

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

FIFTH SECTION

CASE OF SHOYGO v. UKRAINE

(Application no. 29662/13)

JUDGMENT

STRASBOURG

30 September 2021

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



In the case of Shoygo v. Ukraine,

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

Arnfinn Bårdsen, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 29662/13) 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 Russian national, Mr Aleksandr Safyanovich Shoygo ("the applicant"), on 30 April 2013;

the decision to give notice to the Ukrainian Government ("the Government") of the complaint under Article 5 §§ 1, 4 and 5 of the Convention and to declare inadmissible the remainder of the application;

the decision of the Russian Government not to intervene in the proceedings;

the parties' observations;

Having deliberated in private on 9 September 2021,

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

INTRODUCTION

1. The applicant, at the time lacking identity documents, was detained in Ukraine for the purpose of expulsion. He complained that his detention and the related procedures were in breach of Article 5 §§ 1, 4 and 5.

THE FACTS

2. The applicant was born in 1985 and lives in Seoul, Korea. The applicant was represented by Ms S. Butenko, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant was born in 1985 in the Republic of Sakha (Yakutia) in the Russian Federation, in a family of reindeer farmers. His birth was not duly registered. According to him, after his mother's death in 1998 he left his home and, failing to obtain any identity documents, became a vagrant, allegedly travelling in Russia and Ukraine in an irregular manner. Because at the relevant time he lacked identity documents, he could not prove his citizenship.

6. On 1 November 2011 the applicant was arrested by the Ukrainian Border Guards while trying to cross from Ukraine into the Republic of Moldova.

7. On 4 November 2011 the Odessa Circuit Administrative Court, on application from the Border Guards, ordered his expulsion from Ukraine as well as his detention for up to twelve months pending expulsion. The applicant missed the time-limit for appeal, according to him because he was illiterate and lacked legal representation, but his appeal was eventually accepted and on 16 October 2012 the Odessa Administrative Court of Appeal upheld the first-instance court's decision. In their decisions the domestic courts stated that the applicant claimed to be a Russian citizen but lacked any identity documents.

8. The applicant was detained in a centre for temporary accommodation of aliens in irregular situation in the Chernigiv Region.

9. On 25 September 2012 the centre's administration contacted the Russian Embassy in order to obtain documentation for the applicant as a Russian citizen, on the grounds that he had supposedly acquired Russian citizenship as a Soviet citizen who had permanently resided in Russia as of 6 February 1992 (as per section 13 of the Russian Federation's Citizenship Act of 1991). On 27 September 2012 the applicant also asked the honorary consul of Russia in Chernigiv to assist him in obtaining documents concerning his Russian nationality.

10. On 1 November 2012 the applicant was released from the centre.

On 10 December 2012 the High Administrative Court rejected the applicant's appeal on points of law against the decisions of the Circuit Administrative Court and the Court of Appeal considering that the applicant had failed to pay the requisite court fee.

11. On 20 December 2012 the Embassy responded to the applicant that, based on the information provided by the applicant and available to the Embassy, it was not possible to determine whether the applicant was a Russian citizen.

12. Subsequently the applicant obtained a temporary residence permit in Ukraine and documents identifying him as a Russian citizen.

RELEVANT LEGAL FRAMEWORK

13. The Code of Administrative Justice, adopted in 2005, and was entirely restated by Law of 3 October 2017.

14. The 2005 version of the Code provided that circuit courts' orders authorising detention of aliens in irregular situation (at the time the order could authorise detention for up to twelve months) could be appealed to the administrative courts of appeal and to the High Administrative Court.

15. Article 289 of the 2017 restatement of the Code established an amended procedure for examination of cases concerning detention of aliens. It provides that initially detention of aliens with a view to their expulsion is to be ordered for six months, with possible subsequent extensions in case of

difficulties in organising expulsion, for six months at a time and for a total of eighteen months.

16. Other relevant provisions of the domestic law can be found in *Nur Ahmed and Others v. Ukraine* (no. 42779/12 and 5 others, §§ 27-54, 18 June 2020 [Committee]).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

17. The applicant complained that his detention was contrary to Article 5 § 1 of the Convention, that he did not have an effective remedy by which to challenge its legality and no enforceable right to compensation, in breach of Article 5 §§ 4 and 5 of the Convention. The relevant provisions read, insofar 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:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 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.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

18. The applicant submitted that his detention had been unlawful, in particular because the authorities had to be aware from the outset, on account of the applicant not having identification documents, that they would be unable to expel him, because his detention was unnecessary and the possibility of using less restrictive measures was not examined and because the authorities had not pursued his expulsion with requisite diligence.

19. He also submitted that he had not had access to a procedure by which the legality of his detention could be examined, in particular because the High Administrative Court had unjustifiably rejected his appeal and because at the relevant time, prior to the legislative reform of 2017 (see paragraph 15 above), there had been no procedure for periodic review of immigration-related detention in domestic law. Finally, the applicant

complained that he had no enforceable right to compensation for the detention in breach in Article 5 §§ 1 and 4 of the Convention.

20. The Government contested those arguments. In particular, there had been grounds, indicated in the courts' decisions, for the applicant's expulsion which had been pursued with expedition.

B. The Court's assessment

1. Admissibility

21. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

22. The relevant principles of the Court's case-law concerning Article 5 §§ 1 and 4 of the Convention can be found in *Khamroev and Others v. Ukraine* (no. 41651/10, § 85, 15 September 2016) and *Abdulkhakov v. Russia* (no. 14743/11, §§ 210-18, 2 October 2012), respectively.

23. The Court observes that the authorities were obviously confronted with a considerable challenge in organising the expulsion of the applicant because he lacked any identity documents. However, no explanation has been provide for why it took the authorities, who knew about the applicant's affirmations concerning his Russian nationality from the outset of his detention (see paragraphs 6 and 9 above), almost eleven months to contact the Embassy of the Russian Federation to attempt to obtain a travel document for him.

24. These considerations are sufficient for the Court to conclude that the authorities failed to pursue proceedings for the applicant's deportation with requisite diligence (see, for example, *Auad v. Bulgari*a, no. 46390/10, §§ 128-35, 11 October 2011, *Amie and Others v. Bulgaria*, no. 58149/08, §§ 74-79, 12 February 2013, and *Aden Ahmed v. Malta*, no. 55352/12, §§ 144-46, 23 July 2013).

25. There has accordingly been a violation of Article 5 § 1 of the Convention.

26. The Government did not allege that at the relevant time, prior to the 2017 reform (see paragraph 15 above), there was any procedure in domestic law which would allow for review of lawfulness of detention on grounds which evolved after the initial detention was ordered, such as developments in expulsion proceedings (compare, for example, *Azimov v. Russia*, no. 67474/11, §§ 151-55, 18 April 2013, and *R. v. Russia*, no. 11916/15, §§ 99-101, 26 January 2016, with further references).

27. These considerations are sufficient for the Court to conclude that there has been a violation of Article 5 § 4 of the Convention.

28. In view of those conclusions there is no need to examine separately the remainder of the applicant's arguments under those provisions.

29. The Court has, in a number of cases, found that in Ukrainian law there is no enforceable right to compensation in situations where a violation of Article 5 is found by the Court (see, for example, *Korban v. Ukraine*, no. 26744/16, §§ 201 and 202, 4 July 2019, with further references). The Court sees no grounds to reach a different conclusion in this case.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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."

32. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

33. The Government considered that claim unfounded.

34. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

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

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 30 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Arnfinn Bårdsen President