



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

1959 · 50 · 2009

FIRST SECTION

CASE OF NAZAROV v. RUSSIA

(Application no. 13591/05)

JUDGMENT

STRASBOURG

26 November 2009

FINAL

26/02/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nazarov 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 5 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 13591/05) 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 Tajikistani national, Mr Rakhmatullo Ismatulloyevich Nazarov (“the applicant”), on 8 April 2005.

2. The applicant was represented by Mr M. Ovchinnikov, a lawyer practising in Vladimir. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. On 26 May 2008 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).

4. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Dushanbe, Tajikistan. He is currently detained in remand prison IZ-33/1 in Vladimir.

A. The applicant's placement in custody and detention

6. At the material time the applicant was pursuing postgraduate studies in Vladimir, Russia.

7. On 4 April 2004 an investigator of the Department of Interior of the Vladimir Region instituted criminal proceedings against the applicant under Article 228 § 4 of the Russian Criminal Code (purchase or possession of drugs in large quantities). On the same day the applicant was arrested.

8. On 6 April 2004 the Frunzenskiy District Court of Vladimir ("the district court") ordered the applicant's placement in custody reasoning that he had been charged with a serious crime and that, if he remained at liberty, he could have absconded or interfered with the investigation or continued his unlawful activities.

9. On 3 June 2004 the district court extended the term of the applicant's detention until 4 July 2004.

10. On 2 July 2004 the district court extended the term of the applicant's detention until 4 August 2004 for the reason that the investigators needed to take certain steps and that the applicant was charged with a serious crime and, once released, could have absconded, continued unlawful activities and impeded the investigation.

11. On 5 August 2004 the investigators transferred the file in the applicant's criminal case to the district court.

12. On 16 August 2004 the district court scheduled a hearing on 27 August 2004 and ruled that the preventive measure applied to the applicant remain unchanged.

13. On 27 August 2004 the hearing was postponed until 28 September 2004 due to the absence of witnesses.

14. On 28 September 2004 at counsel for the applicant's request the district court decided to return the case file to the prosecutor's office for further investigation. Ten days later the case was transferred to the investigators.

15. On 18 November 2004 the prosecutor's office transferred the case to the district court. On 22 November 2004 the district court received the case file.

16. On 30 November 2004 the district court scheduled a hearing for 9 December 2004 and ruled that the preventive measure remain unchanged.

17. On 8 December 2004 the hearing was postponed until 17 January 2005 upon counsel for the applicant's request.

18. On 17 January 2005 the applicant's counsel filed an application for the applicant's release pending trial, arguing that upon arrival of the case file at the district court the term of the detention had been extended in the absence of the parties to the proceedings. On the same date the application was dismissed for the reason that, having received an investigation file, a

court had to schedule a hearing and decide on any preventive measure to be applied to a suspect.

19. On 24 January 2005 the applicant's counsel appealed against the ruling of 17 January 2005.

20. On 1 February 2005 the district court extended the term of the applicant's detention until 3 May 2005 for the reason that the applicant had been charged with particularly serious crimes. The applicant's counsel appealed against the decision. He invoked Article 5 § 3 of the Convention and argued, in particular, that the district court had not considered the possibility of applying other preventive measures, such as release on bail, and had not taken into account the applicant's personal circumstances. He emphasised that the applicant had a child of under one year of age, had no previous criminal record, had a permanent job and had positive references.

21. Between 7 February and 22 April 2005 the district court's hearings were postponed on several occasions.

22. On 9 March 2005 the Vladimir Regional Court ("the regional court") dismissed the applicant's counsel's appeal and upheld the ruling of 17 January 2005.

23. On 22 March 2005 the regional court dismissed the applicant's representative's appeal and upheld the decision of 1 February 2005.

24. On 27 April 2005 the district court extended the term of the applicant's pre-trial detention until 3 August 2005 for the reason that the applicant had been charged with particularly serious crimes.

25. On 28 April 2005 the district court returned the investigation file to the prosecutor's office and noted that the preventive measure applied to the applicant should remain unchanged because the applicant had been charged with particularly serious crimes.

