



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

SECOND SECTION

CASE OF GALUASHVILI v. GEORGIA

(Application no. 40008/04)

JUDGMENT

STRASBOURG

17 July 2008

FINAL

17/10/2008

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

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 24 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 40008/04) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Tamaz Galuashvili on 27 October 2004. The applicant was represented before the Court by Ms Lia Mukhashavria, Ms Manana Kobakhidze, Ms Maka Gioshvili, Ms Natia Katsitadze, Mr Nikoloz Legashvili and Mr Vakhtang Vakhtangidze.

2. The Georgian Government (“the Government”) were represented by their Agent, Mr Mikheil Kekenadze, of the Ministry of Justice.

3. On 24 October 2006 the Court declared the application partly inadmissible and decided to communicate to the Government the applicant’s allegations concerning arrest without reasonable suspicion, the absence of information about the reasons for his arrest and the lack of adequate reasoning in the court decisions ordering his detention. Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the remainder of the application at the same time as its admissibility.

4. The Government and the applicant each filed observations on admissibility and merits (Rule 54A of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Tbilisi.

6. Following an anonymous telephone call at 3.35 p.m. on 26 June 2004 informing the Central Police Department of Tbilisi (“the CPD”) that armed men had been seen driving a car, the police urgently planned an arrest operation. The case file contains a transcript of that call.

7. At around 4 p.m. on 26 June 2004 the car, driven by the applicant, was stopped in one of the central avenues of Tbilisi (for more details, see *Galuashvili v. Georgia* (dec.), no. 40008/04, 24 October 2006). According to the record of the applicant’s body search undertaken on the spot, certified by two witnesses’ signatures, a gun was found tucked in the belt of his trousers. After the search, the applicant was immediately conveyed to the CPD.

8. According to the applicant’s version of events, however, he was never searched and nor were the reasons for his arrest explained to him at the time. The record of the search was allegedly drawn up *ex post facto* and presented to him only at the CPD, twenty minutes after his arrest in the street. He refused to sign the record of arrest, claiming that it had been fabricated.

9. At the same time the applicant contended that he had first learnt about the nature of the charges against him when glancing at the television in the room of the CPD used for questioning. The evening news of 26 June 2004 reported, quoting the investigator in charge of the case, that the applicant, “a.k.a. the ‘Elephant of Tskhneti’, a well-known criminal and ... recidivist ... had been arrested for the unlawful transport and storage of arms in large quantities.” Only later was the applicant presented with the investigator’s decision, dated 8.00 p.m. 26 June 2004, opening a criminal case and declaring him a suspect.

10. On the same day, without the applicant’s knowledge, the police conducted a search of his home in the presence of his family members. The record of that search, attested by the signatures of several witnesses, disclosed that guns and ammunition were discovered there. In addition, the police discovered and seized several Georgian passports of the applicant, issued on unspecified dates and containing different serial numbers, as well as his two old Soviet passports, in one of which he was apparently mentioned as a national of the former Russian Soviet Federative Socialist Republic. The applicant’s wife refused to sign the record of the search, claiming that the police had planted firearms in their home.

11. On 27 June 2004 the Vake-Saburtalo District Court in Tbilisi validated the results of the two above-mentioned searches.

12. On 28 June 2004 the applicant was charged with the unlawful transportation and storage of firearms and ammunition. He pleaded “not guilty” but promised to cooperate with the investigation. On the same day the prosecutor requested that the applicant be remanded in custody, arguing as follows:

“The circumstances of the case prove the [applicant’s] guilt. He is not sincere in his dealings with the investigators. There exists a suspicion that he might interfere with the establishment of the truth. The possibility that he will abscond cannot be ruled out. A number of investigative actions have to be undertaken...”

No specific circumstances of the case were relied on, or specific explanations put forward, in support of the above assertions.

