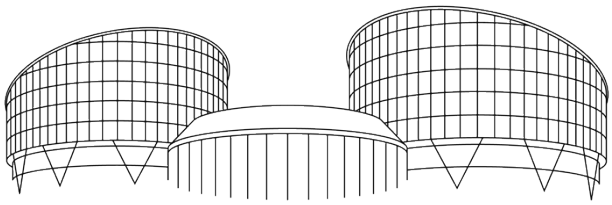

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF YEVGENIY KUZMIN v. RUSSIA

(Application no. 6479/05)

JUDGMENT

STRASBOURG

3 May 2012

FINAL

03/08/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yevgeniy Kuzmin v. Russia**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 6479/05) 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, Mr Yevgeniy Nikolayevich Kuzmin ("the applicant"), on 2 December 2004.

2. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, the absence of sufficient and relevant grounds for his lengthy detention on remand.

4. On 10 November 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Mariinsk, Kemerovo Region.

6. On 8 September 2003 the applicant was arrested on suspicion of aggravated assault and causing death by negligence in order to extract a confession from a suspect.

7. On 10 September 2003 the Mariinsk Town Court of the Kemerovo Region ("the Town Court") ordered that the applicant be placed in detention. The court noted, in particular, that the applicant was suspected of a particularly serious criminal offence and that, being a police officer, he could use his professional experience in order to influence witnesses and obstruct the investigation. The decision was upheld on appeal by the Kemerovo Regional Court ("the Regional Court") on 22 September 2003.

8. On 31 October 2003 the Town Court extended the applicant's pre-trial detention until 29 November 2003, stating that he was charged with serious and particularly serious offences and that, if at liberty, he could obstruct the establishment of the truth and influence witnesses. On 4 December 2003 the Regional Court upheld that decision on appeal.

9. According to the applicant, on 29 November 2003 – the last day of the period of his pre-trial detention authorised by the Town Court in its decision of 31 October 2003 – the authorities of a detention centre where he was being held at that moment refused to release him with reference to a letter of the Mariinsk Town prosecutor stating that on 28 November 2003 the file of his criminal case had been sent to a court. In the applicant's submission, the case file was not in fact sent to the court until 1 December 2003.

10. On 7 December 2003 the Town Court scheduled a hearing in the applicant's case and ordered that the applicant remain in detention. It did not specify the time-limit for the applicant's detention, nor did it give any reasons for that decision.

11. On 16 December 2003 the Town Court ordered that the case file be returned to the investigating authorities so that the applicant would have an opportunity to study it. It also stated that the preventive measure applied in respect of the applicant "should remain the same". It did not specify the time-limit for the applicant's detention, nor did it give any reasons for that decision.

12. On 22 December 2003 the Town Court scheduled a hearing in the applicant's case and ordered that he remain in detention. It did not specify the time-limit for the applicant's detention, nor did it give any reasons for that decision.

13. By a decision of 26 May 2004 the Town Court extended the term of the applicant's detention pending trial until 1 September 2004. It referred to the applicant's personality, the fact that he was charged with serious and particularly serious criminal offences and the fact that he had pleaded not guilty, which, in the court's opinion, suggested that he might obstruct the establishment of the truth, if released.

14. On 19 July 2004 the Town Court further extended the applicant's pre-trial detention until 1 December 2004, relying on the same reasons as those indicated in the decision of 26 May 2004. That decision was upheld on appeal by the Regional Court on 7 September 2004.

15. By a judgment of 22 November 2004 the Town Court convicted the applicant as charged and sentenced him to five years and six months' imprisonment. That judgment was upheld on appeal by the Regional Court on 22 March 2005.

16. At some point the applicant attempted to have criminal proceedings instituted against the Mariinsk Town prosecutor who, according to him, had provided the authorities of a detention centre where he had been held at the material time false information stating that the file of his criminal case had been sent to a court on 28 November 2003, whereas in reality it had not been sent there until 1 December 2003. The applicant complained that on the basis of that false information, he had remained in detention after 29 November 2003, when the term of his pre-trial detention established in the court order of 31 October 2003 had expired.

