

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

FIFTH SECTION

CASE OF MALYK v. UKRAINE

(Application no. 37198/10)

JUDGMENT

STRASBOURG

29 January 2015

FINAL

29/04/2015

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



In the case of Malyk v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 16 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 37198/10) 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 Volodymir Georgiyoviych Malyk ("the applicant"), on 22 June 2010.

2. The Ukrainian Government ("the Government") were represented by their Agent at the time, Mr N. Kulchytskyy.

3. The applicant alleged that his arrest and detention had not been lawful and that he had been unable effectively to challenge them.

4. On 11 October 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Zhytomyr.

A. Background to the case

6. The applicant was the director of B., a limited liability company. In 2007 and 2008 the company took out bank loans for the purpose of production activities. In April 2009 the company changed the composition of the shareholders and management. The changes were allegedly made on

the basis of forged documents. Subsequently, the company failed to repay the loans. The company refused the banks' requests to repay the debts. The applicant claimed that he was no longer working at the company.

7. On 30 October 2009 the Prosecutor of Zhytomyr City instituted criminal proceedings in connection with the embezzlement of funds by the managers and owners of company B. and the forgery of documents.

B. The applicant's arrest and the ensuing proceedings

8. On 25 and 27 November 2009 the investigator of the Zhytomyr Prosecutor's Office questioned the employees of the banks dealing with the loans to company B., the shareholders and the staff of company B. The witnesses gave details as to the role of the applicant in arranging the loan agreements and in the way the shareholders and management had been changed. One of the former shareholders claimed that his signature had been inserted on loan documents which he had not actually signed. He alleged that the applicant had then calmed him down by explaining that everything would be fine; his signature had been inserted without asking him as nobody had wished to bother him.

9. On 27 November 2009 the applicant was also questioned. At 10.15 p.m. on 27 November 2009 the investigator of the Zhytomyr Prosecutor's Office informed the applicant that he was being arrested and detained for seventy-two hours on suspicion of having committed a crime. The investigator drew up an arrest report specifying that the applicant was being arrested in accordance with Articles 106 and 115 of the Code of Criminal Procedure on the grounds that "eyewitnesses had directly identified him as a person who had committed a crime".

10. On 28 November 2009 the applicant challenged his arrest and detention before the Bohunskyy District Court of Zhytomyr ("the District Court"). He argued that his arrest and detention had been unlawful, noting that no eyewitness had identified him as a person who had committed any crime; furthermore, the alleged events had taken place a long time ago and there was no risk that he would abscond since he had previously voluntarily appeared before the investigator.

11. On 30 November 2009 the investigator applied to the District Court with a request to place the applicant in pre-trial detention. On the same day the District Court, relying on Article 165-2 of the Code of Criminal Procedure, found that in order to make a decision on the application of a preventive measure it required more information concerning the applicant's personality, family status and lifestyle. The court therefore ordered that the investigator produce that information and extended the applicant's preliminary detention to ten days.

12. On 7 December 2009 the investigator released the applicant against a written undertaking not to abscond. The investigator noted that the applicant

was disabled; he was the breadwinner for three minor children, one of whom was disabled; he had a permanent place of residence; and that there was no information that he would abscond or hinder the proceedings.

13. On 29 January 2010 the District Court found that the applicant's arrest had been unlawful because the prosecutor's office had failed to provide evidence that any eyewitness had identified the applicant as a person who had committed a crime. The court further considered that the applicant's arrest and his further detention had not been justified and necessary in the circumstances of the case. The prosecutor appealed against that decision.

14. On 23 February 2010 the Zhytomyr Regional Court of Appeal quashed the decision as unfounded, noting that the District Court had not properly examined the witnesses' statements available in the criminal case file. The case was remitted to the District Court for fresh consideration.

15. On 15 March 2010 the District Court dismissed the applicant's complaint, finding that the witness statements available in the file had identified the applicant as a person who had committed the alleged crimes. The applicant appealed against that decision.

16. On 7 April 2010 the Court of Appeal upheld the decision of 15 March 2010, noting that the case file contained the statements of witnesses who had identified the applicant as a person who had committed the alleged crimes.

17. On 11 May 2010, the Supreme Court rejected the applicant's appeal on points of law as inadmissible, noting that the decisions of 15 March and 7 April 2010 were not amenable to review by the Supreme Court.

