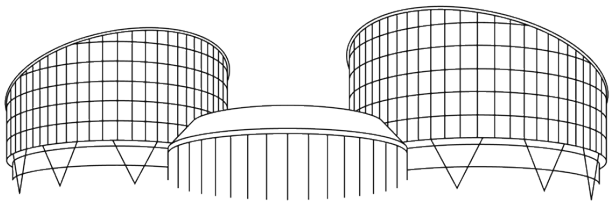

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF VALERIY KOVALENKO v. RUSSIA

(Application no. 41716/08)

JUDGMENT

STRASBOURG

29 May 2012

FINAL

29/08/2012

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

In the case of Valeriy Kovalenko v. Russia**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 10 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 41716/08) 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 Valeriy Viktorovich Kovalenko ("the applicant"), on 8 July 2008.

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

3. The applicant alleged that he had been detained unlawfully and without sufficient reasons, and that the criminal proceedings against him had been unreasonably long.

4. On 15 May 2009 the Court decided to apply Rule 41 of the Rules of Court and to give notice of the application to the Government. The Court further decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

5. The applicant was born in 1965 and is currently serving a custodial sentence in the Ulyanovsk Region.

I. THE CIRCUMSTANCES OF THE CASE

6. On 19 April 2006 a criminal case was opened against the applicant.

7. On 10 June 2006 the applicant was arrested and on the following day charged with several counts of large-scale fraud.

8. On 12 June 2006 the Leninskiy District Court of Ulyanovsk remanded the applicant in custody, finding as follows:

> "[The applicant] is accused of several serious crimes punishable by over two years' imprisonment, which is by itself enough to remand [one] in custody. Moreover ... the court pays particular attention to the prosecution's arguments that the applicant may reoffend (as demonstrated by the episode of defrauding a Ms L. after the opening of the criminal case) and abscond. The court views sceptically the [applicant's] assertion that he is currently registering his residence [with the Ulyanovsk police], as the last registration has expired in 2005 and since then no decisions have been taken in that regard..."

9. The applicant appealed. On 22 June 2006 the Ulyanovsk Regional Court found that the detention order had been lawful and reasoned, and dismissed the appeal.

10. On 7 August 2006 the Leninskiy District Court, stating that the grounds for the applicant's detention still pertained, extended it until 19 October 2006.

11. On 17 October 2006 the Leninskiy District Court extended the applicant's detention until 19 November 2006, holding, in particular:

> "... the preliminary investigation in the present criminal case is not over, it is necessary to carry out many investigative actions ...
>
> Mr Kovalenko is accused of several serious crimes punishable by over two years' imprisonment, which is by itself enough to remand [one] in custody. Thus, there exists a particular risk that he may flee from justice and interfere with the establishment of the truth.
>
> Taking into account the concrete circumstances of the imputed crimes, the information about the [applicant's] personality, in particular, his age, his state of health ... the court concludes that there are no grounds to apply to him a more lenient preventive measure."

12. On 16 November 2006 the Leninskiy District Court extended the applicant's detention until 19 December 2006. It specifically noted:

> "... it is necessary to carry out investigative actions... aimed at locating the significant funds acquired [by the applicant through criminal activities] from the investors and the [applicant's] property."

13. On 8 December, 29 December 2006 and 6 February, 6 March and 5 April 2007 the Leninskiy District Court, with reference to the same grounds, further extended the applicant's detention.

14. On 4 June 2007 Leninskiy District Court extended the applicant's detention until 10 August 2007, finding as follows:

> "... if at liberty, the applicant may reoffend and flee from justice. According to police reports, Mr Kovalenko has never appeared at his registered residence in

> Zhdanovo in the Moscow Region, and the house situated at that address is dilapidated. As to his temporary residence in Ulyanovsk, he appears there only seldom."

15. On 2 August and 6 December 2007 the Ulyanovsk Regional Court granted further requests on the part of the prosecution and extended the applicant's detention. It listed the same grounds justifying the custodial measure.

16. On 21 February 2008 the Ulyanovsk Regional Court extended the applicant's detention until 19 June 2008, noting:

> "... The assertions of the defence that Mr Kovalenko will not flee from justice, as he has ... three children and an aged mother, are unconvincing. It follows from the case file that he is divorced and lives separate from his family ..."

