



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

FIFTH SECTION

CASE OF PSHEVECHERSKIY v. RUSSIA

(Application no. 28957/02)

JUDGMENT

STRASBOURG

24 May 2007

FINAL

24/08/2007

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 Pshevecherskiy v. Russia,

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOCHAROVA,

Mr K. JUNGWIERT,

Mr R. MARUSTE,

Mr A. KOVLER,

Mr J. BORREGO BORREGO,

Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 2 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 28957/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Yuriy Avgustovich Pshevecherskiy ("the applicant"), on 3 August 2001.

2. The applicant was represented by Mr Y. Leonov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. On 8 September 2005 the Court decided to give notice of 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.

4. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Moscow.

A. Applicant's arrest and detention during the investigation

1. Arrest and detention order of 26 May 1999

6. On 24 May 1999 the applicant was arrested on suspicion of child trafficking and the organisation of a criminal enterprise. Two days later a deputy prosecutor in Moscow authorised the applicant's placement in custody on the grounds that he was charged with serious criminal offences and was liable to pervert the course of justice. The extension order indicated that the applicant had been remanded on suspicion of having assisted several pregnant Russian women to obtain visas and to travel to the United States where they had given birth and put their babies up for adoption in exchange for 100 US dollars (USD). The applicant had allegedly received between USD 10,000 and USD 15,000 for each child.

7. In June 1999 the applicant's lawyer appealed to the Tverskoy District Court of Moscow against the detention order of 26 May 1999.

8. On 15 July 1999 the District Court dismissed the appeal, having regard to the gravity of the charges against the applicant and the risk of his absconding or obstructing the examination of the case if released. It noted that an appeal lay to the Moscow City Court. Neither the applicant nor his lawyer lodged an appeal.

9. According to the applicant, the investigation authorities searched his flat and offices a number of times and seized his personal belongings, including a computer and documents.

2. Extension order of 20 July 1999 (period to 23 November 1999)

10. On 20 July 1999 the Moscow City Prosecutor extended the applicant's detention until 23 November 1999, noting the gravity of the charges against the applicant and the fact that he did not have a permanent place of residence or work.

11. On 17 September 1999 the Tverskoy District Court dismissed the appeal by the applicant's lawyer against that order. It held that the investigators had grounds to extend the applicant's detention, having regard to the following considerations: the applicant's character, in particular, the fact that he did not have a fixed place of residence or work and had no previous convictions; the gravity of the charges; the sentence he was facing and the (unspecified) circumstances of the case. The applicant did not appeal.

3. Extension order of 8 September 1999 (period to 24 November 1999)

12. On 8 September 1999 a deputy prosecutor general of the Russian Federation authorised a further extension of the applicant's detention until 24 November 1999 on the ground that it was necessary to take certain

investigative measures and that the gravity of the charges and the applicant's character warranted the extension.

13. The applicant's appeal against the detention order of 8 September 1999 was dismissed on 1 November 1999 by the Tverskoy District Court, which held that the competent prosecutor had authorised the extension in compliance with the requirements of the Code of Criminal Procedure. It took into account the applicant's character, the gravity of the charges against him, "the particular circumstances of the criminal offence" and the need to take additional investigative measures and procedural steps. The decision of 8 September 1999 was not appealed against and became final.

4. Detention orders of 16 November 1999, 14 February, 16 May and 22 August 2000 (period to 24 November 2000)

14. On 16 November 1999 and 14 February 2000 a deputy prosecutor general extended the applicant's detention until 24 February and 24 May 2000 respectively. The reasons for both extensions were similar: the seriousness of the offences, the need to take additional investigative measures and the applicant's character.

15. On 16 May and 22 August 2000 the acting Prosecutor General of the Russian Federation authorised extensions of the applicant's detention until 24 August and 24 November 2000 respectively. He gave the same reasons for the extensions as those that had been given in the previous orders. At the same time, while noting that it was necessary to take certain procedural steps, he indicated that the extensions were also necessary to allow the applicant to study the case file, which comprised thirty volumes.