II. RELEVANT DOMESTIC LAW

A. Constitution of 28 June 1996

18. The relevant part of Article 29 of the Constitution reads as follows:

> "... In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours of the time of arrest, with a reasoned court decision in respect of the holding in custody. ...
>
> Everyone who has been detained has the right to challenge his or her detention in court at any time. ..."

B. Code of Criminal Procedure ("the CCP") of 28 December 1960 (in force at the relevant time)

19. The relevant provisions of the CCP provided as follows:

Article 106. Arrest of a suspect by a body of inquiry

"A body of inquiry may arrest a person suspected of a criminal offence for which a penalty in the form of deprivation of liberty may be imposed only on one of the following grounds:

(1) if the person is discovered whilst or immediately after committing an offence;

(2) if eyewitnesses, including victims, directly identify the person as the one who committed the offence;

(3) if clear traces of the offence are found either on the body of the suspect, or on his clothing, or with him, or in his home.

If there is other information giving grounds to suspect a person of a criminal offence, a body of inquiry may arrest such a person if the latter has attempted to flee, or does not have a permanent place of residence, or if the identity of that person has not been established.

For each case of a suspect's arrest, the body of inquiry shall be required to draw up an arrest report *(протокол затримання)* specifying the grounds, the motives, the time and date, the place of arrest, the explanations of the person detained and the time when it was recorded that the suspect had been informed of his right to have a meeting with defence counsel as from the time of his arrest, in accordance with the procedure provided for in paragraph 2 of Article 21 of the present Code. The arrest report shall be signed by the person who drew it up and by the detainee.

A copy of the arrest report with a list of the detainee's rights and obligations shall immediately be handed to the detainee and sent to the prosecutor. At the request of the prosecutor, the material which served as the grounds for the arrest shall be sent to him as well. ...

Within seventy-two hours of the arrest, the body of inquiry shall:

(1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of the preliminary detention established by law has expired or if the arrest has been effected in violation of the requirements of paragraphs 1 and 2 of the present Article;

(2) release the detainee and select a non-custodial preventive measure;

(3) bring the detainee before a judge with a request to impose a custodial preventive measure on him or her.

If the arrest is appealed against to a court, the detainee's complaint shall be immediately sent by the head of the detention facility to the court. The judge shall consider the complaint together with the request by the investigating body for application of the preventive measure. If the complaint is received after the preventive measure was applied, the judge shall examine it within three days of receiving it. If the request has not been received or if the complaint has been received after the term of seventy-two hours of detention, the complaint shall be considered by the judge within five days of receiving it.

The complaint shall be considered in accordance with the requirements of Article 165-2 of this Code. Following its examination, the judge shall give a ruling, either declaring that the arrest is lawful or allowing the complaint and finding the arrest to be unlawful. ...

The ruling of the judge may be appealed against within seven days of the date of its adoption by the prosecutor, the person concerned, or his or her defence counsel or

legal representative. Lodging such an appeal does not suspend the execution of the court's ruling.

Preliminary detention of a suspect shall not last for more than seventy-two hours. ..."

Article 115. Arrest of a suspect by an investigator

"An investigator may arrest and question a person suspected of having committed a crime in accordance with the procedure provided for in Articles 106, 106-1, and 107 of the Code. ..."

Article 148. Purpose and grounds for the application of preventive measures

"Preventive measures shall be imposed on a suspect, an accused, a defendant, or a convicted person in order to prevent him from attempting to abscond from an inquiry, investigation or the court, from obstructing the establishment of the truth in a criminal case or from pursuing criminal activities, and in order to ensure the execution of procedural decisions.

Preventive measures shall be imposed where there are sufficient grounds to believe that the suspect, accused, defendant or convicted person will attempt to abscond from the investigation and the court, or if he fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues criminal activities. ..."

Article 149. Preventive measures

"The preventive measures are as follows:

(1) a written undertaking not to abscond;

(2) a personal guarantee;

(3) the guarantee of a public organisation or labour collective;

(3-1) bail;

(4) remand in custody;

(5) supervision by the command of a military unit.

As a temporary preventive measure, a suspect may be detained on the grounds and pursuant to the procedure provided for by Articles 106, 115 and 165-2 of this Code."

Article 165-2. Procedure for selection of a preventive measure

"At the stage of the pre-trial investigation, a non-custodial preventive measure shall be selected by the body of inquiry, the investigator, or the prosecutor.

If there are grounds for applying a custodial preventive measure, the body of inquiry or the investigator, with the prosecutor's consent, shall lodge a request with the court. ...