17. On 16 June 2008 the Ulyanovsk Regional Court considered that in order to comply with certain procedural formalities and taking into account that the grounds for the applicant's detention still pertained, the detention should be extended until 19 August 2008.

18. The appeals against the above decisions were examined by the Supreme Court of Russia on 31 January, 2 April and 12 August 2008. The Supreme Court held, in a summary fashion, that all the extension orders had been lawful, reasoned and that the first-instance court had had due regard to the applicant's personal situation.

19. Meanwhile, on 29 October 2007 the applicant was served with the final bill of indictment. It referred to more than 750 counts of large-scale fraud and other crimes committed in various regions of Russia, listing 765 victims, 797 witnesses and more than 800 expert examinations. The same day the applicant and his lawyers began studying the case-file.

20. On 15 August 2008 the Ulyanovsk Regional Court extended the applicant's detention until 19 October 2008.

21. On 10 October 2008 the Ulyanovsk Regional Court extended the applicant's detention until 12 November 2008. It referred, in particular, to the following:

> "The prosecution submits ... that the [applicant's] temporary residence registration in Ulyanovsk expired on 21 December 2005 ([as corroborated by] a certificate from the local police), Mr Kovalenko has only seldom appeared at that address ([as corroborated by] Mr S.'s statement), he was rather registered in Zhdanovo in the Moscow Region ([as corroborated by] a stamp in Mr Kovalenko's passport), in a dilapidated building ([as corroborated by] a certificate from the municipal service provider), which is unfit for living, since its roof leaks and it does not have doors or windows ([as corroborated by] Mr O.'s statement), and is used only to [illegally] register persons who come to Moscow ([as corroborated by] Mr B.'s statement).
>
> ... the court finds the arguments of the prosecution that, if at liberty, the applicant may flee from justice to be convincing."

22. On 20 October 2008 the applicant and his representatives finished studying the case file.

23. On 11 November 2008 the Leninskiy District Court of Ulyanovsk ordered a preliminary hearing of the case, rejected the applicant's request for release and authorised his further detention. It stated that none of the grounds for keeping the applicant in custody had disappeared. Appeals against the decisions of 15 August and 11 November 2008 were dismissed.

24. On 17 November 2008 the Leninskiy District Court held a preliminary hearing. It examined a number of procedural issues and, referring to the gravity of the charges and the danger of his absconding or obstructing the course of the investigation, extended the applicant's detention. No appeal was lodged against this decision.

25. On 26 November 2008 the trial commenced.

26. On 24 April and 10 June 2009 the Leninskiy District Court granted further extensions of the custodial measure for the purpose of finishing the examination of the case. It noted that the grounds for keeping the applicant in custody pertained. The applicant's appeals against both decisions were subsequently rejected by the Regional Court.

27. On 6 July 2009 the Leninskiy District Court found the applicant guilty of large-scale fraud and sentenced him to twelve years' imprisonment.

28. On 28 October 2009 the Ulyanovsk Regional Court made minor amendments to the judgment, upholding it on appeal.

II. RELEVANT DOMESTIC LAW

29. For a comprehensive summary of the domestic provisions on pre-trial detention and time-limits for trial, see *Khudoyorov v. Russia* (no. 6847/02, §§ 76-96, ECHR 2005-X (extracts)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION

30. The applicant complained under Article 5 § 1 (c) that his detention from 19 October to 11 November 2008 had been unlawful. The relevant parts of Article 5 read 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 ..."

31. The Government contested that argument. They submitted that the detention had been lawful and compatible with the requirements of the national legislation as well as the guarantees of Article 5 § 1 (c) of the Convention.

32. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Avdeyev and Veryayev v. Russia*, no. 2737/04, § 41, 9 July 2009).

33. Turning to the circumstances of the present case, the Court notes that the Government submitted a copy of the decision of the Ulyanovsk Regional Court taken on 10 October 2008, which had extended the applicant's detention until 12 November 2008.

34. The Court reiterates that the trial court's decision to maintain a custodial measure would not breach Article 5 § 1 provided that the trial court had acted within its jurisdiction, had the power to make an appropriate order, and had given reasons for its decision to maintain the custodial measure, for which it had also set a time-limit (see, among other authorities, *Khudoyorov*, cited above, §§ 152-153).

