



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

FIFTH SECTION

CASE OF ROMAN MIROSHNICHENKO v. UKRAINE

(Application no. 34211/04)

JUDGMENT

STRASBOURG

19 February 2009

FINAL

19/05/2009

This judgment may be subject to editorial revision.

In the case of Roman Miroshnichenko v. Ukraine,
The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Peer Lorenzen, *President*,
Rait Maruste,
Karel Jungwiert,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
Stanislav Shevchuk, *ad hoc judge*,
and Claudia Westerdiek, *Section Registrar*,
Having deliberated in private on 27 January 2009,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34211/04) 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 Roman Grigoryevich Miroshnichenko, on 15 September 2004.
2. The applicant, who had been granted legal aid, was represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.
3. The applicant alleged, in particular, that the length of his detention was excessive.
4. On 3 April 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning violations of Article 5 §§ 3, 4 and 5 to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Pavlograd.
6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. On 17 November 2000 criminal proceedings were instituted against the applicant and a certain Mr V.G. on suspicion of robbery. On the same date the applicant was arrested and detained.

8. On 20 November 2000 the applicant was formally charged with involvement in a robbery. On the same date a decision was taken to remand him in custody pending trial based, in particular, on the seriousness of the charge against him. Subsequently, the applicant was indicted on several additional charges of robbery and theft, committed on his own and in association with a certain Mr M.M.

9. On 3 July 2002 the Pavlograd City Court (hereafter “the City Court”) convicted the applicant of several offences of robbery and theft, and sentenced him to five years’ imprisonment.

10. The applicant appealed. On 6 December 2002 the Dnipropetrovsk Regional Court of Appeal (“the Court of Appeal”) quashed the judgment of 3 July 2002, finding that the conviction was not based on sufficient evidence. The Court of Appeal ordered that further pre-trial investigations be carried out. It also decided, without giving any reasons, to extend the applicant’s detention pending the additional investigations.

11. On an unspecified date the prosecution submitted the applicant’s case to the City Court for a fresh trial.

12. On 6 May 2003 the City Court found at the preparatory hearing in absence of the applicant that the evidence gathered was insufficient and that the instructions of the Court of Appeal had not been followed. The case was remitted for fresh pre-trial investigations. The court also ordered that the applicant should remain in custody, without, however, giving any reasons for this decision. The prosecutor lodged an appeal against the decision to remit the case for further investigations.

13. On 4 July 2003 the Court of Appeal quashed the decision of 6 May 2003 and referred the case to the City Court for trial. The Court of Appeal also decided, without giving any reasons, that the applicant was to remain in custody.

14. On 1 April 2004 the City Court convicted the applicant of theft and robbery and sentenced him to five years’ imprisonment with deduction of the time spent in detention.

15. That judgment was upheld by the Court of Appeal on 9 June 2004 and by the Supreme Court on 17 March 2005.

II. RELEVANT DOMESTIC LAW

16. Relevant provisions of the Code of Criminal Procedure are to be found in the judgment of 5 April 2005 in the case of *Nevmerzhiysky v. Ukraine* (no. 54825/00, § 54, ECHR 2005-II (extracts)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

17. In his initial letter to the Court dated 15 September 2004 the applicant complained, without referring to any Convention provision, that the length of his pre-trial detention was excessive. On 10 November 2004 he submitted a formal application to the Court, referring to Article 5 § 3 of the Convention in respect of the above complaint. Additionally, the applicant complained under Article 5 § 4 that he had not had any effective remedy whereby he could challenge the lawfulness of his detention and under Article 5 § 5 of the Convention that he had not had any right to compensation for the alleged violations of his rights under Article 5 of the Convention. The aforementioned Convention provisions, in so far as relevant, read as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

....

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.

4. 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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

1. The submissions by the parties

18. The Government maintained that the applicant had failed to respect the six-month time-limit, laid down by Article 35 § 1 of the Convention. They submitted that the applicant's initial conviction of 3 July 2002 turned his "pre-trial detention", which had started on 17 November 2000, into a detention following a conviction. A six-month time-limit for lodging a complaint about this period of detention had thus started to run on that date and had expired on 3 January 2003. After the judgment of 3 July 2002 had been quashed on 6 December 2002, a new period of pre-trial detention had commenced, which lasted until the applicant was convicted on 1 April 2004 for the second time. The six-month period for lodging a Convention complaint about this period of detention had, therefore, expired on 1 October 2004. In the meantime, the Government noted that the first reference to Article 5 of the Convention had been made by the applicant only in his application form of 10 November 2004. In their opinion, his complaints under this provision had, therefore, been lodged out of time. The Government also contended that in any event the applicant could not claim to be a victim of a violation of Article 5 § 5 of the Convention, as his detention had not been in contravention of the provisions of Article 5.

