



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

CASE OF KONDRATYEV v. RUSSIA

(Application no. 2450/04)

JUDGMENT

STRASBOURG

9 April 2009

FINAL

09/07/2009

This judgment may be subject to editorial revision

In the case of Kondratyev 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 19 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 2450/04) 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 Aleksey Viktorovich Kondratyev (“the applicant”), on 17 October 2003.

2. 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 his detention had been excessively long.

4. On 11 January 2008 the President of the First Section decided to communicate the above complaint 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 1977 and is currently serving a prison sentence in Kaluga.

A. The applicant's arrest and detention pending investigation

6. On 4 November 2000 the town prosecutor authorised the applicant's placement in custody on the ground that he was suspected of having committed aggravated murder and was liable to abscond and pervert the course of justice.

7. On 8 November 2000 the applicant was arrested and remanded in custody. Shortly afterwards, on 13 November 2000, charges of aggravated murder were brought against him.

8. In the period from 1 February to 5 October 2001 the regional prosecutor extended the applicant's detention on six occasions pending investigation, referring to the necessity to undertake various investigation activities and having regard to the gravity of the charges. The applicant's appeals against the above decisions yielded no result.

9. On 13 July 2001 the additional charge of firearms trafficking was brought against the applicant.

10. On 2 November 2001 the regional prosecutor's office approved the bill of indictment and the case was sent to Kaluga Regional Court for trial.

11. On 3 December 2001 Kaluga Regional Court remitted the case for an additional investigation, due to various procedural irregularities of the initial investigation. The court held that the applicant should remain in custody. The court did not indicate either reasons for, or the time-limit of, the extension ordered.

12. During the additional investigation the applicant's detention was extended by the regional prosecutor on 14 March 2002 until 13 April 2002, and on 29 March 2002 until 1 July 2002, both times with reference to the gravity of the charges against the applicant, his character and the risk of his absconding and interfering with the investigation. The applicant did not appeal against either of the above decisions.

13. On 28 June 2002 the regional prosecutor's office returned the case to Kaluga Regional Court for examination on the merits.

B. The applicant's detention during the trial

14. On 27 December 2002 Kaluga Regional Court extended the applicant's detention pending trial until 28 March 2003. The decision reads as follows:

“...

On 28 December 2002 the six-month time-limit of the [applicant's] detention during the trial, established by Article 255 § 2 of the Code of Criminal Procedure, expires. However the trial cannot be completed by this date.

In connection with the above, in the absence of information allowing the conclusion that the need for the preventive measure applied to [the applicant] has disappeared or

that the grounds for the [applicant's] detention have changed; regard being had to the fact that [the applicant] is charged with crimes carrying a sentence of over two years' imprisonment, including especially serious crime connected with encroachment on human life and therefore representing an increased danger to society, and the fact that the nature of the charges gives sufficient grounds to believe that [the applicant] can abscond or otherwise obstruct justice, the court considers it necessary to extend the [applicant's] detention until the termination of the trial but not exceeding three months.

..."

15. On 18 March 2003 the Supreme Court of Russia upheld the extension order on appeal, finding that it had been lawful and justified.

16. On 25 March 2003 Kaluga Regional Court extended the applicant's and his four co-defendants' detention until 28 June 2003, repeating the decision of 27 December 2002 verbatim.

17. The applicant appealed, claiming that the Regional Court had no grounds to conclude that he presented a persistent flight risk. Besides, the court did not give any consideration to the fact that the applicant was detained under a prison regime, that he had a permanent residence and employment in Kaluga, that he had participated in prevention of armed conflicts in Chechnya and Georgia, and that his mother was seriously ill. On 22 July 2003 the Supreme Court of Russia upheld the decision of 25 March 2003 on appeal, relying on the arguments mentioned by the Regional Court.

18. On 26 June 2003 Kaluga Regional Court extended the applicant's and his four co-defendants' detention until 28 September 2003. The court reproduced the same reasoning as in the extension orders of 27 December 2002 and 25 March 2003.

