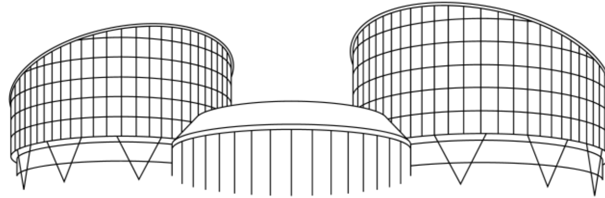

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 40288/06
Naimdzhon Mirzovaliyevich YAKUBOV
against Russia
lodged on 3 June 2006

STATEMENT OF FACTS

The applicant, Mr Naimdzhon Mirzovaliyevich Yakubov, is a Tajikistani national, who was born in 1973 and is currently serving his prison sentence in correctional colony IK-4 in Pushkino Town (the Saratov Region). He is represented before the Court by Mr V. Shukhardin, a lawyer practising in Moscow.

A. The circumstances of the case

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

Until his arrest, the applicant lived in Moscow and worked as a taxi driver. He resided in Russia on the basis of a “migration card” issued to him by the Russian migration authorities and a “temporary residence registration” certificate delivered by the municipal authorities in Moscow. He lived in a flat of his girlfriend from whom he had a child born in 2004.

1. The applicant’s arrest and ensuing detention

On 30 June 2004 the applicant and his alleged accomplice, Mr D.B., were arrested on suspicion of drug trafficking and placed in detention on remand. It was subsequently extended by the Podolskiy Town Court of the Moscow Region (“the Town Court”) at regular intervals. Thus, on 14 July 2005 the Town Court extended their detention until 2 November 2009. On 29 August 2005 the Moscow Regional Court (“the Regional Court”) upheld that detention order, referring to the gravity of the charges as well as the risk that the applicant and his co-defendant would reoffend, abscond and interfere with the course of justice. Other detention orders for the relevant period have not been submitted by the applicant.

On 11 March 2005 the Town Court convicted the applicant and his co-defendant of drug trafficking. At the trial, as well as during the subsequent proceedings, the applicant was represented by a legal-aid advocate.

On 25 April 2005 the Regional Court quashed the judgment and remitted the case to the Town Court for re-examination. The court also extended the co-defendants' detention until 2 August 2005. In doing so the Regional Court referred to the gravity of charges against the applicant and his co-defendant, their foreign citizenship and their illegal stay in Russia. It appears that the applicant's detention was subsequently extended several times. He has not submitted detention orders for the relevant period.

On 9 December 2005 the Town Court convicted the applicant and his co-defendant again.

On 17 April 2006 the Regional Court upheld the judgment.

On 14 February 2007 the Presidium of the Regional Court quashed the appeal judgment of 17 April 2006 and remitted the case to the appeal instance for a new examination.

On 16 April 2007 the Regional Court quashed the judgment of 9 December 2005 and remitted the case to the Town Court for a re-trial. It also ordered to keep the applicant and his co-defendant in detention without giving any reasons or setting any time-limit for that.

On an unspecified date the Town Court extended the co-defendants' detention until 27 July 2007.

On 25 July 2007 the Town Court extended the co-defendants' detention until 27 October 2009, referring to the gravity of charges, their foreign citizenship and their illegal stay in Russia.

On 25 September 2007 the Town Court ordered that the preventive measure in respect of the co-defendants "shall remain unchanged". In support of that decision the court referred to the gravity of charges, their foreign citizenship and their illegal stay in Russia. It did not set any time-limit for the detention.

In January 2008 the applicant requested the court to allow Mr Sh., a lawyer with a Moscow-based human-rights NGO, to participate in the proceedings in the quality of his "public defender" along with the applicant's legal aid advocate. This request was granted.

On 10 January 2008 the Town Court extended the co-defendants' detention for three months until 27 January 2008. The last valid detention order had expired on 27 October 2009. It appears that the co-defendants' detention between 27 October 2009 and 10 January 2008 war authorised *ex post facto*. The court referred to the gravity of charges, the co-defendants' foreign citizenship and their illegal stay in Russia. The court did not address the applicant's argument that his detention after 27 October 2009 had not been covered by any detention order.