26. On 3 and 11 May 2005 the applicant's counsel appealed against the decisions of 27 and 28 April 2005, respectively.

27. On 19 May 2005 the district court extended the applicant's detention until 12 June 2005 because he had been charged with particularly serious crimes and, if released, could have absconded or continued criminal activities. On 27 May 2005 the applicant's counsel appealed against that decision.

28. On 10 June 2005 the district court extended the term of the detention until 12 July 2005 because the applicant had been charged with particularly serious crimes and, if released, could have absconded, impeded the investigation or continued criminal activities. On 15 June 2005 the decision was appealed against.

29. On 16 June 2005 the regional court upheld the decision of 27 April 2005 on appeal.

30. On 23 June 2005 the regional court upheld the decision of 19 May 2005 on appeal.

31. On 28 June 2005 the regional court upheld the decision of 28 April 2005 on appeal.

32. On 8 July 2005 the district court authorised the applicant's pre-trial detention until 12 August 2005, arguing that the applicant was charged with particularly serious crimes, was a national of another State, could abscond, continue criminal activities and impede the investigation. On 8 July 2005 the applicant's counsel appealed against the decision.

33. On 13 July 2005 the regional court upheld the decision of 10 June 2005 on appeal.

34. On 15 July 2005 the prosecutor's office transferred the case file to the district court. On 20 July 2005 the district court received it.

35. On 1 August 2005 the district court scheduled a hearing in the applicant's criminal case. It also noted that the preventive measure applied to the applicant should remain unchanged, without providing any reasons.

36. On 4 August 2005 the regional court upheld the decision of 8 July 2005.

37. On 8 August 2005 counsel for the applicant appealed against the decision of 1 August 2005. On 9 September 2005 the regional court dismissed the appeal.

38. Between 10 August 2005 and 9 February 2006 the district court rescheduled hearings on eight occasions for various reasons.

39. On 17 January 2006 the district court extended the term of the applicant's pre-trial detention until 20 April 2006 for the following reasons: the criminal case file was particularly complex and voluminous; the applicant had been charged with particularly serious crimes; there were no reasons to change the measure applied. The decision was taken in the presence of counsel; the applicant himself was absent.

40. On 7 March 2006 the regional court upheld the decision of 17 January 2006 on appeal.

41. Between 9 February and 13 April 2006 the district court rescheduled hearings on six occasions for various reasons.

42. On 13 April 2006 the district court sentenced the applicant to three years' imprisonment.

43. On 21 June 2006 the regional court upheld the judgment of 13 January 2006 on appeal.

B. Conditions of the applicant's pre-trial detention

1. The applicant's account

44. On 6 April 2004 the applicant was placed in custody in remand prison IZ-33/1 in Vladimir ("the remand prison").

45. While in the remand prison, the applicant was kept in different cells. The number of inmates kept in each cell varied. In particular, cell no.

17 measured approximately 28 sq. m and was equipped with ten bunk beds; eight to fifteen inmates were kept there at the same time as the applicant. Cell no. 43 measured around 28 sq. m, was equipped with eight bunk beds and housed from six to ten inmates. Cell no. 56 measured around 56 sq. m and was equipped with forty-two bunk beds; the number of inmates kept there together with the applicant varied from twenty-five to sixty-six. Cell no. 51 measured 28 sq. m and had twenty-four bunk beds; it housed eight to twenty persons. Cell no. 8 measured 3 sq. m and was equipped with three bunk beds; one to three inmates were kept there.

46. The applicant was not provided with individual bedding. On several occasions he was not allocated an individual sleeping place and the inmates had to take it in turns to sleep.

47. In virtually every cell bunk beds were attached to the walls in three rows. In each cell there was a lavatory pan placed next to the dining table and bunk beds; lavatory pans were not cleaned properly and gave off an unpleasant odour.

48. The cells were not equipped with a ventilation system. As a result, in summer it was very hot and humid inside, while in winter it was very cold. The cells were poorly lit. However, a light was switched on day and night. There were cockroaches, bugs, mice and rats in the cells.

