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

FIRST SECTION

CASE OF LIND v. RUSSIA

(Application no. 25664/05)

JUDGMENT

STRASBOURG

6 December 2007

FINAL

02/06/2008

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 Lind v. Russia,

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

Mr C.L. ROZAKIS, *President,*
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr G. MALINVERNI, *judges,*
and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 15 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 25664/05) 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 and Dutch national, Mr Vladimir Yaapovich Lind (Wladimir Lind, "the applicant"), on 14 June 2005.

2. The applicant was represented before the Court by Mr D. Agranovskiy and Ms E. Liptser, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, about the allegedly inhuman conditions and excessive length of his detention, and the refusal of leave to visit his father on his deathbed or attend a farewell ceremony for him.

4. On 14 October 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. The Dutch Government, having been informed by the Registrar of the right to intervene (Article 36 § 1 of the Convention), did not avail themselves of this right.

6. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1981 and lives in St Petersburg.

A. Background information

8. The applicant is a member of the National Bolsheviks Party.

9. On 14 December 2004 a group of about forty members of the National Bolsheviks Party occupied the waiting area of the President's administration building in Moscow and locked themselves in an office on the ground floor.

10. They asked for a meeting with the President, the deputy head of the President's administration Mr Surkov, and the President's economic advisor Mr Illarionov. Through the windows they distributed leaflets with a printed letter to the President that listed his ten alleged failures to comply with the Constitution and contained a call for his resignation.

11. The intruders stayed in the office for one hour and a half until the police broke down the blocked door. They did not offer any other resistance to the authorities.

B. The applicant's arrest and prosecution

12. On 16 December 2004 the Khamovnicheskiy District Court of Moscow ordered the applicant's detention on the ground that he was suspected of a particularly serious criminal offence, had no permanent residence in Moscow and was a Dutch national. It considered that there was a risk of his re-offending, absconding, interfering with the investigation or intimidating witnesses.

13. The applicant appealed, complaining that the District Court had not cited any facts to justify the necessity of ordering his detention. On 3 February 2005 the Moscow City Court upheld the detention order on appeal, finding that it had been lawful and justified.

14. On 21 December 2004 the applicant was charged with an attempted violent overthrow of State power (Article 278 of the Criminal Code) and intentional destruction and degradation of others' property in public places (Articles 167 § 2 and 214).

15. On 8 February 2005 the Zamoskvoretskiy District Court of Moscow extended the applicant's detention until 14 April 2005, referring to the gravity of the charge. The applicant had no permanent residence in Moscow and there were reasons to believe that he might abscond or interfere with the investigation.

16. The applicant's counsel appealed. He asked the court to release the applicant, taking into account that he had no criminal record, had positive references and was of frail health. On 9 March 2005 the Moscow City Court upheld the extension order on appeal.

17. On 16 February 2005 the applicant's charge was amended to that of participation in mass disorders, an offence under Article 212 § 2 of the Criminal Code.

18. On an unspecified date the prosecutor requested the court to extend the applicant's detention until 14 August 2005. On 14 April 2005 the Zamoskvoretskiy District Court of Moscow extended the applicant's detention until 14 July 2005 for the following reasons:

> "There are no reasons to vary the preventive measure. Taking into account the gravity of the charges and [the applicant's] individual situation, the court considers that there are sufficient indications that [the applicant], once released, might abscond.
>
> At the same time, bearing in mind that the parties to the criminal proceedings have already started studying the case file, the extension asked for by the prosecution appears to be excessive and must be limited to three months. This period will be sufficient for all parties to the proceedings to study effectively the entire case file."

19. On 14 April 2005 the applicant's counsel appealed. He asked the court to apply a more lenient preventive measure, taking into account that the applicant had no criminal record, had a permanent place of residence in Russia, studied at a university and suffered from a kidney disease. He also submitted that the applicant did not need so much time to study the case file. At the appeal hearing before the Moscow City Court the applicant confirmed that he had finished studying the case file.

20. On 11 May 2005 the Moscow City Court upheld the decision of 14 April 2005, finding that it had been lawful, sufficiently reasoned and justified.

21. On 7 June 2005 the investigation was completed and thirty-nine persons, including the applicant, were committed for trial.

