FOURTH SECTION

DECISION

Application no. 5436/05
Jānis Alfrēds ĶIPĒNS
against Latvia

The European Court of Human Rights (Fourth Section), sitting on 5 March 2013 as a Committee composed of:

 George Nicolaou, President,

 Zdravka Kalaydjieva,

 Vincent A. De Gaetano, judges,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 6 December 2004,

Having deliberated, decides as follows:

THE FACTS

1.  The applicant, Mr Jānis Alfrēds Ķipēns, is a Latvian national, who was born in 1945 and lives in Rīga.

2.  The Latvian Government (“the Government”) were represented by their Agent, Mrs I. Reine, who was succeeded by Mrs K. Līce.

A.  The circumstances of the case

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

1.  The first set of criminal proceedings

4.  On 2 November 1992 the applicant was sentenced by the Aizkraukle District Court to five years’ imprisonment, with confiscation of property.

2.  The second set of criminal proceedings

5.  On 27 September 2002 the applicant was remanded in custody after charges of theft were brought against him.

6.  On 29 January 2003 the applicant was informed that, in accordance with his request, his defence would be conducted by a duty defence lawyer.

7.  On 8 July 2003 the Aizkraukle District Court found the applicant guilty of theft and sentenced him on 10 July 2003 to two-and-a-half years’ imprisonment.

8.  The applicant appealed. In his statement of appeal, the applicant primarily complained that the District Court had erred in establishing of the facts.

9.  On 18 February 2004 Zemgale Regional Court heard the appeal and upheld the lower court’s judgment.

10.  At the beginning of the appeal hearing, the court established that the applicant’s defence counsel had asked for a postponement of the hearing owing to his illness. The court read out a fax received from the lawyer. In response to the court’s question, the applicant confirmed that the proceedings should be continued without the presence of counsel. The court then explained the applicant’s procedural rights to him. Upon the court enquiring if he had understood his rights, the applicant confirmed that he wished to conduct his defence himself and that the assistance of his defence counsel was not necessary. During the hearing the applicant made various motions, actively took part in the hearing and made closing submissions.

11.  On 14 April 2004 at a preliminary hearing the Senate of the Supreme Court refused to grant the applicant leave to appeal on points of law.

12.  On 25 March 2005 the applicant finished serving his sentence in the above criminal proceedings.

3.  The third set of criminal proceedings

13.  In July 2000 Rīga City Police Department instituted two sets of criminal proceedings concerning armed robberies at post offices. In 2002 they were referred to the prosecutor’s office handling the matter and joined in a single case.

14.  During the pre-trial investigation of the case the applicant was detained from 29 January to 27 February 2001, on which latter date the preventive measure was lifted because the investigators had not gathered sufficient evidence to bring charges against him. Decisions to bring charges against the applicant and the co-defendants were adopted on 11 and 15 November 2002. The charges were finalised by a decision of 10 June 2003 and on 26 June 2003 the applicant was given a copy of the indictment.

15.  On 7 July 2003 the applicant and two co-defendants were committed for trial before the Rīga District Court. The first hearing was scheduled for 13 April 2004. Two hearings scheduled in April 2004 were postponed to October 2004 owing to the illness of one of his co-defendants and to failure to ensure the attendance at court of several witnesses and the victims. Two hearings scheduled in October 2004 were postponed to January 2005 because one of the prosecution witnesses, K.P., failed to attend court. After several attempts it proved to be impossible to secure her attendance at court, despite a warrant having been issued.

16.  During a hearing on 24 January 2005 the court examined a letter received from K.P., in which she alleged that the defendants had threatened her and that she was afraid to give testimony at court. Her statements given during the pre-trial investigation were then read out at the hearing.

17.  Given that the term of the applicant’s prison sentence imposed on him in the second set of criminal proceedings was due to expire on 25 March 2005, the prosecutor asked the court to remand the applicant in custody. He based the request on the allegations made in the letter written by K.P. and claimed that, if at large, the applicant might influence the witness. The applicant denied that he had threatened K.P.

18.  On 22 February 2005 the Rīga District Court remanded the applicant in custody on suspicion that he could threaten K.P. The decision also referred to the applicant’s six previous convictions, his tendency to reoffend, and his unemployment. Following an appeal by the applicant, the decision was upheld by the Rīga Regional Court on 15 April 2005. During the hearing the prosecutor submitted that K.P. had repeatedly contacted the prosecutor’s office concerning the threats she had received, in which she had been threatened with reprisals if she did give testimony in favour of the defendants. K.P. had claimed that the threats had been received from a prison phone. This information had been investigated.