13. At a hearing on 29 June 2004, the applicant denounced the unfounded nature of the charges and stated that his family, job and fixed place of residence were guarantees of his appearance for trial. He reaffirmed his readiness to cooperate with the investigation and stated that he was suffering from diabetes. The Vake-Saburtalo District Court ordered the applicant’s pre-trial detention for three months in the following terms:

“...Having examined [various pieces of evidence] ... [the court] has come to the conclusion that the collected evidence discloses a substantiated suspicion that the accused committed the offence in question. The evidence has been collected in conformity with the procedural norms.

“[In the court’s] opinion, the prosecutor’s request is substantiated, and granting it would be lawful since the accused has been charged with an offence carrying more than five years’ imprisonment. The seized gun has to be identified; it remains to be seen whether it has been the subject of suspicion in any other crimes. The suspicion that the accused, if released, might interfere with the establishment of the truth or, in view of the prospect of punishment, abscond is substantiated.”

14. The applicant appealed, requesting his release on the same grounds as had previously been put to the District Court. He submitted that the prosecution had not proved that there existed grounds for a reasonable suspicion that he might either abscond or negatively influence the investigation pending trial. The applicant also referred to his diabetes as an argument for release. The prosecutor replied that the appeal was unsubstantiated. A number of investigative measures had to be undertaken, and the applicant’s release might conflict with the interests of the investigation. The prosecution noted that no medical certificate proving the applicant’s disease had been submitted.

15. On 1 July 2004 the Tbilisi Regional Court upheld the detention order of 29 June 2004. It noted that the applicant should remain in custody on the basis of the circumstances “well argued in the prosecutor’s submissions”. In particular, the court continued, “there existed sufficient grounds for the assumption that the applicant’s release pending trial would hinder the establishment of the truth and, in particular, the due assessment of the evidence submitted by the accused.”

16. Both the initial detention order of 29 June 2004 and the appeal decision of 1 July 2004 endorsed the fact that firearms and ammunition had been discovered on the applicant's body and at his home on 26 June 2004.

17. On 5 July 2004, the applicant's lawyer requested an official expert medical opinion on the applicant's condition. The request was dismissed by the investigator on 8 July 2004 on the ground that the applicant had the right to have himself examined by an independent medical expert.

18. On 26 July 2004 the applicant's lawyer requested the prosecution to include in the criminal case file the written statements of thirteen persons whom he had questioned himself. Some of those persons, having been eyewitnesses to the applicant's arrest in the street on 26 June 2004, stated that the applicant had not been searched on the spot. Others, being witnesses to the search of the applicant's home, testified that the police had planted the firearms there. The lawyer also requested that those witnesses be interviewed by the prosecution.

19. On 28 July 2004 the investigator in charge of the applicant's case refused to include the above-mentioned statements as evidence in the file or to interview their authors. He reasoned that, since all of the witnesses who had allegedly been eyewitnesses to the applicant's arrest were women, they would have been uninterested in what had been happening in the street and their testimonies, being moreover "superficial, incomprehensive and unsubstantiated", were not trustworthy. The investigator suggested that those female witnesses might have been influenced and recalled that, in any case, the search on the spot had already been confirmed by other witnesses' signatures. As to the witnesses to the search of the applicant's home, the investigator considered that, as they were his neighbours, they were not impartial.

20. The applicant's lawyer challenged that decision before the prosecutor, complaining, *inter alia*, that the investigator had discriminated against the female witnesses. The prosecutor dismissed the appeal on 2 August 2004 and instead ordered that the police officers who had been involved in the applicant's arrest and in the search of his house be questioned.

21. An alternative expert medical opinion of 3 September 2004 confirmed that the applicant was suffering from a progressive type of diabetes and needed intensive insulin treatment. The opinion concluded that the risk of hypoglycaemia was high which, in the absence of urgent intervention, could lead to the applicant's death. The following week, the applicant was transferred, upon his request, to the prison hospital where he stayed until his release (see paragraph 23 below).

