



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

FIRST SECTION

CASE OF LYUBIMENKO v. RUSSIA

(Application no. 6270/06)

JUDGMENT

STRASBOURG

19 March 2009

FINAL

19/06/2009

This judgment may be subject to editorial revision.

In the case of Lyubimenko v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 6270/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Aleksandr Aleksandrovich Lyubimenko (“the applicant”), on 26 October 2005.

2. The applicant was represented by Mr P. Kazachenok, a lawyer practising in Volgograd. The Russian Government (“the Government”) were initially represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant alleged, in particular, that he had been detained in inhuman conditions and that his detention had been excessively long.

4. On 4 February 2008 the President of the First Section decided to communicate the above complaints 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 President made a decision on priority treatment of the application (Rule 41 of the Rules of Court).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1979 and lives in Volgograd.

A. Criminal proceedings against the applicant

7. On 17 July 2003 the applicant was arrested on suspicion of aggravated murder and harbouring criminals.

8. On 18 July 2003 the Tsentralniy District Court of Volgograd remanded him in custody, referring to the gravity of the charges and the risk that he might abscond or interfere with the investigation.

9. On an unspecified date the applicant's case was joined with the cases of five other persons, who had allegedly acted in conspiracy with the applicant.

10. In October 2003 the applicant and his co-defendants were charged with organising an armed criminal gang, several counts of aggravated robbery, kidnapping, extortion, infliction of serious injuries and murder.

11. On 3 December 2003 the Tsentralniy District Court extended the applicant's detention, referring to the gravity of the charges, the previous criminal record and the risk of his absconding or re-offending.

12. On 12 April 2004 the investigation was completed and six defendants, including the applicant, were committed for trial before the Volgograd Regional Court.

13. The defendants asked for a trial by jury.

14. On 20 April 2004 the Volgograd Regional Court fixed a preliminary hearing for 27 April 2004 to examine the request. It further held that the defendants should meanwhile remain in custody.

15. On 27 April 2004 the Volgograd Regional Court ordered that the defendants be tried by jury and that they remain in custody pending trial.

16. On 13 October 2004 the Volgograd Regional Court extended the defendants' detention until 12 January 2005, referring to the gravity of the charges.

17. On 12 January 2005 the Volgograd Regional Court extended the defendants' detention, referring to the gravity of the charges and the risk that they might put pressure on witnesses and jurors.

18. On 7 April 2005 the Volgograd Regional Court extended the defendants' detention until 12 July 2005. The Regional Court found that, in view of the gravity of the charges, it was "opportune" to keep the defendants in custody. It rejected their requests to release them under an undertaking not to leave the town, as it could not exclude the risk that they might put pressure on witnesses or jurors.

19. On 29 June 2005 the Volgograd Regional Court extended the defendants' detention until 12 October 2005. It found that the defendants might interfere with the proceedings, as they were charged with serious criminal offences, including the charge of being members of an armed criminal gang.

20. On 4 October 2005 the Volgograd Regional Court extended the defendants' detention until 12 January 2006 for the same reasons as before.

21. On 22 December 2005 the Volgograd Regional Court extended the defendants' detention until 12 April 2006 for the same reasons as before.

22. The applicant appealed against the extension order of 22 December 2005. In his grounds of appeal he complained that the Regional Court's conclusions had been hypothetical and had not been supported by relevant facts. The court had relied essentially on the gravity of the charges against him, disregarding his arguments that he had permanent residence and employment, and was the only breadwinner for his elderly parents. On 4 April 2006 the Supreme Court upheld the extension order on appeal, finding that it had been lawful and justified.

23. On 5 July 2006 the Volgograd Regional Court extended the defendants' detention until 12 October 2006 for the same reasons as before.

24. On 2 October 2006 the Volgograd Regional Court extended the defendants' detention until 12 January 2007, referring to the gravity of the charges and the defendants' "characters". The court also indicated that the purpose of the detention was to eliminate any risk of the defendants' absconding, re-offending or hampering the court proceedings.

25. The applicant appealed, claiming that the Regional Court had used a stereotyped formula to justify his detention and that its conclusions that he might abscond, reoffend or interfere with the proceedings were not supported by relevant facts. He had a permanent place of residence and employment and was taking care after his elderly parents.

