



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

Communicated on 25 March 2014

FIRST SECTION

Application no. 51311/12
Mokhammed MAKHMUD
against Russia
lodged on 30 July 2012

STATEMENT OF FACTS

The applicant, Mr Mokhammed Makhmud, is a Somali national, who was born in 1979 and is currently detained in remand prison IZ-47/5 of St Petersburg. He is represented before the Court by Mr S.A. Golubok, a lawyer practising in St Petersburg.

A. The circumstances of the case

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

1. Background to the case

On an unspecified date the applicant arrived to Russia. He was granted refugee status by the Russian authorities. He is married; his wife and child live in Russia. On an unspecified date he asked the US authorities for the asylum and his application was granted.

2. Criminal proceedings against the applicant

According to the Russian authorities, the applicant was involved in illegal transportation of four illegal migrants from Russia to Finland. On 14 May 2012 Mr Kh.M. offered a bribe of 4,000 US dollars to a border guard officer; however, the latter reported the situation to the police. A criminal case into attempted bribery was opened the same day. The applicant was prosecuted along with Mr. Kh.M. as being allegedly involved in the crime.

On 28 May 2012 the applicant was arrested and formally charged with the imputed crime. The same day, the investigator lodged with the court a request to remand the applicant in custody.

On 29 May 2012 the Primorskiy District Court of St Petersburg (the District Court) adjourned examination of the investigator's request for seventy-two hours and extended the applicant's detention until 6 p.m. of 31 May 2012. The decision was amenable to appeal, however, it appears that no appeal followed.

On 31 May 2012 the District Court examined the investigator's request and remanded the applicant in custody. The detention order was pronounced at 7.30 p.m. The court noted that the applicant was a foreign national, that he had no permanent place of residence in Russia – neither *de facto* nor *de jure* (i.e. residence registration), that he was charged with a serious crime, that the suspicion of his involvement in that crime was a reasonable one and that he had no official job or any stable income. The court also noted that his application for US citizenship was pending before US Consulate in Russia. Having regard to the above, the court concluded that the applicant could abscond, put pressure on the witnesses (foreign nationals known to him) and interfere with the course of justice.

On 1 June 2012 the applicant's counsel lodged an appeal against the detention order. The grounds of appeal were also signed by the applicant and contained a request to ensure his participation in the appeal hearing.

On 12 July 2012 the St Petersburg City Court quashed the detention order of 31 May 2012 on appeal as flawed and ordered re-examination of the applicant's case by the first-instance court. The applicant was absent from the hearing. His counsel and the prosecutor were present. It appears that the court did not consider the question whether the applicant had been summoned to the hearing and whether his personal participation was required. The court also authorised the applicant's detention for 12 days until 23 July 2012 stating as follows:

“Taking into account the circumstances on the basis of which the detention order was quashed, having regard to the gravity of the charge and information concerning [his] personality, the appeal court considers it necessary to choose [in respect of the applicant] a preventive measure in the form of detention until the decision of the first-instance court on the investigator's request.”

On 19 July 2012 the District Court examined the case anew and, referring to the same reasons as before, authorised the applicant's detention from 28 May until 28 July 2012. The court noted that the applicant's refugee status, his permanent place of residence and dependent family members (wife and child) did not justify an alternative preventive measure. The court also referred to the applicant's testimony given at the hearing that he had arrived in St Petersburg with intention to eventually leave Russian territory.

On 20 July 2012 the applicant's counsel appealed. He argued, in particular, that the applicant had arrived to St Petersburg before the imputed crime. Even if eventually he planned to leave Russia, it did not mean that he would try to abscond from the investigation when it started. The grounds of appeal contained a request to ensure the applicant's participation in the appeal hearing in person.

The same day, on 20 July 2012, the District Court, relying on the reasoning as before, extended the applicant's pre-trial detention for 17 days until 14 August 2012.

On 3 September 2012 the St Petersburg City Court, having repeated the reasons contained in the detention order of 19 July 2012 by the District Court, upheld that detention order on appeal. The applicant was absent from the hearing. His counsel and the prosecutor were present. It appears that the court did not rule on the request for the applicant's personal participation in the hearing and did not examine the question whether he had been summoned to the hearing.

On an unspecified date the applicant's detention was extended for one month until 14 September 2012.

On 12 September 2012, repeating the same reasons as before and referring to the need to carry out a number of unspecified investigative actions, the District Court extended his detention for one month until 14 October 2012. The applicant specified at the hearing that his asylum request was pending before the US Embassy in Moscow and that his passport had been lost after his arrival to Russia.

On 13 September 2012 the St Petersburg City Court upheld on appeal the detention order of 20 July 2012 as lawful and well-founded.

On 12 December 2012 the District Court extended the applicant's detention until 29 January 2013.

On 13 December 2012 the St Petersburg City Court refused the applicant's counsel's appeal against the detention order of 12 September 2012.

On 28 December 2012 the applicant's and his co-defendant's criminal case arrived at the St Petersburg City Court for trial.

On 22 January 2013 the St. Petersburg City Court held a preparatory hearing, and, on its own initiative, examined the issue of the extension of the applicant's detention, since it was about to expire on 29 January 2013. The Court heard submissions of the parties on the subject and extended the applicant's detention pending trial for six months until 28 June 2013. Finally, the City Court referred the case to the District Court according to new rules of jurisdiction which entered into legal force on 1 January 2013.

On 25 January 2013 the applicant's counsel lodged an appeal.