22. On 25 September 2004 the investigation was terminated and the case sent to the Vake-Saburtalo District Court. During the trial, which opened on 18 November 2004, the applicant's lawyer complained of the prosecution's refusal to admit to the file the above-mentioned thirteen testimonies (see

paragraph 18 above). He also referred to the fact that the witnesses for the prosecution, whose signatures certified the record of the applicant's search, had changed their testimony in favour of the latter. In fact, when interviewed by the District Court, those persons said that they had not witnessed the actual process by which the gun on the applicant's body had been revealed.

23. In its verdict of 22 November 2004, the Vake-Saburtalo District Court convicted the applicant of the unlawful transportation and storage of firearms and ammunition. In its opening part, the verdict referred to the applicant as an unemployed person. The court did not accept the prosecution witnesses' altered testimonies, considering that they had been influenced by the applicant's authority as a criminal ringleader. As disclosed by the record of the hearing, the prosecutor submitted – subsequently endorsed by the court – that the applicant's "donation" of 100,000 Georgian laris (EUR 42,825¹) to the "Development Fund of the Law-Enforcement Agencies" should be considered as a mitigating factor. The facts that the applicant had had no prior convictions and was suffering from diabetes were also endorsed as mitigating circumstances. The applicant was sentenced to one year's imprisonment, suspended, and was immediately released from the courtroom.

24. On 3 December 2004 the applicant challenged the verdict before the Tbilisi Regional Court, seeking an acquittal. However, on 22 December 2004 he informed the Regional Court that he had lost interest in the proceedings and withdrew his appeal. According to the applicant, he had done so for security reasons, as the authorities had threatened to arrest him again.

II. RELEVANT DOMESTIC LAW

25. The Code of Criminal Procedure ("CCP"), as it stood at the material time

Article 145 § 1

"When the police officer, or other competent official, decides that the grounds prescribed by this Code for an arrest exist, he should inform the suspect thereof in understandable terms. Namely, the officer should explain to the suspect what are the charges leveled against him ... and convey him to a police station or other law-enforcement office."

¹ The exchange rate as at 22 February 2008.

Article 151 §§ 1, 2 and 3

“A restraint measure shall be applied to ensure that the accused cannot avoid the preliminary investigation and trial, that his further criminal activity is prevented, that he cannot interfere with the establishment of the truth in the given criminal case, or that the court’s verdict is executed.

The application of a restraint measure is justified if the evidence in the criminal case file sufficiently substantiates the assumption that it is necessary to ensure the attainment of the aims mentioned in the first paragraph of this Article.

The ground for the imposition of pre-trial detention can be a substantiated suspicion that the accused may abscond or interfere with the establishment of the truth in the criminal case, or that a serious or grave crime has been committed.”

Apart from pre-trial detention, Article 152 § 1 envisaged the possibility of using such measures of pre-trial restraint as police supervision, home arrest, bail or a personal undertaking not to leave the place of residence.

Article 159 § 3

“Pre-trial detention shall be imposed only with regard to persons charged with an indictable offence carrying [a punishment of] more than two years’ imprisonment ...”

THE LAW**1. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION**

26. The applicant complained that his arrest had not been based on a reasonable suspicion within the meaning of Article 5 § 1 (c) of the Convention. The relevant part of that provision reads as follows:

“1. ... 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...”

27. The Government contested that argument. They submitted that the arrest of the applicant had been planned on the basis of the anonymous telephone call. They also referred to the fact that the urgent search of the applicant and his home on 26 June 2004 had revealed firearms in his possession. The results of those searches were later validated and endorsed by the domestic courts.

28. The applicant replied that the anonymous call had been fabricated by the police. In support of this assertion, he claimed that, taking into account the distance between the CPD and the place of arrest and the usual traffic jams in the centre of Tbilisi at peak hours, it would hardly have been possible for the police to arrange the operation within thirty minutes of receiving the call.

