

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

THIRD SECTION

CASE OF VOLKOVA v. RUSSIA

(Application no. 56360/07)

JUDGMENT

STRASBOURG

13 June 2017

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



In the case of Volkova v. Russia,

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

Branko Lubarda, *President,*
Pere Pastor Vilanova,
Georgios A. Serghides, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 23 May 2017,

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

PROCEDURE

1. The case originated in an application (no. 56360/07) against the Russian Federation 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, Ms Natalya Aleksandrovna Volkova ("the applicant"), on 29 November 2007.

2. The applicant was represented by Mr V. Sivchenko and Mr V. Anisimov, lawyers practising in the Moscow Region. The Russian Government ("the Government") were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. On 7 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1987 and lived in Voronezh prior to her arrest.

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

A. The applicant's arrest

6. On 14 July 2007 the applicant, together with B., travelled to Moscow by car. At about 3.40 a.m. the police stopped the car; two men from the narcotics unit approached the car and asked the passengers to step out and

produce their identity documents and luggage for inspection. An officer opened the sports bag which, according to the applicant, her friend had asked her to take to another friend in Moscow, and found a black plastic bag. The applicant stated that she was not aware of its contents. The officers then put the black bag into the trunk of the police car and took the applicant and B. to the premises of the narcotics unit.

7. The applicant and B. were interviewed in separate rooms. In the morning the applicant was taken to another office, in which one female officer, a forensics expert and two individuals who were introduced as "attesting witnesses" (*понятые*) were present. The applicant was told to open the black bag and to show its contents. Four plastic bags containing yellow and green herb and cash money were found inside. At 8.15 a.m. the police drafted a report on the seizure of objects and substances. The expert later determined that the herb was marijuana having a total weight of almost three kilograms.

8. At 6 p.m. a senior investigator of the narcotics unit instituted criminal proceedings against the applicant and B. on suspicion of attempted large-scale sale of drugs.

9. At 8.15 p.m. the investigator compiled the record of the applicant's arrest. The time of arrest was given as 7.50 p.m. on 14 July 2007.

10. On 15 July 2007 the applicant was formally charged and the investigator applied to a court for a detention order.

11. The detention hearing before the Zyuzinskiy District Court in Moscow began at 7.15 p.m. on 16 July 2007. Counsel for the applicant submitted that, in view of the actual time of the applicant's detention, the maximum statutory period of forty-eight hours had already expired. However, the court did not heed that argument and ordered that the applicant be remanded in custody because the gravity of charges against her.

12. On 19 July 2007 counsel for the applicant filed an appeal. On 25 July 2007 copies of the appeal were forwarded to the applicant and to the prosecutor for comments. The appeal hearing was initially scheduled for 22 August 2007 but subsequently adjourned for one week because one of the applicant's representatives did not show up.

13. On 27 August 2007 the City Court rejected the appeal against the detention order in a summary fashion, noting that "the pre-trial investigation authorities did not commit any substantial breaches of the rules of criminal procedure".

B. Trial

14. The case against the applicant was referred for trial to the Babushkinskiy District Court in Moscow.

15. The defence claimed that the attesting witnesses who had been present during the opening of the bag were in fact employees of the

narcotics unit rather than independent observers as required by law. Both of those witnesses – Ms P. and Ms A. – did not appear before the trial court. Instead, a court bailiff submitted reports about his unsuccessful attempts to ensure their attendance. The reports contained the same text to the effect that the witnesses could not be reached on the phone, that no one opened the door at their residence and that neighbours had told the bailiff that they had not seen them for a long time.

16. Counsel for the applicant requested the court to obtain the visitors journal from the reception of the narcotics unit. Since the unit was located within a security perimeter, all civilian visitors were to be recorded in the journal. The trial court refused the motion, without giving any reasons. It further held that there existed "exceptional circumstances" for the absence of the witnesses Ms P. and Ms A. and allowed their pre-trial statements to be read out, overriding the objections from the defence.

17. The trial court also authorised the reading-out of the pre-trial statement of Mr F., the driver of the car, of which the applicant and B. had been passengers. The bailiff submitted similarly worded reports to the effect that Mr F. was unavailable on the telephone or at his residence.

