



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

FIFTH SECTION

CASE OF BERGMANN v. ESTONIA

(Application no. 38241/04)

JUDGMENT

STRASBOURG

29 May 2008

FINAL

29/08/2008

This judgment may be subject to editorial revision.

In the case of Bergmann v. Estonia,

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

Peer Lorenzen, President,
Rait Maruste,
Volodymyr Butkevych,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, judges,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 38241/04) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Andres Bergmann (“the applicant”), on 8 October 2004.

2. The applicant was represented by Mr J. Leppik, a lawyer practising in Tallinn. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Hion, Director of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs.

3. The applicant alleged that he had been arrested and taken into custody in violation of the requirements of Article 5 of the Convention.

4. On 11 May 2007 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.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1959 and lives in Tõrva.

6. The applicant was charged with economic offences, committed between 1995 and 2001, whereby damage exceeding 190 million Estonian kroons (EEK) (approximately 12 million euros (EUR)) had been caused.

7. On 13 December 2001 the Tartu County Court (*maakohus*) authorised the applicant's detention until 3 March 2002.

8. On 25 January 2002 the County Court agreed to release the applicant on bail set at EEK 1,000,000 (EUR 64,000). According to the court order the applicant was prohibited from leaving his permanent or temporary place of residence unless authorised by an investigator, prosecutor or court (Section 71-1 § 5 of the Code of Criminal Procedure (*Kriminaalmenetluse koodeks*)). The prosecutor's appeal against the applicant's release was dismissed by the Tartu Court of Appeal (*ringkonnakohus*) on 5 February 2002.

9. The County Court started the examination of the charges against the applicant in September 2002.

10. On 15 October 2003 the prosecutor requested the County Court to revoke the bail and to order the applicant's custody. It appears that the applicant, who had suffered from a head injury, had failed to appear at a hearing and that his lawyer had submitted a medical certificate to the court. According to the certificate, the applicant's head wound had healed. Although the applicant had troublesome pain in his head and neck, following concussion, the doctor found it difficult to assess whether he could participate in a court hearing. Apparently the County Court dismissed the prosecutor's request to take the applicant into custody.

11. On 29 March 2004 the applicant did not appear at a hearing scheduled for that date. His lawyer presented the court with a medical certificate according to which the applicant had paid a visit to his doctor at 8.30 that same morning. The applicant had provided to his doctor another medical certificate, issued on 24 March 2004 in Germany, according to which he had been diagnosed with concussion and had had a head wound requiring stitching. The applicant's doctor had prescribed that he stay at home for a fortnight and avoid strain. She had confirmed that he would not be able to participate in a court hearing on 29 March 2004.

12. The prosecutor presented the court with a copy of a fax according to which the applicant had left Estonia on 24 March and had returned to the country on 27 March 2004. She was of the opinion that by leaving the country without authorisation the applicant had breached the conditions of his bail and that it was therefore necessary to take him into custody.

13. The applicant's lawyer argued against the custody. He conceded that the applicant had been in Germany – where his parents were living – for three days. However, as he had not been placed under house arrest, he had not been in breach of the bail conditions.

14. By a decision of 30 March 2004 the County Court granted the prosecutor's request and ordered the applicant's detention. The court noted that in addition to the period referred to above, the applicant had left the country from 25 October to 28 October 2002 and on 17 January 2004. The court concluded that bail was not a sufficient measure to ensure his presence

at the hearings and that it was necessary to take him immediately into custody.

15. On 31 March 2004 the applicant was arrested at his home and taken into custody.

16. On 2 April 2004 both the applicant and his lawyer appealed against the County Court's decision. They argued that the applicant's non-compliance with Article 71-1 § 5 of the Code of Criminal Procedure had been of a purely formal character and that his failure to appear at the hearing had been caused by health reasons rather than a formal breach of the bail conditions. Moreover, the County Court had not established whether there had existed grounds – such as prevention of crime, bringing a suspect before authorities or preventing his fleeing – for depriving the applicant of his liberty.

17. On 6 April 2004 a judge of the Tartu Court of Appeal made a ruling scheduling a public hearing for 16 April 2004. In the ruling it was stated that the prosecutor, the applicant and his lawyer should be notified about the hearing, with a note that failure of the parties to appear would not prevent the hearing of the matter. On the same date the Court of Appeal sent summonses to the applicant and his lawyer.