29. The applicant reiterated that he had not been searched on the spot and that the relevant record of arrest, attesting to the presence of a gun in the belt of his trousers, had in reality been presented to him only upon his transfer to the CPD. He claimed that he had not been wearing a belt at the time of his arrest and that his light sports trousers could not carry a heavy gun. He further complained that the domestic courts had arbitrarily endorsed the statements of the prosecution witnesses, whilst rejecting those of the defence without any explanation. Lastly, the applicant asserted, without adducing any proof, that the witnesses who had signed the record of his body search were *agents provocateurs* of the police.

A. Admissibility

30. The Court reiterates that the national authorities are better placed to evaluate the evidence adduced before them and, consequently, its task is limited to reviewing under the Convention the decisions they have taken rather than substituting its own assessment of the facts of the case (see, amongst other authorities, *mutatis mutandis*, *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 20, § 43; *Luberti v. Italy*, judgment of 23 February 1984, Series A no. 75, p. 12, § 27).

31. Contrary to the applicant's submission, it is not the Court's task to probe into whether the applicant, on arrest, was wearing trousers in the belt of which he could have carried a gun or whether the police could truly have reached the spot in thirty minutes. Nor can it assess the credibility of the documents in the criminal case file in a manner different from that adopted by the domestic courts. Other than challenging the domestic factual findings, the applicant has not advanced any major and substantiated argument capable of showing a *prima facie* instance of the incompatibility of the national authorities' decisions with the relevant Convention standards.

32. Furthermore, the applicant's arguments concerning the arbitrary disregard of the defence witnesses' statements and the alleged involvement of *agents provocateurs* would have been more appropriate in the context of the proceedings relating to the determination of the criminal charges against him (see, amongst others, *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, § 44, 5 April 2007; *Borisova v. Bulgaria*, no. 56891/00, §§ 46-49, 21 December 2006). He could have raised those grievances before the appellate and cassation courts. Instead, the applicant

chose to drop the case (see paragraph 24 above), a fact which has already led the Court to declare the same complaints raised under Article 6 of the Convention inadmissible for non-exhaustion of domestic remedies (see the *Galuashvili* decision, cited above). As to the complaint about the fabrication of the anonymous telephone call, the Court has already examined and rejected it as being manifestly ill-founded (*ibid.*).

33. The Court further notes that the results of the urgent searches of 26 June 2004, which revealed the firearms and ammunition unlawfully in the applicant's possession, were first validated on 27 June 2004 and, afterwards, were also repeatedly endorsed as established fact by the domestic courts. The Court considers that those well-established facts were sufficient to raise "a reasonable suspicion" that the offence of the unlawful transportation and storage of arms had been committed. It should also be pointed out in this regard that facts which raise a suspicion under Article 5 § 1 (c) of the Convention need not be of the same level of certainty as those necessary to justify a conviction or even the bringing of a charge (see *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55).

34. In the light of the above considerations, the Court concludes that the complaint under Article 5 § 1 (c) of the Convention is unsubstantiated and must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

35. The applicant complained under Article 5 § 2 of the Convention that he was not immediately informed of the reasons for his arrest and the nature of the charges against him, and that he was denied the assistance of a lawyer. This provision reads as follows:

"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

36. The Government stated that, as a gun had been found on his person, the applicant could easily have understood the reasons for his arrest. They submitted the record of his arrest, dated 4.20 p.m. 26 June 2004, which disclosed that the applicant had been informed, upon his transfer to the CPD, of the suspected offence – unlawful transportation of a gun – and had had his procedural rights explained to him. The applicant had refused to sign the record.

37. The applicant endorsed the above-mentioned record as valid evidence, claiming that it disclosed the authorities' hesitation as to the exact classification of the offence in question at the time of his arrest. However, he still maintained that it was only through the evening news of 26 June 2004 that he had first learnt of the charges against him.

A. Admissibility

38. The Court reiterates that, by virtue of Article 5 § 2 of the Convention, any person arrested must be told, in simple, non-technical language which he or she can understand, the essential legal and factual grounds for the measure. Whilst this information must be conveyed “promptly”, it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, p. 19, § 40).

