



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

FIFTH SECTION

CASE OF NIKOLAY KUCHERENKO v. UKRAINE

(Application no. 16447/04)

JUDGMENT

STRASBOURG

19 February 2009

FINAL

19/05/2009

This judgment may be subject to editorial revision.

In the case of Nikolay Kucherenko 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. 16447/04) 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 Nikolay Nikolayevich Kucherenko (“the applicant”), on 3 April 2004.

2. The applicant was represented by Mr P. Dubrovin, a lawyer practising in Odessa. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that his detention between 29 July 2002 and 2 January 2003 had been unlawful and constituted a violation of Article 5 § 1 of the Convention.

4. On 15 June 2006 the President of the Fifth 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Odessa.

6. On 27 April 2002, in the course of a police operation, an undercover police officer bought a substantial quantity of cannabis from the applicant. The applicant was immediately arrested in accordance with Article 263 of

the Administrative Offences Code for a violation of the drug circulation rules which constituted an administrative offence laid down in Article 44 of that Code. Following a body search and a search of the applicant's car, the police found further quantities of the drug.

7. On 29 April 2002 the local police office instituted criminal proceedings against the applicant for drug trafficking.

8. On 2 May 2002 the Ovidiopolskyy District Court of Odessa (hereinafter "the District Court") considered a request by the investigator for the applicant to be placed in pre-trial detention and rejected it. However, it extended the period of the applicant's arrest up to a total of ten days, ordering the investigative authorities to obtain more information on the identity of the applicant and establish further circumstances justifying his detention pending trial.

9. On 8 May 2002 the District Court ordered the applicant's pre-trial detention on the ground that the applicant was charged with a serious crime and, if at large, would continue his criminal activity and abscond from the investigation and trial.

10. On 25 June 2002 the District Court extended the period of the applicant's pre-trial detention until 29 July 2002 as the investigative authorities needed more time to complete the case file, namely, to complete the biological expert examination, to order and carry out a narcotics forensic examination, to question Mr. Sh., who was the witness in the case, to familiarise the applicant with the case file, and to draw up the bill of indictment. The District Court also found that, given the character of the applicant and the gravity of the crime that had been committed, the preventive measure should be left unchanged.

11. On 29 July 2002 the applicant was provided with access to the criminal case file to prepare his defence.

12. On 6 August 2002 the applicant lodged a complaint against the investigation authorities with the District Court, claiming that there had been no legal basis for his detention, in so far as the period of his detention, fixed in the District Court's decision of 25 June 2002, had expired on 29 July 2002 and had not been extended. This complaint was joined to the criminal case file.

13. On 17 September 2002 the applicant finished studying the case file.

14. On 18 September 2002 the supervising prosecutor approved the bill of indictment and the case file was referred to the District Court for adjudication.

15. On 2 January 2003 the District Court considered the applicant's complaint of 6 August 2002 in the course of the preliminary hearing and found that the applicant's detention after 29 July 2002 had been lawful. In particular, the District Court established that during the period between 29 July and 17 September 2002 the applicant had been studying the case file and, in accordance with Article 156 of the Code of Criminal Procedure, this

period was not taken into account in calculating the overall period of his detention pending trial. It further noted that on 18 September 2002 the case file had been referred to the District Court and therefore the applicant's complaint was unsubstantiated. The District Court did not specify the reasons or legal basis for the applicant's detention after the case had been referred to the court. At the same hearing the District Court considered that there had been no grounds for changing the preventive measure in respect of the applicant, but did not state this conclusion in the operative part of the decision. The preliminary hearing was held in the presence of the prosecutor; the applicant and his lawyer were absent.

16. According to the Government, on several occasions in the course of the trial, namely 15 July 2003, 22 October 2003, 22 January 2004, 4 February 2004, and 27 April 2004, the District Court considered the applicant's requests for release and rejected all of them because he was charged with a serious crime and might abscond from the investigation and trial if at liberty.

17. On 12 May 2004 the District Court found the applicant guilty of drug trafficking and sentenced him to six years' imprisonment, having included in the sentence the period of the applicant's detention from 27 April 2002.

