



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

FIRST SECTION

CASE OF BUTUSOV v. RUSSIA
(Application no. 7923/04)

JUDGMENT

STRASBOURG

22 December 2009

FINAL

22/03/2010

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 Butusov v. Russia,

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

Nina Vajić, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyeu,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 7923/04) 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 Mikhail Sergeyevich Butusov (“the applicant”), on 29 January 2004.

2. The applicant, who had been granted legal aid, was represented by Ms L.M. Churkina, a lawyer practising in Yekaterinburg. The Russian Government (“the Government”) were represented by Mr P. Laptev and Mrs V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. On 12 October 2006 the Court declared the application partly inadmissible and decided to give notice of the complaint under Article 5 § 4 to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. On 27 September 2007 the President of the Chamber invited the Government to provide further written observations on the admissibility and merits of the applicant's complaint under Article 5 § 4.

4. The Government objected to the joint examination of the admissibility and merits of the application. The Court examined their objection and dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Snezhinsk, Chelyabinsk region. He is currently serving a prison sentence in the Chelyabinsk region.

6. On 16 July 2003 the applicant was arrested on suspicion of robbery.

7. On 18 July 2003 the Snezhinsk Town Court of the Chelyabinsk region ("the Town Court") released the applicant on an undertaking not to leave the town.

8. On 23 July 2003 the Town Court remanded the applicant in custody. It held that his detention was justified on the ground of his previous convictions, the gravity of the offence, and the risk that he would abscond, obstruct investigation of the case, commit another crime or hinder the execution of the sentence.

9. On 25 July 2003 the applicant's counsel Ye. appealed against the detention order of 23 July 2003. He contested the grounds on which the applicant had been placed in detention. On the same date the Town Court registered the appeal as no. 132.

10. It follows from the Government's submissions, confirmed by a copy of the record of the outgoing mail of the Town Court, that on 28 July 2003 the Town Court sent copies of the grounds of appeal to the applicant, the investigating authorities and the prosecutor's office. On 4 August 2003 the Town Court sent a notification about the examination of the appeal by the Regional Court on 14 August 2003 to the detention facility in which the applicant was detained and to his counsel. However, the Government did not submit any document confirming that the applicant or his lawyer had received that notification. On 7 August 2003 the appeal materials reached the Chelyabinsk Regional Court ("the Regional Court").

11. According to the applicant, neither he nor his lawyer received the notification of the appeal hearing.

12. On 14 August 2003 the Regional Court examined the appeal in the absence of the applicant and his counsel. The Prosecutor, who was present at the hearing, considered that the appeal should be dismissed. The Regional Court upheld the detention order of 23 July 2003, finding it lawful and duly reasoned.

13. Subsequently the Town Court extended the applicant's detention on 17 and 26 September 2003. The applicant did not appeal against those extension orders.

14. On 4 November 2003 the Town Court found the applicant guilty of aggravated robbery and sentenced him to ten years' imprisonment. On 15 January 2004 the Regional Court upheld the applicant's conviction and reduced the term of imprisonment to eight years.

15. On 13 April 2005 the Deputy President of the Supreme Court of the Russian Federation granted the applicant's request for supervisory review of the judgment of 4 November 2003, as upheld on 15 January 2004, and remitted the case for examination on the merits to the Presidium of the Regional Court. On 1 June 2005 the Presidium of the Regional Court upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. Since 1 July 2002 criminal-law matters have been governed by the Code of Criminal Procedure of the Russian Federation of 18 December 2001 ("the CCrP").

17. Article 108 of the CCrP provides that 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. An appeal may be lodged with a higher court within three days against a judicial decision ordering or extending detention. The appeal court must decide on the appeal within three days of its receipt.

18. Article 376 of the CCrP provides that the parties must be notified about the date, time and venue of the appeal hearing no later than fourteen days before it. The court shall decide whether the detainee should be summoned to the hearing.

19. On 22 January 2004 the Constitutional Court delivered decision no. 66-*O* on a complaint about the Supreme Court's refusal to permit a detainee to attend the appeal hearings on the issue of detention. It held:

"Article 376 of the Code of Criminal Procedure regulating the presence of a defendant remanded in custody before the appeal court ... cannot be read as depriving the defendant held in custody ... of the right to express his opinion to the appeal court, by way of his personal attendance at the hearing or by other lawful means, on matters relating to the examination of his complaint about a judicial decision affecting his constitutional rights and freedoms ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 OF THE CONVENTION

20. The applicant complained that the appeal proceedings against the detention order of 23 July 2003 had not complied with the requirements of Article 5 § 4 of the Convention. In particular, his appeal against the detention order of 23 July 2003 was examined only on 14 August 2003 in

his and his counsel's absence. Article 5 § 4 of the Convention 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. Admissibility

21. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged unfairness of the proceedings concerning review of the applicant's detention

22. The Government submitted that the applicant and his counsel had been duly informed of the appeal hearing by notification, sent to them on 4 August 2003.

23. The applicant argued that neither he nor his counsel had been informed of the date of the examination of their appeal. The Government failed to submit to the Court any evidence to prove that the notice of the hearing had in fact reached him and his counsel. Only in December 2006, while reading the materials of the criminal case, did his mother learn that the examination of the appeal had taken place on 14 August 2003.

24. The Court reiterates that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 65, Series A no. 154-B). Although it is not always necessary for the procedure under Article 5 § 4 to be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005- ..., with further references). The proceedings must be adversarial and must always ensure equality of arms between the parties. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). The opportunity for a detainee to be heard either in person or through some form of representation

features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B).

