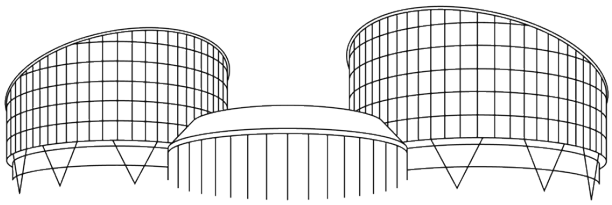

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KISLITSA v. RUSSIA

(Application no. 29985/05)

JUDGMENT

STRASBOURG

19 June 2012

FINAL

19/09/2012

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

In the case of Kislitsa v. Russia,

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

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

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 29 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 29985/05) 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 Viktor Petrovich Kislitsa ("the applicant"), on 4 July 2005.

2. The applicant was represented by Mr V. Nazarov, a lawyer practising in Vladivostok. 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, in particular, that his detention on remand had not been based on relevant and sufficient grounds.

4. On 1 April 2009 the applicant's complaint under Article 5 § 3 of the Convention was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in Bolshoy Kamen, a town in the Primorye Region.

A. Applicant's arrest and detention pending the investigation

6. On 17 February 2005 criminal proceedings were brought against the applicant on suspicion of fraud. On the same day the applicant was arrested.

7. On 19 February 2005 the Frunzenskiy District Court of Vladivostok ordered that the applicant should be detained on remand. The court held as follows:

> "In the court's view, the non-use of a custodial measure in respect of an applicant who has committed a serious crime can entail the applicant's fleeing from the pre-trial investigation and the trial, and hampering the identification and subsequent arrest of those involved in the crime."

8. The applicant was placed in detention facility IZ-25/1 of Vladivostok.

9. The applicant appealed, claiming, in particular, that the Frunzenskiy District Court had not taken into consideration his advanced age and state of health (the applicant was suffering from ischemic heart disease necessitating regular medical supervision). The applicant further alleged that the District Court had no territorial jurisdiction over his case, and, therefore, could not decide on the issue of his detention. He further insisted that the custodial measure should be changed to bail.

10. Meanwhile, on 5 March 2005 another set of criminal proceedings was brought against the applicant on suspicion of fraud. On the same date the two sets of proceedings were joined under no. 512.

11. On 15 March 2005 the Primorye Regional Court upheld the decision of 19 February 2005 on appeal, having taken into consideration the gravity of the charges against the applicant. The court found no violation of the rules of territorial jurisdiction. It held that pursuant to Article 108 § 4 of the Code of Criminal Procedure a request for application of a custodial measure could be examined by a court having territorial jurisdiction over the prosecutor's office investigating the case.

12. On 13 April, 17 June and 12 August 2005 the Frunzenskiy District Court of Vladivostok extended the applicant's detention until 17 June, 17 August and 17 September 2005 respectively. On each occasion the court held as follows:

> "As established, the applicant is charged with a serious crime, and the court considers that, if released, he may reoffend, threaten witnesses and other participants in the criminal proceedings, destroy evidence, or otherwise obstruct the administration of justice."

13. On 11 May, 21 July and 29 August 2005 respectively the Primorye Regional Court upheld the above-mentioned extension orders on appeal.

B. Applicant's detention pending trial and pronouncement of the sentence

14. On 20 July 2005 the pre-trial investigation was completed; on 2 September 2005 the indictment was approved by the Deputy Prosecutor of the Primorye Region, and on 5 September 2005 the case was submitted to the Shkotovskiy District Court of the Primorye Region for trial.

15. On 15 September 2005 the Shkotovskiy District Court held a preliminary hearing and extended the applicant's detention until 17 November 2005. The court held as follows:

> "The court does not see any reason for granting the request filed by the [applicant's] defence for the custodial measure to be changed to an undertaking not to leave the [applicant's] place of residence.
>
> In deciding on this issue the court takes into account the fact that [the applicant] is charged with having committed serious crimes, which, pursuant to Article 108 of the Code of Criminal Procedure, serves as one of the grounds for application of a custodial measure.
>
> Moreover, in the court's opinion, if at large, [the applicant] may obstruct the establishment of the truth in the case. Such a risk stems from the statements of the victim Ye., who submitted at the preliminary hearing that during the pre-trial investigation [the applicant's] [relatives], on his instructions, had attempted to persuade her to change her statements to the applicant's advantage ..."

16. During the preliminary hearing the prosecution challenged the judge's impartiality. The judge withdrew from the case, and the case file was transferred to the Primorye Regional Court.

17. The applicant appealed against the extension of his detention to 17 November 2005. He argued that the District Court had not considered the possibility of applying to him a more lenient preventive measure. The applicant further relied on his heart condition and the fact that the pre-trial investigation had already been completed.

