibility *ratione materiae*, despite the fact that some of the proceedings in issue concerned only the lawfulness of the detention, without involving any related pecuniary claims. The Court reiterated this position in *Reinprecht* (cited above, § 50), with reference to the aforementioned two cases.

21. Accordingly, the fact that the applicant did not bring any claim for damages in the present case does not rule out the applicability of Article 6 § 1 of the Convention to the proceedings concerning the lawfulness of his detention.

22. The Court notes that, having brought the proceedings in question, the applicant sought a judicial declaration that his detention as a murder suspect had been unlawful. Therefore, his civil right to liberty was at stake (see *Aerts*, cited above, § 59, and *Shulepova v. Russia*, no. 34449/03, § 60, 11 December 2008).

23. This consideration is sufficient for the Court to conclude that Article 6 § 1 of the Convention is applicable under its civil head to the proceedings complained of.

24. The Court therefore rejects the Government's objection on the basis of incompatibility of the application *ratione materiae* with the Convention.

25. It further notes that the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

26. The Government argued that the appellate court did not require the applicant's presence for it to adjudicate, in a comprehensive and fair manner, his appeal on the basis of the case file alone. They further noted that the prosecutor had not brought forward any new arguments at that stage.

27. The applicant did not comment on the Government's observations within the set time-limit.

28. The Court notes that the requirement of equality of arms, in the sense of a "fair balance" between the parties, applies to both criminal and civil cases (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, §§ 32-33, Series A, no. 274).

29. As one of the elements of the broader concept of a fair trial, this principle requires each party to be given a reasonable opportunity to present his case, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. This implies, in principle, an opportunity for the parties to a trial to have knowledge of and comment on

all evidence adduced or observations submitted, even by an independent member of the national legal service, with a view to influencing the court's decision (see *Kress v. France* [GC], no. 39594/98, §§ 72 and 74, ECHR 2001-VI).

30. The requirement of equality of arms would however be devoid of substance if a party to the case were not notified of the hearing in such a way as to have an opportunity to attend it, should he or she decide to exercise a right to appear established in domestic law (see *Zagorodnikov v. Russia*, no. 66941/01, § 30, 7 June 2007, and *Fyodorov and Fyodorova v. Ukraine*, no. 39229/03, § 99, 7 July 2011).

31. Turning to the present case, the Court is satisfied that the prosecutor acted as the applicant's adversary in the proceedings in question, even though those were of a civil nature within the meaning of Article 6 § 1 of the Convention and did not concern the determination of a criminal charge against the applicant (see paragraphs 8 and 23 above and, for comparison, *Zhuk v. Ukraine*, no. 45783/05, § 30, 21 October 2010).

32. The Court notes that the appellate court examined the applicant's appeal after hearing the prosecutor's arguments, while the applicant, who had been given a wrong date of the hearing, was not able to contest those arguments or to make his own submissions.

33. The Court therefore considers that the applicant's absence from the hearing before the Kyiv City Court of Appeal was in breach of the principle of equality of arms guaranteed by Article 6 § 1 of the Convention.

34. There has therefore been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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."

36. The applicant did not submit a claim for just satisfaction within the established time-limit. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 8 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President