22. On 20 June 2005 the Tverskoy District Court of Moscow scheduled the preliminary hearing for 30 June 2005 and held that all the defendants should remain in custody.

23. On 30 June 2005 the Tverskoy District Court held a preliminary hearing. It rejected the defendants' requests to release them, citing the gravity of the charges against them and the risk of their absconding or obstructing justice.

24. The applicant's counsel appealed. He repeated the arguments advanced in the grounds of appeal of 14 April 2005 and added that the applicant's father, Mr Jaap Jan Lind, a Dutch national and the former Governor of the New Guinea, was dying of cancer in the Netherlands. On 17 August 2005 the Moscow City Court upheld the decision of 30 June 2005 on appeal, finding that it had been lawful, well-reasoned and justified.

25. The trial started on 8 July 2005.

26. On 14 July 2005 the applicant lodged an application for release, referring to his frail health and a need for a medical examination. On 27 July 2005 the Tverskoy District Court rejected the request. It held that the applicant's detention was lawful and justified. The applicant had not submitted medical certificates showing that his state of health was incompatible with custody. On 5 October 2005 the Moscow City Court upheld the decision on appeal.

27. On 10 August 2005 the applicant's counsel filed a further application for release. He submitted medical certificates, confirming the applicant's and his father's diseases. A human-rights activist, Mr Ponomarev, offered his personal guarantee that the applicant would not abscond. The Dutch Embassy asked the court to release the applicant taking into account the precarious state of his health and his father's terminal illness. Other defendants also lodged applications for release.

28. On 10 August 2005 the Tverskoy District Court rejected the requests. It held:

> "The court takes into account the defence's argument that the individual approach to each defendant's situation is essential when deciding on the preventive measure.
>
> Examining the grounds on which ... the court ordered and extended detention in respect of all the defendants without exception ... the court notes that these grounds still persist today. Therefore, having regard to the state of health, family situation, age, profession and character of all the defendants, and to the personal guarantees offered by certain private individuals and included in the case file, the court concludes that, if released, each of the applicants might abscond or obstruct justice in some other way."

29. The applicant appealed, complaining that the District Court had disregarded the medical evidence confirming his and his father's poor state of health. On 2 November 2005 the Moscow City Court upheld the decision of 10 August 2005 on appeal, finding that the applicant had not submitted medical certificates showing that his state of health prevented him from remaining in custody.

30. On 16 September 2005 the Tverskoy District Court rejected a new application for release, repeating verbatim the wording of the decision of 10 August 2005.

31. In September 2005 the applicant asked the domestic courts to release him for a few days so that he could see his father. Mr Jaap Lind had asked for euthanasia which was scheduled for 29 September 2005. The Dutch Ambassador seconded his request.

32. On 27 September 2005 the Tverskoy District Court of Moscow refused to release the applicant. It found that since the applicant was a Dutch national he might abscond or interfere with the proceedings.

33. On 28 September 2005 the applicant was permitted a phone conversation with his father, in Russian only. The Dutch Embassy paid for the call. The conversation was interrupted by the facility administration a minute later.

34. On 29 September 2005 Mr Jaap Lind died by euthanasia.

35. On 27 October 2005 the Moscow City Court upheld the decision of 27 September 2005 on appeal. It held that the information about the deterioration of the applicant's father's health and the Dutch Ambassador's request to release the applicant had been considered. However, the refusal to release the applicant had been justified, given the gravity of the charge against him. The court found that the applicant had been living in Russia since 1989, had visited his father no more than once a year and had mainly communicated with him by mail and phone. He had been given an opportunity to talk to his father over the phone. It further held that the applicant's state of health was satisfactory, therefore there was no reason to amend the preventive measure.

36. In October 2005 the applicant lodged a new application for release. He submitted that his father had died and he wanted to attend the farewell ceremony. The applicant vouched that he had no intention of absconding and referred to his clean criminal record and positive references. The Dutch Ambassador for a third time asked the court for the applicant's temporary release so that he could attend the farewell ceremony.

37. On 3 October 2005 the Tverskoy District Court rejected the request. It referred to the gravity of the charge and the applicant's Dutch nationality which gave reasons to believe that he might abscond.

38. The applicant appealed. He again asked the court to release him so that he could attend a farewell ceremony for his father. He also contended that he suffered from a chronic kidney disease and required constant medical supervision and treatment. He complained that his applications to the detention facility doctor had remained unanswered and that he had not been provided with any treatment for his disease.

