



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

SECOND SECTION

CASE OF KOBTSEV v. UKRAINE

(Application no. 7324/02)

JUDGMENT

STRASBOURG

4 April 2006

FINAL

04/07/2006

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 Kobtsev 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 V. BUTKEVYCH,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Ms D. JOČIENĚ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 7324/02) 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 Oleksandr Mykolayovych Kobtsev (“the applicant”), on 14 September 2001.

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

3. On 21 January 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1950 and lives in Kyiv.

1. Pre-trial investigation

5. On 30 October 1998 two police officers, in the course of a murder investigation, searched the applicant’s home. They found nine hunting-gun cartridges and arrested the applicant for the unlawful possession of

ammunition. On the same day the police opened a criminal investigation against the applicant.

6. On 31 October 1998 the applicant was questioned as a suspect.

7. On 3 November 1998 the case was referred to the Investigative Division of the Zaliznychnyy District Police Department of Kyiv. The responsible investigator charged the applicant with the unlawful possession of ammunition and authorised his detention on remand.

8. On 10 November 1998 the investigator ordered an expert ballistic examination of the cartridges found in the applicant's home to determine whether they fell into the category of ammunition. The expert's opinion was submitted on 20 November 1998.

9. On 4 December 1998 the investigator questioned witnesses and, on 10 December 1998, the police officers who had conducted the search in the applicant's home.

10. On 11 December 1998 the case file was transferred to the Leningradskyy District Police Department of Kyiv. On 24 December 1998 an investigator attached to this Department took over the case.

11. The investigation was completed on 30 December 1998 and the applicant and his lawyer were given access to the case file. On 11 January 1999 they finished studying it. On 12 January 1999 the applicant's lawyer unsuccessfully requested the investigator to terminate the proceedings for a lack of *corpus delicti*.

12. On 18 January 1999 the indictment was approved by the district prosecutor and sent to the Leningradskyy District Court of Kyiv (hereafter "the District Court").

2. *The trial*

13. On 1 February 1999 the judge of the District Court committed the applicant to trial. In his decision the judge also decided that the applicant's "remand shall remain unchanged".

14. The court held hearings on 16 March 1999, 16 April 1999, 17 and 24 May 1999. Two scheduled hearings were cancelled: on 4 March 1999 witnesses were absent (the court issued compulsory summonses in their respect for the following sittings) and on 4 May 1999 a judge was unavailable. On 16 April and 17 May 1999 the court heard evidence, but had to adjourn the case due to the failure of the witnesses to appear.

15. On 25 May 1999 the applicant's lawyer requested that the case be referred for further investigation. On 27 May 1999 the District Court granted this request, citing the lack of reliable evidence collected by the authorities. By the same decision, the applicant was released on bail (a sum of UAH 5,100¹ was deposited with the Prosecutor's Office).

1. 768 euros – "EUR".

16. On 24 June 1999 the Kyiv City Court (hereafter “the City Court”), allowing the appeal of the prosecution, quashed the decision to remit the case for reinvestigation. The court held that any flaws or shortcomings in the evidence could be assessed and, if need be, rectified during the trial.

17. Between July and December 1999 the proceedings were stayed pending the outcome of the applicant’s request for supervisory review of the City Court’s decision. On 2 December 1999 the Supreme Court rejected this request.

18. On 23 February 2000 the District Court resumed the trial and, on 28 February 2000, found the applicant guilty of the unlawful possession of ammunition and sentenced him to three years’ imprisonment, suspended on probation. The court relied primarily on the police search record and the expert evidence that the cartridges found in the applicant’s apartment were indeed ammunition within the meaning of Article 222 of the Criminal Code. The applicant and the prosecution appealed. On 6 April 2000 City Court quashed the decision of 28 February 2000 and remitted the case for a fresh consideration.

19. In June 2000 the District Court recommenced the trial. Between June and September 2000 the court held five hearings (on 12 and 23 June, 12 July, 30 August and 13 September 2000), during which five witnesses and an expert were heard. As on each occasion an unnamed witness failed to attend, the sittings were adjourned.