16. The applicant did not appeal against any of the above-mentioned orders.

5. Detention order of 20 November 2000 (period to 24 May 2001)

17. In November 2000 the Moscow City Prosecutor asked the Moscow City Court to extend the period of detention for an additional six months because the applicant needed additional time to read the case file. The applicant objected to the extension, claiming that he had waived his right to study the case file and that he should be released because the maximum eighteen-month period of his detention had expired.

18. On 23 November 2000 the Moscow City Court accepted the prosecutor's request and granted the extension until 24 May 2001. The relevant part of its decision which also concerned a co-defendant reads as follows:

"The defendants [need to] study the materials of the criminal case file which comprises fifty-two volumes. It will be impossible for them to finish reading the case file before the expiration of the maximum authorised period of detention.

[The court] does not find any ground for a change in the preventive measure to which the defendants are subject. The criminal offences with which they stand charged are included in the category of serious and particularly serious offences. In view of the circumstances of the case, taking into account the information about the co-defendants' character and the materials in the case file, [I] consider that, if released, the defendants ... will be liable to resume their criminal activities, to pervert the course of justice and to abscond or evade justice.

Having examined the arguments of the defendants and their lawyers, who insisted that there was no basis for extending Mr Pshevecherskiy's detention... [I] find their arguments unsubstantiated.

[The court] cannot accept that the refusal of the defendant, Mr P., and his lawyer to study the materials in the criminal case file complies with the requirements of Article 201 of the RSFSR Code of Criminal Procedure, because the action under Article 201 of the RSFSR Code of Criminal Procedure is an investigative measure which has to be taken by an official authorised by law and recorded in a register.

The record presented at the hearing shows that after the case file was given to Mr P. for studying he, in the presence of his lawyer Mr Po., ... refused to study it because his second lawyer, Ms L., was not present; [the court] cannot conclude that this action constituted a general waiver by the defendant of his right to study the case file.

The court reaches the same conclusion with respect to Mr Pshevecherskiy's refusal to study the case file on 16 November 2000 when his rights as an accused before the termination of the pre-trial investigation were explained to him.

Article 201 of the RSFSR Code on Criminal Procedure lays down that an investigator must provide an accused with the entire case file. The record of 22 November 2000 indicates that when the case file was given to the co-defendant, Mr Pshevecherskiy did not refuse to study it, but refused to participate in that investigative phase in the absence of his lawyer.

The present circumstances allow of the conclusion that the defendants did not comply with the procedure for stating their refusal to study the case file. This conclusion is supported by the fact that at the present hearing the defendants expressed their wish to study the evidence in the case file, in particular, the expert opinions, which make up 14 volumes of the case file."

19. The applicant and his lawyer appealed. In their grounds of appeal they argued that the applicant should be released because the maximum eighteen-month period for which his detention during the investigation was permitted had expired.

20. On 6 February 2001 the Supreme Court of the Russian Federation upheld the detention order of 23 November 2000. The relevant part of the Supreme Court's decision reads as follows:

"The submitted materials show that Mr P. and Mr Pshevecherskiy were arrested on 24 May 1999 in compliance with Article 122 of the RSFSR Code of Criminal Procedure, and on 26 May 1999 their placement in custody was authorised. Subsequently, the acting Prosecutor General of the Russian Federation lawfully extended the detention of Mr P. and Mr Pshevecherskiy for 18 months, that is until

24 November 2000. On 16 November 2000 the defendants were informed that the pre-trial investigation had ended and the requirements of Article 201 of the RSFSR Code of Criminal Procedure had to be fulfilled.

By virtue of Article 97 of the RSFSR Code of Criminal Procedure, when a defendant and his lawyer are unable to complete the examination of the materials in the case file before the expiration of the maximum authorised period of detention, the Prosecutor General of the Russian Federation, a prosecutor of a constituent entity of the Russian Federation ... is entitled to ask a judge, no later than five days before the expiration of the period, ... to extend it.

The Court finds that in asking the city court to extend the period of detention of the defendants, Mr P. and Mr Pshevecherskiy, to 24 months – until 24 May 2001 – the prosecutor acted within his powers and in compliance with the requirements of the above mentioned law on criminal procedure...

As the case file shows, on 22 November 2000 Mr Pshevecherskiy ... was given the materials in the case file for examination, and ... refused to participate in that investigative act without his lawyer.