19. The applicant disagreed in part. He specified that his complaints under Article 5 related only to the period between the quashing of his initial conviction on 6 December 2002 and until his second conviction on 1 April 2004. He further maintained that he had initially informed the Court of his intention to lodge an application on 15 September 2004, and, therefore, within six months of the termination of his detention.

20. The applicant further contended that his detention during this period was contrary to the requirements of Article 5 §§ 3 and 4 of the Convention. He could, therefore, claim to be a victim of Article 5 § 5, as there had not been any procedure for him to claim compensation for having been kept in pre-trial detention.

2. The Court's assessment

a. Article 5 § 3

21. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it may only deal with a matter "within a period of six months from the date on which the final decision was taken". The running of the six-month time-limit is, as a general rule, interrupted by the first letter from the applicant indicating an intention to lodge an application and giving some indication of the nature of the complaints made. As regards complaints not

included in the initial communication, the running of the six-month time-limit is not interrupted until the date the complaint is first submitted to the Court (see *Božinovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 68368/01, 1 February 2005).

22. The Court notes that while it is true that the applicant made no reference to Article 5 of the Convention in his initial letter of 15 September 2004, he did mention that he had been held in detention for a long period, during which the authorities had failed to deal with his case with due diligence. In the Court's view, that statement may be regarded as evincing the applicant's intention to lodge a further complaint about the length of his detention, which is to be considered under Article 5 § 3 and so interrupted the running of the six-month time-limit (see *Tkachev v. Ukraine*, no. 39458/02, § 30, 13 December 2007).

23. The Court considers 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. Articles 5 §§ 4 and 5

24. The Court observes that the applicant first complained about having been unable to challenge the lawfulness of his detention and about unavailability of a procedure for seeking compensation for violations of his rights under Article 5 of the Convention in his application form of 10 November 2004. Referring to the general principles outlined in paragraph 22 above, the Court finds that the applicant's complaints under Article 5 §§ 4 and 5 were introduced outside the six-month time-limit provided for by Article 35 § 3 of the Convention. They should therefore be rejected for having been lodged out of time.

B. Merits

25. The applicant alleged a violation of Article 5 § 3 of the Convention on the ground that the length of his detention between 6 December 2002 and 1 April 2004 had been excessive.

26. The Government provided no comments on the merits of his complaint.

27. The Court notes that although the applicant was initially placed in police custody on 17 November 2000 and remained in detention until his first conviction on 3 July 2002, which was subsequently quashed on 6 December 2002, no complaint has been lodged about this period. Instead, the applicant complained only about the length of the period of detention, which lasted from 6 December 2002 until his second conviction on 1 April 2004. This period lasted one year and four months. However, when assessing the reasonableness of that period of detention on remand, the

Court will have regard to the reasons given in the earlier detention order of 17 November 2000.

28. Having regard to general principles established in its case-law (see *I.A. v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 102, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV and *Iłowiecki v. Poland*, no. 27504/95, § 61, 4 October 2001) the Court notes that the initial order of 17 November 2000 to remand the applicant in custody was based on strong suspicion that he had committed the offence with which he had been charged (see paragraph 8 above). It accepts that the fact that the applicant was suspected of a serious offence may have initially warranted his detention. However, after a certain lapse of time the judicial authorities were obliged to give other express grounds for continued detention, which they did not do in the present case. Furthermore, at no stage did the domestic courts consider application of any alternative preventive measures, and by relying essentially on the gravity of the charges, the authorities extended the applicant's detention on grounds which cannot be regarded as "relevant and sufficient".

29. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

32. The Government maintained that this amount was exorbitant and unsubstantiated.

33. The Court considers that the applicant must have suffered feelings of frustration and injustice as a consequence of the domestic authorities' decision to keep him in custody without sufficient reason. He thus suffered non-pecuniary damage which would not be adequately compensated for solely by the finding of a violation. Accordingly, making its assessment on an equitable basis, the Court awards him EUR 1,000 (see *Tkachev*, cited above, § 61).

B. Costs and expenses

34. The applicant also claimed EUR 1,000 in legal fees.

35. The Government submitted that this claim should be rejected as the applicant had failed to provide any supporting documents.

36. 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 are reasonable as to quantum. In the present case, the Court notes that the applicant obtained legal aid of EUR 850 and that he failed to provide any documents supporting his claim. Regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

37. 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 pre-trial detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 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 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of Ukraine 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President