26. On 28 December 2006 the Supreme Court upheld the extension order on appeal, finding that it had been lawful, well-reasoned and justified. The defendants were charged with serious criminal offences, and they might therefore abscond, re-offend or obstruct the proceedings. The allegedly excessive length of their detention, their poor health, elderly parents or permanent place of residence were not sufficient reasons to warrant release.

27. On 27 December 2006 the Volgograd Regional Court extended the defendants' detention until 12 April 2007 for the same reasons as before.

28. On 10 April 2007 the Volgograd Regional Court extended the defendants' detention until 12 July 2007 for the same reasons as before.

29. On 9 July 2007 the Volgograd Regional Court extended the defendants' detention until 12 October 2007, finding that there was no reason to vary the preventive measure.

30. On 11 October 2007 the Volgograd Regional Court extended the defendants' detention until 12 January 2008, referring to the gravity of the

charges and the risk that they might abscond or intimidate the witnesses or jurors.

31. On 9 January 2008 the Volgograd Regional Court extended the defendants' detention until 12 April 2008 for the same reasons as before.

32. On 8 April 2008 the Volgograd Regional Court rejected the applicant's request to be released under an undertaking not to leave the place of residence and extended the defendants' detention until 12 July 2008. The decision reads as follows:

"As the trial has not yet been completed, it is necessary to extend the defendants' detention.

The court considers that the gravity of the charges justifies applying to the defendants a preventive measure in the form of detention.

However, in addition to the gravity of the charges - namely organisation of an armed gang ... and commission of assaults on citizens and murders - carrying a sentence of up to twenty years' imprisonment for each of the defendants, the court also takes into account other factors.

Thus, the court is entitled to believe that ... application to the defendants of an undertaking not to leave the town or other preventive measures will not exclude the possibility of their absconding or exercising pressure on participants to the proceedings and jurors.

The defendants' argument that their detention had been excessively long is not in itself sufficient to warrant release.

The defendants have not produced any material showing the existence of factors making impossible [*sic*] their stay in detention facility conditions.

The court is not convinced by the defendants' argument that they have not been granted access to the materials submitted by the prosecution in support of their requests for extension. The court has at its disposal only the materials from the criminal case file, which had been studied by the defendants.

The court considers that the grounds for the detention of the defendants, charged with serious and particularly serious criminal offenses, are relevant and sufficient. Their detention serves the interest of society, as it prevents the commission of similar criminal offences and ensures high-quality and effective examination of the present criminal case.

The criminal case file contains sufficient evidence against each defendant justifying an extension of their detention..."

33. On 7 July 2008 the Volgograd Regional Court extended the defendants' detention until 12 October 2008, repeating verbatim the decision of 8 April 2008.

34. On 10 October 2008 the Volgograd Regional Court extended the defendant's detention until 12 January 2009, repeating verbatim the decision of 8 April 2008.

35. The proceedings are still pending before the trial court.

B. Conditions of the applicant's detention

36. Since 25 July 2003 the applicant has been detained in detention facility SIZO no. 1 (IZ-34/1) in Volgograd.

37. According to a certificate of 18 March 2008 issued by the facility administration and submitted by the Government, from 25 July to 10 November 2003 the applicant was held in cells nos. 135, 99 and 113, measuring 10.9 sq. m, 8.4 sq. m and 9.6 sq. m respectively. It was not possible to establish the number of inmates in each cell, as the detention facility registers for that period had been destroyed on expiry of the statutory storage time-limit.

38. Since 10 November 2003 the applicant has been held in sixteen different cells. Cells nos. 107 and 108 measured 9.6 sq. m and housed two to nine inmates. Cells nos. 43, 50, 87, 91, 92 and 94 measured 9.8 sq. m and housed four to ten inmates. Cell no. 106 measured 8.2 sq. m and housed eight to nine inmates. Cells nos. 26 and 87 measured 29.8 sq. m and housed from five to twenty-five inmates. Cell no. 121, where the applicant was held from 22 to 25 September 2006 and from 22 to 26 June 2007, measured 16.7 sq. m. and housed two inmates, including the applicant. Cell no. 119 measured 7.8 sq. m and housed two to five inmates. Cell no. 51 measured 10.3 sq. m and housed six to nine inmates. Cell no. 25 measured 31.2 sq. metres and housed sixteen to twenty-five inmates. From 1 to 17 November 2007 the applicant was held alone in punishment cell no. 16.