On 14 March 2013 the St Petersburg Regional Court upheld the detention order of 22 January 2013 on appeal. It noted that the court's power to examine the detention issue on its own initiative was perfectly compatible with procedural law.

On 4 June 2013 the District Court, by a collective detention order in respect of both co-defendants, extended the applicant's detention for three months until 28 September 2013.

On 4 September 2013 the St Petersburg City Court upheld the detention order.

On 26 September 2013 the District Court extended the applicant's detention until 28 December 2013. The applicant was in detention pending trial at least until 2 January 2014. The outcome of the proceedings remains unknown.

B. Relevant domestic law and practice

1. Right to be heard in detention proceedings

The Code of Criminal Procedure of the Russian Federation, in force as from 1 July 2002 (CCrP), allows the court to take a decision to place the accused in custody in his absence only if an international warrant for his arrest has been issued (Article 108 § 5). No extension of detention may be ordered by the court in the absence of the accused, unless the latter is undergoing forensic psychiatric examination in an in-patient institution or in other circumstances that make it impossible to bring him to court, which circumstances shall be confirmed by appropriate documentation (Article 109 § 13). If these circumstances apply, the participation of the defense counsel in the court hearing shall be ensured (*ibid.*).

In its judgment no. 4-*P* of 22 March 2005 the Constitutional Court of the Russian Federation pronounced its opinion on the right of defendants to be heard in detention matters during the criminal proceedings and stated as follows:

“3.3. ... Since deprivation of liberty ... is permissible only pursuant to a court decision, taken at a hearing ... on condition that the detainee has been provided with an opportunity to submit his arguments to the court, the prohibition on issuing a detention order ... without a hearing shall apply to all court decisions, whether they concern the initial imposition of this preventive measure or its confirmation.”

2. 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:

“3.1. ... 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 a hearing. ... 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-foundedness; [it is connected] with the need to ensure the conditions for the further conduct of the criminal case.”

COMPLAINTS

1. The applicant complains under Article 5 § 3 that his detention on remand has been unreasonably long and that it has not been based on relevant or sufficient reasons.

2. He complains under Article 5 § 4 that his appeals against the detention orders of 31 May 2012, 19 July 2012, 20 July 2012, 12 September 2012, 22 January 2013 and 4 June 2013 were not examined “speedily”.

3. He complains under Article 5 § 4 that he was not afforded an opportunity to be present at the appeal hearings of 12 July 2012 and 3 September 2012, despite his requests to this effect.

4. He complains under Article 5 § 4 that the detention order of 22 January 2013 was issued by the St. Petersburg City Court on its own initiative and, therefore, in breach of the principle of adversarial proceedings.

5. Lastly, he complains that on 12 July 2012 the St Petersburg City Court extended his pre-trial detention on its own initiative, without the parties being heard on this issue.

QUESTIONS TO THE PARTIES

1. Was the applicant’s detention between 12 and 19 July 2012 compatible with the requirements of Article 5 § 1 (c) of the Convention? In particular, were the parties heard on the issue of the extension of the applicant’s detention at the appeal hearing of 12 July 2012? If not, did that amount to a “gross and obvious irregularity” making the detention order of 12 July 2012 invalid *ex facie* (see, *mutatis mutandis*, *Abashev v. Russia*, no. 9096/09, § 37, 27 June 2013; *Mooren v. Germany* [GC], no. 11364/03, § 84, 9 July 2009; *Lloyd and Others v. the United Kingdom*, nos. 29798/96 et seq., §§ 115-19, 1 March 2005), given “the prohibition on issuing a detention order without a hearing” (see judgment no. 4-*P* of 22 March 2005 by the Russian Constitutional Court, Relevant domestic law and practice)?

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”?

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 12 July and 3 September 2012? Did the appeal court examine the applicant's requests for personal participation in these appeal hearings? Did the appeal court consider the question whether the applicant had been summoned to the hearings and whether his personal participation was required for the effective review of the lawfulness of his continued detention (see *Idalov v. Russia* [GC], no. 5826/03, §§ 162-64, 22 May 2012)? Was the applicant summonsed to these appeal hearings?

The parties are invited to produce minutes of the appeal courts hearings in issue and the summons, if any.

(b) Was the defence heard on the issue of the extension of the applicant's detention at the appeal hearing of 12 July 2012 (see *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012)? Was the St Petersburg Court impartial, given that it extended the applicant's detention on 12 July 2012 on its own initiative (see *D.N. v. Switzerland* [GC], no. 27154/95, § 42, ECHR 2001-III; *Nasrulloev v. Russia*, no. 656/06, § 85, 11 October 2007)? Did that court act in the interests of the prosecution in that case and was its power to issue the detention on its own initiative compatible with the principle of adversarial proceedings (see, *mutatis mutandis*, *Ozerov v. Russia*, no. 64962/01, §§ 53-54, 18 May 2010; *Svetlana Naumenko v. Ukraine*, no. 41984/98, § 97, 9 November 2004)?

(c) Was the detention hearing of 22 January 2013 before St Petersburg City Court compatible with the principles of adversarial proceedings and judicial impartiality enshrined in Article 5 § 4 of the Convention, given that the court raised the issue of extension of the applicant's detention on its own initiative (see *Nasrulloev v. Russia*, no. 656/06, § 85, 11 October 2007)?

(d) Were the applicant's appeals against the detention orders of the Primorskiy District Court of St Petersburg of 31 May 2012, 19 July 2012, 20 July 2012, 12 September 2012, 22 January 2013 and 4 June 2013 considered "speedily"?