18. On the same day the District Court issued a *separate ruling* to the effect that the applicant's arrest on 27 April 2002 conducted under the Administrative Offences Code had not been lawful since Article 44 of that Code, relied on by the police officers, did not cover drug trafficking and was therefore evidently inapplicable to the applicant, who had been arrested when selling the drug to the undercover agent. The District Court notified the Odessa Regional Police Department of the established violation of the procedural law committed by the police officers and ordered that an internal inquiry into the circumstances of the applicant's arrest be carried out.

II. RELEVANT DOMESTIC LAW

A. Administrative Offences Code of 7 December 1984 as worded at the material time ("the AOC")

19. Article 44 of the AOC prohibits the fabrication, purchase, storage, transport, or dispatch of drugs or psychotropic substances in small quantities without the purpose of trafficking. A breach of this provision is punishable by a fine of up to forty-three tax-free monthly incomes¹.

1. At the relevant time the tax-free monthly income was established in the amount of UAH 17.00 and constituted a notional rate used for the determination of wages, taxes, fines, etc.

20. Article 263 of the AOC provides, *inter alia*, that anyone who violates drug-circulation rules may be arrested for up to three hours for the purpose of drawing up a report on the administrative offence. However, in order to identify the perpetrator of the offence, subject him to a medical examination, clarify the circumstances of purchase of the drugs or psychotropic substances and examine them, the arrest may be extended up to three days. In such cases the prosecutor shall be informed of the extension in writing within twenty-four hours. In case the arrested person does not have identity documents, the arrest may be extended up to ten days pursuant to an order of the prosecutor.

21. Article 267 of the AOC provides, *inter alia*, that an arrest on grounds of an administrative offence may be challenged by the aggrieved person before the supervising authority, the prosecutor or the court.

B. Code of Criminal Procedure 28 December 1960 as worded at the material time (“the CCP”)

22. Article 156 of the CCP provides, *inter alia*, that the period of detention during pre-trial investigation shall expire on the day the court receives the case file; however, the time taken by the accused and his or her representatives to familiarise themselves with the materials in the criminal case file shall not be included in the calculation of the period for which the accused has been detained as a preventive measure.

Save where the period has been extended pursuant to the procedure established by the CCP, in the event of the expiry of the maximum period of detention as a preventive measure allowed by the CCP, the body of inquiry, the investigator or the prosecutor shall be obliged to release the person from custody without delay.

Governors of pre-trial detention centres shall promptly release from custody any accused in respect of whom a court order extending the period of detention has not been received by the time the period of detention allowed by the CCP expires. They shall notify the person or body before whom the case is pending and the prosecutor supervising the investigation.

In 2003 this Article was amended as regards the rules on calculation of time, taken by the detainee and his or her representative for studying the case file.

23. In accordance with Article 165 of the CCP, detention as a preventive measure shall be applied only by a reasoned decision or ruling of the court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

24. The applicant complained that he had been unlawfully arrested by the police officers on 27 April 2002. He further complained that his detention between 29 July 2002 and 2 January 2003 had been unlawful in so far as it had not been authorised by a court order. The applicant relied on Article 5 § 1 of the Convention, which reads, in so far as relevant, 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; ...”

A. Admissibility

1. *The parties' submissions*

25. The Government, referring to Article 267 of the AOC, contended that the applicant had not challenged before the court his arrest which took place on 27 April 2002 and, accordingly, had not exhausted domestic remedies in this respect. They further maintained that the applicant had failed to comply with the six-month rule when submitting the complaint to the Court.

26. The applicant disagreed.

2. *The Court's assessment*

a. **As regards the arrest on 27 April 2002**

27. The Court observes that under Article 267 of the AOC it was open to the applicant to challenge before the local court the arrest which took place on 27 April 2002. The applicant failed to do so however. Even assuming the applicant complied with requirement of exhaustion of domestic remedies, this complaint falls in any event outside the six-month period. It follows that this part of the application must be dismissed pursuant to Article 35 §§ 1 and 4 of the Convention.

b. As to the applicant's detention between 29 July 2002 and 2 January 2003

28. The Court has recognised that Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports* 1996-IV, and *Ječius v. Lithuania*, no. 34578/97, § 44, ECHR 2000-IX).

