



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

1959 · 50 · 2009

FIRST SECTION

CASE OF KONONOVICH v. RUSSIA

(Application no. 41169/02)

JUDGMENT

STRASBOURG

9 July 2009

FINAL

09/10/2009

This judgment may be subject to editorial revision.

In the case of Kononovich v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 18 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 41169/02) 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 Bogdan Ivanovich Kononovich (“the applicant”), on 3 November 2002.

2. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been subjected to psychological and physical pressure while in police custody and that his pre-trial detention had been unlawful and unreasonably long.

4. On 17 April 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

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 1975 and is serving a prison sentence in Izhevsk.

A. Arrest and detention pending investigation

7. On 20 June 2000 the applicant and two other persons were apprehended on suspicion of involvement in several incidents of theft. The applicant was allegedly taken to a flat where the police officers beat him up to make him confess to the crimes. On the next day he was transferred to a temporary detention facility at a police station. According to the applicant, the beatings continued on 21, 22, 23 and 26 June 2000.

8. On 21, 22, 23 and 26 June 2000 in response to the applicant's complaints of renal colic and pain in the lumbar area, the officer on duty called an ambulance. The applicant was examined on each occasion by a doctor, who did not find it necessary to take him to hospital. The applicant did not tell the doctor or the officer on duty anything as to what might have caused those pains. Nor did he say anything about ill-treatment by the police.

9. On 21 June 2000 the investigator ordered that the applicant's flat be searched. On 23 June 2000 the police conducted the search.

10. On 23 June 2000 the applicant's family retained a lawyer to represent him during the investigation and trial. On 15 December 2000 the applicant's father was also admitted to represent him as a lay defender.

11. On the same day the prosecutor of the Zapadniy Administrative Circuit of Moscow authorised the applicant's detention. The court reasoned that the applicant should remain in custody pending the collection of the evidence necessary for the preparation of his indictment.

12. On 30 June 2000 the applicant was charged with several counts of theft. He denied any involvement in the crimes he was charged with.

13. On 10 August 2000 the prosecutor granted the investigator's request to extend the detention of the applicant and two other defendants until 21 September 2000. The investigator reasoned that he needed more time "to investigate additional criminal acts committed by [the defendants], to join the criminal case-files, to finalise the bill of indictment and to carry out other investigative tasks in order to complete the preliminary investigation".

14. On 8 September 2000 the prosecutor granted the investigator's request to extend the defendants' detention until 21 November 2000. The investigator reproduced verbatim the reasoning of his previous request.

15. On 12 October 2000 the Tverskoy District Court of Moscow dismissed the applicant's application for release. The court noted that the gravity of the charges alone could justify the applicant's detention pending investigation and trial. It also referred to the applicant's previous conviction and another pending criminal investigation against him.

B. First set of criminal proceedings

16. On 27 November 2000 the Nikulinskiy District Court scheduled the first hearing of the matter for 8 December 2000. The court ruled that the applicant and two other defendants should remain in custody pending trial. No time-limits or reasons justifying the defendants' detention were indicated.

17. Between 8 December 2000 and 14 June 2001 the court held twenty-one hearings of the case. On twenty occasions the hearing was adjourned due to the representatives of the defendants' failure to appear or their need to study the case-file.

18. On 14 June 2001 the District Court extended the applicant's detention for three months. The court issued an order in respect of the three defendants, reasoning that their release "might impede a thorough, complete and objective examination of the case". On 13 August 2001 the Moscow City Court upheld the decision of 14 June 2001 on appeal.

19. On 6 August 2001 the District Court found certain procedural irregularities in the bill of indictment and remitted the case to the prosecutor's office for their rectification. The court ordered that all three defendants should remain in custody. On 6 September 2001 the Moscow City Court quashed the decision of 6 August 2001 on appeal and remitted the case for consideration to the District Court. The City Court also held that the defendants should remain in custody pending trial.

20. On 11 October 2001 the District Court received the case-file and scheduled the hearing for 25 October 2001. The court further extended the detention of the three defendants for three months. The court referred to the gravity of the charges against them and the risk that they might impede the thorough, complete and objective examination of the circumstances of the case. On 13 February 2002 the Moscow City Court quashed the decision of 11 October 2001 on appeal. The City Court held that there was no requirement as a matter of law to decide on the applicant's detention at that point.

