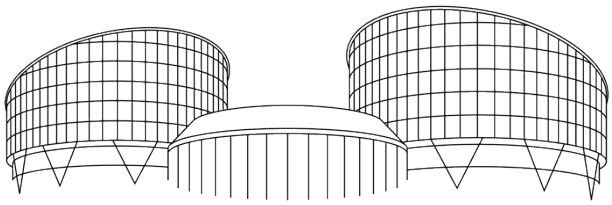

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF RAZHEV v. RUSSIA

(Application no. 29448/05)

JUDGMENT

STRASBOURG

12 June 2012

FINAL

12/09/2012

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

In the case of Razhev 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 Søren Nielsen, *Section Registrar,*

Having deliberated in private on 22 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 29448/05) 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 Oleg Mikhaylovich Razhev ("the applicant"), on 24 June 2005.

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 his pre-trial detention in the period from 4 to 17 March 2005 had not been covered by a valid detention order and that the lawfulness of his detention during that period was not amenable to judicial review.

4. On 17 November 2009 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 1958 and lives in Nizhniy Novgorod.

6. On 3 March 2004 the applicant was detained as a suspect in a criminal case concerning embezzlement, and on 4 March 2004 his pre-trial detention was authorised by a court. On 27 December 2004 the Sormovskiy District

Court, Nizhniy Novgorod, extended the term of pre-trial detention until 3 March 2005 (inclusive of the latter date).

7. On the latter date the period of detention authorised by the court expired, but the applicant remained in detention although no extension of his detention was ordered.

8. On 9 March 2005 the criminal case file was submitted to the Kanavinskiy District Court of Nizhniy Novgorod.

9. On 17 March 2005 the Kanavinskiy District Court declined jurisdiction over the criminal case in favour of the Sormovskiy District Court, and decided at the same time to extend the applicant's detention, placing him "in the charge of the Sormovskiy District Court". On 24 March 2005 the applicant lodged an appeal against the extension of the detention order. On an unidentified date several days later he lodged a complaint with the Presidium of the Nizhniy Novgorod Regional Court; he expressly complained that he had been detained without any detention order after the expiry of the detention term on 3 March 2005, and claimed that in any event his further detention had ceased to be justified.

10. On 11 April 2005 the Sormovskiy District Court extended the applicant's detention until 11 May 2005. This decision was upheld by the Nizhniy Novgorod Regional Court on 11 May 2005.

11. On 22 April 2005 the Nizhniy Novgorod Regional Court examined the applicant's appeal against the decision of 17 March 2005, by which the applicant's detention had been extended. It held that the extension had been lawful and justified. The period of detention between 4 and 17 March 2005 was not examined by the appeal court.

12. On 6 May 2005 the Sormovskiy District Court scheduled a hearing of the applicant's criminal case and held that "the measure of restraint, namely pre-trial detention, [was] to remain unchanged". This decision was upheld by the Nizhniy Novgorod Regional Court on 1 June 2005.

13. On 19 May 2005 the Sormovskiy District Court examined and dismissed the applicant's application for release. This decision was upheld by the Nizhniy Novgorod Regional Court on 1 June 2005.

14. On 27 July 2005 the Nizhniy Novgorod Regional Court judge examined and dismissed the applicant's request for supervisory review of the appeal decision of 22 April 2005. The decision upheld the reasons for the applicant's further detention, without any mention of the period between 4 and 17 March 2005.

15. On 9 September 2005 the Sormovskiy District Court extended the applicant's detention until 9 December 2005.

16. On 6 December 2005 the Sormovskiy District Court convicted the applicant of embezzlement. The applicant's appeal was dismissed by the Nizhniy Novgorod Regional Court on 4 April 2006. On 3 July 2006 the applicant was released on parole.

17. On 27 December 2006 the Nizhniy Novgorod Regional Court examined a criminal case in which the applicant was a victim of unauthorised telephone tapping. The court convicted the implicated police officer of abuse of powers and awarded the applicant non-pecuniary damages.

II. RELEVANT DOMESTIC LAW

18. The Code of Criminal Procedure of the Russian Federation, in force from 1 July 2002, provides that from the date the prosecutor forwards the case to the trial court, the defendant's detention is "before the court" (or "during the trial"). Upon receipt of the case file, the judge must determine, in particular, whether the defendant should remain in custody or be released pending trial (Articles 228 (3) and 231 § 2 (6)).

19. The term of detention "during the trial" is calculated from the date the court received the file and to the date the judgment is given. The period of detention "during the trial" may not normally exceed six months, 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).

20. At any time during the trial the court may order, vary or revoke any preventive measure, including detention (Article 255 § 1). An appeal against such a decision lies to the higher court. It must be lodged within ten days and examined no later than one month after its receipt (Articles 255 § 4 and 374).

21. On 22 March 2005 the Constitutional Court of the Russian Federation adopted Ruling no. 4-P on a complaint lodged by a group of individuals concerning the *de facto* extension of detention after the transfer of a case file to a trial court by the prosecution. In part 3.2 of the ruling the Constitutional Court held:

> "The second part of Article 22 of the Constitution of the Russian Federation provides that ... detention is permitted only on the basis of a court order ... Consequently, if the term of detention, as defined in the court order, expires, the court must decide on the extension of the detention, otherwise the accused person must be released ...
>
> These rules are common to all stages of criminal proceedings, and also cover the transition from one stage to another. ... The transition of the case to another stage does not automatically put an end to a preventive measure applied at previous stages."