29. The Court observes that during the period of the applicant's detention of which he complains, and during the subsequent period, until his conviction, the applicant was held in custody as a result of the preventive measure applied. It follows that the applicant's uninterrupted detention during those periods was of the same legal nature and constituted for the purpose of the Convention a continuous situation which had ceased to exist on 12 May 2004, when the applicant was convicted. As the applicant was still in custody on 3 April 2004, when he lodged the present complaint, this part of the application cannot be dismissed as being out of time (see, *mutatis mutandis*, *Ječius*, cited above, § 44). The Court therefore dismisses the Government's objection in this respect.

30. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

31. The Government maintained that the applicant's pre-trial detention had been lawful.

32. The applicant disagreed.

2. The Court's assessment

33. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly

important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III).

34. The Court reiterates that a period of detention is, in principle, “lawful” if it is based on a court order (see *Ječius*, cited above, § 68, and *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 116, ECHR 2005-II (extracts) §116).

35. In the present case the Court observes that throughout the whole period of the applicant’s detention under consideration there existed no court decision validating the detention.

36. The Court further notes that during the impugned period the applicant was initially held in custody on the ground that he was studying the case file (from 29 July until 17 September 2002) and, subsequently (from 18 September 2002 until 2 January 2003), because he was waiting for his committal for trial.

37. The Court has held that the legal situation in which an accused person is detained for an indeterminate period of time without any judicial authorisation for his prolonged detention purely on the ground that he or she was studying the case file is not compatible with the requirements of Article 5 of the Convention (see *Ječius*, cited above, §§ 57-59, and *Nevmerzhitsky*, cited above, § 133). Likewise, the Court has already examined and found a violation of Article 5 § 1 of the Convention in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that the case file has been submitted to the trial court. In those cases it has held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Korchuganova v. Russia*, no. 75039/01, § 57, 8 June 2006; *Nakhmanovich v. Russia*, no. 55669/00, §§ 67-68, 2 March 2006; *Khudoyorov v. Russia*, no. 6847/02, §§ 146-48, ECHR 2005-X; and *Yeloyev v. Ukraine*, no. 17283/02, § 50, 7 October 2008).

38. The Court therefore concludes that the period of the applicant’s detention between 29 July 2002 and 2 January 2003 was not in accordance with Article 5 § 1 of the Convention. There has accordingly been a violation of that provision.

II. THE LENGTH OF THE APPLICANT'S PRE-TRIAL DETENTION

39. In his initial submissions the applicant seemed to raise an issue under Article 5 § 3 of the Convention as to the length of his pre-trial detention.

40. However, the applicant did not pursue this complaint further. In particular, he made no submissions to this effect at the stage of communicating the application to the Government. It appears that the only matters of his concern were the issues under Article 5 §§ 1 and 4 and Article 6 § 1 of the Convention.

41. In these circumstances, the Court considers that the applicant may not be regarded as wishing to pursue the complaint under Article 5 § 3 of the Convention, within the meaning of Article 37 § 1 (a) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued consideration of the complaint. In view of the above, the Court finds it appropriate to discontinue the examination of the complaint under Article 5 § 3 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant alleged a violation of Article 5 § 4 and Article 6 § 1 of the Convention in so far as his complaint about the unlawfulness of his detention, lodged with the District Court on 6 August 2002, had not been promptly and properly considered by that court.

43. The Court has examined the remainder of the applicant's complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of were within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

46. The Government submitted that the amount claimed by the applicant was exorbitant and unsubstantiated.

47. The Court notes that the applicant must have suffered distress and anxiety on account of the violation found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 1,500 for non-pecuniary damage.

B. Costs and expenses

48. The applicant also claimed 170 Ukrainian hryvnias (about EUR 27) for the costs and expenses incurred before the Court.

49. The Government claimed that this amount had been unsubstantiated.

50. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 applicant the sum of EUR 27 for costs and expenses in the proceedings before the Court.

C. Default interest

51. 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. *Decides* to discontinue the examination of the applicant's complaint under Article 5 § 3 of the Convention;
2. *Declares* the complaint under Article 5 § 1 of the Convention concerning the lawfulness of the applicant's detention between 29 July 2002 and 2 January 2003 admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 5 § 1 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, the following sums to be converted into national currency of Ukraine at the rate applicable at the date of settlement:

- (i) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;
- (ii) EUR 27 (twenty seven euros) in respect of costs and expenses;
- (iii) plus any tax that may be chargeable to the applicant on the above amounts;

(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 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President