19.  In July, August and September 2005 the applicant asked for the preventive measure to be reviewed and was informed by the Rīga District Court that the next review would take place during a court hearing which was scheduled for 26 October 2005.

20.  On 26 October 2005 the Rīga District Court continued its examination of witnesses. One of the witnesses, K.P.’s partner, stated that K.P. had not told him that she had received any threats from the applicant.

21.  On the same date the District Court dismissed the applicant’s application for release, finding that no circumstances had changed since the imposition of the preventive measure. In support of extending the applicant’s remand in custody, the prosecutor explained to the appellate court that for the time being the police had not yet established who had made threats against K.P, but that they suspected that the applicant could have made them. The prosecutor also relied on the applicant’s previous convictions and the seriousness of the charges.

22.  On 24 November 2005 the Rīga Regional Court upheld the dismissal on appeal by relying on the information about the threats K.P. claimed to have received from the defendants and by establishing that there were still grounds to consider that the applicant would seek to obstruct the court proceedings.

23.  During hearings in January and March 2006 the court dismissed applications for release made by the applicant on the grounds that no circumstances had changed since the imposition of the preventive measure. During the hearings the prosecutor explained that the criminal proceedings in relation to the alleged threatening of K.P. had been discontinued. The applicant did not appeal against the decisions to uphold the preventive measure.

24.  The trial continued in April and May 2006. On 8 June 2006 by a judgment of the Rīga District Court the applicant was convicted and sentenced to eight years’ imprisonment.

25.  On 18 January 2007 the Rīga Regional Court upheld the judgment of the lower court on appeal. It noted in its judgment that, despite various attempts, it had proved impossible to secure the attendance of witness K.P. at the appeal hearings. On 14 May 2007 the Senate of the Supreme Court dismissed an appeal on points of law brought by the applicant.

4.  First set of civil proceedings

26.  On 20 March 2001 the applicant brought a claim seeking to have his mother’s will (by which her estate had been left to his niece) declared null and void. Following the dismissal of the claim, on 16 November 2004 the applicant submitted an appeal on points of law. The appeal was stayed and the applicant was asked to pay security for costs in the amount of 50 lati (LVL).

27.  On 29 November 2004 the applicant asked to be exempted from payment of the security for costs. It appears that no procedural decision was adopted in respect of that request.

28.  On 24 January 2005 the claim was returned to the applicant. The decision to return the claim was subject to ancillary appeal.

5.  Second set of civil proceedings

29.  On 25 July 2008 the applicant brought a civil claim for restoration of property under land reform legislation.

30.  On 11 February 2008 the Rīga Regional Court partly upheld the claim. The judgment was subject to appeal.

B.  Relevant domestic law

31.  Section 281 of the Law of Criminal Procedure (as in force from 1 October 2005 and at the material time) regulates the review of detention orders by providing that a detained person, and the representative or defence counsel thereof, may at any time submit an application for release to an investigating judge or a court, and that the decisions provided for in this section may be appealed against in accordance with the procedures specified in section 286 of this Law.

32.  Section 286 provides that if a person’s deprivation of liberty is ordered as a preventive measure after a criminal case has been sent to trial, and the next court session is not scheduled within the next fourteen days, the person concerned may submit a complaint within three working days to a court one level of jurisdiction higher.

COMPLAINTS

33.  The applicant complained under Articles 5 §§ 1 (c) and 3 of the Convention that his pre-trial detention from 29 January to 27 February 2001 and from 22 February 2005 to 8 June 2006 had been unlawful and excessively long.

34.  He also complained under Article 6 § 1 about the length of the third set of criminal proceedings.

35.  He further complained under Article 6 § 3 (c) of the Convention that he had not been represented by a lawyer before the appellate court in the second set of criminal proceedings.

36.  Lastly, he made various other complaints under several Articles of the Convention.

THE LAW

A.  The complaints under Article 5 of the Convention

37.  The applicant complained that his pre-trial detention from 29 January to 27 February 2001 and from 22 February 2005 to 8 June 2006 had been unlawful and excessively long and had therefore been in breach of Article 5 §§ 1 (c) and 3 of the Convention, which read 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 ...