39. Relying on certificates of 18 and 19 March 2008 from the facility administration, the Government further submitted that the applicant had at all times had a separate bunk and had been provided with bedding. The cells were naturally illuminated and ventilated through the windows and were also equipped with fans and fluorescent lamps which functioned during the day and at night. The average temperature inside was 18 to 20° C in winter and 24 to 26° C in summer. Inmates had an hour-long daily walk.

40. It follows from the same certificates that all cells were equipped with a lavatory bowl. This was separated from the living area by a brick partition of 1.5 in height. The dining table was situated at least two metres away from the toilet bowl. There were no insects or rodents in the detention facility, as all the cells were disinfected every month. The inmates were allowed to take a shower once a week and were provided at that time with clean bedding and towels. Finally, the Government submitted that inmates were provided with food three times a day. Boiled drinking water was distributed daily.

41. The applicant did not dispute the cell measurements or the number of inmates per cell. He stated, however, that there were not sufficient bunks for the inmates and that they had to take turns to sleep. He also disagreed with the Government's description of the sanitary conditions. The cells were

smoky and noisy. The artificial light was never switched off, disturbing the applicant's sleep. There was no ventilation and it was extremely hot in summer. In winter it was very cold. There was no lavatory bowl; instead, there was a hole in the floor which inmates used to relieve themselves. The partition separating the toilet facilities from the living area did not offer sufficient privacy and the person using the toilet was in view of the other inmates and the wardens. The dining table was very close to the toilet. Only two persons could sit at it, and the other inmates ate sitting on the floor.

II. RELEVANT DOMESTIC LAW

42. "Preventive measures" or "measures of restraint" (*меры пресечения*) include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98). If necessary, the suspect or accused may be asked to give an undertaking to appear (*обязательство о явке*) (Article 112 of the CCrP).

43. When deciding on a preventive measure, the competent authority is required to consider whether there are "sufficient grounds to believe" that the accused would abscond during the investigation or trial, reoffend or obstruct the establishment of the truth (Article 97). It must also take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 99).

44. Detention may be ordered by a court if the charge carries a sentence of at least two years' imprisonment, provided that a less restrictive preventive measure cannot be applied (Article 108 § 1).

45. After arrest the suspect is placed in custody "during the investigation". The period of detention during the investigation may be extended beyond six months only if the detainee is charged with a serious or particularly serious criminal offence. No extension beyond eighteen months is possible (Article 109 §§ 1-3). The period of detention "during the investigation" is calculated up to the day when the prosecutor sends the case to the trial court (Article 109 § 9).

46. From the date the prosecutor forwards the case to the trial court, the defendant's detention is "before the court" (or "during the trial"). The period of detention "during the trial" is calculated up to the date the judgment is given. It may not normally exceed six months, but if the case concerns serious or particularly serious criminal offences, the trial court may approve one or more extensions of no longer than three months each (Article 255 §§ 2 and 3).

47. Section 22 of the Detention of Suspects Act (Federal Law no. 103-FZ of 15 July 1995) provides that detainees should be given free food sufficient to maintain them in good health according to standards established by the Government of the Russian Federation. Section 23

provides that detainees should be kept in conditions which satisfy sanitary and hygienic requirements. They should be provided with an individual sleeping place and given bedding, tableware and toiletries. Each inmate should have no less than four square metres of personal space in his or her cell.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

48. The applicant complained that the conditions of his detention in detention facility no. IZ-34/1 in Volgograd had been in breach of Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

49. The Government argued that the applicant had not exhausted the domestic remedies available to him. In particular, he had not sought compensation for non-pecuniary damage before a court. To prove the effectiveness of that remedy, they referred to an article in a Russian newspaper, reporting on the case of Mr D., who had contracted scabies while in detention and had been awarded 25,000 Russian roubles (RUB) by the Novgorod Town Court in respect of non-pecuniary damage. They further referred to the judgment of the Zheleznodorozhniy District Court of Orel of 2 June 2004, awarding Mr R. RUB 30,000 as compensation for unlawful detention lasting fifty-six days, for four of which he had been without food.