THE LAW

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

22. The applicant complained under Article 5 § 1 (c) of the Convention that his detention from 4 to 17 March 2005 was not based on any judicial order. Article 5 § 1 (c) 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."

23. The Government confirmed that that from 4 to 17 March 2005 the applicant was held in custody without judicial authorisation. On the former date the detention order expired, and no decision was taken to extend the term of pre-trial detention. The Government referred to the decision of the Constitutional Court that found, on 22 March 2005, that the practice permitting the detention of an accused without a court order for up to six months from the date of receipt of the case file by the trial court was tainted with arbitrariness and therefore incompatible with the Constitution. However, the relevant period of the applicant's detention ended before the Constitutional Court's ruling, and therefore the conclusion made therein had not been taken into account. The Government accepted that the applicant's detention in that period was in breach of Article 5 § 1 of the Convention.

A. Admissibility

24. 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

25. 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, among many other authorities, *Khudoyorov v. Russia*, no. 6847/02, § 124, ECHR 2005-X).

26. The Court observes that in the instant case the period of the applicant's detention authorised by the decision of 27 December 2004 expired on 3 March 2005, but the applicant remained in detention. It appears that anticipating the transfer of the case the investigating authority overlooked the expiry of the term of detention, and so did the court which received the criminal case file on 9 March 2005, which declined jurisdiction. Accordingly, no decision extending the detention order was granted until 17 March 2005. It follows that the applicant's detention between 4 and 17 March 2005 was not covered by a detention order.

27. The Court has already found a violation of Article 5 § 1 of the Convention in many cases against Russia concerning the practice of holding defendants in custody solely on the strength of the fact that their case has been referred to the trial court. It has held that the practice of keeping defendants in detention without judicial authorisation or clear rules governing their situation was incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Isayev v. Russia*, no. 20756/04, §§ 131-33, 22 October 2009; *Yudayev v. Russia*, no. 40258/03, §§ 59-61, 15 January 2009; *Belov v. Russia*, no. 22053/02, §§ 90-91, 3 July 2008; *Lebedev v. Russia*, no. 4493/04, §§ 55-58, 25 October 2007; *Shukhardin v. Russia*, no. 65734/01, §§ 84-85, 28 June 2007; *Belevitskiy v. Russia*, no. 72967/01, §§ 88-90, 1 March 2007; *Korchuganova v. Russia*, no. 75039/01, § 57, 8 June 2006; and *Khudoyorov*, cited above, §§ 147-51). The Court sees no reason to reach a different conclusion in the present case. It notes that the Government have also accepted that that this period of the applicant's detention did not comply with domestic law, and considers that it was not "lawful" within the meaning of Article 5 § 1 of the Convention.

28. In the light of the foregoing considerations, the Court finds that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's detention from 4 to 17 March 2005.

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

29. The applicant complained that he did not have at his disposal an effective procedure by which he could challenge the lawfulness of his detention in the period from 4 to 17 March 2005, as required by Article 5 § 4 of the Convention. This Article provides as follows:

> "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."

30. The Government considered that the applicant could have challenged the allegedly unlawful detention before a court, and allegedly did so by lodging, on 24 March 2005, a complaint about the extension of the pre-trial detention which was decided upon on 17 March 2005. On 22 April 2005 the Kanavinskiy District Court of Nizhniy Novgorod examined his complaint and upheld the first-instance decision. The Government therefore considered that the complaint under Article 5 § 4 was manifestly ill-founded.

A. Admissibility

31. 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

32. The Court reiterates that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B, § 65; *Grauslys v. Lithuania*, no. 36743/97, §§ 51-55, 10 October 2000; and *Ilijkov v. Bulgaria*, no. 33977/96, § 94, 26 July 2001).

33. As the Court has found above, in the period from 4 to 17 March 2005 the applicant's detention was not covered by any detention order (see paragraph 26 above). The applicant was not therefore able to initiate a judicial review of his detention during that period because Russian law provides only for a procedure for an appeal against formal detention orders (see paragraph 20 above). In the absence of such an order the applicant did not have a clear means available to him of seeking a review of the lawfulness of his detention (see, *mutatis mutandis*, *Belevitskiy,* cited above, § 109). Furthermore, when the applicant did complain to the Nizhniy Novgorod Regional Court, alleging unlawful detention in that period, it treated this complaint as an application for release, and did not make a retrospective assessment of the lawfulness of the previous detention periods.

In particular, in the decision of 22 April 2005 the court limited itself to stating reasons for the prospective detention but did not examine the question as to whether there existed an authorisation in respect of the period at issue. Moreover, the subsequent supervisory review conducted on 27 July 2005 omitted this issue as well. Accordingly, the domestic courts did not consider this part of the applicant's detention to be subject to a judicial review.

34. It follows that in the instant case the applicant was not able to take proceedings to examine the lawfulness of his detention of 4 and 17 March 2005.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

36. Lastly, the applicant complained under Article 6 §§ 1, 2 and 3 (b) and (d) of the Convention of a violation of the presumption of innocence, a violation of his right to defend himself through legal assistance of his own choosing and a violation of the guarantees relating to the examination of witnesses. He also complained under Article 8 of the Convention that there had been unlawful telephone tapping.

37. 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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."

39. The applicant did not submit a claim for just satisfaction within the indicated time-limit. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the applicant's pre-trial detention without a detention order in the period between 4 and 17 March 2005 and the lack of judicial review thereof admissible and the remainder of the application inadmissible;

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.

Done in English, and notified in writing on 12 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President