49. The inmates were not provided with toilet paper, toothpaste or cleaning products for sinks and lavatory pans. The applicant was only allowed to have a shower once a week.

50. There were no taps with running hot water in the cells. The remand prison administration provided the inmates with one bucket of hot water per cell twice a day. The inmates were not provided with drinking water and were obliged to drink tap water. The quality of food served in the remand prison was poor.

51. The inmates were escorted for a walk in a special area covered with an iron roof. The walks only lasted about half an hour, although they should have been at least one-hour long.

52. The applicant's counsel pointed out in his applications for release lodged with district and regional courts that the applicant was being kept in poor conditions. His assertions remained unanswered.

2. The Government's account

53. Between 13 April and 25 May 2004, as well as between 4 and 18 June 2004 the applicant was kept in cell no. 17 measuring 33.4 sq. m. The number of inmates kept there at the same time as the applicant varied from six to ten.

54. Between 18 June and 2 August 2004 the applicant was kept in cell no. 43 measuring 16.58 sq. m. The number of inmates kept there at the same time as the applicant varied from six to eight.

55. Between 2 August and 30 September 2004, as well as between 20 January and 28 March 2005 the applicant was kept in cell no. 56 measuring 58.03 sq. m. The number of inmates kept there at the same time as the applicant varied from twenty-nine to forty-two.

56. Between 30 September and 24 November 2004 the applicant was kept in cell no. 51 measuring 32.48 sq. m. The number of inmates kept there at the same time as the applicant varied from sixteen to twenty-three.

57. Between 14 and 20 January 2005 the applicant was kept in cell no. 8 measuring 12.97 sq. m. The number of inmates kept there at the same time as the applicant varied from one to three.

58. Between 28 March and 4 April 2005 the applicant was kept in cell no. 50 measuring 47.35 sq. m. The number of inmates kept there at the same time as the applicant varied from twenty-four to thirty-three.

59. Between 4 April and 15 December 2005 the applicant was kept in cell no. 19 measuring 23.6 sq. m. The number of inmates kept there at the same time as the applicant varied from five to twelve.

60. Between 14 and 27 June 2006 the applicant was kept in cell no. 12 measuring 54.6 sq. m. The number of inmates kept there at the same time as the applicant varied from twelve to eighteen.

61. The applicant was at all times provided with an individual bunk bed and bedding. The bunk beds were not attached to the walls in three rows.

62. The remand prison was not overrun by rodents or insects. Every cell was equipped with the mandatory ventilation system in working condition. The applicant had free access to drinking water. He was supplied with soap. As from 2 August 2005 the applicant was also supplied with toothpaste and toilet paper. Inmates were provided with hot water twice a day and could request a more frequent supply if needed. The applicant had his own portable boiling device. He was allowed to take a shower once a week.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

63. “Preventive measures” (*меры пресечения*) include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98 of the Code of Criminal Procedure (CCP)). If necessary, the suspect or accused may be asked to give an undertaking to appear in court (*обязательство о явке*) (Article 112 of the CCP).

64. 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 CCP). 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 CCP).

65. 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 CCP).

66. 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 of the CCP). 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 of the CCP).

67. 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 CCP).

68. If the suspect is being kept in detention pending trial, the trial court should schedule a preliminary hearing or a trial session within fourteen days from the date of the arrival of the case file from the prosecutor (Article 227 § 3 of the CCP).

B. The Detention of Suspects Act

69. 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 the 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.

C. Case-law of the Constitutional Court of the Russian Federation

70. In their Ruling no. 4-P of 22 March 2005 the Constitutional Court of the Russian Federation examined compatibility of certain provisions of the Code of Criminal Procedure with the Constitution of the Russian Federation. The Constitutional Court found that the provisions concerning detention on remand upon transfer of a criminal case from a prosecutor to a trial court complied with the Constitution. However, their practical

interpretation by the courts might have contradicted their constitutional meaning. The Ruling, in so far as relevant, reads as follows:

“The second part of Article 22 of the Constitution of the Russian Federation provides that ... detention is permitted only on the basis of a court order ... Consequently, if the term of detention, as defined in the court order, expires, the court must decide on the extension of the detention, otherwise the accused person must be released ...

