



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

FIFTH SECTION

CASE OF MOSKALENKO v. UKRAINE

(Application no. 37466/04)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Moskalenko v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 37466/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Aleksey Aleksandrovich Moskalenko (“the applicant”), on 5 October 2004.

2. The applicant was represented by Mr A. Kristenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 26 May 2009 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint under Article 5 § 3 of the Convention concerning the length of the applicant's detention on remand. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1982 and lives in Kurakhove, Donetsk region, Ukraine. He is currently serving his sentence apparently in the Donetsk Pre-Trial Detention Centre, Ukraine.

5. On 16 July 2003 the applicant was arrested on suspicion of aggravated murder, robbery and arson.

6. On 19 July 2003 the Maryinka District Court remanded him in custody, relying on the suspicion that he had committed the offences in question. It also considered that keeping the applicant in detention was necessary to secure the proper conduct of the proceedings, given the risk that he might go into hiding and obstruct the investigation, without, however, specifying the grounds for such an opinion. The court also stressed the severity of crimes allegedly committed by the applicant.

7. In the course of the investigation, the Maryinka District Court prolonged the applicant's detention on 15 September and 15 October 2003. In these decisions the court repeatedly relied on the original grounds given for the applicant's detention.

8 The applicant's appeal against the detention order was dismissed as lodged out of time. His further numerous applications for release were unsuccessful.

9. Later, certain S. and G. were detained and charged in connection with the investigation against the applicant. Subsequently their cases were joined to the applicant's one.

10. On 17 November 2003 the Regional Prosecutor lodged a bill of indictment with the Donetsk Regional Court of Appeal. The applicant was charged with an aggravated murder, robbery and arson.

11. On 12 December 2003 the trial court held the first hearing.

12. On 9 December 2004, after several hearings, the court remitted the case for additional investigation.

13. By 1 March 2005 the additional investigation was completed and the case was sent to the Donetsk Regional Court of Appeal. On 21 March 2005 the latter again remitted the case for additional investigation which was completed by 30 June 2005.

14. During the above additional investigations the authorities further prolonged the applicant's pre-trial detention on 30 January and 27 May 2005. No copy of the former decision is available. In the latter decision the Donetsk Regional Court of Appeal repeated the grounds previously given for the applicant's continued detention and additionally relied on the severity of the anticipated sentence. The court also argued that the applicant could induce witnesses to give false testimony. Again, it did not specify the grounds for such an opinion.

15. On 1 November 2006 the Donetsk Regional Court of Appeal gave judgment. The applicant was convicted as charged and sentenced to fifteen years' imprisonment. The court also convicted S. and G.

16. The parties appealed. The applicant was kept in detention pending appeal.

17. On 14 February 2008 the Supreme Court of Ukraine partly quashed the first-instance judgment and remitted the case for retrial.

18. The retrial started on 27 March 2008.

19. In the retrial proceedings the applicant made several, unsuccessful applications for release. In his applications he repeatedly contested the factual basis for the charges against him and invoked the principle of the presumption of innocence. The court, dismissing his applications, reasoned that they were either “premature” or “inappropriate” at that stage of proceedings.

20. On 21 September 2009 the Donetsk Regional Court of Appeal convicted the applicant as originally charged.

21. The applicant and his lawyer appealed to the Supreme Court of Ukraine but the destiny of their appeals is not known.

II. RELEVANT DOMESTIC LAW

22. Provisions of the Code of Criminal Procedure of 28 December 1960 on preventive measures are set out in *Nevmerzhitsky v. Ukraine* (no. 54825/00, § 54, ECHR 2005-II (extracts)).

THE LAW

I. SCOPE OF THE CASE

23. Following the Court's admissibility decision, the applicant made further submissions, in which he reiterated some of his original complaints.

24. In its partial decision on admissibility of 26 May 2009, the Court adjourned its examination of the applicant's complaint under Article 5 § 3 of the Convention concerning the length of the applicant's detention on remand. The remainder of the complaints was declared inadmissible.

