



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

FIRST SECTION

CASE OF NERATTINI v. GREECE

(Application no. 43529/07)

JUDGMENT

STRASBOURG

18 December 2008

FINAL

18/03/2009

This judgment may be subject to editorial revision.

In the case of Nerattini v. Greece,

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

Nina Vajić, *President*,

Christos Rozakis,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 27 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 43529/07) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Gianni Nerattini (“the applicant”), on 7 October 2007.

2. The applicant was represented by Mr D. Petrouskas, a lawyer practising in Samos, and Mr A. Chondrogiannis, a lawyer practising in Piraeus. The Greek Government (“the Government”) were represented by their Agent’s delegates, Mr K. Georgiadis, Adviser at the State Legal Council, and Mr I. Bakopoulos, Legal Assistant at the State Legal Council. The Italian Government did not make use of their right to intervene under Article 36 § 1 of the Convention.

3. On 17 December 2007 the applicant requested the Court to indicate to the Greek Government his conditional release under Rule 39 of the Rules of Court. Following the Government’s observations concerning the applicant’s state of health while in detention and the medical care provided to him, the President of the Section decided, on 13 February 2008, not to apply Rule 39.

4. On 7 March 2008, the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3) and to give priority to the case under Rule 41 of the Rules of Court in view of the applicant’s advanced age and poor state of health.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1938 and lives in Samos.

A. Outline of events

1. Criminal proceedings initially instituted against the applicant

6. On 17 August 2007 the applicant was arrested in *flagrante delicto* for receiving a package containing 71 grams of cannabis and remanded in custody. Following his arrest, the applicant's house was searched. The investigating authorities found and seized a large number of Egyptian and Greek antiquities, including small statues, ancient coins, vessels and fossils.

7. On 18 August 2007 the applicant was brought before the Public Prosecutor of Samos who charged him with having received a package containing drugs. Concerning the antiquities found in the applicant's house, the Prosecutor decided not to press charges unless new evidence was adduced.

8. On 20 August the investigating judge at the Samos Criminal Court, after questioning the applicant, remanded him in custody with effect from 17 August, the date of his arrest, on the grounds that there were serious *prima facie* indications that the defendant had committed the drug-related offence and that it was necessary to prevent him from absconding and to make sure that he would not commit further offences.

2. Habeas corpus proceedings before the Indictment Division of the Samos Criminal Court

9. On 24 August 2007 the applicant applied for release on bail.

10. On 10 September 2007 the Indictment Division of the Samos Criminal Court rejected the applicant's request (decision no. 49/2007). It held as follows:

"... [the way that the packet was carefully prepared] reveals a dexterous and studied action, established by the choice of special means for the commission of the crime of drug trafficking, as well as a collective action. Furthermore, during the lawful search of the accused's house ... a significant number of antiquities were found, including in particular, 41 coins from different periods, a small statue of Apollo, a small bronze statue of Bacchus, an ancient vessel, a fossil in lava from the volcano of Santorin, part of a fresco and numerous Egyptian antiquities, the possession of which demonstrates the perpetrator's propensity to commit further offences relating to antiquities. In view of the above, there is very serious evidence of the applicant's guilt and ... his request should be rejected since it is reasonably considered that even the replacement of his

pre-trial detention by preventive measures would not be sufficient to ensure his appearance in court and the execution of any judgment the court may deliver.”

3. Further developments

11. On 18 February 2008, the Public Prosecutor submitted to the Indictment Division of the Samos Criminal Court his proposal to prolong the applicant’s detention in compliance with Article 287 of the Code of Criminal Procedure (see paragraph 17 below), since the applicant had been in detention for six months.

