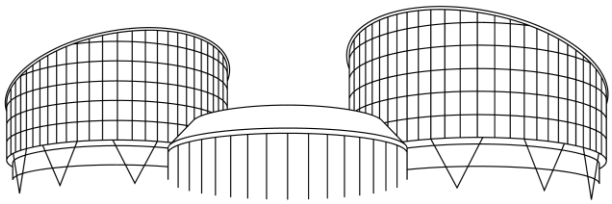

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF POLOVINKIN v. RUSSIA

(Application no. 4320/05)

JUDGMENT

STRASBOURG

25 November 2010

FINAL

25/02/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Polovinkin v. Russia**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Rait Maruste,
Anatoly Kovler,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 2 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 4320/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Vladimir Polovinkin ("the applicant"), on 17 January 2005.

2. The applicant was represented by Mr M. Rachkovskiy, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that certain periods of his detention on remand had been unjustified and unlawful and that the criminal proceedings against him had been unreasonably long.

4. On 12 September 2008 the President of the Fifth Section decided to communicate the complaints concerning Article 5 §§ 1 and 3 and Article 6 § 1 to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

The applicant's detention on remand and the criminal proceedings against him

7. On 5 April 1999 the applicant, who was a police officer, was arrested and on 8 August 1999 he was charged with embezzlement and abuse of power.

8. On 20 March 2000 the criminal case against the applicant was forwarded to the Cheryemushkinskiy District Court of Moscow (the District Court) for trial. On 5 May 2000 the District Court returned the case to the prosecutor's office for additional investigation.

9. On an unspecified date in 2000 the criminal case against the applicant was again forwarded to the District Court for examination. On 18 November 2000 the District Court again returned the case for additional investigation.

10. On an unspecified date in February-March 2001 the prosecutor's office again forwarded the criminal case for trial. On 3 April 2001 the District Court returned the case for additional investigation for the third time.

11. On 15 May 2001 the applicant was released from detention subject to an undertaking not to abscond.

12. On 7 June 2001 the criminal case against the applicant was once more forwarded to the District Court for examination. On an unspecified date between June 2001 and July 2004 the District Court returned the case to the prosecutor's office for further investigation for the fourth time.

13. On an unspecified date in 2004 the criminal case was again forwarded to the District Court for trial. On 22 September 2004 the District Court convicted the applicant and sentenced him to nine years' imprisonment. The applicant was detained immediately. He appealed against the judgment to the Moscow City Court and requested to be released.

14. On 1 December 2004 the Moscow City Court quashed the judgment and remitted the case for a fresh examination. The court upheld the applicant's detention on remand without providing an explanation.

15. On 27 January 2005 the Presidium of the Moscow City Court quashed the decision of 1 December 2004 and sent the case for a fresh examination on appeal.

16. On 3 March 2005 the Moscow City Court upheld the judgment of 22 September 2004.

17. On 23 November 2005 the Supreme Court, acting by way of supervisory review on the applicant's request, quashed the decisions of 27 January and 3 March 2005 and upheld the decision of 1 December 2004. The Supreme Court further ordered the applicant's detention for three months, until 23 February 2006, “in order to secure the examination of the case”, without giving other grounds. The applicant unsuccessfully appealed

against this decision, claiming that his detention on remand had been extended unlawfully and unreasonably (see paragraph 21 below).

18. On 9 and 19 December 2005 the District Court scheduled the preliminary hearing of the applicant's case. On both occasions the court stated that "the preventive measure applied in respect of the applicant should remain the same – detention on remand" and did not provide any time-limits for the detention.

19. On 27 February 2006 the applicant lodged a request for release, stating that the period of his detention ordered by the Supreme Court (see paragraph 17 above) had expired on 23 February 2006.

20. On 28 February 2006 the District Court rejected the applicant's request and ordered his further detention until 23 May 2006, referring to the gravity of the charges against him.

21. On 16 March 2006 the Supreme Court rejected the applicant's appeal of 23 November 2005.

22. On 6 and 26 April 2006 the District Court rejected the applicant's requests for release, referring to the gravity of the charges against him.

23. On 11 May 2006 the District Court extended the applicant's detention on remand until 23 August 2006, referring to the gravity of the charges against him.

24. On 27 June 2006 the District Court convicted the applicant and sentenced him to four years and six months' imprisonment. The applicant did not appeal against this judgment.

25. Between 5 April 1999 and 27 June 2006 the criminal proceedings against the applicant were adjourned on twenty-four occasions due to his and his counsel's absence from the hearings, which resulted in an overall delay in the proceedings of one year and three months.

II. RELEVANT DOMESTIC LAW

26. For a summary of the relevant provisions see *Bakhmutskiy v. Russia* (no. 36932/02, §§ 57-77, 25 June 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

27. The applicant complained that his detention between 23 and 28 February 2006 and between 23 May and 27 June 2006 had been unlawful as it had not been authorised by a domestic court, in violation of Article 5 § 1 of the Convention, which 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 ..."