39. On 27 October 2005 the Moscow City Court upheld the decision on appeal. It found that the applicant's father had donated his body to science, therefore there had been no funeral. The farewell ceremony was scheduled for 30 October 2005 in The Hague. Taking into account the gravity of the charge and the applicant's previously rare contact with his father, it was inopportune to release him.

40. On 8 December 2005 the Tverskoy District Court convicted the applicant of participation in mass disorders and sentenced him to three years' imprisonment conditional on two years' probation. The applicant was immediately released.

C. Conditions of detention

41. The applicant was held in detention facility no. IZ-77/2 in Moscow.

42. According to a certificate of 23 November 2005 issued by the facility administration, produced by the Government, from 16 to 17 December 2004 and from 9 to 10 February 2005 the applicant was kept in cell no. 511. The cell measured 9.7 sq. m, was equipped with five bunks and accommodated three or four inmates. Cell no. 100 – where the applicant

was held from 17 December 2004 to 9 February 2005 and from 10 February to 29 April 2005 – measured 54.7 sq. m, was equipped with twenty-two bunks and housed twenty inmates on average. From 29 April to 8 December 2005 the applicant was detained in cell no. 13 measuring 8.4 sq. m, containing four bunks and accommodating four inmates on average. The Government submitted that the applicant had at all times had a separate bunk and had been provided with bedding.

43. The Government contended that the cells were naturally illuminated through the windows and were also equipped with fluorescent lamps which functioned during the day and at night. On 12 July and 18 October 2005 cells nos. 2, 85, 101, 121, 159, 144, 148, 160, 163, and 236 were examined by a sanitary officer who found the sanitary conditions satisfactory. No traces of insects or rodents were discovered. Relying on a certificate of 12 November 2005 from the facility administration, the Government further submitted that all cells were equipped with a lavatory pan. It was separated from the living area by a brick partition of 1.3 or 2.5 metres in height.

44. The Government affirmed that inmates were provided with food three times a day. They had an hour-long walk daily. The detention facility housed a medical unit which was open twenty-four hours and had all the necessary equipment for high-standard medical assistance. However, the applicant never applied for medical aid.

45. The applicant did not dispute the cell measurements, the number of bunks and the number of inmates per cell. He disagreed, however, with the Government's description of the sanitary conditions. The cells swarmed with cockroaches, crickets and lice. There was no ventilation and it was stifling and smoky inside. The partition separating the toilet facilities from the living area did not offer sufficient privacy and the person using the toilet was in view of the other inmates. The artificial light was never switched off disturbing the applicant's sleep. The applicant conceded that an hour-long walk was organised every day. However, the exercise yard was covered and measured no more than 15 sq. m. Food was scarce. Inmates were allowed to take a shower for ten minutes once a week.

46. The applicant suffered from chronic glomerulonephritis (a kidney disease) and required constant medical supervision and treatment. He received no treatment. On 18 and 25 July 2005 he complained of an aching kidney and asked the facility doctor to examine him and prescribe medication. His request remained unanswered.

II. RELEVANT DOMESTIC LAW

1. Preventive measures in criminal proceedings

47. Since 1 July 2002 criminal-law matters have been governed by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001).

48. "Preventive measures" or "measures of restraint" (*меры пресечения*) include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98). If necessary, the suspect or accused may be asked to give an undertaking to appear (*обязательство о явке*) (Article 112).

49. When deciding on a preventive measure, the competent authority is required to consider whether there are "sufficient grounds to believe" that the accused would abscond during the investigation or trial, reoffend or obstruct the establishment of the truth (Article 97). It must also take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 99).

50. Detention may be ordered by a court if the charge carries a sentence of at least two years' imprisonment, provided that a less restrictive preventive measure cannot be applied (Article 108 § 1).

51. After arrest the suspect is placed in custody "during the investigation". The period of detention during the investigation may be extended beyond six months only if the detainee is charged with a serious or particularly serious criminal offence. No extension beyond eighteen months is possible (Article 109 §§ 1-3). The period of detention "during the investigation" is calculated to the day when the prosecutor sends the case to the trial court (Article 109 § 9).

