



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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54825/00
by Evgen NEVMERZHITSKY
against Ukraine

The European Court of Human Rights (Second Section), sitting on 28 January 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Court of Human Rights on 21 June 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Evgen Nevmerzhitsky, is a Ukrainian national, who was born in Kyiv in 1970 and currently resides there. He was formerly the manager of a branch of the Poltava Bank in Kyiv.

A. The circumstances of the case

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

1. Criminal proceedings brought against the applicant

On 28 September 1995 police officers seized 184,761 US dollars (USD) that had been stored by the applicant on the premises of the Poltava Bank in readiness for their sale to a customer, Mr Y.G. Lukov.

On 18 October 1995 the Investigative Division of the Main Department of the Ministry of Internal Affairs of Ukraine in Kyiv (“the Investigative Division”) began a criminal investigation into allegations of unlawful currency transactions that had allegedly been committed by the applicant. On 8 April 1997 it charged the applicant and other suspects in the case. On the same date an investigator from the Division decided that the applicant should be detained pending trial in the Temporary Investigative Isolation Unit.

On 14 April 1997 an investigator from the Investigative Division charged the applicant with such criminal offences as engaging in unlawful currency transactions (Article 80-2 of the Criminal Code of Ukraine - hereafter the “CCU”), theft of substantial amounts (Article 86-1 of the CCU) and tax evasion (Article 148-5 of the CCU).

From 15 January 1998 until 14 April 1998 the applicant lodged applications with the Investigative Department for a medical examination and challenged the appointment of the investigator. On 7 April 1998 the General Prosecution Service of Ukraine instructed the investigator to arrange for the applicant’s medical examination. The doctors who examined the applicant recommended that he should receive medical treatment in a facility run by the Ministry of Health.

On 8 September 1998 the investigation into the case was completed and the accused were allowed to inspect the case-file. On 9 August 1999 the accused finished their inspection.

On 1 November 1999 the Kyiv City Court remitted the case to the Prosecution Service of Kyiv for an additional investigation (*додавкове розслідування*). On 5 November 1999 the Prosecution lodged a separate application (*окреме подання*) for an order to set aside the City Court ruling. On 16 December 1999 the Supreme Court of Ukraine partly granted the Prosecution’s application. Although it held that the case should be remitted for additional investigation, it specified that certain matters need not be further investigated since the information previously obtained was sufficient.

On 5 January 2000 the supplementary investigation into the case was finished and the case was provided to the applicant to allow him an opportunity to inspect the file.

On 30 October 2000 the Kyiv City Court ruled that the investigation into the charges of unlawful currency transactions should cease as criminal liability for unlawful currency transactions had been abolished and Article 80 of the CCU repealed. It also held that the applicant should remain in custody.

On 19 February 2001 the Kyiv City Court convicted the applicant of repeated financial fraud, acts in preparation of financial fraud, forgery committed by an official, aggravated forgery and abuse of power. It sentenced him to five years and six months' imprisonment and ordered the confiscation of all his personal property. It acquitted him of offences of aiding and abetting the concealment of the proceeds of currency sales, tax evasion, and aggravated fictitious trading. On the basis of the Amnesty Law of 11 May 2000 and because the applicant had already been detained for two years, ten months and fifteen days, the Kyiv City Court decided to excuse him from serving the sentence. None of the parties appealed to the Supreme Court of Ukraine.

2. Claims of Mr Pozharsky and Mr Zinevich for the recovery of money confiscated by the police

On 11 September 1998 Mr K.V. Zinevich applied to the Investigative Division to be joined as a civil party to the criminal proceedings against the applicant. He alleged that the applicant had taken USD 9,160 from him and that the money had been seized by the militia on 28 September 1995. On 11 September 1998 the Division rejected his application as unsubstantiated.

On 1 March 2001 the Kyiv City Court rejected the claims of Mr O.E. Pozharsky for the recovery of USD 175,600 which he said belonged to him and had been deposited with the applicant. On 24 May 2001 the Supreme Court of Ukraine considered a separate claim by Mr Pozharsky for the recovery of USD 175,600 which he said belonged to him but had been seized by the militia as material evidence. In its ruling the Supreme Court of Ukraine dismissed the claims made by Mr Pozharsky and his advocate as unsubstantiated. Claims made by Mr Zinevich for the recovery of a sum that had allegedly been given to the applicant and subsequently confiscated were also rejected in the course of separate proceedings.