28. The Government contested that argument. They pointed out that the applicant's detention between 23 and 28 February 2006 had been authorised by the court order of 23 November 2005 (see paragraph 17 above) and then by the court decision taken on 19 December 2005 (see paragraph 18 above). As for the applicant's detention between 23 May and 27 June 2006, the Government submitted that this period of detention had been authorised by the District Court's decision of 11 May 2006 (see paragraph 23 above).

29. The applicant reiterated his complaint.

A. Admissibility

1. Detention between 23 and 28 February 2006

30. The Court notes that this part of the 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. Detention between 23 May and 27 June 2006

31. From the materials submitted by the parties it transpires that the applicant's detention between 23 May and 27 June 2006 was authorised by the District Court order of 11 May 2006.

32. 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.

B. Merits

33. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Khudoyorov v. Russia*, no. 6847/02, § 124, ECHR 2005-X (extracts)).

34. The Court notes that on 19 December 2005 the District Court, when deciding on the preventive measure imposed on the applicant, noted that it "should remain unchanged" and that it did not provide any time-limits for it.

The Government maintained that this decision had constituted a "lawful" basis for the applicant's detention after 19 December 2005 and that therefore it had covered the period between 23 and 28 February 2006.

35. The Court notes that in several cases against Lithuania it found that the trial court's decision to maintain a preventive measure "unchanged" had not, as such, breached Article 5 § 1 in so far as the trial court "had acted within its jurisdiction... [and] had power to make an appropriate order" (*Stašaitis v. Lithuania* (dec.), no. 47679/99, 28 November 2000, and *Karalevičius v. Lithuania* (dec.), no. 53254/99, 6 June 2002). However, "the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1" (*Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002).

36. The Court observes that on 19 December 2005 the District Court did not give any reasons for its decision to remand the applicant in custody. Nor did it set a time-limit for the continued detention, thus leaving the applicant in a state of uncertainty as to the grounds for his detention after that date.

37. In these circumstances, the Court considers that the District Court's decision of 19 December 2005 did not comply with the requirements of clarity, foreseeability and protection from arbitrariness, which together constitute the essential elements of the "lawfulness" of detention within the meaning of Article 5 § 1.

38. Furthermore, the Court notes that the court order of 23 November 2005 extended the applicant's detention only until 23 February 2006. Taking into account the above conclusion concerning the deficiency of the court's decision of 19 December 2005, the applicant's detention on remand between 23 February and 28 February 2006 was not duly authorised by a domestic court.

39. The Court therefore considers that there was a violation of Article 5 § 1 of the Convention on account of the applicant's detention on remand between 23 and 28 February 2006.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

40. The applicant complained that the length of his detention on remand had been excessive as it had not been based on sufficient reasons. He referred to Article 5 § 3 of the Convention, which provides as follows:

> "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."

41. The Government conceded that the applicant's detention had not been based on sufficient reasons.

A. Admissibility

42. 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.

B. Merits

43. The Court reiterates that it is incumbent on the domestic authorities to establish the existence of concrete facts relevant to the grounds for continued detention. It is not the Court's task to establish such facts and take the place of the national authorities who ruled on the applicant's detention. It is essentially on the basis of the reasons given in the domestic courts' decisions and of the true facts mentioned by the applicant in his or her appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Korchuganova v. Russia*, no. 75039/01, § 72, 8 June 2006, and *Ilijkov v. Bulgaria*, no. 33977/96, § 86, 26 July 2001).

44. The applicant remained in custody from 5 April 1999 until 15 May 2001, and from 22 September 2004 until 27 June 2006. The overall period to be taken into consideration comprised therefore more than three years and ten months.

45. The Court accepts that the applicant's detention could have initially been warranted by a reasonable suspicion of his involvement in the commission of a criminal offence. It remains to be ascertained whether the judicial authorities gave "relevant" and "sufficient" grounds to justify the applicant's continued detention and whether they displayed "special diligence" in the conduct of the proceedings.

46. The Court observes that the gravity of the charge was the main factor for the assessment of the applicant's potential to abscond. The domestic authorities assumed that the gravity of the charge carried such a preponderant weight that no other circumstances could have warranted his release. The Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment of the risk of an accused absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the seriousness of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (see *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Ilijkov*, cited above, § 81).

47. The Court has frequently found a violation of Article 5 § 3 of the Convention in Russian cases where the domestic courts extended an applicant's detention relying essentially on the gravity of the charges and

using stereotyped formulae without addressing specific facts or considering alternative preventive measures (see *Popov and Vorobyev v. Russia*, no. 1606/02, §§ 86-87, 23 April 2009; *Belevitskiy v. Russia*, no. 72967/01, §§ 99 et seq., 1 March 2007; *Khudobin v. Russia*, no. 59696/00, §§ 103 et seq., ECHR 2006-XII; *Mamedova v. Russia*, no. 7064/05, §§ 72 et seq., 1 June 2006; and *Rokhlina v. Russia*, no. 54071/00, §§ 63 et seq., 7 April 2005).

48. Having regard to the above, the Court considers that by failing to address specific facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities extended the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify its duration. In these circumstances it is not necessary to examine whether the proceedings were conducted with "special diligence".

