

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

FIFTH SECTION

CASE OF STASZUK v. UKRAINE

(Application no. 70840/10)

JUDGMENT

This version was rectified on 21 November 2017 under Rule 81 of the Rules of Court.

STRASBOURG

5 October 2017

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



In the case of Staszuk v. Ukraine,

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

Erik Møse, *President,*
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having deliberated in private on 12 September 2017,

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

PROCEDURE

1. The case originated in an application (no. 70840/10) 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 Polish national, Mr Jan Michal Staszuk ("the applicant"), on 13 November 2010.

2. The applicant was represented by Mr S.V. Zakharov, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna.

3. On 4 June 2015 the applicant's complaints under Article 5 §§ 1, 3 and 4 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Polish Government were informed of their right to intervene in the proceedings in accordance with Article 36 § 1. They chose not to avail themselves of that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1985 and lives in Warsaw.

6. On 14 May 2010 the applicant was arrested in Kyiv by officers of the Security Service of Ukraine ("the SBU") on suspicion of unlawfully importing equipment for the covert surveillance of telephone networks and using it to intercept private telephone conversations (see paragraph 24 below), an offence committed in collaboration with M., a Russian national.

7. An SBU investigator lodged a request with the Shevchenkivskyy District Court of Kyiv ("the District Court") seeking that the applicant be

remanded in custody pending the investigation. He submitted that the applicant's detention was necessary in order to prevent him from absconding and interfering with the investigation, given that the applicant was a foreign national, did not have a permanent place of residence in Ukraine and was suspected of a serious offence.

8. On 17 May 2010 the District Court held a hearing in the presence of the prosecutor and his lawyer, remanded the applicant in custody, and ordered that he be placed in an SBU detention facility. It held that the arguments submitted by the investigator were sufficiently strong to allow the conclusion that the applicant should be detained.

9. On 27 May 2010 the Court of Appeal held a hearing to examine the applicant lawyer's appeal against the order of 17 May 2010 in the presence of a prosecutor and the applicant's lawyer and upheld the order.

10. On 13 July 2010 the District Court held a hearing in the presence of the prosecutor, the applicant and his lawyer and extended the applicant's detention until 14 September 2010. It noted that there were no reasons to release the applicant and that the investigative authority needed time to complete the investigation.

11. On 26 July and 6 August 2010 the Court of Appeal held hearings to examine, respectively, the applicant lawyer's and the applicant's own appeals against the District Court's decision of 13 July 2010. Only a prosecutor was present at the former hearing, whereas the latter hearing was attended by the prosecutor, the applicant and his lawyer. The Court of Appeal rejected both appeals and upheld the District Court's decision on both occasions.

12. On 9 September 2010 the Court of Appeal held a hearing in the presence of the prosecutor and the applicant's lawyer, granted the investigative authority's request, and extended the applicant's detention until 14 November 2010. The court noted that the charges against the applicant were serious, that there were no reasons to release him and that the investigative authority needed more time to complete the investigation.

13. On 1 November 2010 the investigator charged the applicant with several additional offences in connection with the same events: breaching the privacy of telephone communications and unlawful transfer of equipment subject to export control, committed in a group (see paragraph 24 below).

14. On 12 November 2010 the Court of Appeal extended the applicant's detention until 14 December 2010.

15. On 14 December 2010 the applicant's case was sent to the District Court for trial.

16. On 27 April 2011 the District Court committed the applicant for trial, rejected the applicant's request for release and ordered his continuing detention pending trial. The court stated that the applicant was charged with

a serious offence, was a foreign national and had no permanent place of residence in Ukraine. No time-limit was set for his detention.

17. On 25 August 2011 the District Court rejected the applicant's requests for release. It gave reasons similar to those given in its decision of 27 April 2011 and added that there was no reason to set an end-date for the applicant's detention since his detention was needed to complete the trial.

18. On 14 October, 24 November 2011, and 11 January 2012 the District Court rejected the applicant's further requests for release. It gave reasons similar to those given in its decision of 27 April 2011.