3. Detention of the applicant

On 8 April 1997 an investigator of the Investigative Division ruled that the applicant should be detained as a suspect (*затриманий в якості підозрюваного*).

On 11 April 1997 the Prosecutor issued a warrant authorising the applicant's arrest (*санкцію на арешт*) as a preventive measure.

On 12 May 1997 the applicant applied to the Moskovsky District Court of Kyiv for orders to quash the warrant, and release him. On 28 May 1997 the District Court rejected the applicant's claims as unsubstantiated. It also held that the applicant's detention was lawful. The applicant was detained in the Temporary Investigative Isolation Unit from 8 April 1997 till 3 June 1997.

The duration of the investigation and the applicant's detention was extended on successive occasions: to six months on 29 May 1997 by the Prosecutor of Kyiv, to nine months on 1 October 1997 by the Deputy Prosecutor General of Ukraine, to twelve months on 18 December 1997 by the Deputy Prosecutor General of Ukraine and to fifteen months on 28 March 1998 by the acting Prosecutor General of Ukraine.

On 12 April 1998 the Division investigator informed the applicant that the preventive measure of detention could be replaced by release on bail. The Prosecutor of Kyiv informed the applicant by a letter of 20 July 1998 that bail had been fixed in the sum of UAH 232,716. On 22 July 1998 that amount was remitted to the account of the Main Department of the Ministry of Internal Affairs in Kyiv by the UKRINBANK (the surety and the applicant's former employer). On 19 August 1998 the Main Department returned the sum and refused to release the applicant on bail.

On 30 June 1998 the acting Prosecutor General of Ukraine extended the term of the investigation and of the applicant's detention for another three months (until the 30 September 1998) bringing the total period to eighteen months.

On 1 November 1999 the Kyiv City Court refused to vary the preventive measure, requiring the applicant to remain in custody. On 16 December 1999 the Supreme Court of Ukraine upheld that decision.

The applicant was detained during the Prosecution's further investigation from 1 November 1999 onwards. On 22 February 2000, owing to the expiry of the maximum statutory period of detention, the Prosecution released the applicant on his undertaking not to abscond.

Following his release the applicant was admitted to the Kyiv City Hospital from 24 February 2000 till 17 March 2000. He continued to receive medical treatment thereafter under the general supervision of a psychiatrist.

3. Articles in the newspapers

i. On 26 November 1998 the Prosecutor General of Ukraine, Mr M. Potbenko, said in an interview to the *Uryadoviy Kur'er* (Урядовий Кур'єр) newspaper "the investigation with regard to the ex-chairman of the Kyiv branch of Poltava-Bank, Mr Nevmerzhytsky, shows that he committed financial fraud as a member of an organised group, embezzling UAH 1,500,000, violated currency exchange rules to the tune of 2,500,000 dollars and misappropriated UAH 55,000 of the bank's funds..."

ii. On 3 December 1998 the Chairman of the Presidential Co-ordinating Committee for Combating Organised Crime and Corruption,

Mr V. Durdynets, informed the newspaper Facy (Факти) that "... the Chairman of the Kyiv branch of the Poltava Bank had stolen UAH 1,500,000".

4. Hunger-strike and forced feeding

The applicant went on hunger-strike from 7 April 1998 until 7 May 1998, consuming only water. On 7 May 1998 he was subjected to forced feeding. On 1 December 1999 the doctor of the detention facility issued a statement that the applicant was receiving medical treatment and, because of his continuing hunger-strike, was being forcibly fed.

5. Complaints to the Constitutional Court of Ukraine

On 2 February 2000 the applicant's sister, on behalf of the applicant, lodged complaints with the Constitutional Court of Ukraine seeking to establish that it was unconstitutional to hold the applicant in custody when the maximum statutory term of detention had expired. She also petitioned the Constitutional Court for a ruling that Article 156 of the Code of Criminal Procedure, which allowed suspects to be detained while the case was being investigated, was unconstitutional. On 25 February 2000 the Secretariat of the Constitutional Court rejected her complaints, holding that it had no jurisdiction to consider them.

B. Relevant domestic law

1. Constitution of Ukraine of 26 June 1996

Article 29

"Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law."