19. On 4 September 2003 the Supreme Court of Russia confirmed the lawfulness of the decision of 26 June 2003 on appeal.

20. On 27 August 2003 Kaluga Regional Court extended the applicant's and his four co-defendants' detention until 28 December 2003. Besides the reasons indicated in previous extension orders the court referred to the great complexity of the case, in particular to the significant number of witnesses to be called and to the substantial amount of evidence to be examined.

21. On 30 October 2003 the Supreme Court of Russia upheld the decision of 27 August 2003 on appeal, having briefly reproduced the reasoning of the Regional Court.

C. The applicant's conviction

22. On 4 December 2003 Kaluga Regional Court convicted the applicant of firearms trafficking and aggravated murder and sentenced him to twenty years' imprisonment.

23. On 16 June 2004 the Supreme Court of Russia upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

24. The Russian Constitution of 12 December 1993 establishes that a judicial decision is required before a defendant can be detained or his or her detention extended (Article 22).

A. Provisions governing detention matters until 1 July 2002

25. Prior to 1 July 2002 detention matters were governed by the Code of Criminal Procedure of the RSFSR (Law of 27 October 1960, the “CCrP”).

26. At the material time a decision ordering pre-trial detention could be taken by a prosecutor or a court (Articles 11, 89 and 96 of the CCrP).

27. Before 14 March 2001, pre-trial detention was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year’s imprisonment (Article 96 of the CCrP). The amendments of 14 March 2001 repealed the provision that permitted defendants to be remanded in custody on the sole ground of the dangerous nature of the criminal offence they had allegedly committed.

28. After his or her arrest the suspect was placed in custody “pending investigation” for an initial two-month period (Article 97 of the CCrP). Further extensions could be granted by prosecutors at ascending levels of jurisdiction.

29. Once the investigation had been completed and the defendant had received the charge sheet and finished reading the case file, the file was submitted to a trial court. From that date a defendant’s detention was “before the court” (or “pending trial”). Until 14 March 2001 the Code of Criminal Procedure set no time-limit for detention “pending trial”. On 14 March 2001 a new Article 239-1 was inserted, which established that the period of detention “during trial” could not normally exceed six months from the date the court received the file.

B. Provisions governing detention matters after 1 July 2002

30. Since 1 July 2002 detention matters have been governed by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001, “the Code”).

31. “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 of the Code). If necessary, the suspect or accused may be asked to give an undertaking to appear (*обязательство о явке*) (Article 112 of the Code).

32. 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 of the Code). 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 of the Code).

33. 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 of the Code).

34. After arrest the suspect is placed in custody "during 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 of the Code). The period of detention "during investigation" is calculated up to the day when the prosecutor sends the case to the trial court (Article 109 § 9 of the Code).

35. 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 of the Code).

THE LAW

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

36. The applicant complained that his right to trial within a reasonable time had been violated 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

37. The Government invited the Court to reject the applicant's complaint relating to the period of his detention prior to 22 July 2003. 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.

38. 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, as recent authorities, *Belov v. Russia*, no. 22053/02, § 102, 3 July 2008; *Mishketkul and Others v. Russia*, no. 36911/02, § 40, 24 May 2007; and *Solmaz v. Turkey*, no. 27561/02, §§ 34-37, ECHR 2007-... (extracts)). The Court therefore dismisses the Government's objection.

39. 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

40. The Government submitted that the preventive measure in the form of detention had been applied to the applicant due to the existence of a reasonable suspicion that he had been involved in an aggravated murder committed in a group (punishable by up to twenty years' imprisonment) and a reasonable suspicion that, if released, he could abscond or otherwise obstruct justice. The above-mentioned grounds remained relevant at all stages of the pre-trial investigation and the trial. The nature of the charges against the applicant was indicative of the applicant's personality. It suggested that he had ongoing ties with criminally-oriented individuals. Besides, the applicant was single and had no children; his mother's advanced age and poor health had not hindered him from leaving the town for contract military service or to go into hiding after the arrests of his co-defendants. The Government further stressed that the complexity of the case itself, involving seven co-defendants facing serious charges, necessitating questioning of over thirty victims and over seventy witnesses and carrying out seventeen expert evaluations, lengthened the criminal proceedings and had required the applicant's detention to be extended. The Government concluded that the period of the applicant's detention had not exceeded a reasonable time and had been founded on "relevant and sufficient" reasons.