19. On 19 March 2012 the District Court convicted the applicant as charged, sentencing him to four years' imprisonment.

20. On 7 December 2012 the Court of Appeal quashed the conviction and remitted the case for additional investigation. It ordered the applicant's continuing detention without giving reasons.

21. On 15 January 2013 the District Court set bail for the applicant.

22. On 16 January 2013 the applicant was released on bail.

23. On 17 May 2013 the District Court approved the applicant's plea bargain, convicted him, and sentenced him to two years and eight months' imprisonment, which was to be considered fully served in view of the time the applicant had spent in pre-trial detention.

II. RELEVANT DOMESTIC LAW

24. Article 163 § 2 of the Criminal Code makes breaching the privacy of telephone communications, if committed using special equipment for covert surveillance, punishable by three to seven years' imprisonment.

Article 359 § 2 of the Code makes unlawful use of equipment for covert surveillance of telephone networks committed in a group punishable by four to seven years' imprisonment.

Article 333 § 1 of the Code makes unlawful transfer of equipment subject to export control punishable by a fine or by up to three years' of restriction of liberty (i.e. detention in a semi-open institution) or by imprisonment for the same term with or without a prohibition on the right to occupy certain positions or engage in certain activities for the term of up to three years.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

25. The applicant complained that his detention between 14 December 2010 and 27 April 2011 and between 27 April 2011 and 19 March 2012 had not been lawful and that his detention in the course of pre-trial investigation and trial had been unreasonably lengthy. He relied on Article 5 §§ 1 and 3 of the Convention which read as follows in the relevant part:

> "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; ...
>
> 3. 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."

The Government disagreed and submitted that there had been no violation of the above provisions.[1]

A. Admissibility

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

B. Merits

1. Article 5 § 1

27. The Court observes that between 14 December 2010 and 27 April 2011 there was no court order authorising the applicant's detention and that from 27 April 2011 to 19 March 2012 the applicant's detention was based on a legislative framework which did not require the courts to provide any grounds for detention or to set a time-limit for it, and indeed, no-time limit had been set in the applicant's case. The Court has dealt with similar situations in the past and found that such practice was incompatible with the requirement of lawfulness enshrined in Article 5 § 1

1. Rectified on 21 November 2017: This sentence was added.

(see *Kharchenko v. Ukraine*, no. 40107/02, §§ 70-76, 98, 10 February 2011). It does not see any reason to depart from that conclusion in the present case.

28. The Court finds, accordingly, that there has been a violation of Article 5 § 1 of the Convention.

2. Article 5 § 3

29. 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, have been recently summarised in *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, §§ 87-91, ECHR 2016 (extracts)).

30. The applicant's detention to be taken into account for the purposes of Article 5 § 3 lasted between 14 May 2010 and 19 March 2012 and between 7 December 2012 and 16 January 2013, that is more than one year and eleven months overall which is not short in absolute terms (see, for example, *Iłowiecki v. Poland*, no. 27504/95, § 52, 4 October 2001, and *Doronin v. Ukraine*, no. 16505/02, § 61, 19 February 2009).

31. The Court notes that the suspicion that the applicant had committed a serious offence and the danger of the applicant, a foreigner with no established residence in Ukraine, absconding might have initially justified his detention (see *Van der Tang v. Spain*, 13 July 1995, §§ 64-67, Series A no. 321). However, those reasons did not evolve with the passage of time and the domestic courts, in extending detention, relied on repetitive formulae without referring to specific circumstances of the applicant's case. Moreover, on 7 December 2012 the Court of Appeal gave no reasons whatsoever for the applicant's continuing detention (see paragraph 20 above).

32. In a number of cases (see, for example, *Tretyakov v. Ukraine*, no. 16698/05, § 59, 29 September 2011, and *Rudnichenko v. Ukraine*, no. 2775/07, § 81, 11 July 2013), including the leading case of *Kharchenko* (cited above, § 99) the Court already found violations of Article 5 § 3 in respect of issues similar to those in the present case. Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion in the present case.