These rules are common for all stages of criminal proceedings, and also cover the transition from one stage to another. ... The transition of the case to another stage does not automatically put an end to the preventive measure applied at previous stages.

Therefore, when the case is transmitted by the prosecution to the trial court, the preventive measure applied at the pre-trial stage ... may continue to apply until the expiry of the term for which it has been set in the respective court decision [imposing it]...

[Under Articles 227 and 228 of the Code of Criminal Procedure] a judge, after having received the criminal case concerning a detained defendant, should, within 14 days, set a hearing and establish “whether the preventive measure applied should be lifted or changed”. This wording implies that the decision to detain the accused or extend his detention, taken at the pre-trial stage, may stand after the completion of the pre-trial investigation and transmittal of the case to the court, only until the end of the term for which the preventive measure has been set.

The prosecution, in its turn, when approving the bill of indictment and transferring the case file to the court, should check whether the term of detention has not expired and whether it is sufficient to allow the judge to take a decision [on further detention of the accused pending trial]. If by the time of transfer of the case file to the court this term has expired, or if it appears to be insufficient to allow the judge to take a decision [on detention], the prosecutor, applying Articles 108 and 109 of the Code of Criminal Proceedings, [must] ask the court to extend the period of detention.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

71. The applicant complained that the conditions of his detention in the remand prison were poor. He relied on Article 3 of the Convention, which reads as follows:

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

A. The parties' submissions

72. 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.

73. The Government further submitted that the Court had competence to examine the conditions of the applicant's detention only after 8 October 2004, arguing that the preceding period fell out of the Court's competence. They contended 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 8 October 2004 for non-compliance with the six-month rule.

74. The Government conceded that certain cells had been overcrowded. In total, the applicant had been held in overcrowded cells nos. 8, 19, 50, 51 and 56 between 8 October 2004 and 27 June 2006, that is, for one year and three months. 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. There were no rodents or insects. The cells were ventilated. The applicant had at all times had access to drinking water and was provided with toiletries.

75. In sum, the Government argued that all conditions of the applicant's detention except for overcrowding of the cells were compatible with Article 3 of the Convention.

76. The applicant argued that the domestic remedies referred to by the Government had proven to be ineffective. He further stated that the material conditions of his detention in various cells were almost identical and insisted that the Court should take into account the whole period of his detention in the remand prison. The applicant maintained his claims concerning the poor conditions of his detention and argued that the number

of inmates kept together with him was at all times considerably higher than the number indicated by the Government.

B. The Court's assessment

1. Admissibility

77. 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 compensation for non-pecuniary damage arising from 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.

78. As regards the Government's argument about non-compliance with the six-month rule, the Court notes that the applicant was detained in the same detention facility from 6 April 2004 until 27 June 2006. 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 conditions in all those cells warrant the examination of the applicant's detention from 6 April 2004 to 27 June 2006 as a whole, without dividing it into separate periods (see, for similar reasoning, *Guliyev v. Russia*, no. 24650/02, §§ 31-33, 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.

79. Lastly, the Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It

further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

80. The Court observes at the outset that the parties disputed certain aspects of the conditions of the applicant's detention in the remand prison. 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.

81. The parties agreed that during certain periods of his detention the applicant was kept in overcrowded cells. For the majority of his detention in the remand prison, which lasted more than two years, the applicant was afforded less than 3 sq. m of personal space. The Government accepted that at times the applicant had less than 2 sq. m of personal space, while in cells nos. 51 and 56 his personal space was at times reduced to less than 1.4 sq. m (see paragraphs 56 and 55 above). 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 severe enough 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 the material conditions of detention (see, for example, *Lind v. Russia*, no. 25664/05, § 59, 6 December 2007; *Kantirev 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).

82. 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 feelings of fear, anguish and inferiority capable of humiliating and debasing him.

