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

Communicated on 15 May 2014

FIRST SECTION

Application no. 44893/10
Sergey Vasilyevich ZHERNOSEK
against Russia
lodged on 15 July 2010

## STATEMENT OF FACTS

The applicant, Mr Sergey Vasilyevich Zhernosek, is a Belarusian national, who was born in 1981 and lives in Polotsk.

### A. The circumstances of the case

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

It appears that in 2007 the applicant temporarily stayed in the Moscow Region.

On 18 December 2007 the Moscow Region prosecuting authorities instituted criminal proceedings on account of robbery.

On unspecified date the applicant, together with three other persons, was charged with robbery and placed in custody.

On 13 October 2009 the Moscow Regional Court extended the term of the applicant's detention until 17 December 2009.

On 4 December 2009 the criminal case against the applicant was transferred for examination to the Naro-Fominsk Town Court of the Moscow Region (the Naro-Fominsk Town Court).

On the same date the Naro-Fominsk Town Court scheduled a preliminary hearing for 11 December 2009.

On 11 December 2009 the Naro-Fominsk Town Court returned the criminal case to the prosecutor having ordered to rectify certain defects. It noted, in particular, that after certain additional investigative steps had been taken, the accused were not provided with an opportunity to study the relevant case materials. At the same time the court ordered the preventive measure applied to the applicant to remain unchanged and extended the term of the applicant's and the three co-accused's pre-trial detention up to thirty days. It stated, in particular, that they were charged with a grave

offence, if released, they could flee from justice, exert pressure on witnesses and continue criminal activity as they had neither a permanent place of residence in Russia nor a stable income. The court dismissed the accused's counsel's argument that the organised criminal group had ceased to exist, and that the initial reasons for the applicant's detention lost their relevance.

The prosecutor appealed against the decision to return the criminal case for rectification of defects. The case was subsequently transferred to the Moscow Regional Court for the examination of the prosecutor's appeal.

On an unspecified date judge K. informed in writing the head of the remand prison SIZO no. 50/4 of Mozhaysk, where the applicant was being held, that the Naro-Fominsk Town Court had extended the term of his and the other three co-accused's term of pre-trial detention up to thirty days, that is until 16 January 2010.

On 13 January 2010 the head of the remand prison SIZO no. 50/4 informed the Moscow Regional Court that the applicant's term of detention was to expire on 16 January 2010 and that, in the absence of an extension of his detention, he should be released on that date.

On 14 January 2010 judge M. of the Moscow Regional Court sent to the head of the remand prison SIZO no. 50/4 a letter stating as follows:

> "... [T]he Moscow Regional Court received... the criminal case on 31 December 2009 together with [the prosecutor's] appeal against the decision of the Naro-Fominsk Town Court of 11 December 2009.
>
> At the same time I clarify that the Naro-Fominsk Town Court received the case on 4 December 2009.
>
> By a decision of the same court of 4 December 2009 the preventive measure applied to the accused remained unchanged.
>
> Under Article 255 § 2 of the Code of Criminal Procedure, if detention as a preventive measure is applied to an accused, his term of detention is six months from the moment of receipt of the criminal case by the court.
>
> Therefore, the term of detention pending judicial proceedings expires on 4 June 2009.
>
> By the decision of the Naro-Fominsk Town Court of 11 December 2009, adopted upon the results of the preliminary hearing, the criminal case was returned to the prosecutor of the Moscow Region. At the same time the preventive measure ... remained unchanged. The term of detention following the return of the case to the prosecutor, that is after the entry into force [of the ruling] is thirty days. However, the decision in the part related to the return of the case to the prosecutor has not entered into force [being appealed against].
>
> Therefore, the judicial proceedings in the case will be pending until [the appeal] is examined by the court of appeal. This means that the six month time-limit which started on 4 December 2009 keeps running. This time-limit will stop running only if the appeal court upholds the ruling of 11 December 2009, following which the case will be pending before the prosecutor. Then the term of detention set in the decision of 11 December 2009 will start running from this date.
>
> Therefore, as noted above, at present the time-limit for detention of the accused is 4 June 2010."