33. There has, therefore, been a violation of Article 5 § 3 of the Convention.

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

34. The applicant complained that he and his lawyer had not been duly informed about certain hearings of the Court of Appeal at which matters relating to the applicant's pre-trial detention were decided.

35. The Court − being master of the characterisation to be given in law to the facts of the case, and having regard to the substance of the applicant's

complaints − decides to examine them under Article 5 § 4 of the Convention (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B).

Article 5 § 4 of the Convention reads:

> "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. The parties' submissions

36. On his application form the applicant complained that he and his lawyer had not been informed about the hearings of the Court of Appeal held on 27 May, 26 July and 9 September 2010.

37. The Government submitted that the applicant was either present personally or represented by a lawyer at the hearings of 27 May, 6 August and 9 September 2010. For the Government, this demonstrated that they had been duly informed of the hearings.

38. The applicant did not submit any observations in response to those of the Government.

B. The Court's assessment

39. The applicant limited his submissions to asserting that neither he nor his lawyer was informed of the above-mentioned hearings. He did not explain specifically how this prejudiced his rights under Article 5 § 4. As far as the applicant's lawyer is concerned, he was in fact present at the hearings of 27 May, 6 August and 9 September 2010. Moreover, the applicant himself was present at the hearing of 6 August 2010. Accordingly, no arguable issue under Article 5 § 4 arises in those respects.

40. To the extent that the applicant may be understood to be arguing that his personal presence was required at the hearings of 27 May and 9 September 2010, the Court notes that those hearings followed shortly the hearings of 17 May 2010 and 6 August 2010 at which the applicant was present and assisted by a lawyer. The applicant did not show that he wished to present at those subsequent hearings new arguments, in particular arguments related to his personal circumstances, which were not examined at earlier hearings (contrast, for example, *Christodoulou and Others v. Greece*, no. 80452/12, § 77, 5 June 2014). Since the applicant was represented at all the hearings in question, no equality of arms issue arises either. Accordingly, even accepting the applicant's allegation that he was not duly summoned to the hearings of 27 May and 9 September 2010, the applicant has not made an arguable case that Article 5 § 4 has been breached due to his personal absence from the hearings of 27 May and 9 September 2010 (see *Depa v. Poland*, no. 62324/00, §§ 48 and 49, 12 December 2006, and *Altınok v. Turkey*, no. 31610/08, §§ 54 and 55, 29 November 2011).

41. It is true that the applicant was neither present nor represented at the hearing of 26 July 2010 and the Government have not specifically rebutted the applicant's allegation that the applicant and his lawyer had not been properly summoned to that hearing. However, the Court of Appeal examined the same question, namely conducted a review of the first-instance court's detention order of 13 July 2010, on 6 August 2010 in the presence of both the applicant and his lawyer. It appears that the only substantive difference was that on 26 July the Court of Appeal examined the applicant's lawyer's appeal while on 6 August 2010 it examined an appeal lodged by the applicant himself. The applicant did not allege that there was any breach of his rights at the 6 August hearing, did not explain what the difference between the two appeals was, or why he had lodged an appeal separately from his lawyer. Neither did he provide any other explanation as to why he believed that his rights had been prejudiced in such circumstances. The Court therefore considers that this complaint is not sufficiently developed nor substantiated.

42. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed compensation in respect of non-pecuniary damage but left the determination of the amount to the Court's discretion.

45. The Government maintained that there had been no violation of the applicant's rights in the present case.[2]

46. The Court, ruling on an equitable basis, awards the applicant 5,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

47. The applicant made no claim for costs and expenses. Accordingly, the Court makes no award under this head.

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2. Rectified on 21 November 2017: "did not comment" was replaced with "maintained that there had been no violation of the applicant's rights in the present case".

C. Default interest

48. 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 complaints under Article 5 §§ 1 and 3 admissible and the remainder of the application inadmissible;

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 § 3 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 5,000 (five 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.

Done in English, and notified in writing on 5 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anne-Marie Dougin	Erik Møse
Acting Deputy Registrar	President