12. On 7 March 2008 the Indictment Division of the Samos Criminal Court replaced the applicant’s pre-trial detention by preventive measures (decision no. 5/2008). In particular, it held that:

“... the prolongation of the applicant’s pre-trial detention is not absolutely necessary since he has a known residence in Samos, and has family and property in Greece, he has not made preparations with a view to absconding, he has never been a fugitive in the past and it is improbable, on the basis of his criminal record and his social and professional status, that he will commit further crimes if he is released. In the light of the above and in view of the applicant’s old age and serious health problems ... the Indictment Division considers that the prolongation of the detention imposes on the applicant a disproportionate burden and that his appearance in court and the execution of any judgment the court may deliver can be ensured by the above preventive measures: (a) prohibition from leaving the country and (b) an obligation to report to his local police station twice a month. ...”

13. Subsequently, the Public Prosecutor laid supplementary charges against the applicant for misappropriation of antiquities. On 28 March 2008 the investigating judge questioned the applicant in that connection.

14. It appears from the case-file that the criminal proceedings against the applicant are still pending before the investigating authorities.

B. The applicant’s medical condition while in detention and the medical care provided to him

15. The applicant suffers from various health problems, including chronic duodenal ulcer, persistent urinary problems, inguinal hernia (when part of the intestine bulges through a weak area in muscles in the groin, the area between the abdomen and thigh) and degenerative spine disorders. He often complains of hemoptysis (coughing up blood), intense epigastric pain and melena.

16. The applicant was frequently hospitalised in the Prison Hospital in order to undergo medical examinations. On several occasions he was granted leave to be consulted by external doctors and undergo special examinations in Public Hospitals, including gastroscopy, echocardiography and chest X-rays. According to the medical certificates submitted by the applicant and the Government, the results of a number of medical

examinations (kidneys, bladder and prostate ultrasound, chest computed tomography, bronchoscopy and heart triplex ultrasound) were imminent. The applicant was prescribed medication for his urinary and gastrointestinal problems. Concerning the inguinal hernia, surgical treatment was advised.

II. RELEVANT DOMESTIC LAW

A. The Constitution

17. Article 6 of the Greek Constitution reads as follows:

“1. No person shall be arrested or imprisoned without a reasoned judicial warrant which must be served at the time he is arrested or remanded in custody, except when caught in the act of committing a crime.

...

4. The maximum duration of detention pending trial shall be specified by law; such detention may not exceed a period of one year in the case of felonies or six months in the case of misdemeanours. In entirely exceptional cases, the maximum durations may be extended by six or three months respectively, by decision of the competent judicial council.”

B. The Code of Criminal Procedure

18. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 282 § 3

“1. During the preliminary procedure, if there are serious indications of guilt, preventive measures may be imposed on a person accused of a felony or an offence punishable with a sentence of imprisonment of at least three months, and provided that these measures are considered to be strictly necessary

...

3. Detention on remand may be imposed instead of preventive measures, provided that the conditions of paragraph (1) are fulfilled, only if the accused is charged with a crime and does not have a known residence in the country or has made preparations with a view to absconding or has been a fugitive in the past ... or it is reasonably considered that if he is released, it is most probable, in the light of his previous conduct or the special circumstances of the incriminated act, that he will commit further offences. The gravity of the charge cannot by itself serve to justify the detention on remand.”

Article 287

“1. Where detention on remand has lasted six months in the case of felonies, or three months in the case of misdemeanours, the Indictment Division shall give a final, reasoned decision on the question whether to prolong detention or release the accused.
...

2. In all cases, and until adoption of the final decision, detention on remand in respect of a single offence shall not exceed one year for felonies or six months for misdemeanours. In exceptional circumstances these limits may be extended by six months or three months respectively by a reasoned decision, against which no appeal shall lie, of

(a) the Indictment Division of the Court of Appeal ...

(b) the Indictment Division of the Court of First Instance ...”

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION**

19. The applicant complained under Article 6 of the Convention that the reasons given by the Indictment Division of the Samos Criminal Court presented him as the perpetrator of a crime with which he had not been charged and for which he was not standing trial. The Court will examine this complaint under Article 6 § 2 to the Convention, which reads as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

A. Admissibility

20. 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. *Submissions of the parties*

21. The Government claimed that decision no. 49/2007 did not contain any statement in breach of the applicant's right to be presumed innocent. On the contrary, the Indictment Division of the Samos Criminal Court had had to provide sufficient reasons in order to substantiate the existence of a risk of new offences being committed in the event that the applicant was to be set free. In any event, in the Government's view, the presumption of the applicant's innocence was not prejudiced since criminal charges were subsequently brought against him for misappropriation of antiquities.