83. 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 the remand prison.

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

84. The applicant complained under Article 5 § 1 of the Convention that his detention after 4 August 2004 had not been based on a court decision, and was thus “unlawful”. He further complained that his detention starting from 1 February 2005 had been “unlawful” because the district court had not given any reasons for the extension of the term of detention. Article 5 § 1 reads, in so far as relevant, as follows:

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

...

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

A. The parties' submissions

85. The Government argued that the applicant's detention was lawful. The term of the detention authorised by the decision of 2 July 2004 had expired on 4 August 2004. The district court had received the case file from the prosecutor on 5 August 2004. Pursuant to Article 227 § 3 of the CCP, the district court had had fourteen days starting from the date of receipt of the case file from the prosecutor to decide on the applicant's detention. The district court's decision of 16 August 2004 that the applicant should remain in custody had been compatible with domestic laws and judicial practice in place at the material time because it had been taken before the adoption of the Ruling of the Constitutional Court of 22 March 2005.

86. The applicant insisted on his complaints. He argued that his detention between 4 and 16 August 2004 had not been based on a court order and that his detention starting from 1 February 2005 had not been justified by valid reasons and thus had been in breach of Article 5 § 1 of the Convention.

87. In their further observation on the admissibility and merits of the case the Government claimed, in vague terms and referring to the Ruling of the Constitutional Court of 22 March 2005, that should the applicant have brought a request for supervisory review of the lawfulness of the period of his detention that commenced on 4 August 2004 after 22 March 2005, he would have obtained redress regarding the alleged violation of his rights at the national level.

B. The Court's assessment

1. Admissibility

(a) Decision of 1 February 2005

88. The Court notes that on 1 February 2005 the district court extended the applicant's detention until 3 May 2005 on the ground of the gravity of the charges against him. It reiterates in this respect that a court's decision to maintain a custodial measure would not breach Article 5 § 1 provided that the court “had acted within its jurisdiction ... [and] had the power to make an appropriate order” (see *Ječius v. Lithuania*, no. 34578/97, § 69, ECHR 2000-IX).

89. In the Court's view, the district court acted within its powers in making the decision of 1 February 2005, and there is nothing to suggest that it was invalid or unlawful under domestic law, or that it was inappropriate for the purpose of Article 5 § 1 (c). The question whether the reasons for the decisions were sufficient and relevant is analysed below in connection with the issue of compliance with Article 5 § 3 (see *Korchuganova v. Russia*, no. 75039/01, § 63, 8 June 2006).

90. Accordingly, the Court finds that this part of the complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must therefore be declared inadmissible.

(b) Detention between 4 and 16 August 2004

91. The Government contended that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They submitted that he had not lodged an application for supervisory review of the lawfulness of his detention between 4 and 16 August 2004 when the relevant changes had been introduced in domestic practice (see paragraph 70 above). They maintained that the Constitutional Court's interpretation of the relevant law had been adjusted to prevent similar breaches in future and influenced the subsequent practice of the domestic courts. The Government raised this issue for the first time in their second set of observations on the present application, which, according to the procedure before the Court, were not commented upon by the applicant.

92. The Court notes at the outset that, in cases where admissibility issues are being decided upon at a separate stage of proceedings, objections regarding alleged non-exhaustion of domestic remedies should be raised before the admissibility of the application is considered, otherwise there will be estoppel (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II; and *Alexov v. Bulgaria*, no. 54578/00, § 152, 22 May 2008). However, it points out that it had decided to examine the merits of the present application at the same time as its admissibility

(see paragraph 3 above). The Court considers that in principle a question might arise as to whether there has been estoppel owing to the Government's failure to invoke this objection in the first set of their observations, which are to be commented on by the applicant, in a case in which the joint procedure provided for by Article 29 § 3 of the Convention has been applied. However, it does not deem it necessary to examine this issue since the Government's objection should be rejected for the following reasons.

93. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V; and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII). The Court further reiterates that the domestic remedies must be “effective” in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR-XI).

