



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

FIFTH SECTION

CASE OF NOSALSKIY v. UKRAINE

(Application no. 26277/02)

JUDGMENT

STRASBOURG

12 July 2007

FINAL

12/10/2007

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 Nosalskiy v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 19 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 26277/02) 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 Stanislav Andrianovich Nosalskiy (“the applicant”), on 13 June 2002.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs Valeriya Lutkovska and Mr Yuriy Zaytsev.

3. On 15 March 2005 the Court decided to give notice of the application to the Government. 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 1938 and lives in Kharkiv.

5. On 23 August 1996 the applicant was charged with aggravated smuggling. The prosecution's case was that he had arranged for an aircraft to be sold to a Russian company in breach of the relevant customs rules.

6. On 25 December 1996 an investigator of the Kharkiv Regional Department of the Security Service (*Управління Служби Безпеки України по Харківській області* hereafter “the USBU”) informed the applicant that the pre-trial investigation had been completed and granted him access to the case-file.

7. On an unknown date in early February 1997 the investigator drew up the bill of indictment and submitted it to the Kharkiv Regional Prosecutor's Office (*Харківська обласна прокуратура*, hereafter “the Prosecutor's Office”) for approval. On 14 February 1997 the Prosecutor's Office decided that further investigations were necessary and remitted the case to the USBU.

8. By July 1997 the investigator had questioned over 40 witnesses. On 25 July 1997 he declared the pre-trial investigation completed, and allowed the applicant to consult the case-file.

9. On 12 August 1997 the Prosecutor's Office sent the case-file together with the bill of indictment to the Kiyevsky District Court of Kharkiv (*Київський районний суд м. Харкова*, hereafter “the Kiyevsky Court”) for trial proceedings.

10. The trial commenced on 16 October 1997.

11. On 1 December 1997, after eight hearings, the Kiyevsky Court remitted the case for further investigations. On 20 January 1998 the Kharkiv Regional Court rejected the prosecution's appeal against this ruling. On 24 June 1998 the Presidium of the Kharkiv Regional Court dismissed a *protest* (extraordinary appeal) of the Deputy Prosecutor of the Kharkiv Region against these decisions.

12. On 30 March 1998, in the context of the additional investigation ordered by the Kiyevsky Court, the applicant's charges were amended to include a forgery by an official.

13. On 1 June 1998 the additional investigation was completed and the applicant was given access to the case-file. On 3 June 1998 the investigator sent the bill of indictment to the Prosecutor's Office for approval. On 24 June 1998 the Prosecutor's Office remitted the case for further investigations.

14. On 10 July 1998 the investigator requested the Russian authorities to question several witnesses living in Moscow. On 26 August 1998 some of those witnesses were questioned and the minutes were provided to the Ukrainian authorities. A similar request for the Russian authorities to question witnesses living in Khabarovsk, filed on 20 October 1998, was not acted on.

15. On 4 November 1998 the investigator ordered an expert examination of the whether the aircraft was fit to fly.

16. On 25 December 1998 the investigator informed the applicant that the pre-trial investigation in his case was completed. Between that date and 1 July 1999 the applicant and his co-accused Mr I. had access to the case-file.

17. On 20 April 1999 the applicant was additionally charged with abuse of power.

18. On 1 July 1999 the Prosecutor's Office approved the bill of indictment and transmitted the case to the Kiyevsky Court.

19. In the period to 5 July 2001 the court held 20 hearings, examined several motions of the applicant, Mr. I and the company which had bought the aircraft, which had joined the proceedings as a civil claimant. Between 15 and 22 June 2001 the proceedings were suspended due to the applicant's illness.

20. On 6 July 2001 Kiyevsky Court remitted part of the case file for further investigations. The applicant appealed. On 22 January 2002 the Kharkiv Regional Court of Appeal (*Апеляційний суд Харківської області*, hereafter "the Court of Appeal") rejected the applicant's appeal against this ruling.