18. On 27 October 2005 the Primorye Regional Court transferred the case to the Fokino Town Court of the Primorye Region. On the same day the Regional Court upheld on appeal the decision of 15 September 2005 to extend the applicant's detention until 17 November 2005.

19. On 15 November 2005 the Fokino Town Court extended the applicant's detention until the pronouncement of the judgment on the applicant's criminal case, provided that period did not exceed six months, that is, until 8 March 2006. The court held as follows:

> "At the present time [there are] no lawful grounds for lifting or altering the custodial measure. The applicant is charged with two crimes, one of which is a serious crime ... There are grounds to believe that, if at large, the applicant might obstruct the establishment of the truth in the case as he has been exerting pressure on the victim, Ye., with the purpose of persuading [the latter] to alter her statements to [his] advantage – this circumstance was mentioned by the victim herself.

> There is no medical evidence preventing [the applicant] from being detained in custody. On the contrary, the case file contains a medical certificate ... dated 8 August 2005 to the effect that [the applicant's] state of health allows him to be detained in a detention facility and participate in investigative actions".

20. On 27 December 2005 the Primorye Regional Court upheld the above decision on appeal.

21. On 17 February 2006 the Fokino Town Court convicted the applicant of fraud and attempted fraud. The applicant was given a suspended sentence of four years' imprisonment, conditional on three years' probation. The applicant was released in the courtroom.

22. On 10 April 2006 the Primorye Regional Court upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

23. 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

24. The "preventive measures" available 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 might abscond during the investigation or trial, reoffend, or obstruct the establishment of the truth (Article 97). The gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances must also be taken into account (Article 99). In exceptional circumstances, and when there exist grounds provided for by Article 97, a preventive measure may be applied to a suspect on account of circumstances listed in Article 99 (Article 100). If necessary, the suspect or accused may be asked to give an undertaking to appear (Article 112).

B. Time-limits for detention

1. Two types of remand in custody

25. The Code makes a distinction between two types of remand in 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. Time-limits for detention "pending investigation"

26. A custodial measure may only be ordered by a judicial decision and in respect of a person who is suspected of, or charged with, a criminal offence punishable by more than two years' imprisonment, and provided that a less restrictive preventive measure cannot be applied (Article 108 § 1). The time-limit for detention pending investigation is fixed at 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 and 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 then be released immediately (Article 109 § 4).

3. Time-limits for detention "pending trial"

27. From the time the prosecutor sends the case to the trial court, the defendant's detention is "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 date when 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

28. The applicant complained under Article 5 § 3 of the Convention that his detention on remand had not been based on relevant and sufficient grounds. Article 5 § 3 provides 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."

29. The Government submitted that the custodial measure had been applied to the applicant, and subsequently extended, by competent domestic courts acting within their competence and in accordance with domestic law. The relevant detention orders had been based on relevant and sufficient reasons: the gravity of the charges against the applicant and a well-founded risk that he might abscond, exert pressure on the witnesses and the victim, or otherwise obstruct the proceedings. In particular, the domestic court had

evidence to the effect that the applicant's relatives had taken measures to persuade the victim, Ye., to change her statements. The Government relied in this respect on the record of Ye.'s questioning as a victim on 12 May 2005, the record of her questioning by the court on 15 November 2005, and her objections to an unspecified appeal filed by the applicant's lawyer. The Government further submitted that the lack of detailed reasoning in the appeal decisions of 11 May, 21 July and 29 August 2005 upholding the extension orders could not be regarded as a ground for finding a violation of Article 5 § 3 of the Convention, since the custodial measure was commensurate with the gravity of the charges against the applicant, the reasonable suspicion against him, and the public interest in preventing crime. Given the above considerations no alternative, more lenient, preventive measures could have been applied to the applicant. The applicant's argument that the custodial measure was incompatible with his state of health had been duly examined by the court and dismissed as unsubstantiated.

30. The applicant agreed that his initial detention might have been justified by the reasonable suspicion of his having committed serious crimes. However, after the completion of the pre-trial investigation and submission of the case for trial the reasons advanced by the domestic court for his continued detention up to his conviction on 17 February 2006 had no longer been sufficient. Factors that ran counter to the presumption that he would reoffend were: the applicant's personality, his having a permanent place of residence and employment, his having a family, including two dependent children, his advanced age, his heart condition, and the absence of any previous criminal record. The detention orders of 15 September and 15 November 2005 had been very brief; they had failed to address the applicant's situation in any detail and had mostly relied on the gravity of the charges against him. Further, it did not appear from the text of these detention orders that the domestic court had considered the possibility of applying an alternative preventive measure. The applicant drew the Court's attention to the fact that on 17 February 2006 he had been convicted and given a suspended sentence of four years' imprisonment, which confirmed the argument that he had never posed any serious danger to society.