49. There has accordingly been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

50. The applicant complained that the criminal proceedings against him had been excessively long. He relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... fair and public hearing within a reasonable time by [a] ... tribunal ..."

51. The Government submitted that the overall length of the criminal proceedings against the applicant had comprised five years and eight months and that that length had been reasonable, having regard to the consistent failure by the applicant and his counsel to attend the hearings and the failure of the victims, witnesses and counsel of the other accused to attend the trial. They also pointed out that the criminal case was rather complex, its file comprising nine volumes, and that on a number of occasions the authorities had had to organise the reconduction of those who had failed to appear before the court.

52. The applicant contested the Government's arguments, maintaining that he had only caused a delay of one year and three months, whereas the criminal proceedings in his case had lasted for almost six years and eight months overall. He submitted that the delays in the proceedings had been caused, among other things, by several referrals of the criminal case for additional investigation, the lengthy examination of the case by the courts at each level and the authorities' failure to organise the participation in the trial of the other participants in the criminal proceedings, such as witnesses and victims. Referring to the Court's case-law, he further pointed out that the

fact that he had been detained on remand should have prompted the authorities to examine the criminal case speedily (see *Kalashnikov v. Russia*, no. 47095/99, § 132, ECHR 2002-VI).

A. Admissibility

53. 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.

B. Merits

1. The period under consideration

54. The period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is "charged" within the autonomous and substantive meaning to be given to that term. It ends with the day on which a charge is finally determined or the proceedings are discontinued (see, among many authorities, *Kalashnikov*, cited above, § 124).

55. From the submitted documents it transpires that the applicant was arrested on 5 April 1999. The criminal proceedings against him ended on 27 June 2006 when the District Court convicted him. The Court further notes that the period from 3 March 2005, when the applicant's second conviction became final and no proceedings were pending, to 23 November 2005, when his conviction was quashed by way of supervisory review and the case was remitted for fresh consideration to the trial court, should not be taken into account (see, for example, *Brovchenko v. Russia*, no. 1603/02, § 97, 18 December 2008). Accordingly, the criminal proceedings against the applicant lasted approximately six years and six months. This period spanned the investigation stage and the judicial proceedings, where the courts reviewed the applicant's case ten times at three levels of jurisdiction. The Court takes note of the applicant's submission that a cumulative delay in the proceedings of one year and three months could be attributable to him.

2. Reasonableness of the length of the proceedings

56. The Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the

conduct of the competent authorities (see, among many other authorities, *Nakhmanovich v. Russia*, no. 55669/00, § 95, 2 March 2006).

57. The Court considers that the criminal case was not complex. It concerned one count of embezzlement, abuse of power and robbery committed by the applicant and his accomplice. In the Court's view, the nature of the criminal case does not suffice to account for the length of the proceedings in the instant case.

58. The Court takes note of the applicant's submission that a delay in the proceedings of one year and three months could be attributable to him. At the same time, even taking this into account, the Court considers that the applicant did not cause significant delays in the proceedings. The fact that the proceedings were adjourned due to his and his counsel's absence at the hearings had not had a significant effect on their overall length.

59. As regards the conduct of the authorities, the Court notes that the criminal investigation against the applicant lasted for more than five years and that within this period the District Court returned the case to the prosecutor's office on four occasions (see paragraphs 8-12 above) owing to deficiencies in the investigation. Further, turning to the Government's argument that the conduct of the participants to the criminal proceedings was one of the reasons for their prolongation, the Court observes that it was incumbent on the court dealing with the case to discipline the parties in order to ensure that the proceedings were conducted at an acceptable pace (see *Sidorenko v. Russia*, no. 4459/03, § 34, 8 March 2007). It therefore considers that these delays are attributable to the State (see *Pishchalnikov v. Russia*, no. 7025/04, § 52, 24 September 2009).

60. Lastly, the Court notes that the fact that the applicant was held in custody for the most part of the criminal proceedings required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously (see, among other authorities, *Korshunov v. Russia*, no. 38971/06, § 71, 25 October 2007).

61. Having examined all the material before it and taking into account the overall length of the proceedings and what was at stake for the applicant, the Court considers that in the instant case the length of the criminal proceedings was excessive and failed to meet the "reasonable-time" requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

62. Lastly, the applicant complained under Article 5 § 1 that his detention on remand between 5 April 1999 and 15 May 2001 had been unlawful and under Article 6 § 1 of the Convention that the criminal proceedings against him had been unfair.

63. The Court has examined these complaints as they have been submitted by the applicant. However, having regard to all the material in its possession, and in so far as the matters complained of are within its competence, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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."

A. Damage

65. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

66. The Government contended that the amount claimed was excessive.

67. The Court, making an assessment on an equitable basis, awards EUR 12,000 to the applicant in respect of non-pecuniary damage plus any tax that may be chargeable on that amount.

B. Default interest

68. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Articles 5 § 1 (in respect of the applicant's detention between 23 and 28 February 2006), 5 § 3 and 6 § 1 of the Convention (in respect of the unreasonable length of the criminal proceedings) admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Deputy Registrar	Peer Lorenzen President