94. In the present case the Government vaguely asserted that the applicant could have applied for supervisory review of the allegedly unlawful period of his detention that commenced on 4 August 2004. The Court reiterates that, according to its constant practice, an application for supervisory review is not a remedy to be used for the purposes of Article 35 § 1 of the Convention (see *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004; and *Shulepov v. Russia*, no. 15435/03, § 23, 26 June 2008). Given that the Government did not specify how the remedy referred to could have provided the applicant with adequate redress for the alleged violation of Article 5 § 1, the Court finds that the Government failed to substantiate their claim that it was effective (see, among other authorities, *Kranz v. Poland*, no. 6214/02, § 23, 17 February 2004; and *Skawinska v. Poland* (dec.), no. 42096/98, 4 March 2003).

95. Therefore, the Government's objection as to the non-exhaustion of domestic remedies must be dismissed.

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

2. Merits

97. The Court observes that on 4 August 2004, that is, one day before the district court received the case file from the prosecutor, the term of the applicant's detention established by the decision of 2 July 2004 had expired. Nonetheless, the district court examined the issue of whether the applicant

should remain in custody only on 16 August 2004, that is, twelve days later. The question arises whether during these twelve days the applicant's detention was "lawful" within the meaning of Article 5 § 1.

98. The Court reiterates that the terms "lawful" and "in accordance with a procedure prescribed by law" used in Article 5 § 1 of the Convention essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. The Convention requires in addition that any deprivation of liberty should be in conformity with the purpose of Article 5, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI).

99. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with. A period of detention will in principle be lawful if it is carried out pursuant to a court order (see *Douiyeb v. the Netherlands* [GC], no. 31464/96, §§ 44-45, 4 August 1999). Given the importance of personal liberty, it is essential that the applicable national law should meet the standard of "lawfulness" set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII).

100. The Court reiterates that detention without a court order or other clear legal ground, regardless of the maximum length for it that might be established by national law, is incompatible with the standard of "lawfulness", enshrined in Article 5 § 1 since during the time of unauthorised detention an individual would be kept in a legal vacuum not covered by any domestic legal provision (see *Khudoyorov v. Russia*, no. 6847/02, § 149, ECHR 2005-X (extracts); and *Lebedev v. Russia*, no. 4493/04, § 57, 25 October 2007).

101. Further, the Constitutional Court of the Russian Federation condemned the practice of interpretation of Article 227 § 3 that would allow detention up to fourteen days without a court order as unconstitutional (see paragraph 70 above). In these circumstances the Court finds that the applicant's detention upon receipt of the case file by the district court was not "lawful" for Convention purposes.

102. The Court concludes that the applicant's detention between 4 and 16 August 2004 lacked a legal basis and was therefore "unlawful". Consequently, there has been a breach of Article 5 § 1 in this respect.

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

103. 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. The parties' submissions

104. The Government submitted that the applicant and his co-accused had been charged with four particularly serious criminal offences, which, in their view, meant that the two suspects had been involved in organised crime. Referring to the case of *Contrada v. Italy* (24 August 1998, § 67, *Reports* 1998-V), they submitted that the criminal proceedings against the applicant had been particularly complicated and time-consuming. The Government suggested that once at liberty, the applicant, a foreign national, could have absconded, interfered with the investigation or continued his unlawful activities and that those circumstances had remained unchanged during the whole period of his pre-trial detention. The Government considered that the applicant's detention had been founded on “relevant and sufficient” reasons. They also pointed out that the applicant had not appealed against several decisions on the extension of his detention.

105. The applicant maintained his claims. He also emphasised that his co-accused had not been placed in custody.

B. The Court's assessment

1. Admissibility

106. The Court notes the Government's assertion that the applicant did not appeal against several decisions on the extension of his detention and assumes that the Government have claimed non-exhaustion of domestic remedies in this connection.