52. From the date the prosecutor forwards the case to the trial court, the defendant's detention is "before the court" (or "during the trial"). The period of detention "during the trial" is calculated to the date the judgment is given. It may not normally exceed six months, but if the case concerns serious or particularly serious criminal offences, the trial court may approve one or more extensions of no longer than three months each (Article 255 §§ 2 and 3).

2. Travel passports

53. A Russian national has to produce a travel passport to cross the Russian border (section 7 of the Law on the Procedure for Entering and Leaving the Russian Federation, no. 114-FZ of 15 August 1996). The travel passport of an accused can be retained by a court, a prosecutor or a policeman until the termination of the criminal proceedings (sections 6.1 § 3 and 6.7 of the Instruction on issuance of travel passports, approved by the Order of the Ministry of Internal Affairs, no. 310 of 26 May 1997).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

54. The applicant complained that the conditions of his detention in detention facility no. IZ-77/2 were in breach of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

55. The Court finds 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 parties' submissions

56. The applicant maintained that the cells had been overcrowded; inmates had been afforded less than 3 sq. m of personal space. The applicant challenged the Government's description of sanitary conditions as factually untrue. The sanitary reports, produced by the Government, related to cells the applicant had never stayed in. The applicant's cells had been stuffy and infested with parasites. Toilet facilities had offered no privacy. The artificial light had never been turned off, disturbing the applicant's sleep and leading to the deterioration of his eyesight. He had not received treatment for his kidney disease, despite his repeated requests.

57. The Government submitted that the conditions of the applicant's detention had been satisfactory. He had been provided with an individual bunk and bedding at all times, and the sanitary and hygienic norms had been met. He was able to exercise daily. The applicant had never applied for medical assistance. If he had, he would have received treatment. In sum, the conditions of the applicant's detention were compatible with Article 3.

2. The Court's assessment

58. The parties disputed certain aspects of the conditions of the applicant's detention in facility no. IZ-77/2 in Moscow. However, there is no need for the Court to establish the truthfulness of each and every allegation, because it finds a violation of Article 3 on the basis of the facts

that have been presented or are undisputed by the respondent Government, for the following reasons.

59. The parties agreed about the cell measurements and the number of inmates in the cells. In cells nos. 100 and 511 where the applicant was held until the end of April 2005, inmates were afforded less than 3 sq. m of personal space. In cell no. 13, where the applicant stayed until his release in December 2005, he had 2.1 sq. m of personal space. The applicant was confined to his cell day and night, save for one hour of daily outdoor exercise.

60. The Court has frequently found a violation of Article 3 of the Convention on account of lack of personal space afforded to detainees (see *Mamedova v. Russia*, no. 7064/05, §§ 61 et seq., 1 June 2006; *Khudoyorov v. Russia*, no. 6847/02, §§ 104 et seq., ECHR 2005-X (extracts); *Labzov v. Russia*, no. 62208/00, §§ 44 et seq., 16 June 2005; *Novoselov v. Russia*, no. 66460/01, §§ 41 et seq., 2 June 2005; *Mayzit v. Russia*, no. 63378/00, §§ 39 et seq., 20 January 2005; *Kalashnikov v. Russia*, no. 47095/99, §§ 97 et seq., ECHR 2002-VI; *Peers v. Greece*, no. 28524/95, §§ 69 et seq., ECHR 2001-III).

61. Having regard to its case-law on the subject and the material submitted by the parties, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. That the applicant was obliged to live, sleep and use the toilet in the same cell with so many other inmates was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in him the feelings of fear, anguish and inferiority capable of humiliating and debasing him.

62. The Court further observes that the applicant suffered from a chronic kidney disease. It follows from the documents submitted by the applicant that on at least two occasions he complained of an aching kidney and asked for a medical examination (see paragraph 46 above). However, the facility doctor did not examine him. No treatment for his disease was provided.

63. The Court concludes that by keeping the applicant in overcrowded cells and by refusing him medical assistance appropriate to his condition, the domestic authorities subjected him to inhuman and degrading treatment. There has therefore been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention in facility no. IZ-77/2.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

64. The applicant complained under Article 5 § 1 (c) of the Convention that there had been no grounds to detain him and that the domestic courts had not had due regard to the defence's arguments. Under Article 5 § 3, he complained about a violation of his right to trial within a reasonable time

and alleged that detention orders had not been founded on sufficient reasons.