The applicant remained in detention after 16 January 2010 on the basis of the above letter.

On 21 January 2010 counsel B. applied to the Moscow Regional Court with a request to release the applicant. He relied on the ruling of the Constitutional Court no. 4-P of 22 March 2005 and argued that the

applicant's term of detention authorised by the Naro-Fominsk Town Court on 11 December 2009 had expired and that, therefore, he was being detained unlawfully.

On 28 January 2010 the Moscow Regional Court, upon the prosecutor's appeal, altered the decision of the Naro-Fominsk Town Court of 11 December 2009 having amended its reasoning. It however upheld the decision to return the case to the prosecutor. The Moscow Regional Court also held that the thirty days term of detention authorised by the Naro-Fominsk Town Court on 11 December 2009 started running from 28 January 2010 and would expire on 26 February 2010. It further stated that from 4 December 2009, when the case was received by the Naro-Fominsk Town Court, and until the entry into force of the decision to return the case to the prosecutor, the accused were deprived of liberty on the basis of Article 255 § 2 of the Code of Criminal Procedure providing for six month time-limit for detention pending trial, which had not expired.

On 10 February 2010 the prosecutor lodged an application for supervisory review of the decision of the Naro-Fominsk Town Court of 11 December 2009 and the decision of the Moscow Regional Court of 28 January 2010.

On 17 February 2010, within the framework of the supervisory review proceedings, the Presidium of the Moscow Regional Court quashed the decision of the Naro-Fominsk Town Court of 11 December 2009 and the decision of the Moscow Regional Court of 28 January 2010 and sent the case for a fresh examination at a preliminary hearing to the Naro-Fominsk Town Court. At the same time the court extended the term of detention in respect of the four accused until 26 May 2010, having stated no reasons for the extension.

On 20 April 2010 the Naro-Fominsk Town Court held a preliminary hearing. In the course of the hearing counsel B. asked to release the applicant on bail. Counsel B. also asked the court to confirm the applicant's right to compensation on account of his unlawful detention without a court order between 16 and 28 January 2010.

On the same date the Naro-Fominsk Town Court examined counsel B.'s application for the applicant's release as well as the application of release lodged by one of his co-accused, D., and dismissed them on the following grounds:

> "- the accused ... are charged with particularly grave offences;
>
> - the accused are citizens of another State, [they] have neither a place of residence nor registration in Russia, [they do not have] stable social connections either;
>
> - the accused have no official sources of income and, taking into account the charges against them, can flee from justice and continue criminal activity;
>
> - the grounds for initial application of detention as a preventive measure to the accused remain relevant."

Also on 20 April 2010 the Naro-Fominsk Town Court scheduled a hearing of the case and extended the applicant's and the three co-accused's detention until 26 August 2010. The court relied on the following grounds for the extension of detention:

> "- [the accused] are charged with particularly grave offences, punishable by a deprivation of liberty;

- the accused are citizens of another State, and do not have in Russia either registration, or a place of residence, or official sources of income, or stable social connections;

- taking into account the gravity and the social danger of the offences they are charged with [and] information about their personalities, the court considers that, if released, they can either flee from justice or continue criminal activity;

- at present the grounds ... for initial application of detention as a preventive measure to the accused remain relevant."

Counsel B. appealed against both decisions. With a reference to Ruling no. 5 of 10 October 2003 the Supreme Court and to the Court's case-law he pointed out that the courts had failed to rely on any evidence corroborating the alleged risk of the applicant's interfering with the evidence in the case or fleeing from justice. He noted, furthermore, that the courts had failed to examine the application of other preventive measures, such as release on bail. Counsel B. also complained about the applicant's detention without a court order between 16 and 28 January 2010.