18. A hearing before the Tartu Court of Appeal took place on 16 April 2004. According to the record of the hearing, the applicant and his lawyer had been informed of the time and place of the hearing with a note that their participation in the hearing would not be mandatory. The prosecutor and the applicant's lawyer were present at the hearing. The presiding judge asked for their opinion on whether it was possible to hear the matter; both the prosecutor and the applicant's lawyer replied in the affirmative.

19. In the applicant's submission, his request to be taken to the Court of Appeal had been refused by the prison authorities and a judge of the appellate court had told his lawyer that it was the practice of the court to hear such cases in the accused's absence. The record of the hearing does not contain any such remarks.

20. By a decision of 16 April 2004 the Court of Appeal dismissed the appeals. It found that the applicant had not complied with the conditions of his bail. Moreover, it had been presented with evidence according to which on 30 March 2004 at noon the applicant had been in a public house in Tallinn, whereas his doctor had prescribed that he stay at home and avoid strain. The court noted that bail was a measure adopted in lieu of detention. Accordingly, as long as the bail remained applicable, there were grounds for deprivation of the applicant's liberty and the lower court had had no obligation to establish once more whether such grounds existed. The court stated that the question of reimbursement of the bail money would be resolved later, at the same time as the determination of the applicant's guilt. This decision was final.

21. On 5 May 2004 the Supreme Court (*Riigikohus*) refused the applicant leave to lodge “an application for correcting court errors” (*kohtuvigade parandamise avaldus*) against the County Court’s decision of 30 March 2004 and the Court of Appeal’s decision of 16 April 2004.

22. In the meantime, on 26 April 2004, at a hearing before the County Court, the applicant again requested his release on bail. He was of the opinion that had he been present and able to present his arguments to the courts at the hearings where the revocation of his bail had been decided, the courts would not have granted the prosecutor’s request to take him into custody.

23. By a decision of 27 April 2004 the County Court dismissed the applicant’s request for release. It mainly referred to the reasons that had been set out in the County Court’s decision of 30 March 2004.

24. By a judgment of 27 December 2004, in simplified proceedings, the County Court convicted the applicant as agreed between him and the prosecutor. He was sentenced to three years’ and six months’ imprisonment, less the time already spent in custody. The bail money was to be returned when the judgment became final.

II. RELEVANT DOMESTIC LAW

25. The relevant provisions of the Code of Criminal Procedure (*Kriminaalmenetluse koodeks*), as in force at the material time, read as follows:

Article 66

“(1) If there is sufficient reason to believe that an accused or a defendant at trial who is at liberty might abscond from an investigation or court proceedings or impede the establishment of the truth in a criminal matter or continue to commit criminal offences, or in order to ensure the enforcement of a court judgment, one of the following preventive measures may be imposed on him or her:

1) obligation not to leave his or her place of residence (*allkiri elukohast mittelahkumise kohta*);

...

3) remand in custody (*vahi alla võtmine*);

4) bail (*kautsjon*);

...”

Article 68

“(1) In the choice of preventive measure, account shall be taken of the seriousness of the criminal offence in question, the personality of the suspect, accused, or defendant at trial, the possibility that the suspect, accused, or defendant at trial may abscond from the investigation or from the court proceedings or may impede the establishment of the truth, and the state of health, age, marital status and other facts concerning the suspect, accused or defendant at trial which may be relevant to the application of a preventive measure.

...”

Article 71-1

“(1) A judge ... may, at the request of the suspect, accused or defendant at trial, replace a preventive custody measure (*vahi alla võtmise*) with bail (*kautsjon*). ...

...

(5) A suspect, accused or defendant at trial who has been released on bail shall not leave his or her permanent or temporary residence unless authorised by an investigator, prosecutor or court.

(5-1) Bail may be revoked at the request of an investigator or prosecutor only by a county or city court judge.

(6) If a suspect, accused or defendant at trial evades, without good reason, preliminary investigation or court proceedings, or intentionally commits a new criminal offence, the sum of the bail shall be transferred to public revenue by a judgment or decision concerning discontinuance of the criminal proceedings ...”

(7) The sum for which bail is granted shall be returned if the suspect, accused or defendant at trial does not breach his or her obligation to appear when summoned ...”

Article 73

“(1) A preventive custody measure may be applied in respect of a suspect, accused or defendant at trial in order to prevent him or her from evading the criminal proceedings or committing a new offence, as well as to ensure the enforcement of a court judgment.

...”

Article 209

“If the defendant at trial fails to appear in a court session, the court shall adjourn the hearing of the criminal matter ... The court shall impose a fine on a defendant at trial who fails to appear ... and shall decide on the application of compulsory attendance or other preventive measures with regard to the defendant at trial.”