17. On 28 June 2005 the Tsentralny District Court of Kemerovo rejected the applicant's complaint against the decision of the prosecutor's office of the Kemerovo Region to dispense with criminal proceedings against the Mariinsk Town prosecutor. This decision was upheld on appeal by the Regional Court on 18 August 2005. The courts confirmed that the prosecutor's office's decision was lawful and well-founded, since there was no evidence of any criminal offence in the actions of the official in question, as he had not breached any provisions of domestic criminal law, or law on criminal procedure, and there was no evidence of any unlawfulness of the applicant's detention during the period complained of.

II. RELEVANT DOMESTIC LAW

18. Since 1 July 2002, criminal-law matters have been governed by the Russian Code of Criminal Procedure (Law no. 174-FZ of 18 December 2001).

A. Preventive measures

19. "Preventive measures" include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98). When deciding on a preventive measure, the competent authority is required to consider whether there are "sufficient grounds to believe" that the accused would abscond during the investigation or trial, reoffend or obstruct the establishment of the truth (Article 97). It must also take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 99). In exceptional circumstances, and when there exist grounds provided for by Article 97, a preventive measure may be applied to a suspect, taking into account the circumstances listed in Article 99 (Article 100). If necessary,

the suspect or accused may be asked to give an undertaking to appear in court (Article 112).

B. Time-limits for detention

1. Two types of custody

20. The Code makes a distinction between two types of custody: the first being "pending investigation", that is, while a competent agency – the police or a prosecutor's office – is investigating the case, and the second being "before the court" (or "pending trial"), at the judicial stage.

2. Limits of duration for detention "pending investigation"

21. A custodial measure may only be ordered by a judicial decision in respect of a person who is suspected of, or charged with, a criminal offence punishable by more than two years' imprisonment (Article 108). The maximum period for detention pending investigation is two months (Article 109). A judge may extend that period up to six months (Article 109 § 2). Further extensions may only be granted by a judge if the person is charged with serious or particularly serious criminal offences (Article 109 § 3). No extension beyond eighteen months is permissible and the detainee must be released immediately (Article 109 § 4).

3. Limits of duration for detention "pending trial"

22. From the time the prosecutor sends the case to the trial court, the defendant's detention falls under the category of "before the court" (or "pending trial"). The period of detention pending trial is calculated up to the date on which the first-instance judgment is given. It may not normally exceed six months from the moment the case file arrives at the court, but if the case concerns serious or particularly serious criminal offences, the trial court may approve one or more extensions of no longer than three months each (Article 255 §§ 2 and 3).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

23. The applicant complained that the domestic authorities had failed to provide sufficient reasons for his continued pre-trial detention. This

complaint falls to be examined under Article 5 § 3 of the Convention, which reads as follows:

> "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."

24. The Government contested that argument, contending that there had been relevant and sufficient grounds for the applicant's detention throughout its entire period. They pointed out that the applicant had been suspected of having committed a serious and particularly serious criminal offence and that, being a police officer, he could have used his professional experience and connections to obstruct the investigation and influence witnesses. The Government referred, in particular, to a witness interview of a certain Ms P., an eyewitness to the incident imputed to the applicant, who stated that police officers had threatened her with violence if she testified against the applicant. In the Government's submission, at the trial Ms P. had changed the statements incriminating the applicant she had made during the preliminary investigation, instead stating that he had not assaulted the victim. The Government therefore argued that, by keeping the applicant in detention, the authorities had protected other persons involved in the criminal proceedings in that case and avoided a miscarriage of justice. They also pointed out that the entire period of the applicant's detention on remand was then deducted from the term of imprisonment imposed on him by the judgment of 22 November 2004.

A. Admissibility

25. The Court notes 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

26. According to the Court's well-established case-law, in determining the length of detention pending trial for the purposes of Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among many other authorities, *Belevitskiy v. Russia*, no. 72967/01, § 99, 1 March 2007).