On 3 June 2010 the Moscow Regional Court dismissed the appeal and upheld both decisions of the Naro-Fominsk Town Court. The Moscow Regional Court stated:

"... the judge was right to extend the term of [the applicant's and another co-accused's] detention and dismissed the application to choose a different preventive measure that would not entail deprivation of liberty. [The] reasons are stated in the court's decisions.

The decision to extend the term of [the applicant's and another co-accused's] detention is in accordance with Articles 109 and 255 of the Code of criminal procedure, and there are no grounds to change the preventive measure.

The arguments ... that the reasons for the extension of the term of detention contradict international treaties on human rights are groundless since the court took a decision in compliance with the requirements of the law on criminal procedure, which corresponds to the international norms on human rights and freedoms."

## B. Relevant domestic law

### *1. Constitution*

Article 22 part 2 of the Constitution of the Russian Federation provides that detention should be authorised by a court order. Detention without a court order is permitted only for up to 48 hours.

### *2. Code of Criminal Procedure*

The Code of Criminal Procedure of 2001 provided, as in force at the material time:

**Article 108. Pre-trial detention**

"1. Pre-trial detention as a measure of restraint shall be applied by a court only where it is impossible to apply a different, less severe, precautionary measure ...

...

3. When the need arises to apply detention as a measure of restraint ... the investigating officer should request the court accordingly ...

4. [The request] should be examined by a single judge of a district court ... with the participation of the suspect or the accused, the public prosecutor and the defender, if one takes part in the proceedings. [The request should be examined] at the place of the preliminary investigation, or of the detention, within 8 hours of the receipt of the [request] to the court. ... The non-justified absence of the parties, who were notified about the time of the hearing in good time, should not prevent [the court] from considering the request [for detention], except for the cases of absence of the accused person.

...

7. Having examined the request [for detention], the judge should take one of the following decisions:

1) to apply pre-trial detention as a measure of restraint in respect of the accused;

2) to dismiss the request [for detention];

3) to adjourn the examination of the request for up to 72 hours so that the requesting party can produce additional evidence in support of the request."

**Article 109. Time-limits for pre-trial detention**

"1. A period of detention during the investigation of criminal offences may not last longer than two months.

2. If it is impossible to complete the preliminary investigation within two months and if there are no grounds for modification or cancellation of the preventive measure this time-limit may be extended by up to six months by a judge of a district or garrison court of the relevant level according to the procedure provided in Article 108 of the present Code. A further extension of this term up to 12 months may be effected in respect of persons accused of committing grave or particularly grave criminal offences only in cases of special complexity of the criminal case, and provided there are grounds for application of this preventive measure, by a judge of the same court upon application of the investigator, filed with the consent of a prosecutor of a subject of the Russian Federation or a military prosecutor of equal status.

3. A term of detention may be extended beyond 12 months and up to 18 months only in exceptional cases and in respect of persons accused of committing grave or particularly grave criminal offences by [a judge] on application by an investigator filed with the consent of the Prosecutor General of the Russian Federation or his deputy.

4. Further extension of the time-limit shall not be allowed. ..."

**Article 110. Cancellation or modification of a preventive measure**

"1. A preventive measure must be cancelled when it ceases to be necessary, or else changed into a stricter or a milder one if the grounds for application of a preventive measure ... change.

2. The cancellation or modification of a preventive measure should be effected by an order of the person carrying out the inquiry, the investigator, the prosecutor or the judge or by a court decision.

3. A preventive measure applied at the pre-trial stage by the prosecutor or by the investigator or the inquirer upon his written instructions may be cancelled or changed only with the prosecutor's approval."

**Article 123. Right to appeal**

"Actions (omissions) and decisions of the agency conducting the inquiry, the inquirer, the investigator, the prosecutor and the court may be appealed against according to the procedure provided in the present Code by the participants in the criminal proceedings and by other persons to the extent that the procedural actions carried out and procedural decisions taken affect their interests."