20. On 13 September 2000 the District Court, on the applicant’s request, remitted the case for further investigation. The court established that neither the applicant nor witnesses had been present when the police officers found the cartridges in his apartment. Moreover, the warrant was issued in breach of procedural rules and the search report submitted to the court was not the one drawn up on 30 October 1998 and signed by the applicant and the witnesses. The court also indicated that the expert ballistic report could not be used in evidence as it had been produced in breach of procedural requirements.

3. *Post-trial proceedings*

21. On 25 October 2000 an investigator attached to the Leningradsky District Prosecutor’s Office terminated the proceedings due to the lack of any *corpus delicti*. The investigator referred essentially to the circumstances relied on by the court when remitting the case for further investigation.

22. The applicant alleged that he was not informed about this decision. Thus, in April 2001 his lawyer lodged an administrative complaint under Article 248 § 8 of the Code of Civil Procedure, challenging the lack of progress in the investigation.

23. The Government stated that the applicant had been informed in a timely manner about the termination of his case and, through his administrative complaint, he had contested the investigator’s ruling of

25 October 2000. However, the decision of the District Court of 20 April 2001, on this complaint, indicates that the applicant challenged the “suspension” (*зупинення*) not the “termination” (*закриття*) of his case. Moreover, in his complaint he requested that his case be terminated due to the absence of any *corpus delicti*.

24. In the above-mentioned decision of 20 April 2001, the District Court held that it had no administrative jurisdiction to determine the applicant’s complaints since the investigative authorities’ acts and omissions could only be reviewed within the framework of the criminal trial. On 20 June 2001 the Kyiv City Court upheld this decision.

25. The applicant alleged that it was not until he applied to the Ombudsman, seeking information about the developments in his case, that the Kyiv City Prosecutor’s Office informed him, by a letter of 12 October 2001, that the proceedings had been terminated. On 26 October 2001 the investigator of the Leningradsky District Prosecutor’s Office ordered the return of the applicant’s bail money.

26. In the meantime, on 13 October 2001 the applicant lodged with the Kyiv City Prosecutor’s Office a request for compensation for unlawful criminal prosecution. Its outcome is unclear, although, in view of the subsequent developments (see paragraph 27 below), it was probably disregarded.

27. On 30 November 2001 the Kyiv City Prosecutor’s Office quashed the decision of 25 October 2000 to terminate the proceedings against the applicant as being premature, and ordered a further investigation into the purported offence.

28. On 25 December 2001 the investigator attached to the Sviatoshynsky District Prosecutor’s Office terminated the proceedings due to the lack of any *corpus delicti*.

II. RELEVANT DOMESTIC LAW

1. *The Criminal Code of 1960*

29. Article 222 of the Code provides:

“Unlawful ...possession ... of firearms (except for smooth-bore hunting guns), ammunition or explosives without the relevant permission ... shall be punished by imprisonment from two to seven years.”

2. *The Code of Criminal Procedure of 1960*

30. Article 6 of the Code enumerates the reasons for the termination of criminal proceedings, including the absence of any *corpus delicti*.

31. Articles 70, 71, 135 and 136 of the Code oblige the witness, summoned by the court or the investigative authorities, to attend and give

evidence. In case of his/her failure to comply with the summons, the authority concerned may issue a compulsory summons, enforceable by the police. The witness' repeated failure to appear in court without valid justification is punishable under the Code of Administrative Offences.

32. Chapter 19 (Articles 206-211) of the Code governs the suspension of criminal proceedings.

33. Articles 148-150 (the general principles on the application of preventive measures) and 155 (the conditions for a remand in custody) may be found in the judgment of 5 April 2005 in the case of *Nevmerzhitsky v. Ukraine* (no. 54825/00, § 54, ECHR 2005-... (extracts)).

Article 154-1 of the Code (the application of bail) and the relevant provisions of Resolution No. 6 of 26 March 1999 of the Plenary Supreme Court of Ukraine on the practice when applying bail as a preventive measure, are set out in the decision of 10 December 2002 in the case of *Koval v. Ukraine* (no. 65550/01).