The applicant and his "public defender" appealed against the detention order of 10 January 2008. They complained about unlawfulness of the applicant's detention between 27 October 2007 and 10 January 2008 as not covered by any detention order and referred to a judgment of the European Court of Human Rights where any *ex post facto* authorisation of detention on remand had been found incompatible with Article 5 § 1 of the Convention (*Shukhardin v. Russia*, no. 65734/01, § 69, 28 June 2007). The date of the appeal hearing was set by the Regional Court for 18 March 2008.

On 23 January 2008 the Town Court extended the detention of the co-defendants until 27 April 2008. The court referred to the gravity of charges, their foreign citizenship and their illegal stay in Russia. The applicant and his co-defendant appealed.

On 13 March 2008 the applicant's "public defender" asked the Regional Court to postpone the hearing on appeals against the detention order of 10 January 2008 due to his participation on 18 March 2008 in separate proceedings before the Supreme Court of Russia and his subsequent business trip from 22 to 31 March 2008. The Regional Court refused that request.

On 18 March 2008 the Regional Court held an appeal hearing. It found the detention order of 10 January 2008 lawful, justified and well reasoned. The court dismissed the appeals in a summary fashion as "groundless". The applicant was absent from the appeal hearing. He was represented by a legal aid advocate, Mr B., appointed by the appeal court. According to the applicant, Mr B. did not discuss the case with him. The applicant was unaware about the appointment of Mr B. as his legal aid advocate.

On 24 April 2008 the Regional Court examined the applicant's appeal against the detention order of 23 January 2008. The applicant's "public defender" was unable to attend the hearing. The applicant was present and represented by Mr B. The prosecutor was absent from the hearing. At the hearing he applicant objected to the examination of his appeal in the absence of his "public defender". The Regional Court decided to postpone the hearing to 6 May 2008 and extended the detention of the applicant and his co-defendant on its own initiative until 7 May 2008. The court noted that the authorised period of their detention would expire on 27 April 2008 and that it would be necessary "to ensure a timely examination of the case by the appeal court". The Regional Court referred in this connection to Articles 376 and 377 of the Code of Criminal Procedure. It did not examine any other reasons which would justify the applicant's detention.

On 6 May 2008 the Regional Court held an appeal hearing. It found justified the co-defendants' detention by the fact that they were foreign citizens without a permanent place of residence or a permanent occupation in Russia. The court also referred to the extreme complexity of the case (the case file consisted of eight volumes and the defendants did not speak Russian). The court extended their detention until 7 June 2008. However, alternatively it allowed for release on bail. The amount required by the court was RUB 5,000,000 (about EUR 125,000) for each defendant. It is unclear how the amount of the bail was calculated, and whether the court obtained and analysed any evidence concerning the defendant's financial situation. According to the applicant, he was unable to pay the bail due to its excessive amount.

At a hearing held *in camera* on 7 June 2008, the Town Court extended the co-defendants' detention until 7 September 2008. It referred to the gravity of charges, their foreign citizenship, illegal stay as well as absence of any permanent occupation in Russia. The applicant was removed from the court room on that date because of his inappropriate behaviour. The applicant's legal aid advocate and one of his "public defenders" remained in the courtroom. The Town Court dismissed the public defender's request to reduce the amount of bail set by the Regional Court. The applicant

appealed. The appeal hearing was set by the Regional Court for 24 July 2008.

On 23 July 2008 the applicant's "public defender" asked the Regional Court to postpone the hearing due to his participation on 24 July 2008 in separate proceedings in another town. The Regional Court refused this request.

On 24 July 2008 the Regional Court, in a summary fashion, upheld the detention order of 7 June 2008 on appeal. The applicant was absent from the hearing. He was represented by a legal aid advocate, Ms S., appointed by the appeal court. According to the applicant, Ms S. did not discuss the case with him. The applicant was not informed about the appointment of the legal aid advocate.

On 1 August 2008 the Town Court convicted the applicant and his co-defendant. On 19 February 2009 the Regional Court upheld the judgment.

2. *The investigation and trial*

On 30 June 2004 the applicant and his alleged accomplice, Mr D.B., were arrested under suspicion of having sold 932.4 g of heroin to an undercover agent of the police. The applicant and Mr B. were immediately brought to the police station and subjected to a personal search. 31.42 g. of heroin were found in the applicant's pocket. On the same day the applicant was subjected to medical examination which revealed traces of morphine in his urine.