21. On 18 February 2002 the Kiyevsky Court decided that the remainder of the case also needed additional investigations.

22. On 22 April 2002 the charges against the applicant were amended in accordance with the new Criminal Code which had entered into force on 1 September 2001.

23. On 26 April 2002 the investigator completed the pre-trial investigation and granted the applicant and his co-accused access to the case file. On 12 July 2002 the case-file and the bill of indictment were sent to the Chervonozavodsky District Court of Kharkiv (*Червонозаводський районний суд м. Харкова* hereafter "the Chervonozavodsky Court"). The judge fixed the preparatory hearing for 22 August 2002; it was adjourned until 11 September 2002 because Mr I. was ill.

24. On 11 September 2002 the Chervonozavodsky Court committed the applicant for trial and fixed the first hearing on the merits for 28 October 2002.

25. Between October 2002 and November 2003 the trial court held three hearings. Eight sittings scheduled for this period were cancelled because investigator or the prosecutor failed to appear. On two occasions the hearings were adjourned due to the judge's illness and holiday. Two more sittings were cancelled on account of Mr I.'s and the applicant's absence.

26. Between December 2003 and June 2004 the proceedings were suspended because the authorities had not provided the witnesses living outside Kharkiv with appropriate accommodation during the hearings.

27. Between 15 June and 13 October 2004 the trial court held fourteen hearings.

28. On 13 October 2004 the Chervonozavodsky Court acquitted the applicant, having found no *corpus delicti* in the imputed actions. The prosecution and the applicant appealed. The latter sought an acquittal on the ground that there had been no crime rather than no *corpus delicti*. The civil claimant also filed an appeal.

29. On 31 March 2005 the Kharkiv Regional Court of Appeal (hereafter “the Court of Appeal”) decided not to entertain the prosecution's appeal on the ground that it was not signed by the prosecutor who had participated in the proceedings before the first instance court. The appeals of the applicant and the civil claimant were rejected as unsubstantiated. The same parties appealed in cassation.

30. On 11 April 2006 the Supreme Court quashed the decision of 31 March 2005 and remitted the case for a fresh appellate hearing on the ground that the Court of Appeal's refusal to entertain the prosecutor's appeal had not been reasonable.

31. On 1 August 2006 the Court of Appeal granted the prosecutor's appeal, quashed the judgment of 13 October 2004 and remitted the case to the Prosecutor's Office for further pre-trial investigations.

32. Since 23 January 1997 the applicant has brought seventeen complaints with higher prosecutions authorities, challenging the conduct of criminal proceedings in his case.

33. The investigation in the case is still pending.

THE LAW

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

34. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention. He also complained under Article 6 that the criminal proceedings against him had been unfair. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by [a] ... tribunal...”

A. Admissibility

1. Alleged unfairness of the proceedings

35. In so far as the applicant complains about the alleged unfairness of the criminal proceedings brought against him, the Court observes that the applicant's complaint is premature as the proceedings at issue are still pending. It therefore rejects this complaint in accordance with Article 35 § 4 of the Convention.

2. *Length of proceedings*

a. **The applicant's victim status**

36. The Government contended that the applicant, as an acquitted defendant, can no longer claim to be a victim of alleged violations of the Convention during the proceedings.

37. The applicant disagreed.

38. The Court first notes that the applicant's acquittal has been quashed on appeal and the criminal proceedings against the applicant are still pending. In any case an acquittal does not in itself deny the person concerned the status of a victim in respect of excessive delays (see *Kobtsev v. Ukraine*, no. 7324/02, § 44, 4 April 2006 with further references).

39. The Court therefore dismisses this objection.

b. **Exhaustion of domestic remedies**

40. The Government stated that each action of the investigators in the case which allegedly protracted the proceedings could have been challenged by the applicant either in court or before the higher prosecution authorities. They also maintained that the applicant had had the right to claim compensation for lengthy proceedings under the 1994 Law “on the procedure for compensation of damage caused to the citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts”, section 2 of which creates a right to compensation where proceedings have ended by way of an acquittal or on certain other specified grounds.