The relevant parts of Article 5 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 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. Admissibility

65. As regards the applicant's complaint that his detention was unlawful, the Court notes that on 16 December 2004 the Khamovnicheskiy District Court of Moscow ordered the applicant's placement in custody because of the gravity of the charges against him. The applicant's detention was subsequently extended on several occasions by the domestic courts.

66. The domestic courts acted within their powers in making those decisions and there is nothing to suggest that they were invalid or unlawful under domestic law. The question whether the reasons for the decisions were sufficient and relevant is analysed below in connection with the issue of compliance with Article 5 § 3 (compare *Khudoyorov*, cited above, §§ 152 and 153).

67. The Court finds that the applicant's detention was compatible with the requirements of Article 5 § 1 of the Convention. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

68. As regards the applicant's complaint about a violation of his right to trial within a reasonable time or to release pending trial, the Court finds that it 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 parties' submissions

69. The applicant considered that the domestic courts had not advanced "relevant and sufficient" reasons to hold him in custody for almost one year. He had positive references, no criminal record, had been a student, had suffered from a serious disease and required constant medical supervision and treatment, and his father had been dying of cancer in the Netherlands. He had offered to post bail and his counsel had provided the trial court with the personal surety of a prominent Russian human-rights activist. However, the domestic authorities had continuously extended his detention, without demonstrating the existence of concrete facts in support of their conclusion that he might abscond, interfere with the investigation or re-offend. They had shifted the burden of proof to the applicant to show that there had been no such risks and that he could be safely released. Moreover, on a number of occasions the trial court had issued collective detention orders, extending the detention of all thirty-nine defendants without proper regard to their individual circumstances. The applicant also submitted that the Court had already found a violation of Article 5 § 3 of the Convention in another application brought by the applicant's co-defendant (see *Dolgova v. Russia*, no. 11886/05, 2 March 2006).

70. The Government submitted that the decisions to remand the applicant in custody had been lawful and justified. The Government repeated the reasons given by the domestic courts and contended that the detention orders had not been grounded solely on the gravity of the charges. The domestic courts had gauged the applicant's potential to abscond by reference to his character and Dutch nationality. Moreover, the criminal proceedings had involved thirty-nine defendants and had been complex. The trial court had held more than forty hearings. The defendants' counsel had failed to appear at certain hearings, thereby slowing the proceedings down. The applicant's release and his flight would have caused yet further delays. The Government considered that there had been no violation of Article 5 § 3 of the Convention because the applicant's pre-trial detention had been founded on "relevant and sufficient" reasons.

2. The Court's assessment

(a) General principles

71. The Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient",

the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, §§ 152 and 153, ECHR 2000-IV).

72. The presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. A person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see, among other authorities, *Castravet v. Moldova*, no. 23393/05, §§ 30 and 32, 13 March 2007; *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...; *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000; and *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, § 4).

73. It is incumbent on the domestic authorities to establish the existence of concrete facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005; and *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, 26 July 2001). The national judicial authorities must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. 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 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; *Ilijkov*, cited above, § 86; and *Labita*, cited above, § 152).

(b) Application to the present case

74. The applicant was placed in custody on 14 December 2004. On 8 December 2005 the trial court convicted him of a criminal offence, put him on probation and immediately released him. The period to be taken into consideration lasted almost twelve months.

75. The Court observes that the applicant was apprehended on the premises on which the impugned offences had allegedly been committed. It

accepts therefore that his detention could have initially been warranted by a reasonable suspicion of his involvement in the commission of these offences. 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.

76. While the investigation was pending the domestic courts consistently relied on the gravity of the charges as the main factor for the assessment of the applicant's potential to abscond, re-offend or obstruct the course of justice. They did not demonstrate the existence of concrete facts in support of their conclusions.

77. 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 re-offending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (see *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 51; also 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).

78. This is particularly true in cases, such as the present one, where the characterisation in law of the facts – and thus the sentence faced by the applicant – was determined by the prosecution without judicial examination of the issue whether the evidence collected supported a reasonable suspicion that the applicant had committed the imputed offence. Indeed, the initial charge of violent overthrow of State power, which was a particularly serious criminal offence according to the domestic classification, had been accepted by the District Court on 8 February 2005 without any inquiry having been carried out, although it was later amended to a lesser charge of participation in mass disorders. Nevertheless, on 14 April 2005 the same court stated in the extension order that the amended charge was also "well-founded", without citing any reasons for that finding (compare *Dolgova*, cited above, § 42).