**Article 227. Judges' powers in respect of a criminal case submitted for trial**

"1. When a criminal case is submitted [to the court], the judge must decide as follows: either

(i) to forward the case to an [appropriate] jurisdiction; or,

(ii) to hold a preliminary hearing; or,

(iii) to hold a hearing.

2. The judge's decision shall take the form of a resolution ...

3. The decision shall be taken within 30 days of the submission of the case to the court. If the accused is detained, the judge must take the decision within 14 days of the submission of the case to the court ..."

**Article 228. Points to be ascertained in connection with a criminal case submitted for trial**

"Where a criminal case is submitted for trial, the judge must ascertain the following points in respect of each accused:

(i) whether the court has jurisdiction to deal with the case;

(ii) whether copies of the indictment have been served;

(iii) whether the measure of restraint should be lifted or changed;

(iv) whether the motions filed should be granted ..."

**Article 229. Grounds for holding a preliminary hearing**

"1. The court, upon a party's request or upon its own initiative, holds a preliminary hearing ...

2. Preliminary hearing is held:

...

(ii) where there are ground to return the case to a prosecutor in instances provided for in Article 237 of the present Code ..."

**Article 231. Setting the case for trial**

"1. When there are no grounds to take one of the decisions described in subparagraphs (i) or (ii) of the first paragraph of Article 227, the judge should assign the case for trial ... In the resolution ... the judge should decide on the following matters:

...

(vi) on the measure of restraint, except for the cases when detention on remand or house arrest are chosen ..."

**Article 237. Returning the case to the prosecutor**

"1. The court, upon a party's request or upon its own initiative, returns the case to the prosecutor for rectification of defects impeding its examination by a court in the [following] instances:

(i) if the bill of indictment was drawn up in breach of the requirements set by the present Code ...

(ii) if the bill of indictment was not served on the accused;

(iii) if it is necessary to draw up a bill of indictment in a criminal case sent to the court together with a decision on the application of compulsory measures of a medical character;

(iv) if there are grounds for joinder of criminal cases ...;

(v) if, when the accused was studying the materials of the case, his rights... were not explained to him.

2. In instances set out in paragraph 1 of the present Article the judge requires the prosecutor to rectify the deficiencies within five days.

3. When returning the case to the prosecutor the judge must decide on the preventive measure to be applied to the accused. If necessary, the judge extends the term of the accused's detention in order to take investigative and other procedural measures, taking into account the time-limits set in Article 109 of the present Code.

**Article 255. Measures of restraint during trial**

"1. During the trial the court may order, change, or lift a preventive measure in respect of the accused.

2. If the defendant has been detained before the trial, his detention may not exceed six months from the moment the court receives the case for trial to the delivery of the judgment by the court, with exceptions provided by paragraph 3 of this Article.

3. The court [...] may extend the accused's detention on remand. It is possible to extend detention only in respect of a defendant charged with serious crimes or especially serious crimes, and each time for a period of up to three months ..."

**Article 376. Setting the case down for the appeal hearing**

"1. Having received the criminal case with the points of appeal ..., the judge must fix the date, time and venue of the [appeal] hearing.

2. The parties must be notified about the date, time and venue [of the appeal hearing] no later than fourteen days before it. The court shall decide whether the convicted detainee should be summoned to the hearing.

3. A convicted detainee who has expressed a wish to be present [at the appeal hearing] shall have the right to be present personally or to submit his arguments by video link. The court shall decide in what form the participation of the convicted person in the hearing is to be secured. ..."

### *3. Constitutional Court*

On 22 March 2005 the Constitutional Court of the Russian Federation adopted Ruling no. 4-P on the complaint lodged by a group of individuals. They complained about the *de facto* extension of their detention after their case files had been sent by the prosecution authorities to the respective trial courts. The Constitutional Court found that the provisions of the Code of Criminal Procedure challenged by the claimants complied with the Constitution of the Russian Federation. However, their practical interpretation by the courts might have contradicted their constitutional meaning. 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 for 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 the measure of restraint applied at previous stages.