39. The Court notes that the record of the arrest was presented to the applicant at 4.20 p.m. at the CPD, that is, twenty minutes following his arrest in the street. The applicant has himself acknowledged this fact (see paragraphs 8 and 37 above). Having closely examined the content of that record, the Court finds that it contained specific information about the reason for the applicant’s arrest, namely, a suspicion that the offence of the illegal transportation and storage of firearms had been committed. In the context of the present case, the interval of twenty minutes cannot be regarded as falling outside the time constraints imposed by the notion of promptness in Article 5 § 2.

40. This limb of the complaint is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

41. As to the second limb of the complaint, relating to the applicant’s inability to have the assistance of a lawyer immediately after his arrest, it was already declared inadmissible on 24 October 2006 (see the *Galuashvili* decision, cited above).

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

42. The applicant complained under Article 5 § 3 of the Convention that the judicial decisions concerning his pre-trial detention lacked reasonable grounds. This provision reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

43. The Government contested that argument, maintaining that the reasons expressly given in the contested judicial decisions were adequate.

44. The applicant replied that the domestic courts had never considered the possible use of other non-custodial forms of pre-trial restraint and that they had justified the imposition of detention on insufficient grounds, such as the severity of the charge against him. He complained that, against

the prosecutor's unsubstantiated statements, the domestic courts, without giving any explanations in the relevant decisions, refused to accept his specific arguments, such as, for example, that he suffered from diabetes and was in need of permanent medical supervision and treatment which would have been impossible to receive in detention. Since the prosecution requested his pre-trial detention without supporting the alleged risks of absconding or hampering the investigation by reference to the specific circumstances of the case or pieces of evidence, the applicant considered that the burden of proof in the relevant proceedings had been shifted onto him, in breach of Article 5 § 3 of the Convention. The applicant further complained in this regard that there was no statutory obligation for the prosecution to assume the burden of proof in matters of detention.

A. Admissibility

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention; nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

46. According to 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 (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110-111, ECHR 2000-XI; *Pihlak v. Estonia*, no. 73270/01, § 41, 21 June 2005). 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, whilst paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a public interest requirement justifying a departure from the rule in Article 5, and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated 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 (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV; *Kudła*, cited above, § 110).

47. 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. The Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be

satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect (see, for example, *Scott v. Spain*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2399-2400, § 74; *I.A. v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2978, § 102).

48. As to the case at hand, the Court first notes that the impugned court decisions of 29 June and 1 July 2004 relied, in addition to the existence of a reasonable suspicion against the applicant, on the need to secure the proper conduct of the proceedings. In this respect, the domestic courts referred to the severity of the penalty to which the applicant was liable. Given that the applicant was found in possession of firearms and ammunition, the Court accepts that there was a reasonable suspicion that the applicant had committed the serious offence with which he had been charged and which could warrant his detention (see *Kusyk v. Poland*, no. 7347/02, §§ 36-37, 24 October 2006). It further subscribes to the domestic authorities’ consideration that the severity of the sentence was a relevant element in the assessment of the risk of absconding or otherwise jeopardising the investigation at the early stages of the proceedings (see *Ilijkov v. Bulgaria*, no. 33977/96, § 80, 26 July 2001). Moreover, in its decision of 29 June 2004, the Vake-Saburtalo District Court referred to the need to test the seized gun in order to establish whether it had been used in any other crimes. In the Court’s view, this was another reasonable ground justifying the applicant’s detention.

49. As to the applicant’s arguments in favour of his release, the Court notes that one of those grounds – the existence of a job as a guarantee for appearance at trial (paragraph 13 above) – was apparently false, in so far as the applicant was, according to the verdict of 22 November 2004, unemployed at the material time (paragraph 23 above). As to the reference to diabetes (paragraphs 13 and 14 above), the Court observes that the veracity of this submission could not be tested by the domestic courts on 29 June and 1 July 2004, as the applicant did not put forward any medical evidence to that end until 3 September 2004 (paragraphs 14 and 21 above). Apparently, he had not taken any medication with him into the prison or sought its immediate acquisition. Moreover, neither he nor his family immediately contacted the prison medical practitioners on this matter.