3.  Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

1.  The period of detention from 29 January to 27 February 2001

38.  The Government argued that the complaint concerning the above period should be considered as a separate period of detention and that the complaint had been submitted out of time.

39.  The applicant did not comment on the Government’s submissions.

40.  The Court reiterates that where an accused persons’ pre-trial detention is broken into various non-consecutive periods and where there are no obstacles to lodging a complaint about the pre-trial detention while they are at liberty, those non-consecutive periods should be assessed separately (see *Neumeister v. Austria*, 27 June 1968, § 6, Series A no. 8, and, more recently, *Idalov v. Russia* [GC], no. 5826/03, § 129, 22 May 2012). Nevertheless, if such periods form part of the same criminal proceedings the Court can take that into consideration when assessing the overall reasonableness of detention for the purposes of Article 5 § 3 of the Convention.

41.  In the present case the applicant was remanded in custody as part of the third set of criminal proceedings on 29 January 2001. After his release on 27 February 2001 and until his arrest on 25 September 2002 as part of the second set of criminal proceedings, the applicant was not prevented from lodging an application with the Court. In these circumstances the Court accepts that the complaint concerning the detention which lasted from 29 January 2001 to 27 February 2001 is inadmissible under Article 35 § 1 as submitted out of time.

2.  The period of detention from 22 February 2005 to 8 June 2006

42.  The Government alleged that the applicant had not used the right to complain about the length of his pre-trial detention before the national courts. In particular, the Government noted that after 1 October 2005, when the new Law on Criminal Procedure became effective, the applicant’s remand in custody was reviewed on three occasions by the Rīga District Court. However, the applicant had only exercised his right to appeal against the decision of 26 October 2006. In this connection, they referred to the case of *Dobrovoļskis v. Latvia* (dec.), no. 2233/03, 5 May 2005*,* where the Court had held in similar circumstances that the applicant had failed to exhaust available domestic remedies. The Government also noted that the applicant had failed to raise the issue of the length of his pre-trial detention during the adjudication of the case, even though, similarly to the case of *Moisejevs v. Latvia* (dec.), no. 64846/01, 15 June 2006, the national court could have taken it into account and reduced the sentence given.

43.  The applicant did not comment on the Government’s submissions.

44.  In relation to the applicant’s allegation of the unlawfulness of his detention which lasted from 22 February 2005 to 8 June 2006, the Court concludes that the complaint in this part does not disclose any appearance of a violation under Article 5 § 1 (c) and it is therefore inadmissible under Article 35 § 3 as manifestly ill-founded.

45.  The Court shall next examine the complaint under Article 5 § 3 of the Convention. It considers that the period to be examined under Article 5 § 3 of the Convention started on 25 March 2005, the date on which the applicant’s previous detention falling under Article 5 § 1 (a) expired (see paragraph 12 above).

46.  The Court reiterates that the rule of exhaustion of domestic remedies as enshrined by Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that this rule is neither absolute nor capable of being applied automatically and that for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take proper account not only of the existence of formal remedies in the legal system of the State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*İlhan v. Turkey* [GC], no. 22277/93, § 59, ECHR 2000‑VII).

47.  As regards the applicant’s complaint of unlawful and lengthy pre‑trial detention, the Court shall at the outset address the Government’s argument that the applicant was obliged to raise this complaint before the trial court, which could then have taken it into account when imposing a sentence. The Court notes that, according to its case-law, in a situation where the person was still detained, an effective remedy under Article 5 § 3 should be able to lead to the lifting of the detention order (see *McKay v. the United Kingdom* [GC], no. 543/03, § 45, ECHR 2006‑X). It shall therefore dismiss the argument that a later compensatory remedy, as argued by the Government, could have been adequate and sufficient in the particular case.

48.  The Court nevertheless agrees with the Government that the applicant failed to use a remedy which could have provided him with reasonable success and led to the lifting of the detention order. In this regard, the Court reiterates its reasoning stated in its decision in the case of *Dergačovs v. Latvia* (dec.), no. 417/06, 12 April 2011. In that case, the applicant had failed to appeal to a higher court against a detention order issued after 1 October 2005, when the new Law of Criminal Procedure had become effective. When the maximum detention period expired and the lower court requested the appellate court to extend the applicant’s detention, the appellate court dismissed the request by applying an analysis compatible with the safeguards enshrined by Article 5 of the Convention. In those circumstances the Court concluded that there was no evidence that the appellate court would have failed to provide a sufficient assessment of the reasons for continued detention if it had previously had the opportunity to assess such a complaint.