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

42. The Court first notes that the 1994 Law sets up a right to compensation only where proceedings have ended. As the criminal proceedings against the applicant are still pending, it is not open to the applicant to make a claim under the 1994 Law.

43. As regards the applicant's purported opportunity to challenge investigators' alleged actions or omissions before superior prosecutors or courts, the Court notes that in several previous cases it has found these remedies ineffective as the Government had failed to show how recourse to such proceedings could have remedied the delays in the investigation of the case (see, for example, *Merit v. Ukraine*, no. 66561/01, §§ 62-63 and 65, 30 March 2004 and *Kobtsev*, cited above, § 49). It does not find any reason to come to a different conclusion in the present case. It, therefore, dismisses this objection.

c. Six month period

44. The Government stated that the six-month time-limit, provided by Article 35 § 1 of the Convention started to run on 1 December 1997, when the Kiyevsky Court ordered re-investigation.

45. The applicant disagreed.

46. When the criminal proceedings were remitted on 1 December 1997, the criminal charges against the applicant had not been determined. Indeed, they have not been determined to date. It follows that the six-month time limit did not begin to run on that date, and has still not begun to run (see *Antonenkov and Others v. Ukraine* (no. 14183/02, §§ 33 and 34, 22 November 2005).

This objection is therefore also rejected.

d. General conclusion

47. The Court notes that this complaint is not manifestly ill-founded. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into account

48. The period to be taken into consideration began only on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. On that date the proceedings had been pending for a little over one year. The period in question has not yet ended. It has thus lasted more than nine years during which it was examined at three instances. It is now pending before the investigator.

2. The reasonableness of the length of the proceedings

49. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

50. The Government stated that the case was of some complexity. In particular it related to the smuggling of an object of exceptional value, the alleged offence had a transnational character, there were two suspects involved who were charged with several different offences, and there was a need to order expert opinions and to question 40 witnesses. The applicant did not express any opinion on this point.

51. The Court notes that no particular complexity may be attached to the legal aspects of the case, nor could the number of suspects pose any particular difficulty to the authorities. The need to question a number of witnesses, some of them living abroad and to order an expert opinion could complicate the case. However, all those circumstances relate to the period in or before 1998, whereas the proceedings in the applicant's case continued for over eight years after that.

52. As regards the conduct of the applicant, the Government submitted that the proceedings had been suspended on four occasions due to the applicant and his co-suspect's illness. They also pointed out that during the proceedings the applicant had consulted the case file for a total of 179 days and that he had filed a number of complaints and appeals, challenging different decisions of investigating and judicial authorities. The applicant disagreed.

53. The Court notes that a seven-day delay in proceedings in June 2001 when the applicant was ill cannot be regarded as having had a major impact on the total length of the proceedings. As to the periods when the applicant as consulting the case file and his applications to higher prosecution and judicial authorities, the Court notes that he cannot be reproached for having made use of his procedural rights (see *Yorgiyadis v. Turkey*, no. 48057/99, § 32, 19 October 2004).

54. As regards the conduct of the domestic authorities, the Court notes that the repeated remittals of the applicant's case back to the investigating authorities for further investigations was the main reason for the protracted length of the proceedings. Moreover, for the period from September 2002 to June 2004 the trial court held only three hearings, the others being cancelled for the reasons mainly attributable to the authorities.

55. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for example, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII, *Antonenkov*, cited above, §§ 45-46 and, in particular, *Vachev v. Bulgaria*, no. 42987/98, § 96, ECHR 2004-VIII (extracts) and *Pavlyulynets v. Ukraine*, no. 70767/01, § 51, 6 September 2005).

56. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

57. There has accordingly been a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 1,600,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

60. The Government did not express an opinion on the matter.

61. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 2,800 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant did not make any claim in this respect. Accordingly, no award is made under this head.

C. Default interest

63. 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 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 2,800 (two thousand eight hundred euros) in respect of non-pecuniary damage, costs and expenses, 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 12 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President