On 1 July 2004 a criminal case was opened against the applicant and Mr B. They were subsequently charged with drug trafficking. The applicant was additionally charged with illegal acquisition, possession and transportation of drugs.

On an unspecified date the prosecution forwarded the case to the Town Court for trial.

On 11 March 2005 the Town Court convicted the applicant and his co-defendant as charged. The applicant was sentenced to 14.5 years' imprisonment.

On 25 April 2005 the Regional Court quashed the judgment and remitted the case to the Town Court for new consideration. The court found that the bill of indictment had been approved by the prosecutor who was a close relative of a police officer involved in the investigation of the criminal case.

On 14 July 2005 the Town Court remitted the case to the prosecutor to remedy the shortcoming.

On an unspecified date the prosecution forwarded the case to the Town Court for examination.

On 6 October 2005 the Town Court held a preliminary hearing.

On 9 December 2005 the Town Court convicted the applicant and his co-defendant as charged. The applicant was sentenced to 11 years' imprisonment.

On 17 April 2006 the Regional Court upheld the judgment.

On 14 February 2007 the Presidium of the Regional Court quashed the appeal judgment of 17 April 2006 and remitted the case to the appeal instance for a new examination. The Presidium held that the operative provisions of the appeal judgment did not correspond to the charges.

On 16 April 2007 the Regional Court quashed the judgment of 9 December 2005 and remitted the case to the Town Court for a new examination. It found that the operative provisions of the judgment were in contradiction to the charges brought against the co-defendants.

On 25 September 2007 the Town Court remitted the case to the prosecutor because the applicant and his co-defendant had not been provided with a translation in Tajik of the last version of the bill of indictment.

On an unspecified date the prosecution forwarded the case to the Town Court for trial.

On 10 January 2008 the Town Court held a preliminary hearing and set the examination of the case for 23 January 2008.

On 23 January 2008 the Town Court granted the applicant's request and appointed Mr Sh. as his "public defender" along with the applicant's legal aid advocate. The court postponed the hearing due to a request lodged by the defence for additional time (five days) to study the case file.

On 4 February 2008 the Town Court remitted the case to the prosecutor because the bill of indictment had been approved by a prosecutor who was a close relative of the investigator in charge of the criminal case.

On 29 May 2008 the prosecution forwarded the case to the Town Court for examination.

On 6 and 7 June 2008 the Town Court held a preliminary hearing in camera. The court refused the applicant's request to be also represented by two "public defenders", his non-marital partner and aunt. The court noted that the non-marital partner had been questioned as a witness in the criminal proceedings against the applicant and that his aunt had not submitted a document confirming acceptance of the above appointment. At the same time the court granted the applicant's request and appointed two "public defenders" for the applicant's representation: Mr Sh., who had been already appointed by the court on 23 January 2008, and Mr E., a human rights activist.

At the preliminary hearing the applicant challenged the presiding judge. The applicant's legal aid advocate, Ms K. opposed that objection by her client. Due to the conflict of their positions, Ms K., was replaced by another legal aid advocate, Mr S. The applicant was represented at the trial before the Town Court by Mr S. and his two public defenders. On several occasions the public defenders did not appear before the Town Court which decided to continue the trial without them.

During the trial the applicant denied his involvement in the imputed offences. He claimed that the had brought Mr B. to the crime scene in his taxi and had been unaware of the purpose of the trip or of the fact that Mr B. had had heroin with him. According to the applicant, as to the heroin found in his pocket, it had been planted by the police. Traces of morphine found in his urine had been caused by consumption of medical drugs allegedly prescribed by a doctor. The applicant's co-defendant, Mr B., also denied any involvement of the applicant in the drug dealing.

On 1 August 2008 the Town Court convicted the applicant and his co-defendant of attempted sale of drugs. The applicant was also convicted of illegal possession of drugs and sentenced to 10.5 years' imprisonment.

The applicant and his "public defender", Mr Sh., appealed. The applicant asked the Town Court to grant him access to the criminal case file in order to prepare for the appeal hearing. His request was refused. The applicant's legal aid advocate, Mr S., was replaced in the appeal proceedings by another legal aid advocate on the applicant's request.