41. The applicant agreed that at the initial stages of the proceedings his detention had been justified by the gravity of the charges he had been facing. However, with the passage of time this ground became less relevant, and the domestic authorities were under an obligation to demonstrate the existence of specific facts in support of their conclusion that he might abscond or otherwise obstruct justice. Relying on his "presumption of

innocence”, the applicant objected to the Government’s argument that the nature of the charges against him could have been indicative of his personality for the purposes of determining the issue of his detention. The applicant further submitted that apart from the reference to the gravity of the charges and sometimes a bald reference to his character the domestic authorities had never relied on or taken into consideration any other grounds mentioned by the Government in their observations. At the same time, the applicant indicated that he had no previous criminal record, he had a permanent residence and employment in Kaluga, had taken part in peacekeeping military operations in the Northern Caucasus, his mother was seriously ill, he had no international passport and therefore could not leave Russia, and he had positive references from the places of his residence, work and military service. The applicant further objected to the Government’s assertion that he had strong connections with criminally-oriented individuals. In particular, the applicant referred to the wording of his sentence, which contains no mention whatsoever of his involvement in any criminal group. The Government’s assertion that he had left the town following the arrests of his co-defendants was also factually untrue and groundless.

2. The Court’s assessment

(a) General principles

42. The Court reiterates that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see *Panchenko v. Russia*, no. 45100/98, § 91, 8 February 2005; *Klyakhin v. Russia*, no. 46082/99, § 57, 30 November 2004; and *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV).

43. 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*, cited above, §§ 152 and 153).

44. 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)).

45. 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 and 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

(i) Period to be taken into consideration

46. The applicant was arrested on 8 November 2000 and was held in custody until his conviction by the first-instance court on 4 December 2003. The period to be taken into consideration therefore lasted three years and twenty-six days.

(ii) *The reasonableness of the length of detention*

47. It is not disputed by the parties that the applicant's detention was initially warranted by a reasonable suspicion of his involvement in the commission of a murder. In the decision of 4 November 2000 the prosecutor cited the gravity of the charges and the need to prevent the applicant from absconding and obstructing justice as the grounds for placing him in custody (see paragraph 6 above). At that stage of the proceedings those reasons were sufficient to justify keeping the applicant in custody (see *Khudoyorov v. Russia*, no. 6847/02, § 176, ECHR 2005-X (extracts)).

48. However, with the passage of time those grounds inevitably became less and less relevant. Accordingly, the authorities were under an obligation to analyse the applicant's personal situation in greater detail and to give specific reasons for holding him in custody.

49. The Court reiterates that after 4 November 2000 the applicant's detention was extended on twelve occasions. When extending the applicant's detention or examining the lawfulness of, and justification for, his continued detention, the domestic authorities consistently relied on the gravity of the charges as the main factor and the applicant's potential to abscond and obstruct the course of justice. On two occasions reference was made to the applicant's "character" (see paragraph 12 above).

50. As regards the domestic authorities' reliance on the gravity of the charges as the decisive element, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention (see *Panchenko*, cited above, § 102; *Ilijkov*, cited above, § 81; and *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003). This is particularly true in the Russian legal system, where the characterisation in law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence obtained supports a reasonable suspicion that the applicant has committed the alleged offence (see *Khudoyorov*, cited above, § 180).

51. The other grounds for the applicant's continued detention were the domestic authorities' findings that the applicant could abscond and obstruct the course of justice. The Court must in this respect ascertain whether the domestic authorities established and convincingly demonstrated the existence of specific facts in support of their conclusions.