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. According to the Court's well-established case-law, in determining the length of detention pending trial under 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 *Panchenko v. Russia*, no. 45100/98, § 91, 8 February 2005; *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV; and *Wemhoff v. Germany*, 27 June 1968, § 9, Series A no. 7).

33. In the present case, the applicant's pre-trial detention lasted one year, from 17 February 2005, when he was arrested, until 17 February 2006, when he was convicted by the trial court. 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)). It is incumbent on the domestic authorities to establish the existence of concrete facts constituting 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 v. Russia*, no. 54071/00, § 67, 7 April 2005, and *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, 26 July 2001).

34. The Court is prepared to accept that the applicant's detention in the present case was initially warranted by a reasonable suspicion that he had been involved in the commission of fraud. 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 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*, cited above, §§ 152-153).

35. In the present case, the domestic courts authorised the extension of the applicant's detention on remand on five occasions. When extending the applicant's detention pending investigation on 13 April, 17 June and 12 August 2005 they relied on the gravity of the charges against the applicant and his potential, if released, to reoffend, influence the witnesses,

destroy the evidence, or otherwise obstruct the proper course of the proceedings. The Court notes that the relevant judicial decisions did not go any further than listing these grounds, omitting to substantiate them with reference to any specific facts (see paragraph 12 above). Later on, when the investigation was already completed and the case file had been submitted to the trial court, the domestic court in its decisions of 15 September and 15 November 2005 continued to rely on the gravity of the charges against the applicant and his potential to obstruct the establishment of the truth. In this latter regard the domestic court relied on the statement by the victim Ye. to the effect that at the stage of the pre-trial investigation she had been approached by the applicant's relatives and asked to alter her testimony (see paragraphs 15 and 19 above).

36. As regards the courts' reliance on the gravity of the 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; *Panchenko*, cited above, § 102; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Ilijkov*, cited above, § 81). 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 control of the issue whether the collected evidence supported a reasonable suspicion that the applicant had committed the imputed offence (see *Rokhlina*, cited above, § 66).

37. As to the presumed risks of the applicant reoffending or destroying the evidence, as already noted above (see paragraph 35 above), at no point in the proceedings was the existence of such risks substantiated by reference to any concrete facts. The Court reiterates in this connection that where circumstances warranting a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention (see *Panchenko*, cited above, §§ 99 and 105, and *Ilijkov*, cited above, § 86).

38. As regards the risk of the applicant perverting the courts of the proceedings by influencing the witnesses, the Court reiterates in this connection that whilst at the initial stages of an investigation the risk that an accused person might pervert the course of justice may 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).

39. The Court accepts that the reasoning applied by the domestic court to demonstrate the existence of a risk of collusion may have been sufficient for holding the applicant in custody when the case was under investigation up to 20 July 2005 (had it been mentioned in the detention orders issued in the relevant period); however, at a later stage, when all the evidence had been collected, and in the absence of any evidence that at the trial stage either the victim Ye. or any other witness in the case had been subjected to any pressure by the applicant himself or his relatives, the reasoning advanced by the domestic courts for the applicant's continued detention did not suffice. In order for their reasoning to be sufficient the domestic courts needed to take into account the stage of the judicial proceedings, the applicant's personal situation (his age, health, residence and employment status, dependent children, the existence or lack of a criminal record, and so on), his behaviour before and after the arrest, and any other specific indications, such as, for example, the nature of the crime and the severity of the potential sentence, in order to justify, or prove groundless, the fear that he might abuse his regained liberty by, *inter alia,* manipulating witnesses.

40. 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). In the present case, it was not until the stage of the trial that the domestic courts mentioned in their decisions the presumed absence of any grounds for altering the custodial measure (see paragraphs 15 and 19 above). Even then, the relevant decisions omitted to set out with sufficient clarity why such alternatives would not have ensured that the trial followed its proper course.

41. In view of the materials in its possession, the Court is not convinced that the domestic court's decisions were based on an analysis of all the pertinent facts and had proper regard to the applicant's individual circumstances.

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

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. The applicant further complained under Articles 3 and 5 of the Convention that his state of health was incompatible with a custodial measure, that there had been a lack of adequate medical assistance in the remand prison, and of the alleged unlawfulness of his detention.

45. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols in this connection. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government considered the above claim to be excessive. They submitted that if the Court were to find a violation, the finding of such a violation would constitute in itself sufficient just satisfaction.

49. 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 EUR 1,000 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

50. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

51. 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 of 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 on 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 19 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President