

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

FIFTH SECTION

CASE OF KRAYNYAK v. UKRAINE

(Application no. 68353/17)

JUDGMENT

STRASBOURG

16 February 2023

This judgment is final but it may be subject to editorial revision.



In the case of Kraynyak v. Ukraine,

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

Mārtiņš Mits*, President*,
María Elósegui,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 68353/17) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 7 September 2017 by a Ukrainian national, Mr Sergiy Vasylyovych Kraynyak ("the applicant"), who was born in 1994, lives in Subich and was represented by Mr O. V. Zarutskyy, a lawyer practising in Kyiv;

the decision to give notice of the complaints under Article 5 §§ 1, 3, 4 and 5 of the Convention to the Ukrainian Government ("the Government"), represented by their then Agent, Mr I. Lishchyna, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 26 January 2023,

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

SUBJECT MATTER OF THE CASE

1. The case mainly concerns the applicant's complaints under Article 5 § 3 of the Convention that his pre-trial detention was unreasonably lengthy, under Article 5 § 4 that the judge who extended his detention on 23 March, 24 April and 19 June 2017 was not impartial, and under Article 5 § 5 that he had no effective right to compensation for those alleged violations.

I. THE APPLICANT'S DETENTION AND TRIAL

2. On 31 August 2015 the Parliament of Ukraine debated draft legislation providing for the allocation of greater powers to the local authorities of some areas of the Donetsk and Luhansk regions, as part of implementation of the so-called Minsk Agreements (see *Khlebik v. Ukraine*, no. 2945/16, § 12, 25 July 2017). A crowd of opponents to the legislation gathered in front of Parliament and attacked the National Guard troops guarding the building. A live hand grenade was thrown, killing four servicemen and injuring more than a hundred people.

3. On the same day the applicant was arrested on suspicion of involvement in the attack. He was initially charged with offences (notably injuring a law-enforcement officer) not covered by the Bail Exclusion Clause.[1]

4. On 16 September 2015 the charges were changed to terrorism, an offence covered by the Clause. According to the charges, the applicant, twenty-six named individuals and a number of unidentified individuals had attacked law-enforcement officers with wooden and metal sticks. At the same time, G. (a co-defendant), acting with the applicant as part of a premeditated plan, had brought live hand grenades to the square in front of Parliament. The applicant's role had been to cover up G.'s actions by lighting and holding a smoke grenade while G. threw a live grenade at the troops.

5. On 2 September 2015 a Kyiv Pecherskyi District Court ordered the applicant's detention. It found that there was a reasonable suspicion against him. It took into account the gravity of the offence he was suspected of and the circumstances under which it had been committed. It considered that there was a risk that he might influence witnesses, abscond and continue criminal activity, and that a non-custodial preventive measure was insufficient to guard against those risks. The court, given the extreme dangerousness of the violent acts the applicant was suspected of, considered it inappropriate to grant bail.

6. On 10 August 2016 an extensive investigation (including more than seventy expert examinations) was completed and the case against the applicant and G. was eventually sent to the Kyiv Shevchenkivskyi District Court for a trial by jury.

7. The courts extended the applicant's and G.'s detention approximately every two months. They stated that although the defendants had strong social connections, it was likely that, given the severity of the punishment they were facing, they could abscond. Moreover, the court noted that, in view of their military experience in the east of Ukraine, the defendants had acquired particular skills making it possible that they would interfere with the investigation, notably by influencing victims and other witnesses. The acts of which they were suspected had caused mass casualties, which meant that there was a strong public interest in ensuring an orderly investigation.

The applicant's right to liberty had to be balanced against other rights and interests of society and, therefore, his detention was justified. Also, a central element of the charges was that his actions had been motivated by opposition to the Minsk Agreements. That remained a controversial issue, which increased the likelihood that he might again engage in the type of conduct of which he was accused.

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[1] The Bail Exclusion Clause was a provision of the Code of Criminal Procedure that excluded the granting of bail and other non-custodial preventive measures to those accused of terrorism and certain national security offences (see *Grubnyk v. Ukraine*, no. 58444/15, §§ 40, 50, 53-56, 116-30, 17 September 2020). It was declared unconstitutional on 25 June 2019.

Preventive measures other than detention would be insufficient to guard against those risks.

8. On 22 May 2020 the applicant was released and placed under twenty-four-hour house arrest. That measure expired on 22 July 2020.

9. At the time of the parties' most recent communication to the Court, 18 January 2022, the case was pending before the trial court.

II. CHALLENGE CONCERNING JUDGE B.

10. On 25 January 2017 the applicant challenged the presiding judge in the case, Judge B. He submitted that, according to the special investigation commission established under the Restoration of Trust in the Judiciary Act, in December 2013 the judge had made politically motivated decisions against *Euromaidan* protesters (see *Shmorgunov and Others v. Ukraine*, nos. 15367/14 and 13 others, §§ 220-29, 21 January 2021). The applicant argued that, since he was accused of a crime which had been motivated by his political views, he had doubts about the judge's impartiality.

11. On 23 March, 24 April and 19 June 2017 Judge B. extended the applicant's detention.

12. On 23 March and 24 April 2017 the defendants' lawyers objected that Judge B. could not examine the matter of pre-trial detention since the challenge against him had not yet been examined.

13. On 2 August 2017 Judge B. himself examined the applicant's challenge and allowed it. He noted that the special investigation commission had indeed recommended to the High Council of Justice that he be dismissed for breach of oath, but that the Council had not followed that recommendation. While the facts cited by the applicant were not incontrovertible proof that he lacked impartiality, the judge nevertheless considered that they were such as to create an objective doubt as to his impartiality in the eyes of the parties in this kind of proceedings. In such circumstances, the need to guarantee the defendants' rights under Article 6 of the Convention was a factor which counted in favour of allowing the challenge.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 3 TO 5 OF THE CONVENTION

14. The Government contested the applicant's complaints set out in paragraph 1 above.

15. The Court notes that the complaints under Article 5 §§ 3 to 5 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the

Convention or inadmissible on any other grounds. They must therefore be declared admissible.

A. Alleged violation of Article 5 § 3

16. The relevant period lasted four years and more than ten months (from 31 August 2015 to 22 July 2020 – see paragraphs 3 and 8 above and *Korban v. Ukraine*, no. 26744/16, § 139, 4 July 2019). Such a length of detention is already a matter of grave concern and requires the domestic authorities to put forward very weighty reasons to justify it (see, for example, *Velečka and Others v. Lithuania*, nos. 56998/16 and 3 others, § 98 and 99, 26 March 2019, with further references).

17. The relevant principles of the Court's case-law are summarised in *Grubnyk v. Ukraine* (no. 58444/15, §§ 110-15, 17 September 2020).

18. In that judgment the Court held that, despite references to the Bail Exclusion Clause, the domestic courts had given relevant and sufficient reasons for Mr Grubnyk's detention. The Court considers that similar considerations apply in the present case.

19. Indeed, when the applicant was initially placed in pre-trial detention, the Bail Exclusion Clause was inapplicable to him (see paragraphs 3 to 5 above). Nevertheless, the domestic court found, referring to the specific circumstances of the case, that the relevant risks justified detention (see paragraph 5 above). In a number of decisions extending detention the courts did invoke the Clause as an additional argument.[2] However, for the courts the invocation of that Clause was not sufficient to extend the applicant's detention. On the contrary, the courts found that there were specific circumstances which justified it (see paragraph 7 above).

20. Accordingly, the Court considers that the domestic courts did not use "general and abstract" arguments for the applicant's detention and that their reasons were relevant and sufficient.

21. It remains to be ascertained whether the authorities displayed "special diligence" in the conduct of the proceedings (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 87, 5 July 2016).