The judge lawfully indicated in his decision [of 23 November 2000] that the refusal of the defendants, Mr P. and Mr Pshevecherskiy, to study the materials in the case file in the absence of their counsel did not mean that they did not wish to study the case file in the presence of their counsel either.

As the record of the court hearing indicates, the co-defendants, Mr P. and Mr Pshevecherskiy, wished to study the expert opinions which made up some 14 to 16 volumes of the case file.

In these circumstances the Court cannot agree that ... the defendants Mr P. and Mr Pshevecherskiy refused to read the case file.

Having regard to the substantial size of the case file, which comprises 52 binders, and to the fact that the defendants and their lawyer will not be able to complete their examination of it before the expiration of the maximum period of detention..., the extension of their detention is lawful.

The city court correctly concluded that there were no grounds for changing the measure of restraint to which the defendants, Mr Parshutkin and Mr Pshevecherskiy, are subject. As it is rightly stated in the decision, they have been charged with particularly serious criminal offences and are liable to abscond, evade justice or obstruct the examination of the case."

B. Detention during the judicial proceedings

21. On 11 May 2001 the applicant finished reading the file and on 24 May 2001 the case was committed for trial in the Moscow City Court. The applicant remained in detention. It appears that his detention was extended at regular intervals. However, he did not challenge any of the detention orders in the court.

22. On 14 December 2001 the Moscow City Court remitted the case to the Moscow Prosecutor's Office for further investigation.

23. On 4 April 2002 the applicant was released on a written undertaking not to leave the city.

24. On 30 December 2003 a senior investigator of the Tsentralniy District Prosecutor's Office of Moscow discontinued the criminal proceedings against the applicant because his conduct could not be characterised as a criminal offence. The investigator also released the applicant from his written undertaking and explained his right to rehabilitation. Although he possessed a right of appeal to a prosecutor or court, the applicant did not appeal.

II. RELEVANT DOMESTIC LAW

A. Preventive measures

25. The Code of Criminal Procedure of the Russian Soviet Federalist Socialist Republic ("the old Code") of 27 October 1960 (effective until 30 June 2002) listed as "preventive measures", *inter alia*, an undertaking not to leave a specified place and placement in custody (Article 89).

B. Grounds for ordering detention on remand

26. A decision to order detention could only be taken by a prosecutor or a court (Articles 11, 89 and 96). In making this decision the relevant authority had to consider whether there were "sufficient grounds to believe" that the accused would abscond during the investigation or trial or obstruct the establishment of the truth or re-offend (Article 89), and to take into account the gravity of the charge, information on the character of the accused, his or her profession, age, state of health, family status and other circumstances (Article 91).

27. Until 14 March 2001, detention on remand was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). On 14 March 2001 the Code was amended to provide for placement in custody if the charge carried a sentence of at least two years' imprisonment, if the defendant had previously defaulted or had no permanent residence in Russia or if his identity could not be ascertained. The amendments of 14 March 2001 also repealed the provision that permitted the defendant's placement in custody on the sole ground of gravity of the criminal offence of which he was accused.

28. A prosecutor's order or court decision ordering detention had to be reasoned and justified (Article 92). The accused had to be informed of the

detention order and to have the procedure for lodging an appeal explained to him or her (Article 92).

C. Time-limits for detention on remand

Types of detention on remand

29. The Code distinguished between two types of detention on remand: the first being detention “during the investigation”, that is to say when an authorised agency – the police or a prosecutor's office – undertook investigative measures, and the second detention “before the court” (or “during the trial proceedings”), when judicial proceedings were pending. Although there was no difference in practice between them (the detainee was normally held in the same detention facility), the calculation of the time-limits was different.

Time-limits for detention “during the investigation”

30. After arrest the person was placed in custody “during the investigation”. The maximum permitted period of detention “during the investigation” was two months, but it could be extended up to eighteen months in “exceptional circumstances”. Extensions were authorised by prosecutors of ascending hierarchical levels, up to the Prosecutor General of the Russian Federation. No extensions beyond eighteen months were permitted (Article 97).

31. The time-limit for detention “during the investigation” was calculated until the day the investigation was considered to have been completed and the defendant was given access to the case file (Articles 97, 199, 200 and 201). If the defendant needed additional time to study the case-file, a judge acting on a request by a prosecutor could grant an extension of the defendant's detention on remand until such time as the defendant had completed his or her examination of the file, but for no longer than six months.