34. Article 212 provides that, on completion of the investigation, the investigator either draws up an indictment or terminates the case.

According to Article 213 the case can be closed by the investigator on both exonerating and non-exonerating grounds.

Article 227 § 2 empowers the prosecutor to quash any investigator's decision.

At the material time, Chapter 22 (Articles 234-236-6), which regulates the appeal against the investigator's decision, did not contain the defendant's right to challenge the decision to institute or re-institute criminal proceedings.

3. *The Law of Ukraine "on the procedure for the compensation of damage caused to the citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts" of 1994*

35. According to Article 1 of the Law, citizens are entitled to compensation for damage caused by:

1) an unlawful conviction, unlawful indictment, unlawful arrest and detention on remand, unlawful search, unlawful attachment of property, unlawful suspension from work and other procedural actions that affect their rights;

2) an unlawful administrative arrest or correctional labour, unlawful forfeiture of property, and the unlawful imposition of fines;

3) the unlawful conduct of operational investigative activities.

Article 2 of the Law (the *ratione personae* scope of this Law) may be found in the judgment of 5 April 2005 in the case of *Afanasyev v. Ukraine* (no. 38722/02, § 52).

36. Article 12 provides that the amount of the compensation is determined by the authority which conducted the investigation or the court which tried the case. If the applicant considers the awarded amount

insufficient, he/she may challenge this decision before a court or a court of appeal respectively.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 5 OF THE CONVENTION

37. The applicant complained under Article 5 §§ 1 and 5 of the Convention of the unlawfulness of his detention.

38. The Court recalls that, according to its established case-law, where no domestic remedy is available, the six month period runs from the act alleged to constitute a violation of the Convention (*Al Akidi v. Bulgaria* (dec.), no. 35825/97, 19 September 2000). The Court notes that the applicant ceased to be in police custody on 27 May 1999, i.e. more than six months before the application was submitted to the Court. The six month period with respect to the applicant's complaint under Article 5 § 5 began on the same date (*Öcalan v. Turkey* (dec.), no. 46221/99, 14 December 2000).

39. It follows that this part of the application was lodged out of time for the purposes of Article 35 § 1 of the Convention and must be dismissed pursuant to Article 35 § 4.

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

40. 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 his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

1. *The applicant's victim status*

41. The Government maintained that the criminal case against the applicant was terminated on exonerating grounds, and thus he had had an opportunity to claim compensation for unlawful prosecution under the 1994 Law.

42. The applicant disagreed.

43. The Court first notes that the Government's submissions about the possibility to sue the authorities for damages will be considered in greater detail below (paragraphs 49-50).

44. In so far as these submissions may be understood to concern the fact that the applicant, as an acquitted defendant, can no longer claim to be a victim of alleged violations of the Convention during the proceedings (see, *inter alia*, *Correia de Matos v. Portugal* (dec.), no. 48188/99, 15 November 2001), the Court recalls that an acquittal does not in itself deny the person concerned the status of a victim in respect of excessive delays (*Wall v. Poland* (dec.), no. 58369/00, 1 October 2002).

45. The Court, therefore, dismisses this objection.

2. Exhaustion of domestic remedies

46. The Government stated that every one of the authorities' actions, which allegedly protracted the proceedings, could have been challenged by the applicant in court or before the higher prosecution authorities. They also maintained that the applicant had had the right to redress for any damage caused by the allegedly unlawful criminal prosecution. With respect to the latter remedy, the Government produced several examples of successful claims by acquitted defendants for damages incurred as a result of unlawful detention, indictments and convictions.

