

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

FIFTH SECTION

DECISION

Application no. 6759/11
Oleksandr Arkadiyovych GAL
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 3 July 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Mark Villiger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 19 January 2011,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Oleksandr Arkadiyovych Gal, is a Ukrainian national who was born in 1961 and lives in Poltava. He is represented before the Court by Mr O.V. Khrapach, a lawyer practising in Poltava.

A. The circumstances of the case

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

The applicant is a private entrepreneur in the food supply sector.

Since November 2009 the Poltava Regional Police Department had been investigating several financial crimes related to forgery of food quality certificates and supply of overpriced foodstuff for school catering in the city of Poltava. As part of the investigation, the police ran a check on the applicant's business.

On 3 November 2010 the police instituted criminal proceedings against the applicant in the context of the investigation for unlawfully causing food supply price increases.

On 5 November 2010 the applicant was arrested by the police on suspicion of committing a financial crime. A record of his arrest was drawn up between 14.45 and 15.30.

On 8 November 2010 the applicant was taken to the Oktyabrsky District Court of Poltava (hereinafter – the District Court), which ordered his detention for up to ten days in order to collect further information. According to the applicant, the hearing started at 14.55 and the decision was taken only at 16.00, when the maximum period of detention without a court decision (seventy-two hours), permitted under domestic law, had expired. The applicant complained to the judge that his detention was unlawful.

On the same day the police instituted two more sets of proceedings against the applicant on suspicion of other counts of the same crime.

On 15 November 2010 the District Court ordered the applicant's detention without setting a maximum duration for it. By separate ruling, it rejected the applicant's complaint that on 8 November 2010 after 14.45 he had been detained unlawfully. It noted that "*Materials [attached] to the application [for the applicant's arrest] disaffirm the allegations regarding detention of [Mr] Gal O.A. in terms that are not provided by law*."

On 23 November 2010 the Poltava Regional Court of Appeal upheld the decision of the first-instance court. On 28 December 2010 the Higher Administrative Court refused to review the decisions of the lower courts in cassation, as the decisions were not subject to such an appeal.

The applicant also challenged the institution of criminal proceedings against him before the District Court.

On 13 December the court rejected the applicant's appeal. On 30 December 2010 the Poltava Regional Court of Appeal upheld the decision of the first-instance court.

On 29 December 2010 the District Court extended the applicant's detention for up to three months on the grounds that the applicant could avoid justice, obstruct the investigation and continue his criminal activities and that it was necessary to ensure the implementation of procedural decisions.

On 18 January 2011 the Poltava Regional Court of Appeal upheld the decision of the first-instance court.

On 25 March 2011 the Leninskiy District Court of Poltava examined the application for release lodged by the applicant's lawyer and allowed it. The applicant's pre-trial detention was replaced by an obligation not to abscond.

B. Relevant domestic law

1. Constitution of Ukraine 1996

Article 29

"Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on grounds and in accordance with a procedure established by law.

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 moment of detention, with a reasoned court decision in respect of the holding in custody.

Everyone who has been arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of defence counsel.

Everyone who has been detained has the right to challenge his or her detention in court at any time.

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention."

2. Code of Criminal Procedure, 1960 (with amendments)

Article 106: Detention of a criminal suspect by the investigating body

"The investigating body shall be entitled to 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 this person as having committed the offence;

3. if clear traces of the offence are found on the body of the suspect or on the clothing he is wearing or which is kept at his home.

For each case of detention of a criminal suspect, the investigating body shall be required to draw up a record mentioning the grounds, the motives, the day, time, year and month, the place of detention, the explanations of the person detained and the time when it was recorded that the suspect was informed of his right to consult defence counsel in person before his first questioning, in accordance with the procedure provided for in paragraph 2 of Article 21 of the present Code. The record of detention shall be signed by the person who drew it up and by the detainee.

A copy of the record with a list of his rights and obligations shall be immediately handed to the detainee and shall be sent to the prosecutor. At the request of the prosecutor, the material which served as a ground for detention shall be sent to him as well ...