Time-limits for detention “before the court”

32. Once the investigation was considered to be complete and the defendant had received the bill of indictment and finished reading the case file, the file was transferred to a trial court. Thereafter the defendant's detention was “before the court” (or “during the trial proceedings”). Until 14 March 2001 the Code set no time-limit for detention “during the trial proceedings”.

D. Proceedings to examine the lawfulness of detention

During detention “during the investigation”

33. The detainee or his or her counsel or representative were entitled to challenge the detention order and any subsequent extension to it in court (Article 220¹). The judge was required to review the lawfulness and justification for the detention or extension order by no later than three days after receipt of the relevant materials. The review was conducted *in camera* in the presence of a prosecutor and the detainee's counsel or representative. The detainee was summoned and a review in his absence was only permissible in exceptional circumstances if the detainee waived his right to be present on his own initiative. The judge could either dismiss the challenge or revoke the detention on remand and order the detainee's release. The judge's decision had to be reasoned (Article 220²).

THE LAW

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

34. The applicant complained that his detention from 24 November 2000 to 21 May 2001 had been unlawful. The Court considers that the present complaint falls to be examined under Article 5 § 1, which in the relevant part 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...”

35. The Government argued that owing to the expiration of the maximum (eighteen-month) period of permitted detention on 24 November 2000 and the fact that the applicant needed additional time to study the voluminous case file, the domestic courts had extended his detention for six months in compliance with the RSFSR Code of Criminal Procedure, in particular Articles 97 and 201 thereof. On 23 November 2000 the Moscow City Court accepted the request of the Moscow City Prosecutor and

extended the detention, holding that the gravity of the charges, the applicant's character (in particular, the fact that he had no permanent place of residence or work) and the circumstances of the case warranted the extension for a further six months and would allow the applicant to complete his examination of the materials in the case file. The Government further pointed out that the applicant had not waived his right to read the file, but had merely insisted on reading it with his lawyer. Furthermore, he had expressly asked the Moscow City Court to allow him to study the volumes of the case file which contained the expert opinions.

36. The applicant averred that he had refused to study the case file whether or not his lawyer was present. The domestic authorities had been well aware of this but had distorted the facts and extended his detention despite his express refusal to read the file.

37. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof.

However, the “lawfulness” of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Khudoyorov v. Russia*, no. 6847/02, §§ 124, ECHR 2005).

38. The Court notes that on 23 November 2000 the Moscow City Court, upon a petition from the Moscow City Prosecutor, extended the applicant's detention for six months, citing the needs of the applicant to study the case file as the main reason. On 6 February 2001 the Supreme Court of the Russian Federation upheld that order.

39. The Court observes that the rules on detention at the time permitted up to eighteen months' detention “during the investigation”, plus up to six months when authorised by a judicial decision if the defendants required more time to study the file (see paragraphs 30 and 31 above).

40. The Court notes that in the present case the eighteen-month period expired on 24 November 2000. On the day before the deadline expired the Moscow City Court authorised six additional months in custody until 24 May 2001 under its power to grant a further extension to allow the applicant to study the case file.

41. The Court reiterates that a court's decision to maintain a custodial measure does not breach Article 5 § 1 provided that the court “acted within its jurisdiction... [and] had power to make an appropriate order” (see *Korchuganova v. Russia*, no. 75039/01, § 62, 8 June 2006, with further references).

42. It has not been alleged that in making the order for a further extension the City Court acted in excess of its jurisdiction. Indeed, as a

matter of domestic law it did have the power to grant a further extension, not exceeding six months (see paragraph 31 above).

43. The City Court found that the applicant should remain in custody because he had been charged with serious criminal offences, did not have a permanent place of residence or work, and was liable to abscond and pervert the course of justice. It examined the applicant's argument that he did not wish to continue reading the file and noted his request for access to the volumes containing the expert reports. It found that the applicant had not waived his right to study the file and needed additional time to do so.