21. On 5 December 2001 the applicant complained to the District Court that he had been beaten up by police officers on 20, 21, 22, 23 and 26 June 2000. In support of his allegations, he submitted medical certificates indicating that doctors from the emergency response unit had been summoned by the officer on duty to examine him.

22. On 7 December 2001 the District Court found the applicant guilty as charged.

23. On 1 April 2002 the Moscow City Court quashed the judgment of 7 December 2001 and remitted the matter for fresh consideration. The court noted, *inter alia*, that the trial court had failed (1) to ensure the examination of several witnesses, instead relying exclusively on their written statements and (2) to ensure participation of the applicant's lay defender in the closing arguments. The court indicated that the applicant should remain in custody pending a new trial.

C. Second set of criminal proceedings

24. On 15 April 2002 the Nikulinskiy District Court scheduled a new hearing of the case for 23 April 2002.

25. On 23 April 2002 the District Court dismissed the defendants' applications for release. The court noted that all three defendants were charged with a serious offence and, if released, they "might interfere with the thorough, complete and objective examination of the case".

26. On 17 May 2002 the Nikulinskiy District Court found the applicant guilty as charged and sentenced him to nine years' imprisonment. The court based its findings on the statements of witnesses who had testified in court, including the applicant's co-accused, victims of the crime, and forensic evidence. The court held that the applicant was to serve his sentence in a correctional colony with strict conditions of detention.

27. On 9 September 2002 the Moscow City Court upheld the applicant's conviction in substance on appeal, indicating that the applicant was to serve his sentence in a correctional colony with normal conditions of detention.

28. It appears that the applicant was sent to serve a prison sentence in a correctional colony with strict conditions of detention. On 14 February 2005 he was transferred to a correctional colony with normal conditions of detention.

29. According to the applicant, he challenged the lawfulness of his detention in the colony with strict conditions of detention by lodging numerous complaints with the prosecutor's office, department of corrections and the court.

II. RELEVANT DOMESTIC LAW

30. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federalist Socialist Republic (Law of 27 October 1960, "the old CCrP"). From 1 July 2002 the old CCrP was replaced by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001, "the new CCrP").

A. Investigation of criminal offences

31. The old CCrP established that a criminal investigation could be initiated by an investigator upon the complaint of an individual or on the investigative authorities' own initiative when there were reasons to believe that a crime had been committed (Articles 108 and 125). It was incumbent on the investigative authorities, a prosecutor or a court to accept and follow up on the allegations concerning a criminal offence within three days of the complaint being lodged. That time-limit could be extended up to ten days in exceptional circumstances (Article 109). A prosecutor was responsible for the general supervision of the investigation (Articles 210 and 211). He or she could order a specific investigative action, transfer the case from one investigator to another or order an additional investigation. If there were no grounds to initiate a criminal investigation, the prosecutor or investigator issued a reasoned decision to that effect which had to be communicated to the interested party. The decision was amenable to an appeal to a higher prosecutor or to a court of general jurisdiction (Article 113).

B. Placement in custody and detention

1. Preventive measures

32. "Preventive measures" or "restrictive measures" include an undertaking not to leave a town or region, a personal guarantee, bail and remand in custody (Article 89 of the old CCrP, Article 98 of the new CCrP).

2. Grounds for remand in custody

33. When deciding whether to remand an accused in custody, the competent authority is required to consider whether there are "sufficient grounds to believe" that he or she would abscond during the investigation or trial or obstruct the establishment of the truth or reoffend (Article 89 of the old CCrP). 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 91 of the old CCrP, Article 99 of the new CCrP).

34. Before 14 March 2001, remand in custody was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). On 14 March 2001 the old CCrP was amended to permit defendants to be remanded in custody if the charge carried a sentence of at least two years' imprisonment, if they had previously defaulted, had no permanent residence in Russia or if their identity could not be ascertained. The amendments of 14 March 2001 also 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. The new CCrP reproduced the amended provisions (Articles 97 § 1 and 108 § 1) and added that a defendant should not be remanded in custody if a less severe preventive measure was available.