22. The applicant submitted that the fact that criminal charges were brought against him six months after the Indictment Division of the Samos Criminal Court had already presented him as guilty for misappropriation of antiquities could not alter the conclusion that his right to be presumed innocent had been breached.

2. *The Court's assessment*

23. The Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to being theoretical and illusory. That also applies to the right enshrined in Article 6 § 2 (*Alenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308). According to the Court's case-law, the presumption of innocence will be violated if, without the accused having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty (*Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62).

24. In the present case, the Court notes that the Indictment Division of the Samos Criminal Court stated that the fact that during the search of the applicant's house a significant number of antiquities was found, "*demonstrates the perpetrator's propensity to commit further offences relating to antiquities*". In the Court's view, it is clear that, according to this statement, the applicant had already committed several thefts of antiquities and it was probable that he would repeat such offences in the future. However the Court points out that, until that time, the applicant had not been formally accused of or tried for such acts. In fact, when he was brought before the Public Prosecutor, on 18 August 2007, the applicant was only charged with having received a packet containing cannabis and the supplementary charges were laid against him several months later.

25. In view of the above, the Court considers that decision no. 49/2007 of the Indictment Division of the Samos Criminal Court reflected the opinion that the applicant was guilty of misappropriation of antiquities, a crime that he was not even formally accused of at that time. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to the presumption of innocence has been breached.

There has accordingly been a violation of Article 6 § 2 of the Convention.

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

26. The applicant complained that his pre-trial detention was unnecessary and was not based on "relevant and sufficient" reasons. He relied on 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. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

27. 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. Submissions of the parties

28. The Government submitted that the applicant's detention had been dictated by reasons of public interest, namely to ensure the defendant's unobstructed presence at the trial and the enforcement of any sentence and to prevent the commission of new crimes. These reasons were invoked in detail in the decision no. 49/2007 of the Indictment Division of the Samos Criminal Court. In the Government's view, these reasons met the standards of relevance and sufficiency required by Article 5 § 3 of the Convention.

29. The applicant argued that his pre-trial detention was unnecessary and abusive and that the authorities had failed to give valid reasons for it.

2. *The Court's assessment*

30. The Court reiterates that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify his continuing detention (*Yağcı and Sargin v. Turkey*, 8 June 1995, § 52, Series A no. 319-A). Moreover, the domestic courts “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 on the applications for release” (*Letellier v. France*, 26 June 1991, § 35, Series A no. 207).

31. Furthermore, while Article 5 § 3 cannot be read as obliging the national authorities to release a detainee on account of his state of health, the authorities when deciding whether a person should be released or detained are obliged to consider alternative measures of ensuring his appearance at trial (see *Jabłoński v. Poland*, no. 33492/96, §§ 82-83, 21 December 2000).

32. Turning to the facts of the present case, the applicant's detention on remand was ordered on 20 August 2007 by the investigating judge at the Samos Criminal Court and subsequently upheld by decision of the Indictment Division of the Samos Criminal Court of 10 September 2007. It ended on 7 March 2008 when the Indictment Division of the Samos Criminal Court replaced it by preventive measures. Consequently, in order to establish whether the applicant's detention was reasonable, within the meaning of Article 5 § 3 of the Convention, the reasons given in this decision should be examined (see *Jablonski*, cited above, § 79).

33. The Court observes that the Indictment Division of the Samos Criminal Court justified the imposition of detention by noting that (a) the way the cannabis was packed revealed a dexterous and studied action; (b) the existence of antiquities in the applicant's house proved the perpetrator's propensity to commit further offences relating to antiquities; (c) there was serious evidence of the applicant's guilt; and (d) there was a risk of his absconding.