22. The Court recognises that the applicant's case was complex, concerning an incident with more than a hundred victims.

23. At the same time, the applicant alleged that there had been considerable delays in his case after the pre-trial investigation had been completed on 10 August 2016 (see paragraph 6 above). The Government did not contest the applicant's allegation that after that date the trial did not begin

[2] In the detention orders of October and December 2015, February and July 2016 and January to June 2017 the courts, at the end of their reasoning, quoted the Bail Exclusion Clause *verbatim*, without providing any comments and typically introducing the quote by "also" (*крім того*). There was no reference to the Clause in other orders, for example those of August, October and December 2016, August 2017 and March 2018.

until at least 15 August 2017, that is, for more than a year. No good reason has been given for that delay. Afterwards, the applicant remained deprived of his liberty for almost three more years.

24. The authorities did not show that there existed exceptional circumstances justifying the applicant's detention for such a substantial period, such as, for example, the need to collect evidence abroad or to request international legal assistance (see *Lisovskij v. Lithuania*, no. 36249/14, § 80, 2 May 2017, with further references).

25. The Court concludes, therefore, that the authorities failed to display special diligence in the period after completion of the pre-trial investigation. This consideration is sufficient for the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

B. Alleged violation of Article 5 § 4

26. The Court has held that the term "court" referred to in Article 5 § 4 must be construed as a body which enjoys the same qualities of independence and impartiality as are required of the "tribunal" mentioned in Article 6 (see *Ali Osman Özmen v. Turkey*, no. 42969/04, § 87, 5 July 2016). It must be assessed under the same criteria of impartiality (see *D.N. v. Switzerland*, no. 27154/95, §§ 42-46, 29 March 2001).

27. The requirement of impartiality under Article 6 also has a procedural dimension. Where the applicant raises doubts as to the courts' impartiality which are not manifestly devoid of merit, the absence of a timely examination of such a challenge may raise an issue of objective impartiality (see *Remli v. France*, 23 April 1996, § 48, *Reports of Judgments and Decisions* 1996-II; *Gazeta Ukraina-Tsentr v. Ukraine*, no. 16695/04, §§ 34 and 35, 15 July 2010; and *Cosmos Maritime Trading and Shipping Agency v. Ukraine*, no. 53427/09, §§ 78-82, 27 June 2019).

28. In the present case Judge B. himself eventually allowed the applicant's challenge, holding that the circumstances could create an appearance for the parties that he lacked impartiality. It follows that, while the judge's subjective impartiality is not in doubt, the Court cannot hold that the applicant's misgivings concerning that judge's impartiality were devoid of any basis.

29. The Court considers that the applicant's concerns should have been addressed before the judge decided to extend his detention on 23 March, 24 April and 19 June 2017. However, that was not done.

30. There has, accordingly, been a violation of Article 5 § 4 of the Convention.

C. Alleged violation of Article 5 § 5

31. Having examined all the material before it, the Court concludes that the applicant's complaint discloses a violation of Articles 5 § 5 of the Convention in the light of the findings in *Korban* (cited above, §§ 201 and 202, with further references).

II. REMAINING COMPLAINT

32. The applicant also complained that his detention from 25 October to 13 December 2016 had not been lawful for the purposes of Article 5 § 1 of the Convention. The Court has examined this part of the application and considers that it was lodged outside of the six-month time-limit and must therefore be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He also claimed EUR 1,008 for the costs and expenses incurred before the Court, to be paid directly to his representative.

34. The Government contested those claims, considering them unfounded, unsubstantiated and exaggerated.

35. The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

36. Having regard to the documents in its possession, the Court considers it reasonable to award the sum of EUR 8, plus any tax that may be chargeable to the applicant, for the proceedings before the Court, to be paid directly to the applicant's representative, Mr Zarutskyy.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 3, 4 and 5 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

6. *Holds*

(a) that the respondent State is to pay the applicant, within three months, EUR 8 (eight euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement and to be transferred directly into the account of the applicant's representative, Mr Zarutskyy;

(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;

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

Done in English, and notified in writing on 16 February 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Mārtiņš Mits
Deputy Registrar	President