



16-day period for judicial review of prosecutor's order for detention pending extradition was excessive

In today's Chamber judgment in the case of [Shcherbina v. Russia](#) (application no. 41970/11), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 5 (enforceable right to compensation for unlawful detention) in conjunction with Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, and

a violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court).

The case concerned the detention pending extradition from Russia to Kazakhstan of a man wanted by the Kazakh authorities, and in particular the duration of the review proceedings examining the lawfulness of his detention order.

The Court held that the period of 16 days between Mr Shcherbina's request for review of the detention order and the relevant court decision had been excessive, given that the original detention order had been issued by a prosecutor, not by a judge.

Principal facts

The applicant, Aleksandr Shcherbina, was born in 1970. His nationality – Kazakh or Russian – is the subject of controversy between the parties.

Having fled to Russia from Kazakhstan in 2001, while on leave from serving a term of imprisonment in an "open colony", Mr Shcherbina was arrested and detained in Russia on 28 February 2011 on order of the Kaluga (Russia) town prosecutor, following an extradition request by the Kazakh authorities.

On 30 March 2011 Mr Shcherbina challenged that detention order before the competent district court. A first hearing of his complaint on 8 April was adjourned due to the fact that the prosecutor challenged the judge, on the ground that she had already participated in the examination of a previous extradition case in respect of Mr Shcherbina in 2007, when she had ordered his release and he had eventually not been extradited. On 15 April 2011, another judge of the district court found that his detention, in the absence of a detention order by a Russian court, was unlawful. At the same time, the court ordered his detention pending extradition to Kazakhstan, an extradition order having in the meantime been issued by the Deputy Prosecutor General. On 28 April 2011 a regional court quashed the detention order, finding that there was no risk of absconding, and Mr Shcherbina was released. The order for his extradition was subsequently upheld.

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

Complaints, procedure and composition of the Court

Relying in particular on Article 5 § 1 (right to liberty and security), Mr Shcherbina complained that his detention from 28 February to 28 April 2011 had been unlawful. Relying further, in particular, on Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), he complained that his request for a review of the prosecutor's detention order had not been speedily examined.

The application was lodged with the European Court of Human Rights on 8 July 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle **Berro-Lefèvre** (Monaco), *President*,
Julia **Laffranque** (Estonia),
Paulo **Pinto de Albuquerque** (Portugal),
Linos-Alexandre **Sicilianos** (Greece),
Erik **Møse** (Norway),
Ksenija **Turković** (Croatia),
Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Article 5 §§ 1 and 5

The Court found that Mr Shcherbina's detention between 15 and 28 April 2011 had not been "unlawful" within the meaning of Article 5 § 1, as it had been ordered by a court acting within its competence and in accordance with the law. This part of his complaint was therefore manifestly ill-founded and had to be declared inadmissible.

As regards the period between 28 February and 15 April 2011, the Court noted that the Government conceded, as had been found by the competent district court on the latter date, that Mr Shcherbina's detention had been unlawful. However, the Court could not agree with the Government's conclusion that he could therefore not claim to be a victim of a violation of the Convention. Under the Court's case-law, in order for an applicant to lose his victim status, the national authorities, in addition to acknowledging a violation of the Convention, had to provide him with sufficient redress. Here the applicant did not receive any compensation for the unlawful detention; consequently the applicant has not lost victim status. The same situation (alleged inability to obtain a compensation) also raised an issue under Article 5 § 5 (enforceable right to compensation for unlawful detention).

In that respect, the Court noted the Government's submission that there had been a compensatory remedy available to Mr Shcherbina, which he had failed to use and that he had therefore not exhausted the remedies at national level. However, having regard to the provisions of Russian law referred to by the Government, the Court was not persuaded that Mr Shcherbina's claim for damages would have had chances of success. It observed in particular that the rules on compensation for damage caused by the application of a custodial measure contained in the Code of Criminal Procedure were not applicable to detention pending extradition to another country, as in his case. It was also doubtful whether Mr Shcherbina had been entitled to seek compensation under the Civil Code on the basis of the authorities' strict liability for unlawful detention, as that liability was limited to certain forms of deprivation of liberty – such as in the context of criminal proceedings – and it was not certain whether those rules would cover detention pending extradition.

In view of that uncertainty, the Court concluded that Mr Shcherbina had not had an enforceable right to compensation for his unlawful detention. There had accordingly been a violation of Article 5 § 5 in conjunction with Article 5 § 1.

Article 5 § 4

The Court observed that the period between Mr Shcherbina's appeal against the prosecutor's detention order, on 30 March 2011, and the district court's decision, on 15 April 2011, had amounted to 16 days. Such a period might not raise an issue under Article 5 § 4 in cases where the original detention was imposed by a court and then reviewed by a higher court. However, in Mr Shcherbina's case the original detention order had not been issued by a judge but by a prosecutor who was not a part of the judiciary.

Furthermore, the decision-making process leading to the detention order of 28 February 2011 had not offered the guarantees of due process: the decision had been taken without any involvement of Mr Shcherbina. Moreover, as the district court found in its decision of 15 April 2011, the prosecutor had had no powers to order his detention.

The Court also noted that Mr Shcherbina's case had not been very complex and there was no evidence that after lodging his application for release on 30 March he had contributed in any way to the duration of the detention proceedings and to the delay in the judicial review.

In view of those circumstances, the Court considered that the standard of "speediness" of judicial review under Article 5 § 4 of the Convention came closer to the standard of "promptness" under Article 5 § 3, which requires that a detained person "shall be brought promptly before a judge". The Court therefore concluded that the delay of 16 days in the judicial review of the detention order of 28 February 2011 had been excessive. There had accordingly been a violation of Article 5 § 4.

Just satisfaction (Article 41)

The Court held that Russia was to pay Mr Shcherbina 6,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,650 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.