49.  The Court sees no reason in the instant case to depart from the above reasoning and its finding in the *Dergačovs* decision. It observes that the applicant only appealed against one decision issued after 1 October 2005 concerning his continued remand in custody (see paragraph 22 above), even though the trial court continued to regularly pronounce on the necessity of his detention until the applicant was convicted in June 2006.

50.  Relying on the aforementioned observations, the Court concludes that this complaint must be rejected under Article 35 § 1 of the Convention.

B.  Complaint under Article 6 § 1 of the Convention

51.  The applicant complained that the length of the third set of criminal proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

52.  The Government considered that, for the purposes of Article 6 of the Convention, the criminal proceedings had begun on 11 November 2002 and not on 29 January 2001, and had therefore lasted four years and six months. In addition, they submitted that the applicant had failed to exhaust domestic remedies.

53.  The applicant did not comment on the Government’s observations.

54.  The Court recalls that in *Trūps v. Latvia* (dec.), no. 58497/08, 20 November 2012, the Court concluded that section 14 the Law of Criminal Procedure, dated 1 October 2005, as shown by the national courts’ practice, had established a compensatory remedy for complaints of unreasonably lengthy criminal proceedings which had to be exhausted. The remedy provides for the possibility of discontinuing unreasonably long criminal proceedings or the length of criminal proceedings being taken into consideration in sentencing. In the above decision, the Court was also satisfied that the aforementioned remedy was not limited in terms of temporal jurisdiction.

55.  Observing that the applicant never brought a complaint about the length of the criminal proceedings before the domestic courts, the Court concludes that the applicant did not exhaust domestic remedies.

56.  In the light of the above, the Court concludes that this complaint must be rejected under Article 35 § 1 of the Convention.

C.  Complaint under Article 6 § 3 (c) of the Convention

57.  The applicant complained that he had not been represented by defence counsel before the appellate court at the hearing held on 18 February 2004, contrary to the guarantees of Article 6 § 3 (c) of the Convention, which reads as follows:

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

(c)  to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...”

58.  The Government disagreed with the complaint.

59.  The applicant did not comment on the Government’s submission.

60.  According to the Court’s established case-law, it is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at trial and on appeal (see, amongst others, *Lala v. the Netherlands*, no. 14861/89, 22 September 1994, § 33, Series A no. 297‑A). However, neither the letter nor the spirit of Article 6 of the Convention prevent a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). It is important nevertheless that the waiver be expressed in anunequivocal manner and based on an informed decision (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003). The national court has to determine whether any waiver has been unequivocally expressed having regard to the particular circumstances of the case (*Panovits v. Cyprus*, no. 4268/04, § 73, 11 December 2008).

61.  In the present case, the court observes that the applicant was represented by a lawyer before the lower court but that, owing to illness, the lawyer was unable to attend the appellate hearing in question. However, the Court notes that the appellate court ensured that the applicant’s procedural rights were explained to him (see paragraph 10 above), and it cannot be concluded that the applicant’s decision to continue the proceedings without his defence counsel being present was taken without having received sufficient information about the consequences of such a decision. It must also be noted that there were no special circumstances which would have obliged the domestic court to take any particular measures in order to safeguard the applicant’s rights.

62.  It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

D.  Complaint under Article 13 of the Convention

63.  The applicant further complained that there had been no effective remedies available to him as regards the complaint concerning the length of the third set of criminal proceedings under Article 6 § 1 of the Convention.

64.  In the light of the Court’s findings in relation to Article 6 set out above, the Court does not find it necessary to examine the complaint under Article 13 of the Convention.

E.  Other complaints

65.  Lastly, the applicant also alleged a number of other violations under various Articles of the Convention in relation to all three sets of criminal proceedings and both sets of civil proceedings.

66.  In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that the remainder of the application does not disclose any appearance of a violation of any of the Articles of the Convention. It follows that these complaints are inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

 Fatoş Aracı George Nicolaou
 Deputy Registrar President