27. In the present case, the applicant's detention lasted from 8 September 2003, when he was arrested, until 22 November 2004, when he was convicted by the trial court, that is, for one year, two months and fourteen days. Even if this period does not appear particularly excessive in

itself, the Court reiterates that Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain minimum period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)).

28. The Court is prepared to accept that the applicant's detention in the present case could have initially been warranted by a reasonable suspicion that he had been involved in the commission of a criminal offence. In this connection, it reiterates that the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, §§ 152-153, ECHR 2000-IV).

29. In the present case, the domestic courts authorised the extension of the applicant's detention on remand on six occasions, of which on three occasions they relied mainly on the seriousness of the charges against the applicant and his potential to abscond, influence the witnesses, or obstruct the course of the investigation, if at large (see paragraphs 8, 13 and 14 above) and on the other three occasions the courts gave no reasons at all (see paragraphs 10-12 above).

30. As regards the courts' reliance on the seriousness of charges as the decisive element, the Court has repeatedly held that this reason cannot by itself serve to justify long periods of detention (see, among other authorities, *Khudoyorov v. Russia*, no. 6847/02, § 180, ECHR 2005-X (extracts)). Although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (see *Letellier v. France*, 26 June 1991, § 51, Series A no. 207; *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005). This is particularly true in cases, such as the present one, where the characterisation in law of the facts – and thus the sentence faced by the applicant – was determined by the prosecution without judicial review of whether the evidence collected supported a reasonable suspicion that the applicant had committed the imputed offence (see *Rokhlina v. Russia*, no. 54071/00, § 66, 7 April 2005).

31. It remains to be ascertained whether the domestic courts established and convincingly demonstrated the existence of concrete facts in support of their conclusions that the applicant was likely to abscond, influence witnesses, or obstruct the course of justice. The Court reiterates in this respect that it is incumbent on the domestic authorities to establish the existence of concrete facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina,* cited above, § 67, and *Ilijkov*, cited above, §§ 84-85).

32. In the present case, the Government argued that the applicant had been a police officer and therefore could have used his professional experience and connections to influence witnesses and obstruct the investigation. They referred, in particular, to statements of a certain witness P., who had alleged that she had been threatened by police officers if she testified against the applicant, and who at the trial had repudiated her statements incriminating the applicant which she had made at the pre-trial stage (see paragraph 24 above). The Court would be prepared to accept that such an argument could be regarded as "relevant and "sufficient" in the applicant's situation. It notes, however, that it was only on one occasion that a domestic court referred to the applicant's professional status and his ability to influence witnesses if at large, and namely when the applicant's initial detention on remand was authorised in the decision of 10 September 2003 (see paragraph 7 above). Even on that occasion, the court merely referred to the applicant's ability to influence witnesses, without going into any details similar to those indicated by the Government. None of the further court orders by which the applicant's detention was extended ever mentioned the applicant's professional status as the reason for his continued detention. In fact, on one occasion a domestic court stated in its extension order that the applicant could influence witnesses or obstruct the investigation (see paragraph 8 above), then three times merely stated that the preventive measure applied should remain the same (see paragraphs 10-12 above), and on another two occasions referred to the applicant's personality and suggested that he may obstruct the establishment of the truth in his case because he had pleaded innocent (see paragraphs 13 and 14 above).

33. At no point, however, did the domestic court describe the applicant's personality in detail, disclose any evidence, or mention any particular facts of the applicant's case warranting his continued detention. The judiciary never specified why it considered the risk of his absconding or interfering with the witnesses or with the course of justice to exist and to be decisive. Moreover, the preliminary investigation in the present case appears to have

ended by 28 November 2003, when the case file was sent to a court for trial, but the applicant remained in detention on remand for another year, until 22 November 2004. The Court reiterates in this connection that whilst at the initial stages of the investigation the risk that an accused person might pervert the course of justice could justify keeping him or her in custody, after the evidence has been collected that ground becomes less strong (see *Mamedova v. Russia*, no. 7064/05, § 79, 1 June 2006).