Article 222

“In the course of a court hearing of a criminal matter, the court shall be entitled to select, amend or annul ... the preventive measures previously adopted with regard to the defendant at trial.”

26. Article 74 of the Code of Criminal Court Appeal and Cassation Procedure (*Apellatsioon ja kassatsioon kriminaalkohtumenetluse seadustik*), as in force at the material time, provided that an appeal against a procedural ruling of a first-instance court had to be transmitted to the court of appeal by the first-instance court on the next day after it had received the appeal. The court of appeal had to decide on the scheduling of a hearing not later than on the next day after receipt of the appeal; the appeal had to be examined by the court of appeal within ten days after the scheduling of the hearing. The participants in the proceedings had to be informed of the hearing but their failure to appear did not prevent the matter from being heard.

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION**

27. The applicant complained that he had been taken into custody in violation of Article 5 § 3 of the Convention. Article 5, in so far as relevant, 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:

...

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

...

3. 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. Release may be conditioned by guarantees to appear for trial.

...”

28. The Government contested that argument.

A. Admissibility

29. 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. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

30. The applicant complained that he had been taken into custody even though he had not been absent from any of the court hearings without good reason. Accordingly, the courts had interpreted the substance of bail contrary to Article 5 § 3 of the Convention. Moreover, he argued that he had been deprived of his liberty without having been heard by the County Court or the Court of Appeal.

31. The Government submitted that the applicant had been taken into custody on 13 December 2001 and had been subsequently released on bail. He had been remanded in custody in 2004 not so much because of the suspicion that he had committed a crime but because he had breached the duty imposed on him not to leave his residence. Therefore, the applicant's detention after the replacement of the bail had fallen within the scope of Article 5 § 1 (b) of the Convention and Article 5 § 3 had not been applicable.

32. In the alternative, assuming that Article 5 § 3 was applicable, the Government admitted that the period from the applicant's detention on 31 March to his appearance at a County Court hearing on 26 April 2004, where the issue of the legality of his detention had been discussed, had indeed been long. However, the Government pointed out that the applicant and his lawyer had done nothing to ensure the applicant's appearance at the Court of Appeal's hearing on 16 April 2004 despite the fact that they had been informed of the date of the hearing and of the fact that the applicant's failure to appear would not prevent the court from examining the matter.

33. The Government pointed out that Article 5 § 3 expressly allowed for the release of a person detained on remand to be conditioned by guarantees of his appearance for trial. There was no absolute right to be released on bail and Article 5 § 3 did not specify how and under what conditions guarantees

to appear for trial should be applied or their application be terminated. Accordingly, these issues were subject to determination by domestic law. In the present case the applicant had been released on bail in 2002; however, he had been in breach of the conditions of the bail and had thus been taken into custody again in accordance with domestic law.

2. The Court's assessment

(a) Applicability of Article 5 § 3

34. Article 5 § 1 contains an exhaustive list of permissible grounds for deprivation of liberty. Taking into account that the applicability of sub-paragraph (c) of Article 5 § 1 triggers also the protection provided by Article 5 § 3, which constitutes an important additional guarantee for an arrested person, the Court considers it appropriate to analyse first whether this sub-paragraph is applicable to the present case (see *Harkmann v. Estonia*, no. 2192/03, § 32, 11 July 2006).

35. The Court observes that in the present case the applicant had been detained on 13 December 2001 on suspicion of having committed economic offences. A month and a half later he had been released on bail. According to the conditions of the bail under the domestic law, he had been prohibited from leaving his permanent residence, unless authorised by an investigator, prosecutor or court, and he was obliged to appear before the court when summoned.

36. The Court further observes that the applicant was summoned to a hearing of the criminal case against him scheduled for 29 March 2004 before the County Court. However, he failed to appear, while his lawyer presented the court with a medical certificate. Thereafter, on 30 March 2004, the court ordered the applicant's detention for a breach of the conditions of his bail, as he had on three occasions left the country without the requisite authorisation.

37. In these circumstances, the Court considers that the purpose of the measures applied in respect of the applicant – his initial arrest on 13 December 2001, release on bail on 25 January 2002 and placement in detention again on 31 March 2004 – was to ensure his effective participation in the criminal proceedings against him, and it observes that the above restrictions had a legal basis in the Code of Criminal Procedure.

