



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

SECOND SECTION

CASE OF YURTAYEV v. UKRAINE

(Application no. 11336/02)

JUDGMENT

STRASBOURG

31 January 2006

FINAL

31/04/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yurtayev v. Ukraine,

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

Mr J.-P. COSTA, *President*,

Mr I. CABRAL BARRETO,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 11336/02) 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 Yuriy Viktorovich Yurtayev (“the applicant”), on 17 November 2001.

2. The applicant was represented by Mr Bulayev, a lawyer practising in Donetsk. The Ukrainian Government (“the Government”) were represented by their Agent, Ms Valeria Lutkovska.

3. On 25 October 2004 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1961 and is currently serving a prison sentence at Penitentiary No. 8 in Makeyevka, the Donetsk region.

5. On 27 February 1998 the applicant, along with eight others, was arrested on suspicion of hooliganism and extortion.

6. On 2 March 1998 the applicant was charged with the above crimes and detained on remand.

7. By June 1998 the pre-trial investigation was completed and the applicant was given access to the case file. On 26 June 1998 he finished studying it.

8. On 17 July 1998 the investigator drafted the bill of indictment. On 3 August 1998, it was approved by the district prosecutor and referred to the Tsentralno-Gorodskoy District Court of Gorlovka (hereafter “the District Court”) for examination on the merits. The prosecution’s case was that the applicant and eight other suspects were members of a gang, involved in several counts of extortion and hooliganism (Articles 144 and 206 of the 1960 Criminal Code, respectively).

9. Between 2 September 1998 and 6 October 1998 the District Court held eight hearings. On the latter date it ordered an additional forensic assessment of the severity of the bodily harm suffered by K. (one of four victims).

10. On 3 December 1998 the trial judge resumed the hearing and, until 16 December 1998, conducted three more sittings.

11. On 30 December 1998 the applicant was acquitted of extortion but sentenced to two years’ imprisonment for inflicting bodily harm (Article 102 of the Code). The prosecution appealed, challenging the court’s reclassification of the imputed offences which led to the excessive mildness of the sentence. On 23 February 1999 the Donetsk Regional Court upheld the conviction.

12. On 24 February 1999 the Presidium of the Donetsk Regional Court, following the *protest* (an extraordinary appeal) of the Deputy President of the Donetsk Regional Court (hereafter “the Regional Court”), quashed these decisions and remitted the case for a fresh investigation.

13. By April 1999 the additional investigation was finalised and the applicant was given access to the case file. On 26 May 1999 the investigator filed a bill of indictment against the applicant and his co-accused, charging them with extortion.

14. On 22 June 1999 the new trial commenced before the District Court, sitting with another judge, and on 22 July 1999, following ten hearings, the District Court convicted the applicant and his co-defendants of inflicting bodily harm and unlawfully depriving another of liberty (Article 123 of the Code). The court further amnestied and released six of the convicts; however, the applicant and two others were left in custody. The prosecution challenged this decision relying on the same grounds as in its previous appeal (paragraph 11 above).

15. On 19 October 1999 the Regional Court returned the case file to the District Court on account of its failure to provide the defendants with an opportunity to study the court records, as required by the Code of Criminal Procedure.

16. On 22 November 1999 the District Court, having complied with that requirement, resubmitted the case to the Regional Court. On 30 November

1999 the latter quashed the decision of 22 June 1999 and remitted the case to the Kuybyshevsky District Court of Gorlovka (hereafter “the Kuybyshevsky Court”).

17. On 4 January 2000 the Kuybyshevsky Court recommenced the trial and scheduled the first hearing for 11 January 2000. However, this sitting did not take place due to the absence of the defendants who had been released in June 1999. The judge adjourned the trial pending the establishment of their whereabouts.

18. On 20 March 2000 the proceedings concerning the defaulting defendants were disjoined from the applicant’s case. The court fixed the next hearing for 3 April 2000, which subsequently was adjourned until 17 April 2000 due to the victim’s failure to appear.

19. Between 17 April 2000 and 15 June 2000, the Kuybyshevsky Court held twelve hearings. On 22 June 2000, at an *in camera* hearing, the court sentenced the applicant to nine years’ imprisonment following his conviction for extortion. The period of detention on remand was included in the sentence. In his appeal the applicant’s lawyer challenged the court’s assessment of facts and law; however, he did not raise the issue of the non-public examination of the case.

20. On 20 April 2001 the Regional Court ruled that the first instance court had failed to comply with certain procedural requirements regarding the defendants’ right to be duly notified about the conduct of the appeal proceedings. The court therefore decided to return the case file to the Kuybyshevsky Court for this purpose.

21. On an unspecified date, the case was referred anew to the Regional Court.

22. On 1 June 2001 the Regional Court upheld the decision of 22 June 2000 in substance but mitigated the prison regime applicable to the applicant.

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

1. The complaint about the alleged unfairness of the proceedings

23. The applicant complained under Article 6 § 1 of the Convention that his conviction was unfair. In particular, he challenged the independence and impartiality of the trial judge, as he had to take into the consideration the position of the Regional Court expressed in its decision of 30 November

1999. He also complained that the non-public hearing of the case on 22 June 2000 was unreasonable and unlawful.

24. As regards the applicant's complaint that he was tried in private, the Court observes that the applicant and his lawyer have failed to raise this complaint in their appeal to the Regional Court. Therefore, the remedies available under Ukrainian law were not exhausted, as required by Article 35 § 1 of the Convention. It follows that this complaint must be rejected under Article 35 § 4.