Within seventy-two hours of the arrest the investigating body shall:

(1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of 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 detention 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 detention is lawful or allowing the complaint and finding the detention to be unlawful.

The ruling of the judge may be appealed against within seven days from 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.

Detention of a criminal suspect shall not last for more than seventy-two hours.

If, within the terms established by law, the ruling of the judge on the application of a custodial preventive measure or on the release of the detainee has not arrived at the pre-trial detention facility, the head of the pre-trial detention facility shall release the person concerned, drawing up a record to that effect, and shall inform the official or body that carried out the arrest accordingly."

Article 165-2: Procedure for the selection of a preventive measure

"... In the event that the investigating body or investigator considers that there are grounds for selecting a custodial preventive measure, with the prosecutor's consent he shall lodge an application with the court. The prosecutor is entitled to lodge an application to the same effect. In determining this issue, the prosecutor shall be obliged to familiarise himself with all the material evidence in the case that would justify placing the person in custody, and to verify that the evidence was obtained in a lawful manner and is sufficient for charging the person.

The application shall be considered within seventy-two hours of the time at which the suspect or accused is detained.

...

Upon receiving the application, the judge shall examine the material in the criminal case file submitted by the investigating bodies or investigator. A prosecutor shall question the suspect or accused and, if necessary, hear evidence from the person who is the subject of the proceedings, obtain the opinion of the previous prosecutor or defence counsel, if the latter appeared before the court, and issue an order:

(1) refusing to select a custodial preventive measure if there are no grounds for doing so;

(2) selecting a custodial preventive measure.

The court shall be entitled to select a non-custodial preventive measure for the suspect or accused if the investigator or prosecutor refuses to apply a custodial preventive measure.

The judge's order may be appealed against to the court of appeal by the prosecutor, suspect, accused or his or her defence counsel or legal representative, within three days from the date on which it was made. The lodging of an appeal shall not suspend the execution of the judge's order.

If the selection of the preventive measure for the detained person requires further examination of information about that person or if other circumstances relevant to the decision on this matter must be established, the judge may issue a decision to continue the detention for up to ten days, and, at the request of the suspect or accused, for up to fifteen days. Where such a need arises in respect of a person who has not been apprehended, the judge may postpone the hearing for up to ten days and take measures which would ensure that person's cooperation or issue a decision to detain a suspect or an accused for that period of time."

COMPLAINTS

The applicant complained under Article 5 §§ 1 (c) and 3 of the Convention that there had been no grounds for his detention and that he had

not been released after the maximum permitted period for detention without a court decision (seventy-two hours) had expired.

He further complained under Article 5 § 4 and Article 13 that the court had only considered his complaint of 8 November 2010 concerning the lawfulness of his detention a week later, that is, on 15 November 2010.

Under Article 5 § 4 and Article 13, he also complained that the Higher Administrative Court had refused to examine his cassation appeal against the decisions of the lower courts on his detention.

The applicant also complained under Article 6 §§ 1 and 2 of the Convention that the proceedings were unfair, referring in particular to the use of documentation by the investigation which, in the applicant's opinion, had been received unlawfully from third parties. He maintained that he was accused of actions which did not constitute a crime.

In his further submissions of 5 May 2011 he complained that the whole period of his detention was unlawful and contrary to Article 5 of the Convention.

THE LAW

1. The applicant complained under Articles 5 §§ 1 and 3 of the Convention that he had not been brought promptly before the court after his arrest and that his detention was unlawful and unreasonable. He further complained under Articles 5 § 4 and Article 13 that his complaint concerning the lawfulness of his detention had not been examined promptly. The Court considers that the latter complaint should be examined only under Article 5 § 4 of the Convention, which is the relevant provision.

Article 5, in so far as relevant, provides 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:
>
> ...
>
> (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 brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

> 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...”

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The Court examined the remainder of the applicant’s complaints. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that 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.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant’s complaints concerning the lawfulness of his detention and the promptness and effectiveness of the review of such lawfulness;

Declares the remainder of the application inadmissible.

Stephen Phillips	Dean Spielmann
Deputy Registrar	President