50. Lastly, the Court notes that the applicant was tried speedily – within five months (see paragraphs 7 and 23 above). Consequently, the authorities dealt with the case with special diligence, this factor being of further importance in assessing the compatibility of pre-trial detention with Article 5 § 3 of the Convention (see *Kusyk*, cited above, § 39; *Klamecki v. Poland*, no. 25415/94, §§ 74 and 76, 28 March 2002).

51. In view of the foregoing considerations, the Court concludes that, whilst it would certainly have been desirable for the domestic courts to have given more detailed reasoning as to the grounds for the applicant's detention, this cannot, in the circumstances of the present case, amount to a violation of his rights under Article 5 § 3 of the Convention (see *Sardinas Albo*, cited above, § 89; *Van der Tang v. Spain*, judgment of 13 July 1995, Series A no. 321, p. 19, § 60).

52. The Court thus concludes that there has been no violation of Article 5 § 3 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 5 § 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by 6 votes to 1 that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 17 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinion of Judge Tulkens is annexed to this judgment.

F.T.
S.D.

DISSENTING OPINION OF JUDGE TULKENS

I cannot subscribe to the decision of the majority in so far as it departs in two essential respects from the Court's case-law concerning Article 5 § 3 of the Convention and from the general principles underlying that provision.

1. I note firstly that the present case is similar to *Patsuria v. Georgia* (no. 30779/04, §§ 61-77, 6 November 2007), in which the Court held precisely that in the absence of specific, relevant and sufficient grounds, the first three months of the applicant's pre-trial detention had breached Article 5 § 3 of the Convention.

This touches on a basic principle governing the Court's settled case-law. A decision to continue a person's pre-trial detention must be duly *reasoned* and the reasons must be given *in concreto*. It is essentially on the basis of the reasons given in the relevant decisions of the national judicial authorities and of the arguments submitted by the applicant in his or her applications for release that the Court is called upon to decide whether or not the detention on remand was justified under Article 5 § 3 of the Convention. In this context, any period of detention on remand, whatever its length, requires appropriate reasoning by the competent national authorities (see *Jabłoński v. Poland*, no. 33492/96, § 80, 21 December 2000). It was precisely such a review and such reasoning that were lacking in the present case.

2. The domestic courts did not attempt to refute the arguments submitted by the applicant in his applications for release but simply accepted the general, abstract assertions put forward by the prosecution (see paragraphs 13-15 of the judgment). Contrary to the relevant Convention standards (see, for example, *Garycki v. Poland*, no. 14348/02, § 46, 6 February 2007), the first-instance court endorsed the mere existence, unrelated to other valid grounds, of a reasonable suspicion that the applicant had committed the offence, and referred to the severity of the possible punishment (see *Rokhlina v. Russia*, no. 54071/00, § 66, 7 April 2005, and *Khudoyorov v. Russia*, no. 6847/02, § 181, ECHR 2005-X). Another reason which was relied on – the lawfulness of the evidence collected – was necessary under domestic law to justify the applicant's detention; however, in my view, this goes to the issue under Article 5 § 1 (c) of the Convention and it is not relevant for the assessment of the reasonableness of the decision concerning pre-trial detention for the purposes of Article 5 § 3 (see *Patsuria*, cited above, § 68).

3. Admittedly, the fear that the applicant might abscond or hamper the establishment of the truth might, in principle, have been a valid ground. However, the domestic courts did not substantiate this fear with reference to any specific circumstances of the case, and relied solely on the prosecutor's abstract statements, unsupported by actual evidence (see, by contrast, *Ramishvili and Kokhreidze v. Georgia* (dec.), no. 1704/06, 27 June 2007).