47. The applicant considered these remedies ineffective in his case.

48. The Court recalls that the purpose of the exhaustion rule, contained in Article 35 § 1 of the Convention, is to afford Contracting States the opportunity of preventing or putting right the violations alleged, before those allegations are submitted to the Court. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (see, *inter alia*, *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

49. As regards compensation for an unlawful prosecution, the Court notes that such a claim could be lodged with the authority which conducted the investigation or the court which tried the case, with the possibility of a subsequent judicial review or appeal. The only legal ground for that claim was an investigator's decision to close a criminal case on exonerative grounds ("the investigator's acquittal") or an acquittal at trial (see paragraph 35 above). At the material time the applicant could not challenge the institution or reinstatement of criminal proceedings (see paragraph 34 above), whereas the higher prosecution authorities had an unlimited power to revoke the investigator's acquittal and to order further inquiries into the case, thus depriving the claim for compensation of any prospect of success (see paragraph 26 above; *Panteleyenko v. Ukraine* (dec.), no. 11901/02, 15 March 2005 and *Grabchuk v. Ukraine* (dec.), no. 8599/02, 23 October 2001). Consequently, in the present case, the outcome of the

procedure referred to by the Government depended heavily on the discretionary powers of the executive authorities. This remedy, therefore, cannot be considered effective within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 31, ECHR 2000-IV).

In so far as the Government relied on the applicant's alleged right to challenge the authorities' actions impeding the progress of the proceedings, the Court considers that the Government have failed to indicate whether and, if so how, the applicant could obtain relief – either preventive or compensatory – by complaining to the very instances that were allegedly responsible for the delays.

50. In these circumstances, the Court concludes that the applicant was absolved from pursuing the remedies referred to by the respondent Government.

3. Compliance with the six month rule

51. The Government pleaded the applicant's failure to comply with the six month rule. In their opinion, the final decision in the case was taken on 25 October 2000. Therefore, the applicant should have lodged his case within six months of this date, that is by 25 May 2001 at the latest.

52. The applicant disagreed.

53. The Court notes that the Government have failed to advance any argument as to why the Court should disregard the investigator's ruling of 25 December 2001, by which the proceedings in the applicant's case were ultimately terminated. This decision was taken within the framework of the same criminal case referred to by the Government, concerned the same charge and, apparently, replaced the ruling of 25 October 2000 as the final decision when it was overruled by Kyiv Prosecutor's Office in November 2001 (paragraph 27 above).

54. This objection must accordingly be rejected.

4. Conclusion

55. 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.

B. Merits

1. Period to be taken into consideration

56. The Government stated that the proceedings in the applicant's case were discontinued on 25 October 2000 and thus the period between that date and 30 November 2001, when this ruling was quashed, should not be taken

into account. The Government affirmed that the applicant was duly informed about the October 2000 ruling, referring in this respect to his administrative complaint in April 2000, by which (according to them) he had challenged that decision.

57. The applicant maintained that the ruling of 25 October 2000 was never duly notified to him and that, moreover, once he had learned about this decision and attempted to claim damages from the authorities, the proceedings in his criminal case were reopened.

58. The Court recalls that the period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is “charged”, within the autonomous meaning to be given to that term. It ends when the charge is finally determined or the proceedings are discontinued (*Rokhlina v. Russia*, no. 54071/00, § 81, 7 April 2005).

59. The Court notes that the Government have not produced any evidence that a copy of the ruling of 25 October 2000 was ever made available to the applicant before October 2001. The applicant’s administrative complaint cannot serve as a proof to this effect, since the District Court’s decision of 20 April 2001 explicitly states that the applicant challenged “the suspension” (not “the termination”) of the proceedings and, moreover, mentions that he sought their termination on the basis of a lack of *corpus delicti*. Finally, it is to be noted that his bail was not returned immediately, upon the purported termination of the case, as required by domestic law. Instead, it took the authorities over a year to make the appropriate arrangements (paragraph 25 above). In fact, contrary to the Government’s submissions, there is no indication that this measure had been formally lifted before 26 October 2001.

60. Having regard to the foregoing, the Court accepts that from September 2000 to October 2001 the applicant continued to believe that he was the subject of a criminal investigation and bound by the bail conditions.