38. The Court concludes that the applicant's detention fell within the ambit of sub-paragraph (c) of Article 5 § 1 of the Convention. Having found that sub-paragraph (c) was applicable, paragraph 3 of Article 5 also comes into play and the Court will proceed to examine whether the more stringent guarantees afforded by Article 5 § 3 were complied with (see *Harkmann*, cited above, § 35).

(b) Whether the guarantees afforded by Article 5 § 3 were complied with

39. The Court reiterates that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see, for example, *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III).

40. Article 5 § 3 is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5 § 1 (c) (see, for example, *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, p. 24, § 51; *Aquilina*, cited above, §§ 48-49; and *McKay v. the United Kingdom* [GC], no. 543/03, § 34, ECHR 2006-...).

41. The Court has pointed out that under Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the “officer” under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (see *McKay*, cited above, §§ 35-38, with further references).

42. The Court observes that, as in the above-cited case of *Harkmann*, the detention of the applicant in the present case was ordered by a court. Thus, the Court is called upon to determine whether the judicial involvement in the applicant’s arrest was sufficient in order to meet the requirements of Article 5 § 3.

43. In this context, the Court takes note of the Government’s argument that the applicant’s detention had been initially ordered by a court already on 13 December 2001 and that he had been subsequently released on bail, while the Convention did not regulate the matter of how and under what conditions the bail could be revoked and the applicant remanded again in custody. The Court also takes note of the applicant’s argument that his failure to appear at the hearing before the County Court had been caused by his health problems and not by the fact that he had left the country on three occasions, the latter having been the main ground why the bail had been revoked.

44. The Court finds that a judicial decision as to the necessity of the applicant’s detention which had been taken as long as two years or more before his arrest on 31 March 2004 cannot be considered sufficient at the material time. The circumstances militating for or against the applicant’s detention might have changed over that period and the reasons to justify his detention required fresh examination in order to meet the procedural and substantive requirements of Article 5 § 3 (see paragraph 41 above). However, in the present case the applicant was not heard personally about

possible reasons militating against the detention order of 30 March and the detention after his arrest on 31 March 2004.

45. The Court agrees with the Government that the text of Article 5 § 3 indeed does not determine how the guarantees of appearance for trial, as mentioned in the last sentence of the paragraph, are to be applied or under what conditions they can be terminated. Therefore, it is not for the Court to decide whether the reasons for revocation of the bail in the present case were sufficient or not. However, what the text of Article 5 § 3 does require is that a person has to be brought promptly before a judge or other judicial officer after having been arrested or detained. The text of the provision does not provide for any possible exceptions to that requirement, not even on grounds of prior judicial involvement. To conclude otherwise would run counter to the plain meaning of the text of the provision (see *Harkmann*, cited above, § 38).

46. The Court further notes that subsequent to his arrest and after his appeal the applicant was not brought before the Court of Appeal either. The first opportunity for him personally to present a court with arguments for his release was only on 26 April 2004, that is 26 days after his arrest. The Court finds that such a period is incompatible with the requirement of “promptness” under Article 5 § 3 (see, for example, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

47. There has accordingly been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

48. The applicant complained that the proceedings before the Court of Appeal had violated his rights guaranteed under the Convention. The Court considers that the impugned proceedings concerning the applicant’s deprivation of liberty fall to be examined under Article 5 § 4, which reads as follows:

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

49. The Government contested that argument.

A. Admissibility

50. The Court notes that this complaint is closely linked to the applicant’s complaint about not having been taken promptly before a judge and it must therefore be declared admissible.

B. Merits

51. Having regard to the finding of a violation of Article 5 § 3 of the Convention in the present case, the Court considers that the fact that the applicant was not brought before the Court of Appeal was in substance a further prolongation of the situation dealt with above, namely that he was not brought promptly before a judge after his arrest. Therefore, the Court considers that it is not necessary to examine the applicant's complaint under Article 5 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant requested the Court to award just satisfaction commensurate with the seriousness of the violation. He did not submit any quantified claims.

54. The Government agreed that if the Court were to find a violation, it should also determine the sum to be awarded by way of just satisfaction.

55. The Court finds that the applicant must have suffered anxiety and distress as a result of the violations of the Convention that cannot be compensated for adequately by the Court's findings. Making its assessment on an equitable basis, the Court awards the applicant the sum of 3,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant did not make any claims for the costs and expenses he incurred before the Court.

C. Default interest

57. 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 application admissible unanimously;
2. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* unanimously that it is not necessary to examine the applicant's complaint under Article 5 § 4 of the Convention;
4. *Holds* unanimously
 - (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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Estonian kroons at the rate applicable at the date of settlement;
 - (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 29 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President