107. The Court reiterates that the purpose of the rule requiring domestic remedies to be exhausted is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before those allegations are submitted to the Court. In the context of an alleged violation of Article 5 § 3 of the Convention, this rule requires that the applicant give the domestic authorities an opportunity to consider whether his right to trial within a reasonable time has been respected and whether there exist relevant and

sufficient grounds continuing to justify the deprivation of liberty (see *Shcheglyuk v. Russia*, no. 7649/02, § 35, 14 December 2006).

108. 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-...). Following his placement in custody on 4 April 2004 the applicant continuously remained in detention. It is not disputed that he did not lodge appeals against the extension orders issued before 17 January 2005. He did, however, appeal to the regional court against the subsequent extension orders, referring, in particular, to Article 5 § 3 of the Convention. He thereby gave an opportunity to the regional court to consider whether his detention was compatible with his Convention right to trial within a reasonable time or release pending trial. Indeed, the regional 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 concludes that the applicant has exhausted domestic remedies and rejects the Government's objection.

109. The Court further 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.

2. Merits

(a) General principles

110. 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, §§ 152-53, ECHR 2000-IV).

111. 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-...; and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). 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)).

112. 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 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 established facts stated 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*, cited above, § 72).

(b) Application to the present case

113. The Court observes that the applicant's detention pending trial lasted from 4 April 2004, the date of arrest, to 13 January 2006, the date of conviction. The overall duration thus amounted to one year, nine months and ten days.

114. 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 drug-related offences. 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.

115. The Government asserted that the length of the applicant's pre-trial detention was a result of the particular complexity of his criminal case. The Court readily accepts that when fighting organised crime the investigative authorities may indeed face serious obstacles that would cause delays in the

course of an investigation. However, it is not persuaded that a criminal case concerning four instances of drug offences and involving two co-accused could be considered as one related to organised crime. Therefore, the alleged complexity of the criminal case cannot in itself justify lengthy detention pending trial.

116. During the entire period of the applicant's detention the district court ordered extensions of detention on the basis of the gravity of the charges against him. They also stated that the applicant could abscond or interfere with the criminal proceedings, without explaining the reasons for those findings.

117. As regards the domestic authorities' reliance on the gravity of the charges as the decisive element, the Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding, 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 *Belevitskiy v. Russia*, no. 72967/01, § 101, 1 March 2007; *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001; and *Letellier v. France*, 26 June 1991, § 51, Series A no. 207,). This is particularly relevant 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 the issue whether the evidence that has been obtained supports a reasonable suspicion that the applicant has committed the alleged offence (see *Khudoyorov v. Russia*, no. 6847/02, § 180, 8 November 2005).

118. Furthermore, it does not transpire from the domestic courts' decisions that they ever examined the applicant's personal history when deciding upon whether to extend his detention pending trial. The courts assumed that the gravity of the charges carried such a preponderant weight that no other circumstances could have warranted the applicant's release. In this connection the Court reiterates that any system of mandatory detention is incompatible *per se* with Article 5 § 3 of the Convention (see *Ilijkov*, cited above, § 84, with further references). It is incumbent on the domestic authorities to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty. In the Court's view, the courts failed to mention any such facts in their decisions on the applicant's detention.

119. The Court has previously found a violation of Article 5 § 3 of the Convention in several Russian cases where the domestic courts extended an applicant's detention relying essentially on the gravity of the charges and using stereotyped formula paraphrasing the reasons for detention provided for by the Code of Criminal Procedure, without explaining how they applied in the applicant's case or considering alternative preventive measures (see *Belevitskiy*, *Mamedova* and *Khudoyorov* cases cited above, and also

Khudobin v. Russia, no. 59696/00, §§ 103 et seq., ECHR 2006-... (extracts); *Dolgova v. Russia*, no. 11886/05, §§ 38 et seq., 2 March 2006; *Rokhlina v. Russia*, no. 54071/00, §§ 63 et seq., 7 April 2005; *Panchenko v. Russia*, no. 45100/98, §§ 91 et seq., 8 February 2005; and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 et seq., ECHR 2003-IX (extracts)).

