

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

FIFTH SECTION

DECISION

Application no. 11096/16
Sergiy Dmytrovych POTAPOV
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 20 January 2022 as a Committee composed of:

Lətif Hüseynov, *President,*
Lado Chanturia,
Arnfinn Bårdsen
and Viktoriya Maradudina, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 17 February 2016,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

The applicant, Mr Sergiy Dmytrovych Potapov, is a Ukrainian national, who was born in 1986 and lives in the city of Khmelnytskyy, Ukraine. He was represented by Mr Y.V. Vashchuk, a lawyer practising in the same city.

The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr I. Lishchyna of the Ministry of Justice.

The Government's observations were not included in the case file for the consideration of the Court as they were submitted outside the time-limit.

A. The circumstances of the case

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

On 17 September 2015 a Ms B. reported to the police that the applicant and three other persons had been extorting money from her. Criminal proceedings were instituted.

Late in the evening on 18 September 2015 the applicant with two accomplices allegedly abducted Ms B. and detained her for about 12 hours. They also took away her passport.

On 19 September 2015 the police instituted criminal proceedings on suspicion of deprivation of liberty and unlawful withholding of an official documents and joined them to the first set of the criminal proceedings.

According to the arrest report the applicant was arrested on 19 September 2015 at 9:30 p.m. on suspicion of extortion. The arrest report indicated two grounds for the applicant's arrest, quoting the relevant provision of the Code of Criminal Procedure (see below).

On 21 September 2015 the applicant complained to the Yarmolyntsi Local Court of Khmelnytskyy Region of his unlawful arrest without a court order since it had taken place two days after the criminal proceedings had been instituted. He also noted that he had not been arrested at 9:30 p.m., as stated in the arrest report, but at 2:30 p.m. The court rejected that complaint.

On the same day the court ordered the applicant's pre-trial detention, having referred to the nature and gravity of charges, the applicant's unemployment and permanent residence in a country house, the victim's fears about her life and limb, the risk that the applicant might influence witnesses and other participants in the proceedings or otherwise obstruct criminal proceedings, and the fact that the fourth accomplice had not been yet identified.

On 6 November 2015 and 15 January 2016 the court extended the applicant's detention justifying it, in addition to the above reasons, by the need to conduct several expert examinations, including those requested by the defence.

On 12 February 2016 the applicant was released under all-night house arrest.

B. Relevant domestic law

Article 208 of the Code of Criminal Procedure authorises arrests without a court order in the following circumstances and subjects them to the following requirements:

> "1. [In the absence of a court order a] competent official shall be entitled to arrest a person suspected of having committed a crime for which imprisonment may be imposed only in the following cases:
>
> (1) if the person has been caught whilst committing a crime or attempting to commit one; or
>
> (2) if immediately after a criminal offence the statements of an eyewitness, including the victim, or [a combination] of clear signs on the body, clothes or at the scene of the event indicate that the person has just committed an offence..."

THE LAW

A. Complaint under Article 5 § 1 of the Convention

The applicant complained of his arrest in breach of Article 5 § 1 of the Convention, which reads 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:
>
> ...
>
> (e) 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 ..."

The Court notes that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law (see *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 125, 1 June 2021).

In its judgment in *Grubnyk v. Ukraine* (no. 58444/15, 17 September 2020) the Court found violations of Article 5 § 1 in respect of arrest effected under provision of Article 208 of the Code of Criminal Procedure, where considerable time, namely about three weeks, elapsed between the alleged offence, a terrorist act, and the arrest.

The Court notes that in the present case the applicant was arrested two days after the victim had first reported to the police alleged extortion and hours after she had allegedly been detained and her passport had been taken away by the applicant. The Court further observes, that although the arrest report was only reasoned by the suspicion of extortion, all the three offences imputed to the applicant were joined in one set of the criminal proceedings and appear to be united by a common and continuous intent. In this context, the Court cannot conclude that the applicant was arrested beyond the situation of either "whilst committing a crime" or "immediately after a criminal offence" as provided for by Article 208 § 1 of the Code of Criminal Procedure. There is also no evidence that the applicant was arrested at an earlier hour than the one indicated in the arrest report.

The Court thus finds that the applicant's arrest could not be considered unlawful within the meaning of Article 5 § 1 of the Convention.

In view of the above, this part of the application is manifestly ill-founded and should be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 5 § 3 of the Convention

The applicant also complained under Article 5 § 3 of the Convention that he had been held in pre-trial detention on formal and ill-founded grounds. The relevant part of this provision reads as follows:

> "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 Court has previously held that the persistence of a reasonable suspicion that the detainee has committed an offence is a *sine qua non* for the validity of his or her continued detention. But when the national judicial authorities first examine, "promptly" after the arrest, whether to place the arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention. Those other grounds may be a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to protect the detainee (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 87-88 and 101-102, 5 July 2016, with further references). Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017, with further references).

The Court observes that there were sufficient grounds for the applicant's initial detention on 21 September 2015, as well as for the subsequent one, that lasted for 4 months and 23 days in total, in view of the existence of a reasonable suspicion that he had committed serious offences, as well as due to the risks of his absconding and witness tampering given his personal situation and the specific circumstances of the case. No delays in the conduct of the proceedings by the authorities can be detected.

In the circumstances of the present case, the Court finds that the applicant's detention was based on relevant and sufficient grounds. Accordingly, this complaint 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,

Declares the application inadmissible.

Done in English and notified in writing on 10 February 2022.

Viktoriya Maradudina Acting Deputy Registrar	Lətif Hüseynov President