44. In this respect, the Court finds that the applicant's detention on the basis of the order of 23 November 2000 cannot be said to have been arbitrary as the City Court gave certain grounds to justify his continued detention on remand. The sufficiency and relevance of these grounds will be discussed below from the standpoint of Article 5 § 3 of the Convention (see *Khudoyorov*, cited above, § 152).

45. It has not been established that, in issuing the detention order of 23 November 2000, the City Court acted in bad faith or neglected to apply the relevant legislation correctly. There is nothing to suggest that its decision was invalid or unlawful under domestic law.

46. In these circumstances, the Court finds that the complaint about the alleged unlawfulness of the applicant's detention from 24 November 2000 to 24 May 2001 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

47. The applicant complained that the length of his pre-trial detention was unreasonable, in breach of Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”

A. Admissibility

1. Submissions by the parties

48. The Government claimed that the applicant had failed to exhaust domestic remedies as the only appeal he had lodged was against the detention order of 23 November 2000.

49. The applicant submitted that at the material time he had unsuccessfully applied to all the domestic authorities for release.

2. *The Court's assessment*

50. The Court reiterates that the purpose of the rule requiring domestic remedies to be exhausted is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before those allegations are submitted to the Court (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). In the context of an alleged violation of Article 5 § 3 of the Convention, this rule requires that the applicant give the domestic authorities an opportunity to consider whether his right to trial within a reasonable time has been respected and whether there exist relevant and sufficient grounds continuing to justify the deprivation of liberty.

51. Following his arrest on 24 May 1999 the applicant remained in custody until his release on 4 April 2002. It is not disputed that he did not lodge any appeals against the District Court's decisions of 15 July, 17 September and 1 November 1999 and the prosecutors' extension orders of 16 November 1999, 14 February, 16 May and 22 August 2000. He did, however, challenge the later decision of the Moscow City Court before the Supreme Court of the Russian Federation, which on 6 February 2001 held that the applicant's arrest and the entire period of his detention were lawful. In these circumstances, the Government's objection of non-exhaustion of domestic remedies must be dismissed in so far as it concerned the applicant's failure to appeal against the detention orders issued before 23 November 2000 (see *Shcheglyuk v. Russia*, no. 7649/02, § 36, 14 December 2006).

52. The Court further notes that 6 February 2001 was the most recent date on which the appeal court examined the issue concerning the applicant's continued detention. It reiterates that on that date the Supreme Court upheld the order of 23 November 2000 extending the applicant's detention until 24 May 2001. The applicant did not challenge any of the orders extending his detention after 24 May 2001. The Government argued that by failing to file appeals, the applicant had denied the domestic authorities an opportunity to consider whether these further extensions were compatible with his Convention right to trial within a reasonable time or release pending trial. They insisted that the Court should reject the applicant's complaints in respect of that period of his pre-trial detention for the failure to exhaust available domestic remedies.

53. In this respect the Court reiterates that the question of exhaustion of domestic remedies in respect of the extension orders issued after 24 May 2001 will only arise if the examination of the reasons given by the domestic courts in their decisions extending the applicant's detention until 24 May 2001 will lead the Court to the conclusion that by that date the detention had not exceeded a reasonable time. Indeed, the Court has already held that when detention on remand is found to have exceeded a reasonable time on the most recent date when an appeal court examined the detention matter,

the detention after that date will also be found, except in extraordinary circumstances, to have necessarily kept such character throughout the time for which it was continued (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 12).

54. The Court thus considers that the issue of exhaustion of domestic remedies in respect of the applicant's detention after 24 May 2001 is closely linked to the merits of the complaint that his detention before 24 May 2001 had already exceeded a reasonable time in violation of the requirements of Article 5 § 3 of the Convention. The Court therefore finds it necessary to join the Government's objection to the merits of the applicant's complaint in respect of his detention on remand before 24 May 2001.

55. The Court further notes that the applicant's complaint under Article 5 § 3 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

56. The Government submitted that the length of the applicant's detention on remand was not excessive. It did not exceed the maximum period of detention established under Russian law. The Government further noted that the extensions of the applicant's detention were necessary in the circumstances of the case, in particular taking into account the applicant's character (notably, the fact that he did not have a permanent place of residence or work), the gravity of the charges against him and the risk of his absconding or obstructing the examination of the case, if released.