THE LAW

I. ALLEGED ILL-TREATMENT OF THE APPLICANT

35. The applicant complained that on several occasions between 21 and 26 June 2000 he had been subjected to psychological and physical pressure by police officers in order to make him confess to crimes he had not committed. The Court considers that the applicant's complaint falls to be examined under Article 3 of the Convention, which reads as follows:

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

36. The Government submitted that the complaint must be rejected for non-exhaustion of domestic remedies. Neither the applicant nor his counsel asked the prosecutor's office to open a criminal investigation into the applicant's allegations. The fact that the applicant had raised the issue once at a court hearing preceding his initial conviction on 7 December 2001 could not be regarded as satisfying the requirements set forth in Article 35 § 1 of the Convention. Lastly, they claimed that the applicant's allegations had not been supported by any *prima facie* evidence and did not meet the standard of proof “beyond reasonable doubt” established by the Court's case-law.

37. The applicant maintained his complaint.

Admissibility

38. The Court does not find it necessary to examine the objection as to the exhaustion of domestic remedies raised by the Government, as this complaint is in any event inadmissible for the following reasons.

39. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

40. Turning to the circumstances of the case, the Court observes that in support of his allegations of ill-treatment, the applicant relied solely on the certificates issued by a medical emergency response unit and indicating that he had complained of pains in the lumbar area and renal colic. The doctor did not administer any treatment or find it necessary to take the applicant to hospital. Furthermore, at the relevant time the applicant did not complain about ill-treatment to the doctor who examined him or to the officer on duty. He brought his allegations, which were very general and lacked any detail, to the attention of the court which considered the criminal charges against him only after more than a year and a half had passed.

41. Accordingly, the medical documentation submitted does not constitute a sufficient evidentiary basis to enable the Court to find *prima facie* that the applicant was subjected to the alleged ill-treatment in June 2000.

42. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Articles 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF THE RIGHT TO LIBERTY

43. The applicant complained that his pre-trial detention exceeded the reasonable time requirement. He relied on Article 6 of the Convention. The Court considers that the complaint falls to be examined under Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

44. The Government contested that argument. They further claimed that the complaint must be rejected for the applicant’s failure to comply with the six-month rule provided for in Article 35 § 1 of the Convention.

45. The applicant maintained his complaint.

A. Admissibility

46. The Court reiterates that, in determining the length of pre-trial detention 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, among other authorities, *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 23, § 9, and *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV). A person convicted at first instance cannot be regarded as being detained “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence”, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty “after conviction by a competent court” (see *Panchenko v. Russia*, no. 45100/98, §§ 91 and 93, 8 February 2005).

47. The Court observes that the applicant’s pre-trial detention commenced on 20 June 2000, when he was arrested, and ended on 17 May 2002, when he was convicted by the trial court. The period from 7 December 2001 to 27 March 2002, when the applicant’s initial conviction was quashed on appeal and his case remitted for new consideration, cannot be taken into account for the purposes of Article 5 § 3. From 27 March to 17 May 2002, when the trial court convicted the applicant for the second time, he was again in pre-trial detention, this time falling within the scope of Article 5 § 3.

48. The Court considers that, in the present case, both periods of the applicant’s pre-trial detention should be regarded as a whole and the six-month period should only start to run from the end of the second period, that is from 17 May 2002 (see, among recent authorities, *Belov v. Russia*, no. 22053/02, § 102, 3 July 2008).

49. The Court concludes that, after deducting the periods when the applicant was detained after conviction under Article 5 § 1 (a) of the Convention from the total time for which he was deprived of his liberty, the applicant spent over nineteen months in detention within the meaning of Article 5 § 3.

50. The Court further finds that the applicant’s pre-trial detention ended within the six months preceding 3 November 2002, that is, the date of the introduction of the application. Therefore, the Government’s objection that the complaint has been submitted too late must be dismissed.

51. 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

52. Under the Court’s case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a

genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and set them out in their decisions dismissing the applications for release (see *Labita*, cited above, § 152).