Therefore, when the case is transmitted by the prosecution to the trial court, the measure of restraint applied at the pre-trial stage ... may continue to apply until the expiry of the term for which it has been set in the respective court decision [imposing it] ...

> [Under Articles 227 and 228 of the Code of Criminal Procedure] a judge, after having received the criminal case concerning a detained defendant, should, within 14 days, set a hearing and establish "whether the measure of restraint applied should be lifted or changed". This wording implies that the decision to detain the accused or extend his detention, taken at the pre-trial stage, may stand after the completion of the pre-trial investigation and transmittal of the case to the court, only until the end of the term for which the measure of restraint has been set.
>
> The prosecution, in its turn, when approving the bill of indictment and transferring the case file to the court, should check whether the term of detention has not expired and whether it is sufficient to allow the judge to take a decision [on further detention of the accused pending trial]. If by the time of transfer of the case file to the court this term has expired, or if it appears to be insufficient to allow the judge to take a decision [on detention], the prosecutor, applying Articles 108 and 109 of the Code of Criminal Proceedings, [must] ask the court to extend the period of detention."

In its Ruling the Constitutional Court further held:

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

*4. Supreme Court*

In Ruling no. 5 of 10 October 2003 the Supreme Court of Russia stated as follows:

> "14. When deciding on extension of the term of detention the courts should take into account that under Article 5 § 3 of the [European] Convention on Human Rights everyone arrested or detained is entitled to trial within a reasonable time or to release lending trial.
>
> According to the ... position of the European Court of Human Rights, the length of the accused's detention is calculated from the day when the person charged (or the suspect) was placed into custody and to the day when the first-instance court delivers a judgment.
>
> It should be taken into account 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 the continued detention. However, the suspicion cannot remain the sole basis for the continued detention. There must be other circumstances in order to justify the isolation from society. Such circumstances may include, in particular, the possibility that the suspect, the charged or the accused may continue the criminal activity, or flee from the investigation or the trial, or forge evidence in the case, or collude with witnesses.
>
> At the same time such circumstances must be real [and] well-grounded, that is corroborated by reliable information. If extending the term of detention the courts must indicate concrete circumstances justifying the extension as well as evidence corroborating such circumstances."

## COMPLAINTS

The applicant complains under Article 5 of the Convention that between 16 and 28 January 2010 he was unlawfully deprived of liberty in the absence of any court order authorising his detention. He argues, in particular, that the letter of 14 January 2010 did not constitute a court order.

The applicant also complains under Article 5 § 3 of the Convention that the court decisions extending the term of his detention were not duly reasoned. He maintains that the courts extended the term of detention in respect of all the accused having failed to examine his individual situation.

The applicant further complains under Article 5 § 4 of the Convention that he had no possibility to take up judicial proceedings to contest the lawfulness of his detention between 16 and 28 January 2010. Furthermore, the courts did not examine 'speedily' counsel B.'s application for the applicant's release lodged on 21 January 2010.

## QUESTIONS TO THE PARTIES

1. Was the applicant deprived of his liberty in breach of Article 5 § 1 of the Convention? In particular, as regards the applicant's detention between 16 and 28 January 2010, was he deprived of liberty in accordance with a procedure prescribed by law?

2. Was the length of the applicant's pre-trial detention in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention?

3. Did the applicant have at his disposal an effective procedure by which he could challenge the lawfulness of his detention, as required by Article 5 § 4 of the Convention?

In particular, was it open to him to institute proceedings in order to challenge the lawfulness of his detention between 16 and 28 January 2010?

When did the domestic courts examine the application for release lodged by the applicant's counsel on 21 January 2010? Did the length of the proceedings on the application for release comply with the "speed" requirement of Article 5 § 4 of the Convention?