In particular, the first-instance court mentioned, without providing any logical explanation for the asserted cause and effect, the need to test the seized gun in order to establish whether it had been used in any other crimes (see paragraph 13 of the judgment). However, I am unable to discern how the applicant's release might have hindered that particular investigative measure, given that the gun in question had already been taken from the applicant and was in the authorities' possession. Neither did the appellate court specify why the applicant, if released, might interfere with the investigation. Consequently, I find that the risks of absconding and hampering the establishment of the truth appear, in the present case, to be unsubstantiated, hypothetical and thus insufficient to justify depriving the applicant of his liberty (see *Patsuria*, cited above, §§ 69 and 71; *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 43; and *Smirnova v. Russia*, no. 46133/99 and 48183/99, § 63, ECHR 2003-IX).

4. Even though specific, relevant facts warranting the applicant's deprivation of liberty may have existed in the present case, they were not set out in the relevant domestic decisions (see *Labita v. Italy* [GC], no. 26772/95, § 152 *in fine*, ECHR 2000-IV). It is not the Court's task to take the place of the national authorities and establish such facts in their stead (see *Ilijkov v. Bulgaria*, no. 33977/96, § 86, 26 July 2001; *Nikolov v. Bulgaria*, no. 38884/97, § 74, 30 January 2003; and *Panchenko v. Russia*, no. 45100/98, § 105, 8 February 2005), as the majority did in the present case (see paragraph 49 of the judgment).

5. What, then, are the factors which led the majority to conclude that there was no violation of Article 5 § 3 of the Convention in this case?

A first aspect that was explicitly mentioned was the *severity of the penalty* to which the applicant was liable (see paragraph 48). The Court has always held that the seriousness of the offence – and, consequently, the severity of the sentence – is a necessary ground for continuing a person's pre-trial detention but is in itself insufficient; other supporting reasons must also be given (see *Demirel v. Turkey*, no. 39324/98, § 59, 8 January 2003, and *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003), but that did not happen in this case.

The second aspect is probably the decisive factor which persuaded the majority: the *length* of the applicant's pre-trial detention, a period of five months, which was deemed, so to speak, "insufficient". This marks, in my opinion, the other departure from our case-law. As the Court forcefully pointed out in *Belchev v. Bulgaria* (no. 39270/98, § 82, 8 April 2004), there is no cause to consider that there is a "certain period" within which pre-trial detention may be regarded as acceptable. Even a relatively short period of detention – the period in *Belchev* was four months and fourteen days – must be *justified* by the authorities and may, where appropriate, be found to breach Article 5 § 3 if there is no satisfactory justification.

6. Lastly, under Article 5 § 3 of the Convention, when deciding whether a person should be released or detained, the authorities must consider alternative measures of ensuring his or her appearance at the trial. Indeed, this provision proclaims not only the right to “trial within a reasonable time or to release pending trial” but also lays down that “release may be conditioned by guarantees to appear for trial” (see, among other authorities, *Kaszczyńiec v. Poland*, no. 59526/00, § 57, 22 May 2007). *The authorities are under an obligation to conduct such a review and it must be clear from the reasoning of their decision that the review has taken place* (see *J.G. v. Poland*, no. 36258/97, §§ 55-56, 6 April 2004). However, in the present case, the domestic courts did not consider at all the possibility of applying other non-custodial preventive measures, which were expressly envisaged by Article 152 § 1 of the CCP. Such an omission by the domestic courts is yet another indication of their disregard for the requirements of Article 5 § 3 of the Convention (see *Patsuria*, cited above, §§ 75-76, and *Dolgova v. Russia*, no. 11886/05, §§ 47, 48 and 50, 2 March 2006).

7. As the Court has often emphasised, the safeguard in Article 5 § 3 of the Convention secures “the rule of law, one of the fundamental principles of a democratic society” (see *Dikme v. Turkey*, no. 20869/92, § 66, ECHR 2000-VIII). The very essence of Article 5 § 3 is the right to remain free pending a criminal trial, so that the presumption of innocence is given practical and useful effect rather than being theoretical and illusory. Liberty is the rule and detention the exception. That is the message which the Court should be giving States in the efforts they pursue, by various means, to limit pre-trial detention, which is a problematic issue in all criminal-justice systems in Europe.