35. The Court notes that in issuing the decision of 10 October 2008 the trial court acted within its jurisdiction. There is nothing to suggest that the decision was invalid or unlawful under domestic law in so far as it authorised the applicant's detention for a subsequent period. Nor has it been claimed that that decision was otherwise incompatible with the requirements of Article 5 § 1, the question of the sufficiency and relevance of the grounds relied on being analysed below in the context of compliance with Article 5 § 3 of the Convention.

36. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

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

37. Relying on Article 5 § 3 of the Convention, the applicant complained that his detention had been excessively long and that the decisions

extending his pre-trial detention had not been founded on "relevant and sufficient" grounds. Article 5 § 3 of the Convention provides:

> "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..."

38. The Government submitted that the applicant's pre-trial detention had been compatible with the requirements of Article 5 § 3 of the Convention. The applicant's continued remand in custody had been based not only on the gravity of the charges, but also on the danger of his absconding and re-offending, particularly since the applicant did not have a valid registration of his home address with the Ulyanovsk police and since the investigation could not locate the proceeds from his criminal activities. They further claimed that the applicant had destroyed a large amount of evidence prior to his arrest, and could obstruct the course of the investigation if at liberty.

39. The applicant maintained his complaints. He alleged that his pre-trial detention had been founded exclusively on the gravity of the charges brought against him.

A. Admissibility

40. 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

41. The Court observes that the applicant spent more than three years in pre-trial detention, from 10 June 2006, the date of his arrest, to 6 July 2009, the date of his conviction. Such a long period requires strong justification from the domestic authorities, which must put forward relevant and sufficient reasons for continuing to keep an accused in custody.

42. It follows from the detention orders that the main reason for keeping the applicant in custody was the gravity of the charges brought against him. In this respect, the Court has repeatedly held that the gravity of the charges, while being a relevant ground, cannot by itself serve to justify long periods of detention (see *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001). After a certain period of time it no longer suffices and the domestic authorities are under an obligation to analyse the detainee's personal situation in greater detail and to give

specific reasons for holding him in custody (see *Khudoyorov*, cited above, § 177).

43. The other two grounds for the applicant's detention mentioned in the domestic decisions were the risks of his absconding or reoffending. The Court reiterates 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. It remains to be ascertained whether the domestic authorities established and convincingly demonstrated the existence of concrete facts in support of their conclusions (see *Avdeyev and Veryayev v. Russia*, cited above, § 65).

44. The Government claimed that a risk of the applicant's absconding had been established. They submitted that the applicant's permanent address had been located in another region of Russia and that his registration with the Ulyanovsk police had expired, which meant that he had no address at which he could be reached. The Court reiterates at the outset that according to its case-law, the absence of a fixed residence as such does not give rise to a danger of absconding (cf. *Popkov v. Russia*, no. 32327/06, § 59, 15 May 2008; *Pshevecherskiy v. Russia*, no. 28957/02, § 68, 24 May 2007; and *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005). Moreover, the Court stresses that the existence of a stable residence is a question of fact which is different and distinct from the issue of whether or not an individual has complied with the legal and administrative formalities for having his address registered with the competent authorities. In the instant case, out of some twenty judicial acts dealing with the matter of the applicant's detention, only two set out reasoned findings of fact concerning his residences in Ulyanovsk and in the Moscow Region (see paragraphs 14 and 21 above), whereas the others merely mentioned that he had omitted to renew the registration of his Ulyanovsk address with the local police.

45. The Government further submitted that the other factors increasing the risk of absconding were that the applicant was divorced and that he did not have close ties with his family. The Court considers that this ground for keeping the applicant in custody was not based on sufficient concrete facts.

46. As to the risk of re-offending, the domestic courts noted that the applicant continued his criminal activity even after the opening of the criminal case against him. The courts referred to an incident involving Ms L. that had happened after the opening of the criminal case.

47. The Court notes that this reason is relevant and refers to the concrete facts of the case. It was also sufficient to justify the applicant's detention for a certain period. However, with the lapse of time the domestic courts should have examined whether that reason pertained and whether it justified the

applicant's continued detention. This requirement is especially pertinent in cases where an individual is continuously kept in detention for a long period of time, as in the instant case.

48. It seems that the domestic courts, having used that reason once, continued to refer to it using formulaic wording and without due regard to the subsequent development of the case. Moreover, they dismissed the arguments of the defence that the applicant would settle his debts with the victims when at liberty, without any reasoning. In these circumstances, the Court finds that the domestic courts failed to refer to specific and sufficient facts to demonstrate the risk of the applicant re-offending. Accordingly, this reason could not justify such a lengthy period of pre-trial detention.