57. The applicant replied that the domestic courts had not provided any evidence to show that he was genuinely liable to re-offend, abscond or pervert the course of justice. The only reason for his continued detention was the gravity of the charges against him. Furthermore, the criminal proceedings against him were later discontinued because there was no evidence that a criminal offence had been committed.

2. The Court's assessment

(a) General principles

58. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified only if there are specific indications of a genuine requirement of public

interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

59. The arguments for and against release must not be “general and abstract” (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the concrete facts outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84 *in fine*, 26 July 2001).

60. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (*Labita*, cited above, § 153).

(b) Application of the general principles to the present case

61. Having regard to its finding in paragraphs 53 and 54 above, the Court will firstly examine the period of two years of the applicant's detention on remand, that is from the date of his arrest on 24 May 1999 to 24 May 2001.

62. The Court accepts that the applicant's detention may initially have been warranted by a reasonable suspicion that he had organised a criminal enterprise involved in child trafficking. In the decision of 26 May 1999 a deputy Moscow prosecutor cited the gravity of the charges, the need to ensure the proper conduct of the investigation and to prevent the applicant from perverting the course of justice as the grounds for placing him in custody. At that stage of the proceedings those reasons were sufficient to justify keeping the applicant in custody (see *Khudoyorov*, cited above, § 176).

63. However, with the passage of time those grounds inevitably became less and less relevant. Accordingly, the authorities were under an obligation to analyse the applicant's personal situation in greater detail and to give specific reasons for holding him in custody.

64. The Court reiterates that from 24 May 1999 to 24 May 2001 the applicant's detention on remand was extended seven times. When extending the applicant's detention or examining the lawfulness of, and justification for, his continued detention the domestic authorities consistently relied on the gravity of the charges as the main factor and the risk of the applicant's absconding or perverting the course of justice.

65. As regards the domestic authorities' reliance on the gravity of the charges as being the decisive element, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; *Ilijkov*, cited above, § 81). This is particularly true in the Russian legal system where the characterisation in law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of the issue whether the evidence that has been obtained supports a reasonable suspicion that the applicant has committed the alleged offence (see *Khudoyorov*, cited above, § 180). In this respect, the Court does not lose sight of the fact that the criminal proceedings against the applicant were eventually discontinued because his conduct did not constitute a criminal offence.

66. The other grounds for the applicant's continued detention were the domestic authorities' findings that the applicant was liable to abscond or pervert the course of justice. The Court reiterates that it is incumbent on the domestic authorities to establish the existence of concrete facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005). It remains to be ascertained whether the domestic authorities established and convincingly demonstrated the existence of concrete facts in support of their conclusions.

67. The Court notes that the domestic authorities gauged the risk of the applicant's absconding by reference to the fact that he had been charged with serious criminal offences and so faced a heavy sentence. In this respect the Court reiterates that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view. It must be examined with reference to a number of other relevant factors which may either confirm the existence of

a danger of absconding and re-offending or make it appear so slight that it cannot justify detention pending trial (see *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 431; and *Panchenko*, cited above, § 106).

68. In the present case the domestic authorities did not cite any concrete facts warranting the applicant's detention on that ground, save for a brief reference to the applicant's "character", as typified by his lack of a permanent place of residence or work. In this respect, the Court reiterates that the mere absence of a fixed residence does not give rise to a danger of absconding. Nor can it be concluded from a person's lack of employment that he is liable to commit new offences (see *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005). The Court further observes that the authorities did not indicate any other circumstance to suggest that, if released, the applicant would abscond or otherwise upset the course of the trial. The Court finds that the existence of such a risk was not established.

69. The Court further emphasises that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures to ensure his or her appearance at the trial (see *Sulaoja*, cited above, § 64, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). During the entire period under consideration the authorities did not consider the possibility of ensuring the applicant's attendance by the use of other "preventive measures" – such as a written undertaking or bail – which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings. Furthermore, the Court finds it particularly striking that the applicant was kept in custody for six months, from 24 November 2000 to 24 May 2001, for the sole purpose of studying the case file. However, at no point did either the City Court or Supreme Court, which examined the issue of the lawfulness of the applicant's detention during that period, consider having recourse to such alternative measures or, at the very minimum, seek to explain in their decisions why such alternatives would not have ensured that the trial would follow its proper course.