79. The only other ground for the applicant's detention during the investigation was the domestic courts' finding that the applicant had no permanent residence in Moscow. The Court reiterates that the mere absence of a fixed residence does not give rise to a danger of absconding (see *Pshevecherskiy v. Russia*, no. 28957/02, § 68, 24 May 2007; and *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005). In any event, it was undisputed that the applicant had a fixed residence in St Petersburg and was a student at a university there.

80. After the case had been submitted for trial in June 2005 the trial court used the same summary formula to refuse the petitions for release and extend the pre-trial detention of thirty-nine persons, notwithstanding the defence's express request that each detainee's situation be dealt with individually. The Court has already found that the practice of issuing

collective detention orders without a case-by-case assessment of the grounds for detention in respect of each detainee was incompatible, in itself, with Article 5 § 3 of the Convention (see *Shcheglyuk v. Russia*, no. 7649/02, § 45, 14 December 2006; *Korchuganova*, cited above, § 76; and *Dolgova*, cited above, § 49). By extending the applicant's detention by means of collective detention orders the domestic authorities had no proper regard to his individual circumstances. It is even more striking that the extension order of 20 June 2005 only noted that "all defendants should remain in custody" without giving any grounds whatsoever for their continued detention.

81. In the decisions of 27 September and 3 October 2005 rejecting the applications for release the courts relied for the first time in the proceedings on the applicant's Dutch nationality as a reason to believe that he might abscond. The Court accepts that a detainee's foreign nationality could be a relevant factor in assessing the risk of flight. However, the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier: there must be a whole set of circumstances, such as, particularly, the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 15). The domestic courts did not mention any such circumstance in their decisions or point to any specific aspects of the applicant's character or behaviour that would justify their conclusion that the applicant presented a persistent flight risk. The applicant, on the other hand, constantly invoked the facts showing his close ties with Russia that mitigated the risk of his absconding abroad, such as his permanent place of residence and family in Russia and ongoing studies at a Russian university. In any event, the applicant, who was also a Russian national, could only cross the Russian border with his Russian travel passport (see paragraph 53 above). The domestic authorities did not explain why the withdrawal of his Russian travel passport, a measure explicitly envisaged in domestic law for removing flight risks, would not have been sufficient to prevent him from absconding abroad.

82. The Court further observes that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at trial. This Convention provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see *Sulaoja*, cited above, § 64 *in fine*, 15 February 2005; and *Jabłoński*, cited above, § 83). In the present case the authorities never considered the possibility of ensuring the applicant's attendance by the use of a more lenient preventive measure, although many times his lawyers asked for his release on bail and provided the domestic courts with the personal surety of a human-rights activist.

83. The Court has frequently found a violation of Article 5 § 3 of the Convention in Russian cases where the domestic courts prolonged an applicant's detention relying essentially on the gravity of the charges and using stereotyped formula without addressing concrete facts or considering alternative preventive measures (see *Belevitskiy v. Russia*, no. 72967/01, §§ 99 et seq., 1 March 2007; *Khudobin v. Russia*, no. 59696/00, §§ 103 et seq., ECHR 2006-... (extracts); *Mamedova v. Russia*, cited above, §§ 72 et seq.; *Dolgova v. Russia*, cited above, §§ 38 et seq.; *Khudoyorov v. Russia*, cited above, §§ 172 et seq.; *Rokhlina v. Russia*, cited above, §§ 63 et seq.; *Panchenko v. Russia*, cited above, §§ 91 et seq.; and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 et seq., ECHR 2003-IX (extracts)).

84. The Court is aware of the fact that a majority of the above-mentioned cases concerned longer periods of deprivation of liberty and that against that background one year may be regarded as a relatively short period spent in detention. Article 5 § 3 of the Convention, however, cannot be seen as authorising detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)). The fact that the maximum time-limit permitted by the domestic law was not exceeded is not a decisive element for the Court's assessment, either. The calculation of the domestic time-limits depended solely on the gravity of the charges (see paragraph 51 above) which was decided upon by the prosecution and was not subject to an effective judicial review (see *Shcheglyuk*, cited above, § 43).