The scope of the case now before the Court is accordingly limited to the complaint which was adjourned on 26 May 2009.

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

25. The applicant complained that the length of his detention on remand had been excessive. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, 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.”

26. The Government contested that argument.

A. Admissibility

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

B. Merits

1. *Period to be taken into consideration*

28. The applicant's detention started on 16 July 2003, when he was arrested on suspicion of having committed an aggravated murder, robbery and arson. On 1 November 2006 the Donetsk Regional Court of Appeal convicted him as charged.

As from that date he was detained “after conviction by a competent court”, within the meaning of Article 5 § 1 (a) and, consequently, that period of his detention falls outside the scope of Article 5 § 3 (cf. *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI).

On 14 February 2008 the Supreme Court of Ukraine quashed the applicant's conviction. Following that date his detention was again covered by Article 5 § 3. It continued until 21 September 2009 when the applicant was again convicted.

29. Accordingly, the period to be taken into consideration amounts to four years, ten months and 25 days.

2. *Reasonableness of the length of the applicant's detention on remand*

30. The Government contended that the length of the applicant's detention on remand had been reasonable given the complexity of the case and the large number of investigative measures that had had to be taken. They concluded that the proceedings had been conducted with due diligence and the authorities had had sufficient grounds for the applicant's continued detention.

31. The applicant disagreed.

32. The Court points out that the general principles regarding the right “to trial within a reasonable time or to release pending trial”, as guaranteed by Article 5 § 3 of the Convention were stated in a number of its previous judgements (see, among many other authorities, *Kudła v. Poland*, cited above, § 110 and *Nevmerzhitsky v. Ukraine*, cited above, § 130 et seq.).

33. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely (1) the serious nature of the offences with which he had been charged, (2) the severity of the penalty to which he was liable and

(3) the need to secure the proper conduct of the proceedings, given the risk that the applicant might go into hiding and induce witnesses to give false testimony.

34. The Court accepts that the reasonable suspicion against the applicant of having committed serious offences could initially warrant his detention. Also, the need to secure the proper conduct of the proceedings (in particular the process of obtaining evidence from witnesses) constituted valid grounds for the applicant's initial detention.

35. However, with the passage of time, those grounds became less and less relevant. The Court must then establish whether the other grounds adduced by the courts – namely, the severity of the anticipated sentence, the risk of the applicant's going into hiding and the risk that the applicant would induce witnesses to give false testimony – were “sufficient” and “relevant” (see *Kudła v. Poland*, cited above, § 111).

36. The Court notes that the judicial authorities continuously relied on the likelihood that a heavy sentence might be imposed on the applicant, given the serious nature of the offences with which he had been charged. In this respect, the Court recalls that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. It acknowledges that in view of the seriousness of the charges against the applicant the authorities could justifiably consider that such a risk existed. However, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001).

37. As regards the risk that the applicant might go into hiding and induce witnesses to give false testimony, the Court points out that in their decisions to remand the applicant in detention or to prolong it the authorities did not specify any concrete grounds justifying their opinion (see paragraphs 6 and 14 above). Moreover, as the proceedings progressed and the collection of evidence neared completion, the risk of his intimidating certain witnesses would also have become less relevant (see *Nevmerzhitsky*, cited above, § 136).

38. Lastly, the Court notes that no alternative measures were effectively considered by the domestic authorities to ensure the applicant's appearance at trial (*ibid.*, § 137 with further references).

39. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 250,000 euros (EUR) in respect of non-pecuniary damage.

42. The Government did not comment on the claim.

43. The Court, making its assessment on an equitable basis, awards the applicant EUR 4,100 in respect of non-pecuniary damage.

B. Costs and expenses

44. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

45. 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 under Article 5 § 3 of the Convention concerning the length of the applicant's detention on remand admissible;
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, EUR 4,100 (four thousand one hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President