On 19 February 2009 the Regional Court upheld the judgment of 1 August 2008 on appeal. The court noted, inter alia, that the applicant had studied the criminal case file before his last trial and had been provided with copies of important documents including minutes of the hearings in both languages, Russian and Tajik. The court also found that there was no evidence that the applicant's legal aid advocates had acted in breach of their duties.

B. Relevant domestic law and practice

1. Preventive measures and amount of bail

The Russian Code of Criminal Procedure in force at the material time ("the CCrP") provides for "preventive measures" (меры пресечения) which include an undertaking not to leave a town or region, personal surety, bail, house arrest and detention (Article 98 of the CCrP). The amount of bail should be set by the court taking into account the nature of the offence, information about personality of the suspect or accused as well as assets and financial situation of the bailor (Article 106 § 1 of the CCrP).

2. Grounds justifying detention on remand

Article 108 § 1 of the CCrP provides that detention on remand may be ordered by a court in respect of a person suspected of or charged with a criminal offence punishable by more than two years' imprisonment, provided that a less restrictive preventive measure cannot be applied. 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 of the CCrP). It must also take into account the gravity of charges, information on the character of the accused, his or her profession, age, state of health, family status and other circumstances (Article 99 of the CCrP).

3. Retrospective authorisation of detention

On 15 July 2003 the Russian Constitutional Court issued decision no. 292-O on a complaint by Mr Khudoyorov of ex post facto extension of his "detention during judicial proceedings" by a court decision. It held as follows:

> "Article 255 § 3 of the Code of Criminal Procedure of the Russian Federation provides that the [trial court] may ... after the expiry of the six months' period from the moment when the case has been sent to the court, extend a defendant's detention for successive periods of up to three months. It does not contain, however, any provisions permitting the courts to take a decision extending a defendant's detention once the previously authorised time-limit has expired, in which event the person is detained without a judicial decision. Nor do other rules of criminal procedure provide

for such a possibility. Moreover, Articles 10 § 2 and 109 § 4 of the Code of Criminal Procedure expressly require the court, prosecutor, investigator ... to release immediately anyone who is unlawfully held in custody beyond the time-limit established in the Code. Such is also the requirement of Article 5 §§ 3 and 4 of the European Convention ... which is an integral part of the legal system of the Russian Federation, pursuant to Article 15 § 4 of the Russian Constitution ...”

4. Detention orders issued by the courts on their own initiative

At any time during the trial the court may order, vary or revoke any preventive measure, including detention on remand (Article 255 § 1 of the CCrP). The court may order detention on remand in respect of a defendant either at request of a party to the proceedings or on its own initiative (Article 108 § 10 of the CCrP). In its judgment no. 4-P of 22 March 2005 the Russian Constitutional Court found that the courts’ power to issue detention orders on their own initiative was compatible with the Russian Constitution. It held as follows:

> “According to the sense of the law, the prosecutor is obliged to lodge requests for authorisation of detention or extension thereof ... at any stage of criminal proceedings; that does not exclude the right of the court to consider this question, if it arises at the trial stage [of the proceedings]. ... This does not mean that the court takes over the functions of the prosecution, since the legal and factual grounds for the choice of a preventive measure are in no relation to the support of the charges or recognition of their well-fondness; [it is connected] with the need to ensure the conditions for the further conduct of the criminal case.”

COMPLAINTS

1. Under Article 5 § 1 the applicant makes the following complaints:

(a) his detention between 27 October 2007 and 10 January 2008 was unlawful as authorised retroactively;

(b) his detention between 28 April 2008 and 6 May 2008 was unlawful since the Moscow Regional Court which authorised that period of detention on 24 April 2008 was not competent to do so on his own initiative and before having examined the lawfulness of the detention order issued previously as well as grounds justifying his detention.

2. Under Article 5 § 3 the applicant makes the following complaints:

(a) his detention on remand was unreasonably long and was not based on sufficient reasons;

(b) the amount set for bail by the courts was excessive and disproportionate. In that connection, he submits that the authorities have not taken into account his assets and financial situation before deciding on the amount.

3. Under Article 5 § 4 the applicant makes the following complaints:

(a) the detention order of 7 June 2008 was issued in the applicant’s absence and *in camera*;

(b) his appeals against detention orders of 10 January 2008 and 7 June 2008 were examined without the applicant and his public defender who asked the court to postpone the appeal hearings. The appeal court, without

informing the applicant, appointed legal aid advocates who have not discussed the case with him.