18. By judgment of 8 April 2008, the District Court found the applicant and B. guilty as charged and sentenced each of them to eight years' imprisonment in a high-security correctional colony. It held in particular that the applicant's claim that she did not know she was carrying marijuana in her friend's bag was refuted by the seizure report of 14 July 2007 and the statements by the witnesses Ms P. and Ms A.

19. On 28 July 2008 the Moscow City Court examined and rejected her appeal against the conviction.

II. RELEVANT DOMESTIC LAW

20. Article 60(1) of the Code of Criminal Procedure defines the "attesting witness" (*понятой*) as an individual who has no interest in the outcome of the criminal case and whom the investigator involves to certify the carrying out of an investigative measure, as well as the nature, process and findings of that measure. Article 60(2)(3) prohibits police operatives from acting as attesting witnesses.

21. Article 75(1) establishes that the evidence obtained in breach of the provisions of the Code is inadmissible and may not be relied upon.

THE LAW

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

22. The applicant complained that her initial unrecorded detention and belated appearance before the court had been in breach of Article 5 § 1 of the Convention, which reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law ..."

A. Admissibility

23. The Court considers 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

1. Initial unrecorded detention

24. The Government acknowledged that a belated drawing-up of the arrest record had breached Article 5 § 1 of the Convention. The applicant took note of the Government's acknowledgement.

25. The Court notes that the applicant was deprived of her liberty at 3.40 a.m. on 14 July 2007 but her detention was not formalised until 7.50 p.m. on that day. She remained under police control for sixteen hours and ten minutes without any record or formal recognition of her procedural status.

26. It has been the Court's consistent view that unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention, and discloses a most grave violation of that provision. The Court has already found violations in cases where the formalisation of an applicant's status as an arrested criminal suspect was delayed without a reasonable explanation (see, among many other authorities, *Rakhimberdiyev v. Russia*, no. 47837/06, § 36, 18 September 2014; *Smolik v. Ukraine*, no. 11778/05, §§ 46-48, 19 January 2012; *Ivan Kuzmin v. Russia*, no. 30271/03, §§ 81-84, 25 November 2010; and *Aleksandr Sokolov v. Russia*, no. 20364/05, 4 November 2010, §§ 70-73). The present case is another example of this practice: although the record of arrest was eventually prepared, the time of the applicant's arrest given in the record was different from the time of her actual apprehension. Her sixteen-hour detention at the police station was not recorded or acknowledged in any procedural form. It follows that her initial detention

breached the requirements implicit in Article 5 of the Convention for the proper recording of deprivations of liberty.

2. Detention in excess of forty-eight hours without a judicial order

27. The Government submitted that there had been no breach of the applicable legal provisions because the domestic court had issued the detention order within forty-eight hours of the time given in the record of arrest. The applicant pointed out that the period of time between her actual apprehension and the court hearing had been in excess of forty-eight hours.

28. As the Court has established, the record of the applicant's arrest did not correctly reflect the time of her apprehension, and by the time her detention had been formalised she had already spent more than sixteen hours in police custody. The District Court was made aware of that fact by the defence, but failed to address it in the detention order or take it into account in any other manner. It follows that the detention order was issued after the expiry of the time-limit established in the Code of Criminal Procedure and that the applicant's detention in the intervening period had been unlawful (see *Birulev and Shishkin v. Russia*, nos. 35919/05 and 3346/06, § 59, 14 June 2016).

3. Conclusion

29. In view of the foregoing, the Court concludes that the failure to formalise the applicant's deprivation of liberty on 14 July 2007 in a timely and appropriate fashion, and the ensuring detention without an arrest warrant in excess of the forty-eight-hour statutory time-limit, ran counter to the "lawfulness" guarantee of Article 5 § 1 of the Convention. There has therefore been a violation of that Article.

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

30. The applicant complained that the examination of her appeal against the arrest warrant had not been "speedy". She relied on Article 5 § 4 of the Convention which reads as follows:

> "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

31. The Court considers 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

32. The Government submitted that the Moscow City Court had committed a breach of the national legal requirements relating to the examination of the applicant's appeal against the detention order. The applicant maintained her complaint.

33. The Court reiterates that it has previously found a violation of Article 5 § 4 in cases where appeal proceedings lasted seventeen (see *Kadem v. Malta*, no. 55263/00, §§ 44-45, 9 January 2003), twenty (see *Butusov v. Russia*, no. 7923/04, §§ 32-35, 22 December 2009), twenty-six (see *Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006), and twenty-seven days (see *Pichugin v. Russia*, no. 38623/03, §§ 154-56, 23 October 2012). In the instant case, the delay was much longer: the appeal, which had been submitted on 19 July 2007, was heard thirty-eight days later. Even though the applicant's counsel contributed to the delay by failing to attend the hearing on 22 August, the length of the appeal proceedings was still too long to comply with the requirement of "speediness".

34. There has therefore been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

35. The applicant further complained under Article 6 §§ 1 and 3 (d) of the Convention that she had not been able to obtain the attendance and examination of the witnesses Ms P., Ms A. and Mr F. The relevant parts of Article 6 read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

A. Admissibility

36. The Court considers that the 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

37. The Government submitted that the reading-out of the pre-trial statements of the missing witnesses had not affected the overall fairness of the proceedings. It was materially impossible to locate them and further attempts to do so could have led to excessive delays in the proceedings.

38. The applicant replied that the Russian courts had maliciously restricted the ability of her defence to show that Ms P. and Ms A. had been police employees rather than independent observers. Had that fact been proven, the record of seizure would have been inadmissible evidence and the prosecution's case would have collapsed.

39. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision; it will therefore consider the applicant's complaint under both provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015). Furthermore, the Court has always interpreted Article 6 § 3 in the context of an overall examination of the fairness of the proceedings. When examining complaints under Article 6 § 1, the Court has carried out its examination of the overall fairness of the proceedings by having regard to such factors as the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 143-44, ECHR 2011).

40. In the present case, Ms P. and Ms A. were "attesting witnesses" within the meaning of the Russian Code of Criminal Procedure (see paragraph 20 above). The Court has already found that, unlike material witnesses who may have knowledge of the circumstances of the criminal case, "attesting witnesses" are not expected to possess information about the facts of the case because their primary function is that of neutral observers of an investigative measure (see *Shumeyev and Others v. Russia* (dec.), nos. 29474/07 and others, § 31, 22 September 2015). The applicant had reason to believe that their neutrality may have been compromised on account of their affiliation with the narcotics police and she sought to obtain their attendance and examination in open court with a view to clarifying that point. Had she been successful in showing that they were in fact police employees, it would have bolstered the defence's claim that the record of seizure of objects and substances had been prepared in breach of the explicit prohibition on the participation of police operatives and was therefore inadmissible in evidence (see paragraphs 20 and 21 above). It follows that while the statements by attesting witnesses may not have been the sole or decisive evidence on which the applicant's conviction was based, it was

their role in the preparation of the crucial piece of evidence that carried considerable weight in the establishment of her guilt.

41. The Court does not need to examine whether the domestic authorities deployed adequate and sufficient efforts for locating Ms P. or Ms A. for the purpose of bringing them before the trial court. As it happened, the defence offered a different course of action which, if accepted, might have been a sufficient counterbalancing factor capable of compensating for the difficulties which the absence of the attesting witnesses had created for the defence. Counsel asked the trial court to obtain the list of visitors to the police premises on that day on the assumption that it would contain the names of civilian visitors only, as the police officers and employees would use their service badges to enter the building. If Ms P. and Ms A. had not been registered as visitors, that would have indicated, by converse implication, that they were employed by, or affiliated with, the police. However, the trial court refused to obtain the visitors journal without giving any reasons for that refusal.

42. In these circumstances, the Court finds that the fairness of the criminal proceedings against the applicant was irretrievably undermined on account of the trial court's failure to secure the attendance and examination of the attesting witnesses whose testimony could have rendered inadmissible the evidence forming the decisive basis for the applicant's conviction, compounded with its refusal to put in place any counterbalancing factors to secure a fair and proper assessment of the reliability of the evidence. Accordingly, the Court concludes to a violation of Article 6 §§ 1 and 3 (d) of the Convention. This finding makes it unnecessary to examine separately the impact of the non-attendance of the witness Mr F.

IV. 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."

44. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage for each of the violations she alleged.

45. The Government considered the claim to be excessive.

46. The Court awards the applicant the amount claimed in respect of non-pecuniary damage, plus any tax that may be chargeable.

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* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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.

Done in English, and notified in writing on 13 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Branko Lubarda
Deputy Registrar	President