52. The Court notes that the domestic authorities gauged the applicant's potential to abscond by reference to the fact that he had been charged with serious criminal offences, thus facing a severe sentence. In this connection the Court reiterates that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the necessity to continue the deprivation of liberty must be examined with reference to a number of other relevant factors. In the present case, contrary to the Government's submission, the domestic authorities did not mention any specific facts warranting the applicant's detention on that ground. The

Court further observes that the authorities did not indicate a single circumstance suggesting that if released the applicant would abscond or evade justice, or that he would otherwise upset the course of the trial. The Court finds that the existence of such a risk was not established.

53. In so far as the references to the applicant's character are concerned, the Court observes that on both occasions this statement was not accompanied with any description of the applicant's character or an explanation as to why it made his detention necessary.

54. The Court further emphasises that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at the trial (see *Jabłoński*, cited above, § 83). During the entire period under consideration the authorities did not consider the possibility of ensuring the applicant's attendance by the use of other "preventive measures" – such as a written undertaking or bail – which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings. This failure is made all the more inexplicable by the fact that the new Code of Criminal Procedure expressly requires the domestic courts to consider less restrictive measures as an alternative to custody.

55. In sum, the Court finds that the domestic authorities' decisions were not based on an analysis of all the pertinent facts. They took no notice of the arguments in favour of the applicant's release pending trial. It is of particular concern to the Court that the Russian authorities persistently used a stereotyped summary formula to justify the extension of the applicant's detention; the prosecutors reproduced the same formula in all their decisions. The Court also notes that the domestic authorities, using the same formula, simultaneously extended the detention of the applicant and his co-defendants. In the Court's view, this approach is incompatible, in itself, with the guarantees enshrined in Article 5 § 3 of the Convention in so far as it permits the continued detention of a group of persons without a case-by-case assessment of the grounds for detention or of compliance with the "reasonable-time" requirement in respect of each individual member of the group (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).

56. Having regard to the above, the Court considers that by failing to refer to concrete relevant facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify its duration for more than three years. In these circumstances it would not be necessary to examine whether the proceedings against the applicant were conducted with "special diligence".

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. Lastly, the applicant complained under Article 5 § 2 of the Convention that he had not been informed about the reasons for his arrest and the charge against him. Relying on Articles 3, 5, 6 and 13 of the Convention, he further complained that the domestic court had failed to establish the exact date when the murder had been committed, that the domestic court favoured the prosecution over the defence, that it had disregarded the evidence produced by him and had restrained him in the exercise of his procedural rights, and that the domestic court had shifted the burden of proof to him and had evaluated the evidence incorrectly.

59. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant assessed the pecuniary damage at 10,000 euros (EUR), which represented his loss of earnings during the detention period and the amounts spent on food parcels while in the remand centre. He further claimed EUR 90,000 in respect of non-pecuniary damage.

62. The Government submitted that the claim of pecuniary damage was unsubstantiated. They further submitted that the claim of non-pecuniary damage was excessive and that the finding of a violation would in itself constitute sufficient just satisfaction.

63. The Court finds that there has been no causal link between the violation found and the claimed pecuniary damage. Consequently, it sees no reason to award the applicant any sum under this head. The Court considers, however, that the applicant has suffered non-pecuniary damage as a result of

detention for more than three years which 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 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

64. The applicant claimed 6,000 Russian roubles for legal fees incurred in the domestic proceedings. The applicant supported his claim with appropriate payment document.

65. The Government submitted that the requested sum contradicted the principle of necessity and reasonableness of costs and expenses.

66. The Court notes that it has not been contested that the above expenses were incurred in order to prevent the violation of the applicant's right to trial within a reasonable time or to release pending trial. The Court therefore awards the applicant EUR 170 under this head, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

67. 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 the applicant's 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 the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 170 (one hundred and seventy euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
- (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 9 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President