2. The Code of Criminal Procedure of Ukraine

Article 156: Periods of detention during an investigation

"Detention during pre-trial investigations shall not exceed two months. In cases in which it is impossible for the investigation of the case to be completed within the period provided for by Part One of this Article and there are no grounds for discontinuing the preventive measure or substituting a less restrictive measure, the period of detention may be extended:

(1) to four months - on an application approved by the prosecutor who supervises compliance with the laws by bodies of inquiry and pre-trial investigation or by the prosecutor who, or a judge of the court which, issued the order for the application of the preventive measure;

(2) to nine months - in cases of serious and especially serious crimes, on an application approved by the deputy Prosecutor General of Ukraine, the prosecutor of the Autonomous Republic of Crimea, the regions, the cities of Kyiv and Sevastopol and prosecutors assimilated thereto or by the same prosecutor submitted for consideration to a judge of an appellate court;

3) to eighteen months - in particularly complex cases involving especially serious crimes, on an application by the Prosecutor General of Ukraine, his Deputy or by the same prosecutor submitted for consideration to a judge of the Supreme Court of Ukraine;

In every case in which it is impossible to complete the investigation in full within the periods specified in Parts One or Two of this Article, the prosecutor supervising compliance with the law during the investigation into the case shall have the right to consent to the charge for which there is evidence being referred to the court. In such event the part of the case concerning uninvestigated crimes or criminal offences shall, in accordance with the requirements of Article 26 of this Code, be severed into a separate set of proceedings and completed under the general procedure.

The period of detention during the investigation shall be calculated from the moment the detention is ordered and, if the detention was preceded by time spent in police custody, from the moment of arrest. The period of detention shall include any time spent by the person concerned in undergoing expert examination as an in-patient in a psychiatric medical institution of any type. In the event of repeated detention orders being made against a person in the same case or in a case joined to it or severed from it or of new charges being brought, previous periods of detention shall be taken into account when calculating the length of the detention.

The period of detention during pre-trial investigations shall expire on the day the court receives the case-file; however, the time it takes for the accused and his representatives to familiarise themselves with the materials in the criminal case-file shall not be included in the calculation of the period for which the accused has been detained as a preventive measure.

In the event that the case is withdrawn from the court by a prosecutor on the basis of Article 232 of this Code, time shall start to run again on the day the case is received by the prosecutor.

In the event that the case is returned by the court to the prosecutor for a supplementary investigation the period of detention shall be calculated from the moment the case is received by the prosecutor and shall not exceed two months. The period specified shall be further extended by taking into account the time the accused was held in detention before the referral of the case to the court, in accordance with the procedure and within the time-limit prescribed by Part Two of this Article.

In the event of expiry of the maximum period for detention as a preventive measure allowed by Parts One and Two of this Article then, unless the period was extended pursuant to the procedure established by this Code, the body of inquiry, the investigator, or the prosecutor shall be obliged to release the person from custody without delay.

Governors of pre-trial detention centres shall promptly release from custody any accused in respect of whom a court order extending the period of detention has not been received by the time the period of detention allowed by Parts One, Two and Six of this Article expires. They shall send notice to the person or body before whom the case is pending and to the prosecutor supervising the investigation (Article 156 in the wording of Law no. [1960-12](#) of 10 December 1991, as amended by Laws nos. [2857-12](#) of 15 December 1992, [3351-12](#) of 30 June 1993; in the wording of Law no. 2533-III of 21 June 2001 – which entered into force on 29 June 2001).”

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that he was subjected to inhuman or degrading treatment or punishment whilst remanded in custody.

2. The applicant next complains under Article 5 §§ 1(c) and 3 of the Convention that:

a. he was arrested unlawfully, he was not brought before a judge promptly and was unlawfully denied release on bail;

b. the amount set as a surety for release on bail was unreasonable;

c. the length of his detention was unreasonable and the detention was unlawful once the maximum statutory period of detention had expired.

3. The applicant complains under Article 6 of the Convention that:

a. the Ukrainian courts’ decision regarding the money confiscated by the militia and allegedly belonging to private individuals was incorrect;

b. the principle of the presumption of innocence was violated by the General Prosecutor of Ukraine and the Head of the Co-ordinating Committee for Combating Organised Crime and Corruption;

c. neither he nor his advocates were given enough time to prepare his defence, owing to the volume of evidence in the case and the time needed to become acquainted with the case-file.

4. The applicant also complains under Article 13 of the Convention of a lack of effective remedies for his claims and complaints, including the complaints regarding compulsory medical treatment.

THE LAW

1. The applicant complains that he was subjected to inhuman or degrading treatment, since he was detained even though he was suffering from a number of chronic diseases. He also complains of a lack of adequate medical treatment while in custody and of unsatisfactory conditions of detention. He maintains that his forced feeding when on hunger strike caused him substantial mental and physical suffering. In particular, the manner of its administration was degrading. He complains that he was handcuffed to a heating appliance, in the presence of guards and a guard

dog, and held down by the guards while a special medical tube was used to feed him. He refers to Article 3 of the Convention which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicant alleges that his detention was unlawful, he was not brought before a judge promptly and was denied release on bail. He relies on Article 5 §§ 1 (c) and 3 of the Convention, which provides:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

a. As to the applicant’s complaints that his detention was unlawful, the Court notes that it had been authorised by a prosecutor on 11 April 1997 and was subsequently reviewed by the Moskovsky District Court on 28 May 1997. The Court finds that, since he did not lodge his application with the Court until 21 June 1999, the applicant has not complied with the six-months time-limit laid down for the introduction of complaints. It follows that these complaints must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

b. As to the applicant’s complaints that he was not brought before a judge promptly to have the lawfulness of his arrest reviewed, the Court considers that the facts and decisions of which the applicant complains relate to the period between April and May 1998, and therefore fall outside the six-month time-limit laid down for the introduction of complaints to the Court.

It follows that this complaint was made out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

c. In so far as the applicant complains that he was unlawfully denied release on bail and that the amount set as surety for bail was unreasonable, the Court considers that the facts and decisions of which the applicant complains (which were all prior to 19 August 1998), also fall outside the six-month time-limit for introduction of complaints to the Court.

It follows that this complaint was made out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

d. As to the applicant's complaints about the length of his pre-trial detention and in particular the period from 30 September 1998 to February 2000, the Court considers that it cannot, on the basis of the case-file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. The applicant next complains under Article 6 §§ 2 and 3(b) of the Convention of a breach of the principle of the presumption of innocence, that he was not allowed enough time to prepare his defence and that the courts' decision regarding confiscation of money by the militia was wrong.

In particular, he refers to Article 6 §§ 2 and 3 (b), which, in so far as they are relevant, provide:

“2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: ...

(b) to have adequate time and facilities for the preparation of his defence; ...”

a. As to the alleged violation of the principle of the presumption of innocence by the General Prosecutor of Ukraine and the Head of the Coordinating Committee for Combating Organised Crime and Corruption, the Court considers that the applicant did not exhaust all the domestic remedies available to him before applying to the Court, as required Article 35 § 1 of the Convention. In particular, he did not appeal to the Supreme Court of Ukraine against his conviction on 19 February 2001, and failed to challenge the statements of the above-mentioned officials in the course of separate civil or criminal proceedings. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

b. In so far as the applicant complains that, owing to the volume of evidence and the time needed to become acquainted with the case-file, he and his advocates did not have enough time to prepare his defence when the case was remitted for trial, the Court again notes that the applicant did not appeal to the Supreme Court of Ukraine raising those complaints. It follows that this complaint must also be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

c. In so far as the applicant complains that the domestic courts' decision with regard to the money confiscated by the militia was erroneous, the Court finds that he cannot be considered a victim with regard to these complaints, since the sums confiscated allegedly belonged to third parties. It follows that this complaint must be rejected as being incompatible *ratione personae*, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. Finally, the applicant also complains of a lack of effective remedies for his complaints, including those concerning the forced feeding. He refers to Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The Court considers that in substance the applicant complains that all his submissions, petitions, complaints and appeals lodged with State bodies, including judicial bodies, were rejected and none of them was allowed, i.e. he complains of their outcome. The Court notes that the applicant had a range of remedies at his disposal and availed himself of them on several occasions. The fact that the outcome of those proceedings was unfavourable does not suffice to raise an issue under Article 13. The Court recalls that the remedy within the meaning of Article 13 does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of the complaint (see *K. v. the United Kingdom*, application no. 11468/85, Commission decision of 15 October 1986, DR 50, p. 199).

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to communicate the applicant’s complaints with regard to his forced feeding, detention conditions and the length and lawfulness of his detention, to the respondent Government;

Declares the remainder of the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President