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

86. There has therefore been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

87. The applicant further complained that he was not allowed to bid farewell to his dying father. He complained about the refusal to release him for a few days so that he could see his father before his death or attend the farewell ceremony in The Hague. He relied on Article 3 of the Convention.

88. The Court has already found that the refusal of leave to visit a sick relative does not attain a minimum level of severity to fall within the scope of Article 3 (see *Sannino v. Italy* (dec.), no. 72639/01, 3 May 2005). In a number of cases it considered complaints about the rejection of a detainee's request for permission to visit an ailing relative or attend a relatives' funeral

under Article 8 of the Convention (see *Schemkamper v. France*, no. 75833/01, §§ 19-36, 18 October 2005; *Sannino* (dec.), cited above; and *Płoski v. Poland*, no. 26761/95, §§ 26-39, 12 November 2002). Accordingly, the applicant's complaint about the refusals of leave to visit his dying father and attend the farewell ceremony for him falls to be examined under Article 8 of the Convention which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

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

B. Merits

1. The parties' submissions

90. The Government submitted that the domestic courts had refused the applicant's request for temporary release because he had been charged with a serious criminal offence and was a Dutch national. He might have absconded, if released. Moreover, the applicant had been living in Russia since 1989, had travelled to the Netherlands to visit his father no more than once a year and had mainly corresponded with him by mail and phone. He had been given an opportunity to talk to his father over the phone. The applicant's father had donated his body to science and there had been no funeral. Therefore, there had been no violation of Article 8.

91. The applicant exposed the Government's submissions as untrue. He had often stayed with his father for several months and had had close ties with him. It had been very important for him to see his father before his death and to attend the farewell ceremony. He had offered guarantees that he would not abscond. He had indeed been given an opportunity to talk to his father over the phone, but the conversation had lasted only a minute. He had been compelled to speak Russian to his father, a Dutchman lacking a good command of the Russian language.

2. The Court's assessment

92. The Court has already found that the refusal of leave to visit an ailing relative or to attend a relative's funeral constituted an interference with the right to respect for family life (see *Schemkamper*, cited above, § 31; *Sannino* (dec.), cited above; and *Płoski*, cited above, § 32). Accordingly, the refusals to release the applicant so that he could see his father on his deathbed and attend the farewell ceremony for him interfered with the applicant's rights under Article 8 of the Convention. The Court reiterates that any interference with an individual's right to respect for his private and family life will constitute a breach of Article 8, unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

93. The Court is satisfied that the interference had a lawful basis, notably Article 108 § 1 of the Code of Criminal Procedure which provided for the preventive measure of detention of a person charged with an offence carrying a sentence of at least two years' imprisonment. The interference also pursued "a legitimate aim" within the meaning of paragraph 2 of Article 8 of the Convention, that of protecting public safety and preventing disorder or crime (see *Płoski*, cited above, § 34). It remains to be determined whether it was "necessary in a democratic society".

94. Article 8 of the Convention does not guarantee a detained person an unconditional right to leave to visit a sick relative or attend a relative's funeral. It is up to the domestic authorities to assess each request on its merits. The Court's scrutiny is limited to consideration of the impugned measures in the context of the applicant's Convention rights, taking into account the margin of appreciation left to the Contracting States (see, *mutatis mutandis*, *Płoski*, cited above, § 38). At the same time the Court emphasises that even if a detainee by the very nature of his situation must be subjected to various limitations of his rights and freedoms, every such limitation must be nevertheless justifiable as necessary in a democratic society. It is the duty of the State to demonstrate that such necessity really existed, that is, to demonstrate the existence of a pressing social need (see *Schemkamper*, cited above, § 33).