50. The Government further submitted that the Court had competence to examine the conditions of the applicant's detention only during the six months preceding the submission of his application form. They argued that the applicant's detention was not a continuing situation, as he had been repeatedly transferred from one cell to another and the conditions of his detention had varied in different cells. Moreover, if detainees were allowed to complain about long periods of detention, this would impose a disproportionate burden on the authorities to store detention facility registers indefinitely. Accordingly, the Government invited the Court to reject the applicant's complaints relating to the period prior to 15 September 2005 for non-compliance with the six-month rule.

51. The Court observes that in the case of *Benediktov v. Russia* (no. 106/02, §§ 29-30, 10 May 2007), in comparable circumstances, it found that the Government had failed to demonstrate what redress could have been afforded to the applicant by a prosecutor or a court, taking into account that the problems arising from the conditions of the applicant's detention had apparently been of a structural nature and had not concerned the applicant's personal situation alone. In the case at hand, the Government submitted no evidence to enable the Court to depart from these findings with regard to the existence of an effective domestic remedy for the structural problem of overcrowding in Russian detention facilities. Although they referred to two cases in which the domestic courts granted detainees non-pecuniary damage for inadequate conditions of detention, the Court notes that in those cases compensation was awarded for a detainee's infection with scabies or a failure to provide a detainee with food. Neither of those cases concerned detention in overcrowded cells. Moreover, the Government did not produce copies of the judgments to which they referred. Accordingly, the Court dismisses the Government's objection as to non-exhaustion of domestic remedies.

52. As regards the Government's argument about non-compliance with the six-month rule, the Court notes that the applicant has been detained in the same detention facility since 25 July 2003 until now. The continuous nature of his detention, his identical descriptions of the general conditions of detention in all the cells in the detention facility and the allegation of severe overcrowding as the main characteristic of his detention conditions in all these cells warrant the examination of the applicant's detention from 25 July 2003 to date as a whole, without dividing it into separate periods (see, for similar reasoning, *Guliyev v. Russia*, no. 24650/02, §§ 31 to 33, 19 June 2008; and *Benediktov*, cited above, § 31). The Court does not lose sight of the Government's argument that certain aspects of the conditions of the applicant's detention varied in different cells. However, it does not consider that those differences are sufficient to allow it to distinguish between the conditions of the applicant's detention or for his detention to be separated into several periods depending on the cell in which he was kept. The Court therefore dismisses the Government's objection as to non-compliance with the six-month rule.

53. 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

54. The Government conceded that certain cells had been overpopulated (cells nos. 87, 50, 106, 26, 92, 91, 94, 119, 108, 51, 26 and 25). In total, the

applicant had been held in overcrowded cells for about two-and-a-half years. In all other cells the conditions of the applicant's detention had been satisfactory and in compliance with the requirements of Article 3. He had been provided with an individual bunk and bedding at all times. He had been able to exercise daily. The sanitary and hygienic norms had been met. The applicant had received adequate medical treatment on request.

55. The applicant maintained his claims.

56. The parties disputed certain aspects of the conditions of the applicant's detention in facility no. IZ-34/1 in Volgograd. However, there is no need for the Court to establish the truthfulness of each and every allegation, because it finds a violation of Article 3 on the basis of the facts that have been presented or are undisputed by the respondent Government, for the following reasons.

57. The parties agreed about the cell measurements and the number of inmates in the cells. For the majority of his detention, which has lasted more than five years, the applicant has been afforded less than 3 sq. m of personal space. On occasions, he had less than 1.5 sq. m of personal space, while in cells nos. 50, 87 and 106 his personal space was at times reduced to less than 1 sq. m. The applicant was confined to his cell day and night, save for one hour of daily outdoor exercise. The Court reiterates in this connection that in previous cases where the applicants disposed of less than 3 sq. m of personal space, it found that the overcrowding was so severe as to justify, in its own right, a finding of a violation of Article 3 of the Convention. Accordingly, it was not necessary to assess other aspects of physical conditions of detention (see, for example, *Lind v. Russia*, no. 25664/05, § 59, 6 December 2007; *Kantyreva v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Andrey Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Mayzit v. Russia*, no. 63378/00, § 40, 20 January 2005; and *Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005).

58. Having regard to its case-law on the subject and the material submitted by the parties, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. That the applicant was obliged to live, sleep and use the toilet in the same cell with so many other inmates was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in him the feelings of fear, anguish and inferiority capable of humiliating and debasing him.

59. The Court concludes that by keeping the applicant in overcrowded cells, the domestic authorities subjected him to inhuman and degrading treatment. There has therefore been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention in facility no. IZ-34/1.