61. In this respect the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, e.g., *Multiplex v. Croatia*, no. 58112/00, § 44, 10 July 2003). It finds that the defendant’s rights would be illusory if he or she were not informed about developments in the proceedings (see, *mutatis mutandis*, *Sukhorubchenko v. Russia*, no. 69315/01, § 53, 10 February 2005), especially when the authorities’ decisions could confer a right to sue for damages.

62. The Court considers that the test of being “substantially affected” regarding the initiation of the charge (*Calleja v. Malta*, no. 75274/01, § 123, 7 April 2005) applies equally to the determination of the final date of the criminal proceedings.

63. Accordingly, the period under consideration began on 30 October 1998 and ended on 25 December 2001, nearly three years and two months later.

2. *The reasonableness of the length of the proceedings*

a. Arguments before the Court

64. The Government submitted that the domestic authorities had displayed due diligence in the conduct of the proceedings as the investigation had been finalised within two months and the court hearings were scheduled and held at regular intervals. The Government observed that the applicant had contributed to the prolongation of the proceedings by challenging the decision of the Kyiv City Court of 24 June 1999 before the supervisory instance and by repeatedly requesting reinvestigations.

65. The applicant maintained that the proceedings had not been conducted with sufficient diligence and that he had not been responsible for any delay in the proceedings.

b. The Court's assessment

66. 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).

67. The Court notes that the present case did not give rise to any complex question of fact or law, as its scope was limited to one count of unlawful possession of ammunition, in which the applicant was the only suspect. It is thus not the complexity of the case which accounted for its length.

68. Nor does it appear that the applicant's conduct substantially contributed to the length of the proceedings. In any event, the Court reiterates that Article 6 does not require a person charged with a criminal offence to co-operate actively with the judicial authorities. In particular, an applicant cannot be blamed for taking full advantage of the resources afforded to the defence by national law (*Yağcı and Sargin v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 66).

69. The Court finds, however, that many delays in the present proceedings were occasioned by the omissions of the domestic authorities. In this connection it recalls that for seven months (between October 1998 and May 1999) 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).

70. In the initial stages, the investigation caused an unnecessary prolongation of the proceedings. The criminal case was opened immediately after the search of the applicant's home, in respect of a relatively simple offence for which the applicant was the only suspect.

71. Further delays in the proceedings were due to the infrequent hearings during the trial and the authorities' failure to secure the presence of witnesses. The Court notes that after on 1 February 1999 the applicant was committed for trial and until 17 May 1999 (i.e. when the applicant was still detained on remand) the court held only three hearings, two of which were adjourned on account of the witnesses' failure to appear (paragraph 14 above). The Court recalls that the duty to administer justice expeditiously is incumbent on the relevant authorities (*Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 56, 17 December 2002). It observes that the trial court had at its disposal effective mechanisms to ensure witnesses' attendance (paragraph 31 above). However, it does not appear from the case file that the authorities ever considered the possibility of imposing administrative penalties on the defaulting witnesses. Nor did the trial court's compulsory summonses of 4 March 1999 seem to have any effect.

72. For the period from June to September 2000 (after the original conviction was quashed on appeal), the District Court held four hearings with delays between them ranging from two to six weeks. Although by that time the applicant had been released from custody, the Court considers that the trial court should have fixed a tighter schedule in order to speed up the proceedings (cf. *Čevizović v. Germany*, no. 49746/99, 29 July 2004, §§ 51 and 60). Finally, it notes that the short period of reinvestigation in October 2000 was followed by months of inactivity (paragraphs 20 and 25).

73. Having regard to the foregoing, the Court considers that the length of the proceedings in the present case did not satisfy the "reasonable time" requirement. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicant claimed an unspecified amount of compensation for the moral and material damage caused by the length of the proceedings

instituted against him. He referred in particular to the distress and anguish sustained during his detention on remand.

76. The Government contested the claim.

77. 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 Court's mere finding. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant 2,000 EUR in non-pecuniary damage.

B. Costs and expenses

78. 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

79. 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 2,000 (two 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.

Done in English, and notified in writing on 4 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President