25. Turning to the circumstances of the present case the Court observes that on 14 August 2003 the Regional Court examined the applicant's appeal against the detention order of 23 July 2003. The prosecutor was present at the hearing and requested that the appeal be dismissed. The applicant, who was in custody, was not brought to the hearing. As to the applicant's counsel, the Government submitted that he had been duly notified of the hearing. The applicant argued that counsel had never received any notification. In that respect the Court observes that the Government did not provide it with any evidence that the notice of the hearing had in fact reached the applicant's counsel. In these circumstances, the Court is not persuaded that the applicant's counsel was duly notified of the appeal hearing of 14 August 2003.

26. The Court is of the view that to ensure equality of arms it was necessary to give the applicant the opportunity to appear, either in person or through some form of representation, at the same time as the prosecutor, so that he could reply to the latter's arguments (compare *Kampanis*, cited above, § 58). Given that neither the applicant nor his counsel were present at the examination of the applicant's appeal on 14 August 2003, whereas the prosecutor was present and made submissions, the Court considers that those proceedings did not meet the requirements of Article 5 § 4. The Court also notes that there is nothing in the appeal decision of 14 August 2003 to suggest that the appeal court examined whether the applicant's counsel had been duly notified of the appeal hearing and, if he had not, whether the examination of the appeal should have been adjourned or whether the applicant should have been brought to the hearing.

27. Finally, the Court notes that the Government have not provided any evidence that the applicant or his counsel were informed about the outcome of the appeal proceedings or served with a copy of the decision of 14 August 2003. It follows that the applicant was left in uncertainty as to the fate of his appeal for a long time and was deprived of an effective check on the lawfulness of his detention.

28. Having regard to the above, the Court concludes that the examination of the applicant's appeal against the detention order of 23 July 2003 did not satisfy the requirements of Article 5 § 4 of the Convention. Accordingly, there has been a violation of that Article.

2. Speediness of the review of the applicant's detention

29. The Government submitted that in accordance with procedure which existed at the material time, scheduling of appeal hearings was done by the first-instance court, which had also to transfer the criminal case to the

appeal court. In that respect the Government noted that the domestic law did not set any time-limits for transferring the case file to the appeal court.

30. The applicant maintained his complaint. He argued in particular that, in breach of domestic law, it took the Regional Court more than three days to examine the appeal.

31. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to persons detained a right to institute 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 detention and ordering its termination if it proves unlawful (see *Baranowski v. Poland*, no. 28358/95, § 68, ECHR 2000-III). The question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII).

32. Turning to the circumstances of the present case, the Court firstly observes that the appeal proceedings commenced on 25 July 2003, the date on which the applicant's counsel lodged his grounds of appeal, and ended on 14 August 2003, when the Regional Court examined and dismissed the appeal. It follows that the appeal proceedings lasted twenty days.

33. The Court further observes that on 23 July 2003 the applicant was remanded in custody on suspicion of robbery and in view of his previous convictions, danger of absconding and interfering with the proceedings. In his appeal against that detention order, the applicant's counsel contested these grounds. In the Court's opinion, these were straightforward matters, and it has not been argued by the Government that the case in itself disclosed any complex features.

34. The Court also notes that the Government did not argue that the applicant or his counsel had in some way contributed to the length of the appeal proceedings. It therefore follows that the entire length of the appeal proceedings is attributable to the domestic authorities. The Town Court received the appeal on 25 July 2003. However, it was not until 7 August 2003 that the appeal materials reached the Regional Court. In that respect the Court cannot accept the Government's argument that domestic law did not set any time-limits for transferring the criminal case from the first-instance court to the appeal court. It reiterates that it is for the State to organise its judicial system in such a way as to enable the courts to comply with the requirements of Article 5 § 4 (see, *mutatis mutandis*, *R.M.D. v. Switzerland*, 26 September 1997, § 54, *Reports of Judgments and Decisions* 1997-VI). In any event, the Regional Court received the appeal materials on 7 August 2003 and examined the appeal only on 14 August 2003. The Government did not provide any justification for this delay. In that respect the Court reiterates that where an individual's personal liberty is at stake, the Court has set up very strict standards concerning the State's compliance with the requirement of speedy review of the lawfulness of detention (see, for

example, *Kadem v. Malta*, no. 55263/00, §§ 44-45, 9 January 2003 where the Court considered a delay of seventeen days in deciding on the lawfulness of the applicant's detention excessive, and *Rehbock*, cited above, §§ 85-86, where the Court considered that a delay of twenty-three days on deciding on the application for release was excessive).

35. Having regard to the above, the Court considers that the period of twenty days cannot be considered compatible with the “speediness” requirement of Article 5 § 4. There has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

38. The Government considered that the applicant had failed to substantiate his claim and therefore it had to be rejected.

39. The Court considers that the domestic courts' failure to review the lawfulness of the applicant's detention in conformity with the requirements of Article 5 § 4 caused the applicant non-pecuniary damage, such as stress and frustration, which cannot be compensated by the findings of violations. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,800 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

40. The applicant did not submit any claims for costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

41. 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 remainder of the application admissible.
2. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the examination of the applicant's appeal against the detention order of 23 July 2003 in the absence of the applicant and his counsel;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the delay in examination of the applicant's appeal against the detention order of 23 July 2003;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President