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

60. The applicant complained of a violation of his right to trial within a reasonable time and alleged that detention orders had not been founded on sufficient reasons. He relied on Article 5 § 3 of the Convention, which provides:

“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.”

A. Admissibility

61. The Government invited the Court to reject the applicant’s complaint relating to the period of his detention before 22 December 2005. In their opinion, the Court had competence to examine the applicant’s detention only with regard to the six months preceding the submission of his application form. Moreover, the applicant had not appealed against the detention orders issued before 22 December 2005.

62. The Court considers that a person alleging a violation of Article 5 § 3 of the Convention with respect to the length of his detention complains of a continuing situation which should be considered as a whole and not divided into separate periods in the manner suggested by the Government (see, *mutatis mutandis*, *Solmaz v. Turkey*, no. 27561/02, §§ 29 and 37, ECHR 2007-... (extracts)). Following his placement in custody on 18 July 2003 the applicant continuously remained in detention. Although he did not lodge appeals against the extension orders issued before December 2005, he appealed to the Supreme Court against the detention orders of 22 December 2005 and 2 October 2006. He thereby gave an opportunity to the Supreme Court to consider whether his detention was compatible with his Convention right to trial within a reasonable time or release pending trial. Indeed, the Supreme Court had to assess the necessity of further extensions in the light of the entire preceding period of detention, taking into account how much time had already been spent in custody. The Court therefore dismisses the Government’s objection.

63. 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. Arguments by the parties

64. The Government submitted that the applicant had been charged with many particularly serious criminal offences. He was moreover suspected of being an active member of an armed criminal gang committing crimes on a regular basis and presenting an increased danger to society. Referring to the case of *Contrada v. Italy* (24 August 1998, § 67, *Reports of Judgments and Decisions* 1998-V), they submitted that his membership of a mafia-type organisation with a rigid hierarchical structure and substantial power of intimidation had complicated and lengthened the criminal proceedings. It had been necessary to hold the applicant in custody during the investigation and trial to prevent his interfering with witnesses and jurors who lived in the same area and were not segregated from society. The domestic courts had justified the extensions of his detention by reference to his previous criminal record, the fact of his being unmarried and the defence's failure to produce guarantees that the applicant would appear for trial or materials showing that he could not remain in the detention facility conditions. The Government considered the applicant's detention had been founded on "relevant and sufficient" reasons.

65. The applicant maintained his claims.

2. The Court's assessment

(a) General principles

66. The Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, §§ 152 and 153, ECHR 2000-IV).

67. The presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continued detention ceases to be reasonable. 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 the continued

detention (see, among other authorities, *Castravet v. Moldova*, no. 23393/05, §§ 30 and 32, 13 March 2007; *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...; *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000; and *Neumeister v. Austria*, 27 June 1968, § 4, Series A no. 8). Article 5 § 3 of the Convention cannot be seen as unconditionally authorising detention provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)).

68. It is incumbent on the domestic authorities to establish the existence of specific facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005, and *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, 26 July 2001). The national judicial authorities 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 must set them out in their decisions dismissing the applications for release. It is not the Court's task to establish such facts and take the place of the national authorities who ruled on the applicant's detention. It is essentially on the basis of the reasons given in the domestic courts' decisions and of the true facts mentioned 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 of the Convention (see *Korchuganova v. Russia*, no. 75039/01, § 72, 8 June 2006; *Ilijkov*, cited above, § 86; and *Labita*, cited above, § 152).

(b) Application to the present case

69. The applicant was arrested on 17 July 2003. He has been held in custody ever since. The period to be taken into consideration has lasted more than five years and seven months.

70. It is not disputed by the parties that the applicant's detention was initially warranted by a reasonable suspicion of his membership of an armed criminal gang and his involvement in the commission of several counts of aggravated robbery, kidnapping, extortion, infliction of serious injuries and murder. It remains to be ascertained whether the judicial authorities gave "relevant" and "sufficient" grounds to justify his continued detention and whether they displayed "special diligence" in the conduct of the proceedings. The inordinate length of the applicant's detention is a matter of grave concern for the Court. In these circumstances, the Russian authorities

should have put forward very weighty reasons for keeping the applicant in detention for more than five years and seven months.