49. In their submissions the Government claimed that there was a high probability that the applicant would obstruct the course of the investigation if left at liberty, because he had allegedly destroyed a considerable amount of evidence before his arrest. They also claimed that there was a high risk of the applicant absconding, as the investigation could not locate significant funds allegedly acquired by him through criminal activities (see paragraph 38 above). The Court notes that the domestic courts did not rely upon these reasons for keeping the applicant in custody; those arguments were introduced by the Government only at the stage of communication. The Court reiterates that it is not its task to take the place of the national authorities which ruled on the applicant's detention. It falls to them to examine all the facts arguing for or against detention and set them out in their decisions. Accordingly, the Government's new reasons, which were raised for the first time in the proceedings before the Court, shall not be taken into account (see *Sarban v. Moldova*, no. 3456/05, § 102, 4 October 2005, and *Nikolov v. Bulgaria*, no. 38884/97, § 74 et seq., 30 January 2003).

50. The detention orders also contained such grounds of keeping the applicant in custody as "information about the applicant's personality" and "the particular circumstances of the case". However, the courts never explained why these facts justify the applicant's prolonged remand in custody.

51. The Court lastly 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).

52. In the present case at no point did the domestic courts consider applying a more lenient preventive measure to the applicant, despite the requests of the defence to release him on bail.

53. It follows that the domestic authorities extended the applicant's detention on grounds that cannot be regarded as "sufficient" to justify its length. The Court concludes that under such circumstances it is not

necessary to examine whether the proceedings were conducted with "special diligence".

54. Accordingly, there has been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

55. The applicant further complained that the criminal proceedings against him had been excessively long. He relied on Article 6 § 1 of the Convention, which, in its relevant part, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

56. The Government argued that the length of the proceedings had been reasonable in view of the particular complexity of the case and the applicant's conduct.

57. The criminal case against the applicant was opened on 19 April 2006. On 28 October 2009 the Ulyanovsk Regional Court found the applicant guilty and convicted him at final instance. Thus, the period to be taken into consideration lasted three years, six months and ten days at two levels of jurisdiction.

58. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

59. The Court accepts that the applicant's case was particularly complex. He was charged with more than 750 counts of large-scale fraud and other crimes committed in various regions of Russia. The case involved 765 victims, 797 witnesses and more than 800 expert examinations (see paragraph 19 above).

60. As regards the applicant, the Court does not consider that his conduct prolonged the proceedings, but observes that it took him and his lawyers nearly a year, from 29 October 2007 to 20 October 2008, to study the case-file (see paragraphs 19 and 22 above).

61. As regards the conduct of the authorities, the Court reiterates that the investigation lasted from April 2006 until October 2007 when the applicant was served with the indictment and began studying the case file. Having regard to the extensive investigation which the case necessitated (cf. paragraph 59 above) the Court does not find this period excessive. The actual trial in the first instance lasted from November 2008 until 6 July 2009 and the proceedings in the appeal court came to an end on 28 October 2009. The Court has not found any significant delay during this period of

approximately one year, which in itself does not appear excessive for court proceedings at two levels of jurisdiction.

62. Making an overall assessment of the complexity of the case, the conduct of the parties and the total length of the proceedings, the Court considers that the latter did not go beyond what may be considered reasonable.

63. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. In respect of pecuniary damage, the applicant claimed 45,549,024 Russian roubles (RUB) representing the amount he was obliged to pay to the victims of his crimes. The applicant also claimed compensation for non-pecuniary damage and left it to the Court to determine the amount.

66. The Government contested the claim for pecuniary damage.

67. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, taking into consideration the violation found and making an assessment on an equitable basis, the Court awards the applicant 3,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

68. The applicant also claimed RUB 549,024 for legal fees in the domestic proceedings. As to the costs and expenses incurred before the Court, the applicant left this claim to the Court's discretion.

69. The Government contested both claims and pointed out that the applicant did not provide any documents to corroborate them.

70. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant did not submit any

documents confirming that the expenses to which he refers have actually been incurred and rejects his claim for costs and expenses.

C. Default interest

71. The Court considers it appropriate that the default interest 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 concerning an allegedly excessive length of the applicant's detention 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 3,000 (three thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant, 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President