120. Having regard to its case-law on the subject and the above considerations, the Court concludes that the domestic authorities did not adduce “relevant and sufficient” reasons to justify the applicant's detention in excess of a “reasonable time”. In these circumstances it is not necessary to examine whether the proceedings were conducted with “special diligence”.

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

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

122. The applicant complained under Article 5 § 4 of the Convention that the domestic courts had not examined his appeals against decisions on the extension of his detention “speedily”. Article 5 § 4 reads as follows:

“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 ...”

A. Submissions by the parties

123. The Government submitted that the domestic courts had “speedily” examined the applicant's complaints concerning the lawfulness of his detention on remand and his counsel's appeals against the detention orders.

124. The applicant maintained his complaint.

B. The Court's assessment

1. Admissibility

125. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

126. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of the detention and ordering its termination if it proves unlawful. Although it does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B; and *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224). The requirement that a decision be given “speedily” is undeniably one such guarantee; while one year per level of jurisdiction may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79, ECHR 2003-IV). In that context, the Court also observes that there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending because the defendant should benefit fully from the principle of the presumption of innocence (see *Iłowiecki v. Poland*, no. 27504/95, § 76, 4 October 2001).

(b) Application of the general principles to the present case

127. The Court observes that it took the regional court approximately a month to examine each of the applicant's counsel's appeals against the extension of his detention. The time taken to examine the appeals was never less than twenty-seven days. Moreover, on one occasion the delay in the examination of the appeal amounted to one month and seventeen days (see paragraphs 22 - 23, 29 - 31, 33, 36 and 40 above). There is nothing to suggest that the applicant caused these delays in the proceedings.

128. The Court therefore considers that the periods during which the regional court examined the appeals against the decisions on extensions cannot be considered compatible with the “speediness” requirement of Article 5 § 4, especially taking into account that their entire duration was attributable to the authorities (see, for example, *Mamedova*, cited above, § 96; *Khudoyorov*, cited above, §§ 198 and 203; and *Rehbock v. Slovenia*, no. 29462/95, §§ 85-86, ECHR 2000-XII, where review proceedings which lasted twenty-three days were found not to have been “speedy”).

129. There has therefore been a violation of Article 5 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. 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

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

132. The Government considered the claims exaggerated.

133. The Court notes that it has found violations of Articles 3 and 5 of the Convention in the present case. The applicant spent almost two years in custody, in inhuman and degrading conditions. One period of his detention lacked legal grounds; the whole period of the detention was excessively long. The applicant's appeals against extension orders were not examined speedily. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. The Court finds it appropriate to award the applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

134. The applicant was represented by Mr Ovchinnikov and his associates, Mr Bagryanskiy and Mr Mikhaylov, lawyers practising in Vladimir. He submitted a copy of an agreement dated 1 February 2005 under which the applicant had undertaken to pay Mr Ovchinnikov EUR 7,000 within thirty days from the date on which the Court's judgment in the applicant's case would enter into force, and a copy of an agreement dated 16 October 2008, which had replaced the agreement of 1 February 2005, under which the applicant had undertaken to pay the said sum under the same conditions to the legal bureau operated by Mr Ovchinnikov, Mr Bagryanskiy and Mr Mikhaylov. The applicant claimed reimbursements of his lawyers' fees in the amount of EUR 7,000.

135. The Government submitted that the costs had not actually been incurred.

136. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). The Court considers that the applicant's claim is

excessive. Regard being had to the information in its possession, the Court finds it appropriate to award EUR 3,500 in respect of legal costs, plus any tax that may be chargeable to the applicant.

C. Default interest

137. 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 complaints under Articles 3 and 5 §§ 3 and 4, as well as the complaint under Article 5 § 1 of the Convention concerning the lawfulness of the applicant's detention between 4 and 16 August 2004 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's unlawful detention between 4 and 16 August 2004;
4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay, 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 15,000 (fifteen thousand euros) to the applicant in respect of non-pecuniary damage, plus any tax that may be chargeable thereon;
 - (ii) EUR 3,500 (three thousand five hundred euros) in respect of costs and expenses, to be paid to the applicant's representatives, 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 amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President