71. The judicial authorities relied, in addition to the reasonable suspicion against the applicant, on the risk that he might abscond, reoffend or interfere with witnesses or jurors. In this respect they referred to the gravity of the charges, with a particular emphasis on the charge of membership of an armed criminal gang, and the applicant's criminal record.

72. The gravity of the charges was the main factor for the assessment of the applicant's potential to abscond, reoffend or obstruct the course of justice. Thus, in the appeal decision of 28 December 2006 the Supreme Court found that the gravity of the charges outweighed the specific facts militating in favour of the applicant's release, such as the considerable length of his detention pending trial, his permanent place of residence, elderly parents and poor health (see paragraph 26 above). The courts assumed that the gravity of the charges carried such a preponderant weight that no other circumstances could have obtained the applicant's release. The Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment of the risk of an accused absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (see *Letellier v. France*, 26 June 1991, § 51, Series A no. 207; also see *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Ilykov*, cited above, § 81).

73. Another ground for the applicant's detention was his presumed membership of an organised criminal group. The Court accepts that in cases concerning organised crime the risk that a detainee if released might put pressure on witnesses or might otherwise obstruct the proceedings is often particularly high. These factors can justify a relatively longer period of detention. However, they do not give the authorities unlimited power to extend this preventive measure (see *Osuch v. Poland*, no. 31246/02, § 26, 14 November 2006; and *Celejewski v. Poland*, no. 17584/04, §§ 37-38, 4 May 2006). Taking into account that the applicant was suspected of being an active member of an organised criminal group, the Court accepts that the authorities could justifiably consider that the risk of pressure on witnesses and jurors was initially present. However, the Court is not persuaded that that ground could in itself justify the entire five-year period of the applicant's detention. Indeed, the domestic courts referred to the risk of hampering the proceedings in a summary fashion without pointing to any aspect of the applicant's character or behaviour in support of their conclusion that he was likely to resort to intimidation. In the Court's view such a generally formulated risk may not serve as a justification for the applicant's detention for a period of more than five years. The domestic courts omitted to consider the fact that that ground inevitably became less

and less relevant with the passage of time. The courts' reasoning did not evolve to reflect the developing situation and to verify whether at the advanced stage of the proceedings that ground retained its sufficiency. The Court is not therefore convinced that, throughout the entire period of the applicant's detention, compelling reasons existed for a fear that he would interfere with witnesses or jurors or otherwise hamper the examination of the case, and certainly not such as to outweigh the applicant's right to trial within a reasonable time or release pending trial.

74. The domestic courts also referred to the applicant's criminal record. Indeed, that factor was relevant in assessing the danger of reoffending. Such a danger, if convincingly established, may lead the judicial authorities to place and leave a suspect in detention in order to prevent any attempts to commit further offences. It is however necessary, among other conditions, that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned (see *Clooth v. Belgium*, 12 December 1991, § 40, Series A no. 225). In the present case the domestic courts did not specify the offence for which the applicant had been previously convicted, nor did they examine its nature and degree of seriousness. Such a brief and unelaborated reference to previous criminal record cannot be regarded as sufficient to establish the risk of reoffending, especially in the absence of any assessment of the defendant's personality. In any event, even assuming that the authorities could justifiably consider that such a risk was initially present, the Court is not persuaded that that ground could in itself justify the entire five-year period of the applicant's detention (compare *Pihlak v. Estonia*, no. 73270/01, §§ 44 and 45, 21 June 2005).

75. No other grounds have been invoked by the domestic courts. The Government referred in their observations to the applicant's family situation, namely the fact of his being unmarried. The Court reiterates that it is not its task to assume the place of the national authorities who ruled on the applicant's detention or to supply its own analysis of facts arguing for or against detention (see *Nikolov v. Bulgaria*, no. 38884/97, § 74, 30 January 2003, and *Labita*, cited above, § 152). This argument was advanced for the first time in the proceedings before the Court and the domestic courts never mentioned it in their decisions.

76. The Court observes that all decisions extending the applicant's detention on remand were stereotypically worded and in summary form. They did not describe in detail the applicant's personality or individual circumstances. Although in one of the extension orders the Regional Court stated that it had taken into account "the defendants' characters", this statement was not accompanied with any description of the applicant's character or an explanation as to why it made his detention necessary (see paragraph 24 above). The domestic authorities' reluctance to devote proper attention to discussion of the applicant's personal situation is particularly manifest in the Regional Court's decisions of 20 and 27 April 2004, which

gave no grounds whatsoever for the applicant's continued detention. The Regional Court only noted that "the defendants should remain in custody" (see paragraphs 14 and 15 above). It is even more striking that by that time the applicant had already spent a year in custody, the investigation had been completed and the case had been referred for trial.