34. In the Court's view, the first and second grounds are, as such, irrelevant for establishing the reasonableness of detention for having received a packet containing cannabis. As the Court has previously held, the second ground is also incompatible with the presumption of innocence, which the domestic courts must respect when justifying detention under Article 5 § 3 of the Convention (see *Lavents v. Latvia*, no. 58442/00, § 70, 28 November 2002), in so far as the applicant was not, at that time, formally accused of or tried for offences relating to antiquities (see paragraphs 24-25 above).

35. With regard to the third ground, namely the existence of serious evidence of the applicant's guilt, the Court reiterates that 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. A court decision of that kind would need a more solid basis to show not only that there was genuinely “a reasonable suspicion”, but also that there were other serious elements of public interest which, notwithstanding the presumption of innocence, outweighed the right to liberty (see, amongst others, *I.A. v. France*, 23 September 1998, § 102, Reports 1998-VII) given that the primary purpose of the second limb of Article 5 § 3 is to require the provisional release of the accused pending trial (see *Garycki v. Poland*, no. 14348/02, § 39, 6 February 2007, and *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-X).

36. In the present case, the Court accepts that the suspicion against the applicant of having committed the drug-related offence may initially have justified his detention. Yet the Court does not accept that it could constitute a “relevant and sufficient” ground for his being held in custody for the entire relevant period, which started on 17 August 2007 and ended on 7 March 2008.

37. As to the risk of absconding, the Court notes that although that risk may be a relevant element in assessing the reasonableness of the deprivation of liberty, it cannot be established on the basis of abstract statements, unsupported by any arguments (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). In the decision in question, the risk of absconding was just mentioned laconically, without being related to the specific circumstances of the case.

38. The Court would also emphasise that, under Article 5 § 3, the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. This is all the more necessary where, as in the present case, there are weighty arguments militating in favour of the applicant’s release, namely the applicant’s age and poor state of health. However the Indictment Division of Samos Criminal Court did not explain why alternative measures would not have secured the applicant’s presence before the court nor, had the applicant been released, why his trial would not have followed its proper course.

39. Finally, the Court cannot overlook the fact that in its latest decision no. 5/2008 releasing the applicant on bail, the Indictment Division of Samos Criminal Court took into consideration that the applicant had a known residence in Samos, that he had family and property in Greece, that he had never been a fugitive and that, on the basis of his criminal record and his social and professional status, it was improbable that he would commit further crimes if he was released. However, the above statements were valid from the first day the applicant was arrested and did not concern new elements that were brought to the authorities’ attention during the period the

applicant was detained. The Court can therefore only regret that the Indictment Division of Samos Criminal Court failed to include the above elements in its first decision and waited another six months before it finally ordered the applicant's conditional release.

40. In view of the above, the Court considers that the applicant's detention on remand was not reasonable or justified.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed that he had sustained pecuniary loss on account of his unlawful imprisonment. He estimated this loss at 668,68 euros (EUR), the sum he had spent while he was in prison. In addition he alleged non-pecuniary damage in respect of which he sought EUR 252,000.

43. The Government submitted that there was no causal link between the alleged violations and the pecuniary damage alleged. As far as the applicant's non-pecuniary claims are concerned, the Government considered that the finding of a violation should constitute sufficient just satisfaction.

44. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

45. The applicant also claimed EUR 1,850 for the costs and expenses incurred before the domestic courts and EUR 2,000 for those incurred before the Court. He produced two bills of costs for a total amount of EUR 1,850.

46. The Government submitted that there was no causal link between the amount claimed in respect of the domestic proceedings and the alleged violations. The Government further stated that the legal fees for the proceedings before the Court were excessive.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,850 covering costs under all heads, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

48. 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;
2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;
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 15,000 (fifteen thousands euros), plus any tax that may be chargeable on that amount, in respect of non-pecuniary damage, and EUR 1,850 (one thousand eight hundred and fifty euros) for costs and expenses, plus any tax that may be chargeable to the applicant on that amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 18 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President