25. In so far as the applicant complained that the first instance court lacked independency and impartiality as it had to follow the previous decisions of the Regional Court in this case, the Court recalls that in order to establish whether a tribunal can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and whether that court presents an appearance of independence. The Court recalls that the notion of impartiality has two aspects: the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint, in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect. The Court notes that the applicant did not express any doubts about the subjective impartiality of the court. As regards the objective test, it considers that it must be examined together with the "independence" issue as these two concepts are closely linked (*Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

26. The Court recalls its extensive case law concerning the judicial guarantees against outside pressure, above all, against the influence of the executive (see, *mutatis mutandis*, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 77; *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68). However, it considers that Article 6 § 1 cannot be interpreted as prohibiting courts of lower jurisdiction from following directives made by higher tribunals, especially if given in the course of ordinary appellate proceedings.

27. The Court notes that the applicant had the benefit of adversarial proceedings before the domestic courts. At the various stages of those proceedings he was able to submit the arguments he considered relevant to his case. It does not discern any arbitrariness or procedural unfairness in the decisions of the domestic courts.

28. It follows that this aspect of the case is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it must be rejected under Article 35 § 4.

2. The complaint concerning the length of the proceedings

29. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement of Article 6 § 1 of the Convention, which reads 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. The Government’s objections to admissibility

30. The Government maintained that the applicant could not be considered a victim of the alleged violation as his term of imprisonment included the period spent in detention on remand.

31. The applicant disagreed.

32. The Court considers that this latter measure does not constitute either express or implicit acknowledgement of any violation of the Convention; nor does it provide any redress regarding the length of the proceedings. It follows that the applicant may still claim to be a victim of a violation of this provision.

b. Conclusion

33. The Court notes that this complaint 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.

II. MERITS

1. Period to be taken into consideration

34. The criminal proceeding in the present case began on 27 February 1998, when the applicant was arrested, and ended on 1 June 2001, with the appeal judgment of the Regional Court. They thus lasted a total of three years and three months for two instances which both considered the case on three occasions.

2. The reasonableness of the length of the proceedings

a. Arguments before the Court

35. The Government submitted that the case was factually complex, involving nine defendants and four victims, and that the investigative and judicial authorities had taken all possible measures to ensure the speedy examination of the case.

36. The applicant maintained that the proceedings had been too long, especially in view of the fact that throughout this period he was detained on remand in poor conditions.

b. The Court's assessment

37. The Court recalls that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities. On the latter point, what is at stake for the applicant has also to be taken into consideration (see, *inter alia*, *Kalashnikov v. Russia*, no. 47095/99, § 125, ECHR 2002-VI). In this connection it recalls that throughout the period under consideration the applicant was kept in custody – a fact which required particular diligence on the part of the courts dealing with the case to administer justice expeditiously (*Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 83, ECHR 2003-IX (extracts); *Abdoella v. the Netherlands*, judgment of 25 November 1992, Series A no. 248-A, § 24, and *Henworth v. the United Kingdom*, no. 515/02, § 29, 2 November 2004).

38. The Court accepts the Government's contention that the number of accused persons increased the complexity of the case to a certain extent. However, in view of the repeated reinvestigations and retrials, with the reduction in the number of defendants to three in the last round, it considers that the weight of this argument is somewhat diminished.

39. The Court further notes that nothing in the case file suggests that the applicant's conduct in any way contributed to the length of the proceedings.

40. The Court finds, however, that several delays are to be laid at the door of the authorities. The repeated failures of the domestic courts to respect the rights of the defence lay at the origin of two delays in the appeal process: the examination of the appeals was postponed for four months in 1999 and for a year in 2000-2001 because the defendants were not given access to the certain documents in the case file (paragraphs 15-16 and 21 above). Moreover, the proceedings remained dormant for approximately three months pending the establishment of the whereabouts of the defaulting defendants (paragraphs 17-18 above). Although the delay caused by private persons cannot in itself be imputed to the respondent State (cf. *Foley v. the United Kingdom*, no. 39197/98, § 38, 22 October 2002), the Court considers that, in the circumstances of the case, particularly given the applicant's detention on remand in poor conditions (he had by that time already spent almost two years in custody), this postponement appears unreasonable. The more so, since, as the applicant's subsequent conviction showed, the presence of these co-defendants was not indispensable for the determination of the applicant's case.

41. The Court further notes that the protracted length of the proceedings was to a large extent caused by the retrials of the case. Although the Court is not in a position to analyse the quality of the case-law of the domestic courts, it observes that, since remittal is usually ordered because of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system (*Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003).

42. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings against the applicant were not pursued with the diligence required. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

45. The Government contested the claim.

46. The Court takes the view that the applicant has suffered some non-pecuniary damage as a result of the violation found which cannot be made good by the mere finding. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 in non-pecuniary damage.

B. Costs and expenses

47. The applicant did not submit any claim under this head within the set time-limit; the Court therefore makes no award in this respect.

C. Default interest

48. 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 complaint concerning the excessive length of the criminal proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 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 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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 31 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President