77. After the case had been submitted for trial in April 2004 the trial court issued collective detention orders using the same stereotyped formula to extend the detention of six persons. The Court has already found that the practice of issuing collective detention orders without a case-by-case assessment of the grounds for detention in respect of each detainee was incompatible, in itself, with Article 5 § 3 of the Convention (see *Shcheglyuk v. Russia*, no. 7649/02, § 45, 14 December 2006; *Korchuganova*, cited above, § 76; and *Dolgova v. Russia*, no. 11886/05, § 49, 2 March 2006). By extending the applicant's detention by means of collective detention orders the domestic authorities had no proper regard to his individual circumstances.

78. Lastly, the Court notes that the domestic authorities explicitly refused to consider whether the length of the applicant's detention had exceeded a "reasonable time" (see paragraphs 26 and 32 above). Such an analysis should have been particularly prominent in the domestic decisions after the applicant had spent several years in custody; however, the reasonable-time test has never been applied.

79. The Court has frequently found a violation of Article 5 § 3 of the Convention in Russian cases where the domestic courts extended an applicant's detention relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures (see *Belevitskiy v. Russia*, no. 72967/01, §§ 99 et seq., 1 March 2007; *Khudobin v. Russia*, no. 59696/00, §§ 103 et seq., ECHR 2006-... (extracts); *Mamedova v. Russia*, no. 7064/05, §§ 72 et seq., 1 June 2006; *Dolgova*, cited above, §§ 38 et seq.; *Khudoyorov v. Russia*, no. 6847/02, §§ 172 et seq., ECHR 2005-X (extracts); *Rokhlina v. Russia*, cited above, §§ 63 et seq.; *Panchenko v. Russia*, cited above, §§ 91 et seq.; and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 et seq., ECHR 2003-IX (extracts)).

80. Having regard to the above, the Court considers that by failing to address specific facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities extended the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify its duration for more than five years. In these circumstances, it will not be necessary to examine whether the proceedings were conducted with "special diligence". However, the Court will address the Government's argument that the complexity of the applicant's case accounted for the length of his detention. It accepts that in cases concerning organised crime, involving numerous defendants, the process of gathering and hearing evidence is often a difficult task, as it is

necessary to obtain voluminous evidence from many sources and to determine the facts and degree of alleged responsibility of each of the co-suspects (see, *mutadis mutandis*, *Łaszkiewicz v. Poland*, no. 28481/03, §§ 59 and 61, 15 January 2008). However, it has already found, in similar circumstances, that the complexity of the case, the number or the conduct of the defendants could not justify more than five years' detention pending investigation and trial (see *Erdem v. Germany*, no. 38321/97, § 46, ECHR 2001-VII (extracts)).

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

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

82. The applicant further complained under Article 6 § 3 (b) that he had been refused access to the materials submitted by the prosecution in support of their requests for an extension of his detention. The Court considers that this complaint falls to be examined under Article 5 § 4 (see *Lamy v. Belgium*, 30 March 1989, §§ 29 and 37, Series A no. 151), which provides:

“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..”

83. The Court observes that the applicant did not raise this issue in his appeal submissions. Therefore, he did not afford the appeal court an opportunity to examine the alleged breaches of his right to challenge appropriately the reasons relied upon to justify his being remanded in custody and, if appropriate, to offer redress. The applicant has not provided any adequate explanation of why this complaint was not raised before the appeal court. The Court considers that the applicant has failed to exhaust domestic remedies in respect of this complaint, as required by Article 35 § 1. Accordingly, this complaint must be rejected pursuant to Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 8,000 euros (EUR) in respect of non-pecuniary damage.

86. The Government submitted that the claim was excessive and was not supported by documents.

87. The Court considers that the applicant has suffered non-pecuniary damage as a result of his detention for more than five years in inhuman and degrading conditions. Moreover, his detention was not based on sufficient grounds. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

88. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

89. 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 inhuman conditions and excessive length of the applicant's detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 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 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Søren Nielsen
Registrar

Christos Rozakis
President