34. The Court further emphasises that when deciding whether a person should be released or detained the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at the trial (see *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). It does not appear that during the period under consideration the domestic courts once considered the possibility of ensuring the applicant's attendance by the use of other "preventive measures" – such as a written undertaking not to leave a specified place or bail – which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings, or, at the very least, that they sought to explain in their decisions why such alternatives would not have ensured that the trial followed its proper course.

35. Having regard to the materials in its possession, the Court is not convinced that the domestic courts' decisions were based on a sufficient analysis of all the relevant facts. While extending the applicant's detention by means of identically or similarly worded detention orders, the domestic authorities had no proper regard to the individual circumstances of the present case.

36. Overall, the Court considers that by failing to refer to specific relevant matters or to consider alternative "preventive measures" and by relying essentially on the seriousness of the charges, the authorities extended the applicant's detention on grounds which cannot be regarded as "sufficient". They thus failed to justify the continued deprivation of the applicant's liberty. In such circumstances it is therefore not necessary to examine whether the case was complex or whether the proceedings were conducted with "special diligence".

37. In the light of the foregoing consideration, the Court finds that there has been a violation of Article 5 § 3 of the Convention.

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

38. The applicant complained that there had been no lawful basis for his detention between 30 November and 7 December 2003. He referred to Article 5 § 1 (c) of the Convention, which, in its relevant parts, 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:

...

(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;

..."

39. The Court observes that the period of the applicant's detention on remand authorised by a court decision of 31 October 2003 expired on 29 November 2003, and that from 30 November until 7 December 2003 the applicant's detention was not covered by any court order. During that latter period the applicant remained in detention on the ground that his case was sent to a court on 28 November 2003 (see paragraph 9 above). Subsequently he sought to have criminal proceedings instituted against the Mariinsk Town prosecutor who had informed the authorities of the detention centre, where he had been held at that time, that his case had been sent to a trial court on 28 November 2003, whereas, in fact, it had not been sent there until 1 December 2003, with the result that the authorities failed to release him upon the expiry of the term of his detention authorised on 31 October 2003. This request was, however, dismissed by the prosecutor's office of the Kemerovo Region whose decision was then upheld by the Tsentralny District Court of Kemerovo on 28 June 2005 and then by the Kemerovo Regional Court on 18 August 2005, since, according to the domestic law, no criminal acts were committed (see paragraph 17 above).

40. The present application was lodged on 2 December 2004. It follows, therefore, that the applicant can only be considered as having complied with the six month rule set out in Article 35 § 1 of the Convention in respect of this part of the application if the criminal proceedings which he attempted to institute can be considered to be an "effective remedy" within the meaning of this provision.

41. The Court reiterates that for a remedy to be effective it should be able to find in the applicant's favour and to afford adequate redress. In the circumstances of the present case, however, the Court does not consider these requirements to be fulfilled. As is clear from the domestic courts' decisions, the Mariinsk Town prosecutor did not breach any provisions of the domestic criminal law or law on criminal procedure, and therefore the detention centre authorities' failure to release the applicant was not in breach of the domestic law either. Accordingly, any recourse to this remedy would from the outset be without any prospects of success. In the light of the foregoing, the Court considers therefore that it should not take into

account the date of the Kemerovo Regional Court's decision for the purpose of calculating the six month period in the present case (see, in a somewhat similar context, *Zenin v. Russia* (dec.), no. 15413/03, 24 September 2009).

42. It follows that this part of the application has been lodged out of time and must be rejected pursuant to Article 35 §§ 1 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 for his lengthy detention on remand, without specifying an amount.

45. The Government argued that there had been no violation of the applicant's Convention rights in the present case, and that therefore he was not entitled to any compensation.

46. The Court observes that it has found a violation of Article 5 § 3 on account of the applicant's continued detention on remand in the absence of "sufficient" reasons. The applicant must have suffered anguish and distress on account of that infringement of his right to liberty. Having regard to these considerations and judging on an equitable basis, the Court finds it reasonable to award the applicant 1,000 euros (EUR) under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

47. The applicant did not submit any claim for costs and expenses. Thus, the Court does not make any award under this head.

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 complaint under Article 5 § 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles 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 3 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President