(c) the appeal court did not sufficiently address the applicant's argument as to the unlawfulness of retrospective authorisation of his detention between 27 October 2007 and 10 January 2008.

4. Under Article 6 the applicant makes the following complaints:

(a) the length of the criminal proceedings against him was unreasonable;

(b) the courts were biased;

(c) the courts did not allow him to be represented in the criminal proceedings by his non-marital partner and aunt;

(d) the defence of his legal aid advocates was ineffective;

(e) the courts dismissed his requests to study the case file again after the end of the trial in order to prepare to the appeal hearing;

(f) the courts based his conviction on inadmissible evidence, the drugs were planted in the applicant's pocket.

QUESTIONS TO THE PARTIES

1. Was the applicant's detention on remand compatible with the requirements of Article 5 § 1 (c) of the Convention? In particular, the parties are invited to comment on the following questions:

(a) Was his detention between 27 October 2007 and 10 January 2008 in accordance with a procedure prescribed by law? Was it properly authorised by a competent authority? Was the retroactive authorisation of that period of detention compatible with the requirements of Article 5 § 1 of the Convention (see *Shukhardin v. Russia*, no. 65734/01, § 69, 28 June 2007; *Chumakov v. Russia*, no. 41794/04, § 135, 24 April 2012)?

(b) Was the applicant's detention between 28 April 2008 and 6 May 2008 in accordance with a procedure prescribed by law? Was the Moscow Regional Court which authorised that period of detention on 24 April 2008 competent to do so without having examined the grounds justifying the applicant's detention listed in the Code of Criminal Procedure (see "Relevant domestic law and practice")? Was the reason given by the Moscow Regional Court, i.e. to ensure a timely examination of the applicant's appeal against a detention order, a sufficient legal basis for the applicant's detention? Did that reason correspond to any of the acceptable reasons for detaining a person under Article 5?

2. Was the length of the applicant's detention on remand in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention? In particular, were the domestic courts' decisions extending the applicant's detention founded on "relevant and sufficient" reasons and were the proceedings conducted with a "special diligence"? Was the amount of bail set by the domestic courts (RUB 5,000,000) reasonable? Did the courts assess the applicant's capacity to pay the sum required (see *Toshev v. Bulgaria*, no. 56308/00, §§ 68 et seq., 10 August 2006)?

The parties are invited to read carefully the information contained in the "Facts" part and check its accuracy. Where a detention order is missing, or

where there is no information about the decision of the second instance court (if any) the parties are invited to produce relevant documents and information.

3. Was the procedure by which the applicant sought to challenge the lawfulness of his detention in conformity with Article 5 § 4 of the Convention? In particular, the parties are invited to comment on the following questions:

(a) Was the applicant afforded an opportunity to be present at the appeal hearings of 18 March 2008 and 24 July 2008? Did he benefit from effective legal assistance at those hearings? When were the legal aid advocates appointed by the appeal court? Was the applicant informed about the appointments? Had he agreed to be represented by those advocates? Had the appointed advocates met the applicant before the appeal hearings and discussed with him the defence strategy?

(b) Was the Moscow Regional Court which on 24 April 2008 extended the applicant's detention on its own initiative impartial, as required by Article 5 § 4 of the Convention (see *D.N. v. Switzerland* [GC], no. 27154/95, § 42, ECHR 2001-III), given that it held the trial in the absence of the prosecution (cf. *Ozerov v. Russia*, no. 64962/01, §§ 53-54, 18 May 2010)? Did that court act in the interests of the prosecution in that case (cf. *Svetlana Naumenko v. Ukraine*, no. 41984/98, § 97, 9 November 2004; *Nasrulloyev v. Russia*, no. 656/06, § 85, 11 October 2007)?

(c) Did the courts sufficiently address the applicant's arguments concerning unlawfulness of his detention between 27 October 2007 and 10 January 2008 in the detention order of 10 January 2008 and in the appeal decision of 18 March 2008? If not, did it amount to a violation of Article 5 § 4 of the Convention (see *Klyakhin v. Russia*, no. 46082/99, §§ 76-79, 30 November 2004)?

4. Was the length of the criminal proceedings in the present case in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention?