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

SECOND SECTION

CASE OF GIGOLASHVILI v. GEORGIA

(Application no. 18145/05)

JUDGMENT

STRASBOURG

8 July 2008

FINAL

08/10/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gigolashvili v. Georgia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 17 June 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 18145/05) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Koba Gigolashvili ("the applicant"), on 27 April 2005.

2. The applicant was represented by Mr Malkhaz Jangirashvili, a lawyer practising in Tbilisi. The Georgian Government ("the Government") were represented by their Agent, Mr David Tomadze of the Ministry of Justice.

3. On 25 June 2007 the Court decided to give notice to the Government of the applicant's complaint under Article 5 § 1 (c) of the Convention concerning the period of pre-trial detention without a court order. Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the application at the same time as its admissibility.

4. The parties entered into settlement negotiations which proved fruitless, and both failed to submit observations on the admissibility or merits of the application, despite reminders, although, in a letter dated 11 November 2007, the applicant explicitly maintained his interest in having his case examined by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Rustavi.

6. On 6 December 2003 the applicant was arrested by the police and charged with the offence of the unlawful possession of drugs.

7. On 8 December 2003 the Vake-Saburtalo District Court in Tbilisi remanded the applicant in custody for three months. The court endorsed the prosecutor's argument that, in view of the applicant's prior conviction for which he had been on probation, there was a reasonable suspicion that he might abscond pending the new set of proceedings.

8. On 19 February 2004 the prosecution brought against the applicant and two other persons additional charges of conspiracy to commit the unlawful possession of arms, robbery and murder.

9. On 4 March 2004 the Tbilisi Regional Court extended the applicant's detention until 5 May 2004.

10. On 29 April 2004 the investigator in charge of the case, notifying the applicant and two other accused persons that the investigation had been terminated, invited them to study the case materials. The applicant contested the termination of the investigation, requesting that additional witnesses be examined. In a decision of 29 April 2004, the investigator, reasoning that the applicant could have made such a request earlier, dismissed it as an attempt to prolong the proceedings.

11. On 5 May 2004 the authorised period of the applicant's detention expired without the court ordering its extension.

12. On 13 May 2004 the applicant complained to the competent prosecution authority that his detention had been unlawful since 5 May 2004. He also challenged the termination of the investigation as premature.

13. In a decision of 16 May 2004, the Vake-Saburtalo district prosecutor dismissed the applicant's complaint of 13 May 2004 as unsubstantiated. As regards the alleged unlawfulness of detention since 5 May 2004, the prosecutor reasoned that the time during which the accused studied case materials did not, under the relevant procedural law, count towards the detention term. In so far as the applicant and his representatives had started studying the case materials on 30 April 2004, this fact being proved by the relevant records of the investigator, the applicant's detention thereafter could not be said to be unlawful.

14. On 8 July 2004 the Vake-Saburtalo district prosecutor sent the criminal case, along with the bill of indictment, to the Supreme Court of Georgia for trial. According to the indictment, the three accused persons and their lawyers had been examining the case materials between 30 April and 7 July 2004.

15. On 26 October 2004 the applicant complained to the Supreme Court, reiterating, *inter alia*, that no judicial decision had authorised his detention since 5 May 2004. As to the prosecutor's reasoning that the time spent on studying the case materials had not counted towards the detention term, the applicant, relying on numerous factual details, first submitted that his

lawyer had fully examined the file on 30 April and 1 May 2004, in two and a half hours. He further argued that, even if the investigator's formal records were to be trusted, then the examination of the file should be considered to have ended on 28 June 2004. Since his case had been referred for trial only on 8 July 2004, the applicant claimed to have been kept in unlawful detention for at least ten days. In the light of the above arguments, he requested to be released immediately.

16. On 27 October 2004 the Supreme Court, having examined the admissibility of the case, decided to commit the applicant and the two others for trial under Article 417, 425 and 428 of the Code of Criminal Procedure ("the CCP"). Without replying to the applicant's allegations about the unlawfulness of his pre-trial detention, the court upheld the restraint measure on the basis of the "nature of the charges" and the inability to conduct, at the admissibility stage, a comprehensive judicial assessment of his arguments for release.

17. As disclosed by the case file, the Supreme Court relinquished, on 6 May 2005, jurisdiction over the criminal proceedings in favour of the Tbilisi Regional Court. On 31 May 2005 the applicant complained about the unlawfulness of his detention before the latter, reiterating his previous arguments.

18. On 20 July 2005 the Tbilisi Regional Court dismissed the applicant's complaint as unsubstantiated. After a thorough examination of all the relevant circumstances of the case, the court found that the defendants and their representatives had started studying the case materials on 30 April 2004, immediately after the termination of the investigation on 29 April 2004. This process lasted until 7 July 2004, one day before the case was sent by the prosecutor for trial. Reiterating that, pursuant to Article 406 § 4 of the CCP, the period of examination of the case file did not constitute part of the authorised detention term, the Regional Court concluded that the applicant's detention between 30 April and 7 July 2004 should not be taken into account.

19. In an order of 5 July 2006, the President of the Supreme Court noted that, the applicant's criminal case file having been sent for trial on 8 July 2004, the permissible term of twenty-four months for the defendant's pre-trial detention under Article 680(4) § 9 of the CCP would expire on 8 July 2006. Using his prerogative under the same Article to extend, in exceptional circumstances, the detention beyond that term, the President remanded the applicant in custody until 8 November 2006.

20. In a verdict of 22 December 2006 of the Tbilisi Regional Court, the applicant was convicted of the aforementioned offences and sentenced to twelve years in prison. The period of imprisonment started to run, according to the verdict, from the date of the applicant's arrest on 6 December 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. *The Code of Criminal Procedure ("the CCP"), as it stood at the material time*

Article 406 § 4 – "Time spent on studying the case materials"

"The time spent by the accused (defendant) and his or her representative on studying the criminal case materials shall not be counted towards the period of detention prescribed by law."

Article 417 §§ 1 and 3 - "Committal for trial"

"1. Where there is a sufficient basis for hearing the case, the judge (court), without prejudging the merits of the case, shall commit the accused for trial...

3. During the admissibility hearing, in addition to deciding whether to commit the accused for trial..., the judge (court) shall decide whether to impose a measure of restraint on the accused."

Article 419 - "Time-limits for committal decisions"

"The judge (court) shall decide whether to commit the accused for trial within fourteen days or, in complicated cases, within a month of the date of delivery of a final judgment on the last criminal case registered with the same judge (court)."

The CCP distinguished between two periods of detention: detention "pending investigation", whilst the case was investigated, and detention "pending trial", whilst the case was tried by a court. Although there was no difference in practice between the two periods of detention, the calculation of the time-limits was different.

Incorporated into the Code by an Amendment of 25 March 2005, Article 680(4) contained provisional rules regulating the time-limits of the above-mentioned periods of detention. Pursuant to Articles 680(4) § 1, those provisional rules, particularly that contained in Article 680(4) § 9, were to remain valid until the entry into force of Article 162, the latter provision introducing shorter time-limits of detention.

Article 681 § 9 stated that Article 162 would enter into force on 1 January 2006.

Pursuant to Article 680(4) § 9, if only two levels of jurisdiction were involved, the permitted term of detention "pending trial" was twenty-four months. However, in "exceptional circumstances", the President of the Supreme Court could extend that term to a maximum of thirty months.

An amendment of 28 April 2006, which entered into force on 13 May 2006, further revised Article 162, by reducing the maximum permissible term of detention pending "investigation" and "trial", to nine

months, both periods taken together. Simultaneously, Article 681 § 2 was amended to bring Article 162 into force on 1 January 2007. Consequently, the provisional rules on the detention time-limits contained in Article 680(4) also remained in force until 1 January 2007 (see Article 680(4) § 1 above).

22. *The Constitutional Court judgment of 16 December 2003 in the case of "The Public Defender v. The Parliament of Georgia"*

The complainant challenged the constitutionality of Article 406 § 4 of the CCP. On 16 December 2003 the Constitutional Court declared that the provision was not only unconstitutional but also incompatible with Article 5 § 1 of the Convention. However, the Constitutional Court ruled in the operative part of its judgment that, in order "to avoid the creation of difficulties for the investigative authorities", the enforcement of its judgment by the annulment of the impugned provision should be delayed until 25 September 2004.

23. *The Constitutional Court Act of 31 January 1996, as it stood at the material time*

Pursuant to section 23 § 1, if the Constitutional Court found the challenged legislative provision to be unconstitutional, that provision should be considered null and void from the moment the relevant judgment was pronounced.

Under Article 25 § 3, the Constitutional Court's judgment should be enforced immediately after its announcement, unless another date was fixed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION

24. Relying in substance on Article 5 § 1 (c) of the Convention, the applicant complained that his detention since 5 May 2004 had been unlawful. He also claimed that Article 680(4) § 9 of the CCP had already been abrogated when the President of the Supreme Court had remanded him in custody on 5 July 2006. Article 5 § 1 of the Convention, in its relevant part, reads as follows:

> "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...”

A. General observation

25. The Court notes that neither the Government nor the applicant submitted observations on the admissibility and merits of the case after notice of the application had been given to the Government. However, having examined the terms of his letter of 11 November 2007, the Court observes that the applicant unequivocally maintained his interest in the application (paragraphs 3-4 above). It therefore decides to proceed with the examination of the application as the case file stands.

B. Admissibility

1. As to the lawfulness of the applicant’s detention between 5 May and 27 October 2004

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. The detention order of 5 July 2006

27. The applicant complained that the detention order of 5 July 2006 of the President of the Supreme Court was unlawful, in so far as it was based on Article 680(4) § 9 of the CCP, which the applicant alleged had been repealed by then.

28. However, the Court observes that Article 680(4) of the CCP, containing the provisional rules on the calculation of detention periods, was in force until 1 January 2007. Thus, the amendment of 28 April 2006 to Article 681 § 2 of the CCP, taking effect on 13 May 2006, extended the validity of those rules, including that contained in Article 680(4) § 9, until 1 January 2007 (see paragraph 21 above).

29. Consequently, this aspect of the applicant’s complaint under Article 5 § 1 (c) of the Convention is manifestly ill-founded and should be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

C. Merits

30. The Court observes that, after the last detention order of 4 March 2004 expired on 5 May 2004, the applicant's pre-trial detention was no longer explicitly authorised by a court order (see paragraphs 9 and 11 above). That situation lasted until 27 October 2004, when the Supreme Court, as well as committing the applicant for trial under Article 417 § 3 of the CCP, authorised his continued detention pending trial (see paragraph 16 above).

31. The Court notes that a violation of Article 5 § 1 (c) of the Convention was found in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that they were studying the criminal case file and/or that a bill of indictment had been lodged with the court with jurisdiction to try the case. Detaining defendants without a specific legal basis or clear rules governing their situation - with the result that they may be deprived of their liberty for an unlimited period of time without judicial authorisation - is incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see, among others, *Ječius v. Lithuania*, no. 34578/97, §§ 57-64, ECHR 2000-IX; *Stašaitis v. Lithuania*, no. 47679/99, §§ 56-61, 21 March 2002; *Grauslys v. Lithuania*, no. 36743/97, §§ 39-41, 10 October 2000; *Baranowski v. Poland*, no. 28358/95, §§ 53-58, ECHR 2000-III; *Khudoyorov v. Russia*, no. 6847/02, §§ 146, ECHR 2005-... (extracts)).

32. The Court notes that the present application is no different from the *Baranowski*, *Ječius* or *Khudoyorov* cases cited above, due to the similar deficiencies in the Georgian criminal procedural law and practice at the material time.

33. First, in the period between 5 May and 7 July 2004, the applicant, pursuant to Article 406 § 4 of the CCP, was kept in detention solely by reference to the process of studying the case file, which ground, even if fully compatible with domestic law (see *Ječius*, cited above, § 56, and *Grauslys*, cited above, § 39 *in fine*), is wholly extraneous to Article 5 § 1 (see, for example, *Ječius*, cited above, § 59). Noteworthy in this regard is the fact that, subsequently, the Constitutional Court of Georgia found Article 406 § 4 of the CCP to be incompatible with Article 5 § 1 of the Convention (see paragraph 22 above).

34. Secondly, from 8 July until 27 October 2004, the applicant's detention was justified by the fact that the case was transmitted to the trial court. The Court observes in this regard that, under Article 417 §§ 1 and 3 of the CCP at the material time, once the prosecution had terminated the investigation and transmitted the criminal case to the court with jurisdiction, the latter held an admissibility hearing and decided whether to commit the

accused for trial and whether it was necessary to impose a measure of restraint on that individual.

35. However, a problem arose with the timing of such a hearing. Pursuant to Article 419 of the CCP, an admissibility hearing was to be held within fourteen days or, for "complicated cases", within a month of the delivery of a final judgment on the last, unrelated criminal case lodged with the same judge, but the latter had no time constraints on deciding that "last" case. At the same time, the CCP neither required that, in the meantime, a judicial order authorising the defendant's detention be issued; nor did it specify any statutory periods for this phase of the detention. Such statutory lacuna resulted in the practice of detaining defendants without any judicial decision for months, as happened in the present case (see *Absandze v. Georgia* (dec.), no. 57861/00, 20 July 2004; *Ramishvili and Kokhreidze* v. *Georgia* (dec.) no. 1704/06, 26 June 2007).

36. It follows that, between 5 May and 27 October 2004, for five months and twenty-two days, there was no judicial decision authorising the applicant's detention. The fact that the applicant and his advocate had been studying the criminal case file which was then sent, along with the bill of indictment, to the competent court for trial, could not constitute a "lawful" basis for the applicant's continued remand in custody for the purposes of Article 5 § 1 (c) of the Convention (see *Grauslys*, cited above, § 39; *Nakhmanovich v. Russia*, no. 55669/00, § 68, 2 March 2006, and *Khudoyorov*, cited above, §§ 149-151).

37. There has thus been a violation of Article 5 § 1 (c) of the Convention in respect of that period of detention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

39. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the lawfulness of applicant's pre-trial detention between 5 May and 27 October 2004, without a valid court order, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 (c) of the Convention.

Done in English, and notified in writing on 8 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President