95. In the cases of *Schemkamper*, *Sannino*, and *Płoski* (all cited above) the Court had regard to the following factors to assess whether the refusals of leave to visit a sick relative or to attend a relative's funeral were "necessary in a democratic society": the stage of the criminal proceedings against the applicant, the nature of the criminal offence, the applicant's character, the gravity of the relative's illness, the degree of kinship, the possibility of escorted leave, and so on. Thus, a violation of Article 8 was found in the *Płoski* case, where the applicant, who had not been convicted, was charged with a non-violent crime and sought leave to attend the

funerals of his parents, who died within one month of each other, whereas the authorities did not give compelling reasons for the refusal and did not consider the possibility of escorted leave. By contrast, in the *Sannino* case, the refusal was justified because the applicant had been convicted of murder and was of dubious character. He sought leave to visit his grandfather who was not a close relative and whose state of health was not really precarious. In the most recent case, *Schemkamper*, the Court also found the refusal justified because the applicant's father was not so unwell as to be unable to visit the applicant in prison.

96. Turning to the present case, the Court observes that the applicant's father was dying of cancer in The Hague. He had asked for euthanasia, which was scheduled for 29 September 2005. It is the distinguishing feature of this case that the date of the applicant's father's death was known in advance and that he was to die within a matter of days. It was therefore the last opportunity for the applicant and his father to meet. Given that the applicant's father was in hospital in a grave condition, it was unrealistic to expect him to visit his son in detention. Taking into account the exceptional circumstances of the case and the strong humanitarian considerations involved, the domestic authorities should have examined the applicant's request for release with particular attention and scrutiny.

97. The domestic authorities justified the refusal to temporarily release the applicant by reference to his Dutch nationality and his potential to abscond. The Court is not oblivious to the fact that the applicant's father was in The Hague and that in order to see him the applicant would have had to travel to the Netherlands, thereby leaving the jurisdiction of Russia. It understands the apprehension of the domestic authorities that the applicant might not return from abroad. It notes in this connection that it was open to the Russian authorities to seek assistance from the Dutch authorities. The Russian authorities did not consider applying for such assistance, despite the fact that the Dutch Ambassador had contacted them at least three times to request the applicant's release (see paragraphs 27, 31 and 36 above). Nevertheless, given that the domestic authorities are better placed than the European Court to assess the matter, the Court is unable to find that, in refusing to release the applicant so that he could visit his dying father in The Hague or attend the farewell ceremony, the domestic authorities exceeded the margin appreciation afforded to them.

98. The respect for the applicant's family life required however that, once his application for release had been rejected, he be provided with an alternative opportunity to bid farewell to his dying father. The Court notes in this connection that the applicant was allowed to talk to his father over the phone, in Russian only. The conversation lasted a minute and was interrupted by the facility administration. The Government did not provide any explanation for the interruption of the conversation. The Court considers that a one-minute conversation in a language which the applicant's father had difficulty understanding did not provide a meaningful

opportunity for the applicant to bid farewell to his dying father. No other possibility to contact his father was provided.

99. Having regard to the foregoing, the Court concludes that the domestic authorities failed to secure respect for the applicant's family life as required by Article 8 of the Convention. There has therefore been a breach of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage.

102. The Government submitted that the claim was excessive. The award should not exceed the amount awarded by the Court in the *Kalashnikov* case (see *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI).

103. The Court notes that it has found a combination of grievous violations in the present case. The applicant spent a year in custody, in inhuman and degrading conditions. His detention was not based on sufficient grounds. He was not allowed to bid farewell to his dying father in violation of his right to respect for his family life. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by the mere finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

104. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

105. 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 concerning the inhuman conditions and excessive length of the applicant's detention and the refusals of leave to visit his dying father and to attend the farewell ceremony for him admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 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 8 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 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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 6 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr A. Kovler is annexed to this judgment.

C.L.R.

S.N.

CONCURRING OPINION OF JUDGE KOVLER

I agree with the Court's conclusions in the present case, including the finding that there has been a violation of Article 5 § 3 of the Convention.

In my dissenting opinion in the case of *Dolgova v. Russia* (no. 11886/05, 2 March 2006) I referred to the judgment in the case of *Labita v. Italy* ([GC], no. 26772/95, § 152, ECHR 2000-IV) to underline that "[w]hether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features" (*Labita*, § 152). Although the period of detention in the present case is the same as in the *Dolgova* case, there are factors which, in my opinion, distinguish it from *Dolgova* and warrant the conclusion that there has been a violation of Article 5 § 3, such as the applicant's chronic kidney disease, the inhuman conditions of his detention (see paragraphs 42-45) and his father's terminal illness and death. The domestic courts had an obligation under Article 99 of the Russian Code of Criminal Procedure to take those factors into account.