The request shall be considered within seventy-two hours of the arrest of the suspect or accused.

If the request concerns the detention of a person who is at liberty, the judge shall have the power to issue a warrant for the arrest of such a person and for escorting him to the court. The preliminary detention in such cases shall not exceed seventy-two hours; and if the person concerned is outside the locality in which the court operates,

it shall not exceed forty-eight hours from the time the arrested person is brought to the locality.

Upon receiving the request, the judge shall examine the material in the case file submitted by the body of inquiry, the investigator, or the prosecutor. A judge shall question the suspect or the accused and, if necessary, hear evidence from the person in charge of the criminal case, obtain the opinion of the prosecutor and defence counsel, if the latter appeared before the court, and take a decision:

(1) refusing to apply the [custodial] preventive measure if there are no grounds for doing so;

(2) applying the custodial preventive measure.

Having refused to apply a custodial preventive measure, the court may apply a non-custodial preventive measure in respect of the suspect or the accused.

The judge's decision may be appealed against to a court of appeal by the prosecutor, the suspect, the accused or his or her defence counsel or legal representative within three days of its delivery. The introduction of an appeal shall not suspend the execution of the judge's decision.

If, in order to select a preventive measure in respect of a detained person, it is necessary to examine additional material concerning the personality of the detainee or to clarify other circumstances that are important for the adoption of the decision on this matter, the judge may extend the preliminary detention up to ten days or, if requested by the suspect or the accused, up to fifteen days. If it is necessary to examine additional material concerning a person who has not been arrested, the judge may adjourn the consideration of this issue for up to ten days and take measures for ensuring the proper conduct of that person or issue an order for his arrest and detention for the same period."

THE LAW

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

20. The applicant complained that his arrest and detention, based on the investigator's decision of 27 November 2009, had been arbitrary. He relied on Article 5 § 1 of the Convention, which provides as relevant:

"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. Admissibility

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

B. Merits

22. The Government submitted that the applicant had been arrested as there had been a reasonable suspicion that he had committed the crimes. The matter was examined by the domestic courts, which found that the investigator's decision had been in compliance with the domestic law. The Government therefore maintained that the applicant's arrest and detention on the basis of the investigator's decision had been lawful, reasonable and justified.

23. The applicant disagreed and argued that he had been arrested arbitrarily.

24. The Court reiterates that under Article 5 § 1 (c) a person may be detained in the context of criminal proceedings only for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence. A "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information that would satisfy an objective observer that the person concerned may have committed an offence (see *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI).

25. The expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to the substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, and the Court can and should review whether that law has been complied with (see, among many other references, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports of Judgments and Decisions* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

26. The "lawfulness" of detention under domestic law is the primary, but not always the decisive element. The Court must, in addition, be satisfied that the detention, during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner (see *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 84, 24 June 2010). In order for deprivation of liberty to be considered free from arbitrariness, it does not suffice that this measure is executed in conformity

with national law; it must also be necessary in the circumstances (see *Nešťák v. Slovakia*, no. 65559/01, § 74, 27 February 2007, *Khayredinov v. Ukraine*, no. 38717/04, § 27, 14 October 2010 and *Korneykova v. Ukraine*, no. 39884/05, § 34, 19 January 2012).

27. The Court notes that at 10.15 p.m. on 27 November 2009 the investigator decided to arrest the applicant in connection with the events which had taken place about half a year earlier. The applicant was detained on the basis of that decision until 30 November 2009. The investigator did not obtain a preliminary arrest warrant from a court, as required by Article 29 of the Constitution and Article 165-2 § 4 of the CCP, but based his decision to arrest the applicant without a court order on Articles 106 and 115 of the CCP. According to the report, the applicant was arrested because he had been identified by eyewitnesses as a person who had committed a crime. The report did not indicate who had identified the applicant, or exactly what crime the eyewitnesses had observed the applicant committing. Given the absence of that basic information, the arrest report did not provide a meaningful guarantee to show that the applicant's arrest had been effected on the basis of a reasonable suspicion that he had committed an offence (see *Grinenko v. Ukraine,* no. 33627/06, § 83, 15 November 2012).