53. The Court accepts that the applicant's detention could have initially been warranted by a reasonable suspicion of his involvement in the thefts.

54. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty (see *Labita*, cited above, § 153).

55. The Court observes that in the present case the domestic courts essentially referred to the gravity of the charges against the applicant. On one occasion they also mentioned his previous conviction as a reason for refusal of his release. As for the applicant's detention pending trial, the court consistently ruled that the defendants' release "might impede a thorough, complete and objective examination of the case".

56. As regards the domestic authorities' reliance on the gravity of the charges as the decisive element justifying pre-trial detention, the Court reiterates that the need to continue a deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence (see *Panchenko*, cited above, § 102, and *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001). In the present case, however, it appears that the domestic courts assumed that the gravity of the charges carried such a preponderant weight that they did not even consider any other pertinent facts. There was no explanation provided as to how the fact that the applicant had an earlier conviction was relevant to the matter. Nor did the trial court elucidate in what way the applicant's release "might impede a thorough, complete and objective examination of the case".

57. The Court further notes that the trial court used the same summary formula to extend pre-trial detention of the three defendants. No regard had been had to the applicant's individual circumstances.

58. Lastly, the Court observes that at no point in the proceedings did the domestic courts explain in their decisions why alternatives to the deprivation of liberty would not have ensured that the trial would follow its proper course.

59. 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 *Belov*, cited above §§ 108 et seq.; *Belevitskiy*, cited above, §§ 99 et seq.; *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 v. Russia*, no. 11886/05, §§ 38 et seq., 2 March 2006; *Khudoyorov v. Russia*, no. 6847/02, §§ 172 et seq., ECHR 2005-X (extracts); *Rokhlina v. Russia*, no. 54071/00, §§ 63 et seq., 7 April 2005; *Panchenko v. Russia*, cited above, §§ 91 et seq.; and *Smirnova*, cited above, §§ 56 et seq.).

60. Having examined the materials submitted to it, the Court does not discern any fact or argument put forward by the domestic authorities when ruling on the applicant's pre-trial detention capable of persuading it to reach a different conclusion in the present case.

61. Having regard to the above, the Court considers that by relying essentially on the gravity of the charges and by failing to address specific facts or consider alternative preventive measures the authorities extended the applicant's detention on grounds which cannot be regarded as "sufficient" to justify its duration.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. Lastly, the applicant complained that his arrest on 20 June 2000 and detention from 6 August to 7 December 2001 had been unlawful; that a search of his flat had not been compliant with applicable rules of criminal procedure; that the criminal proceedings against him had been unfair and unreasonably long; that his case had been considered by a partial tribunal; that he had been found guilty on the basis of inconclusive and insufficient evidence; that his lawyer had failed to carry out his defence effectively; that the trial court had failed to ensure presence of certain witnesses in court; that he had been sent to serve his sentence in a penitentiary establishment under more severe conditions than were prescribed by law. He referred to Article 6 of the Convention.

64. Having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence *ratione materiae*, it finds that the evidence discloses no 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 30,000 euros (EUR) in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage.

67. The Government submitted that the applicant had claimed compensation for pecuniary and non-pecuniary damage incurred in the course of his criminal prosecution. They opined that the applicant's claims should be dismissed. In any event, they considered them excessive.

68. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court observes that it has found a violation of the applicant's right to liberty in the present case in that the length of 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, it awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

69. The applicant also claimed 12,000 Russian roubles (RUB) for the costs and expenses incurred before the Court. He submitted original receipts for RUB 4,525 in respect of his expenses for translation of documents and for RUB 976,34 in respect of his postal expenses.

70. The Government claimed that the applicant had not substantiated his claims in full.

71. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 125 for the costs and expenses incurred by the applicant in the course of the proceedings before the Court, plus any tax that may be chargeable to him.

C. Default interest

72. 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 an alleged violation of the applicant's right to a trial within a reasonable time or release pending trial 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 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 125 (one hundred and twenty-five euros) in respect of cost and expenses in the proceedings before the Court;
 - (iii) 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President