70. In sum, the Court finds that the domestic authorities' decisions were not based on an analysis of all the pertinent facts. They paid no regard to the arguments in favour of the applicant's release pending trial. It is also of particular concern to the Court that the Russian authorities persistently used a stereotyped summary formula to justify extending his detention: the prosecutors reproduced the same formula in all their decisions.

71. Having regard to the above, the Court considers that by failing to address concrete relevant facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities prolonged the applicant's detention until 24 May 2001 on grounds which cannot be regarded as "sufficient". They thus failed to justify the applicant's continued detention and by 24 May 2001 the length of his

detention had already ceased to be reasonable (see *Rokhlina*, cited above, § 69).

72. Having regard to the above finding and in the absence of any extraordinary circumstances, the Court cannot conclude that after 24 May 2001 the character of the applicant's continued detention changed. It is hence not necessary to examine whether the applicant exhausted domestic remedies in respect of his complaint related to his detention after 24 May 2001.

73. The Court, accordingly, finds a violation of Article 5 § 3 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. In his observations lodged with the Court on 5 February 2006 the applicant complained that the length of the criminal proceedings had been excessive, that the trial court had not examined the merits of the criminal case, that for almost three years he had been detained in poor conditions, and that the investigation authorities had seized his property and had not returned it to him.

75. The Court reiterates that, according to Article 35 of the Convention, the Court may only deal with a matter within a period of six months from the date on which the final decision was taken. The Court notes that the applicant's complaints relate to the period when he was in pre-trial detention and the criminal proceedings against him were pending. The applicant's detention on remand ended with his release on 4 April 2002 and the criminal proceedings terminated on 30 December 2003 with the decision of a senior investigator of the Tsentralniy District Prosecutor's Office of Moscow. The applicant raised these complaints before the Court in his observations lodged on 5 February 2006, which was more than six months after the criminal proceedings against him were discontinued.

76. It follows that the present complaints were introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicant claimed an unspecified amount representing capital losses during the period when he was detained. He submitted that he had been dismissed from his employment during the criminal proceedings and had been forced to pay for his lawyers' services. He further claimed 2,500,000 US dollars in respect of non-pecuniary damage.

79. The Government contested the existence of a causal link between the alleged violation and the pecuniary loss alleged by the applicant, as the decision to prefer criminal charges against the applicant was not the subject of the Court's review in the present case. They further argued that the applicant had not exhausted the available domestic remedies in respect of his claims under Article 41 of the Convention as he could have lodged an action in tort in the competent domestic court. In any event, a finding of a violation would constitute sufficient just satisfaction.

80. The Court reiterates, firstly, that an applicant cannot be required to exhaust domestic remedies to obtain compensation for his loss since this would prolong the procedure before the Court in a manner incompatible with the effective protection of human rights (see *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, § 40, and *Gridin v. Russia*, no. 4171/04, § 20, 1 June 2006). The Government objection as to the non-exhaustion of domestic remedies is, therefore, dismissed.

81. The Court further notes that the decision to prefer criminal charges against the applicant was not the subject of its review in the present case. It shares the Government's view that there is no causal link between the violations found and the pecuniary damage claimed (see *Nakhmanovich v. Russia*, no. 55669/00, § 102, 2 March 2006). Furthermore, the applicant did not specify the amount of compensation claimed in respect of pecuniary damage. Consequently the Court finds no reason to award the applicant any sum under this head.

82. As to non-pecuniary damage, the Court observes that the applicant, who was not convicted of any criminal offence, spent a long period in custody without relevant and sufficient grounds. In these circumstances, it considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, it awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

83. The applicant did not seek reimbursement of costs and expenses and this is not a matter which the Court is required to examine on its own motion (see *Motière v. France*, no. 39615/98, § 26, 5 December 2000).

C. Default interest

84. 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. *Decides* to join to the merits the question of exhaustion of domestic remedies in respect of the applicant's complaint about the excessive length of his detention after 24 May 2001;
2. *Declares* the complaint concerning an alleged violation of the applicant's right to trial within a reasonable time or release pending trial admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
4. *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 5,000 (five thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of the 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President