28. Nevertheless, subsequently the courts reviewed the available witness statements and found that the investigator did in fact have grounds to consider that the witnesses had identified the applicant as a person who had committed the alleged crimes. However, neither the investigator in his arrest report nor the domestic courts reviewing the investigator's decision gave reasons showing that the applicant's preliminary detention, as a temporary preventive measure in terms of Article 149 of the CCP, was a necessary procedural step aimed at preventing certain risks for the proceedings. The domestic authorities did not establish and substantiate any of the specific purposes for applying preventive measure in accordance with the domestic law. In that regard, the Court notes that on 7 December 2009 the investigator released the applicant from detention after finding that there was no information that he would abscond or hinder the investigation. It is also notable that that decision was taken with due attention to the applicant's personal and family situation.

29. Having regard to the above considerations, the Court finds that the applicant's detention, based on the investigator's decision of 27 November 2009, was incompatible with the requirements of Article 5 § 1 (c) of the Convention. There has therefore been a violation of Article 5 § 1 of the Convention.

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

30. The applicant complained that he had been unable effectively to challenge his arrest and detention.

31. The Court considers that the complaint falls under Article 5 § 4 of the Convention, which provides as follows:

> "4. 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

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

B. Merits

33. The Government submitted that the applicant could and did challenge his arrest and detention. The domestic courts examined the applicant's complaint of 28 November 2009 and rejected it as unfounded. The Government further asserted that on 30 November 2009 the District Court had implicitly reviewed the lawfulness of the applicant's deprivation of liberty and found that his preliminary detention should be extended to ten days. They concluded that there had been no violation of Article 5 § 4 of the Convention.

34. The applicant disagreed and argued that the District Court had not examined his complaint on 30 November 2009 but had done so for the first time only on 29 January 2010.

35. 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). Among the procedural guarantees, Article 5 § 4 requires that the judicial review of the lawfulness of detention be decided speedily, which implies that such proceedings must be conducted with the requisite expedition and without unjustified delays (see *Jablonski v. Poland*, no. 33492/96, §§ 91 and 92, 21 December 2000).

36. The Court stresses that, since there is an individual's personal liberty at stake, Article 5 § 4 imposes strict requirements of speedy review (see *Shcherbakov v. Russia (no. 2),* no. 34959/07, § 101, 24 October 2013). In the recent case of *Asalya v. Turkey* (no. 43875/09, § 73, 15 April 2014),

where the applicant regained his liberty on the seventh day of his detention by way of decision of the executive, the Court held that the failure of the domestic court to determine the lawfulness of detention before the actual release had not been compatible with Article 5 § 4. The Court reached that conclusion after finding that the failure of the domestic court to review the applicant's ongoing detention had not been justified by any valid reason. On the contrary, no issue has arisen where the applicants were released within a matter of hours before any judicial scrutiny of their detention could in practice have taken place (see, for example, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 45, Series A no. 182).

37. In the present case the applicant lodged his complaint the day after his arrest, namely on 28 November 2009, setting out the reasons for which his arrest and detention had to be declared unlawful. By virtue of Article 106 of the CCP, his complaint had to be immediately sent to the relevant court and had to be considered by a judge together with the investigator's request to remand the applicant in custody. However, in the hearing of 30 November 2009 the District Court did not determine whether or not the applicant's arrest and detention had been lawful. Nor did it take a definite decision in respect of the investigator's request. Instead, the court extended the applicant's detention to ten days, reasoning that the investigator had to provide additional information concerning the applicant's personality, family status and lifestyle. The Court does not discern any justification for failing to examine the applicant's complaint on that day. Furthermore, when the applicant was released on 7 December 2009, his complaint had still not been examined.

38. Having regard to the circumstances of the case, the Court considers that the manner in which the domestic courts examined the applicant's complaint concerning the lawfulness of his arrest and detention was not compatible with the "speedy" review requirement under Article 5 § 4 of the Convention.

39. There has therefore been a violation of that provision 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 20,000 euros (EUR) in respect of non-pecuniary damage.

42. The Government contested that claim and submitted that it was unfounded.

43. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of violations in the present case. Ruling on an equitable basis, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed EUR 1,300 for the legal expenses and EUR 78 for the translation costs incurred before the Court.

45. The Government argued that the claims were unsubstantiated.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 564 in respect of legal expenses and EUR 78 in respect of translation costs.

C. Default interest

47. The Court considers it appropriate that the default interest rate 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 application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

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

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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 564 (five hundred and sixty-four euros), plus any tax that may be chargeable to the applicant, in respect of legal expenses;

(iii) EUR 78 (seventy-eight euros), plus any tax that may be chargeable to the applicant, in respect of translation costs;

(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;

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

Done in English, and notified in writing on 29 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President