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La Corte EDU sull'arresto arbitrario e illegale
(CEDU V sez., sent. 23 maggio 2024, ric. n. 52855/19)

Nel caso deciso dalla Corte EDU, il ricorrente ha lamentato la presunta violazione degli articoli 5 §§ 1 e 5 della Convenzione, per essere stato tratto in arresto, all'esito di una perquisizione, senza previo mandato. Preliminarmente, la Corte ha osservato che affinché la privazione della libertà personale possa ritenersi esente da arbitrarietà, non è sufficiente che tale misura sia eseguita conformemente alla legge nazionale, ma deve anche essere "necessaria" date le circostanze. Più in particolare, la Corte ha constatato che né il rapporto di arresto né il rapporto di perquisizione contenevano informazioni circa le circostanze concrete relative al tipo di reato commesso dal ricorrente prima del suo arresto così come non riferivano gli elementi chiaramente predittivi l'avvenuta commissione del reato. Stando così le cose, e non sussistendo nessuna delle eccezioni previste dalla legge per effettuare l'arresto, la Corte EDU ha dichiarato la violazione dell'articolo 5 § 1 della Convenzione e, per conseguenza, anche del § 5 per il mancato riconoscimento di un equo risarcimento.

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

FIFTH SECTION

CASE OF *Omissis* v. UKRAINE
(Application no. 52855/19)

JUDGMENT
STRASBOURG
23 May 2024

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 *Omissis* v. Ukraine,
The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Georges Ravarani, *President*,
Lado Chanturia,
Carlo Ranzoni,

Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Mattias Guyomar,
Mykola Gnatovskyy, *judges*,
and Victor Soloveytchik, *Section Registrar*,
Having regard to:
the application (no. 52855/19) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr *omissis* ("the applicant"), on 7 October 2019;
the decision to give notice to the Ukrainian Government ("the Government") of the complaints under Article 5 §§ 1 and 5 and under Article 6 § 2 of the Convention and to declare inadmissible the remainder of the application;
the parties' observations;
Having deliberated in private on 26 March and 16 April 2024,
Delivers the following judgment, which was adopted on the last mentioned date:

INTRODUCTION

1. The case concerns the applicant's complaints under Article 5 § 1 of the Convention that his arrest without a prior court order had been unlawful, under Article 5 § 5 that he had not had an enforceable right to compensation for his unlawful arrest and detention, and under Article 6 § 2 that his right to be presumed innocent had been breached.

THE FACTS

2. The applicant was born in 1987 and lives in Kryzhanivka. He was represented by Ms V. Kirina, a lawyer practising in Kyiv.
3. The Government were represented by their Agent, most recently Ms O. Davydchuk, of the Ministry of Justice.
4. The facts of the case may be summarised as follows.

I. THE APPLICANT'S ARREST AND DETENTION

5. On 25 January 2019 the authorities opened a criminal investigation into unauthorised interference with communication systems and the creation, storage and dissemination of malicious software and pornographic material.
6. At 6.22 a.m. on 11 July 2019, in the context of the above-mentioned investigation, the authorities carried out a search of a hotel room occupied at the time by the applicant and his business partner. According to the search report, a laptop and mobile phones were seized.
7. Upon completion of the search, the investigator arrested the applicant on suspicion of storage, dissemination and distribution of pornographic material, committed by a group. His arrest was made without a prior court order.
8. The arrest report referred to Article 208 § 1 of the 2012 Code of Criminal Procedure ("the CCP") and indicated that the applicant had been arrested "after a crime had been committed following statements by an eyewitness or victim or following the indication of clear signs that he had just committed a crime". No further details were given in the arrest report.
9. According to the notification of suspicion served on the applicant on 12 July 2019, he had created and organised a so-called "bulletproof hosting" and had committed several cybercrimes by sharing "malicious software" and pornographic material. He was also suspected of being responsible for

several distributed denial of service attacks on Ukrainian State agencies. On the same day the prosecutor applied to the local court to have him detained.

10. On 12 July 2019 the Pecherskyi District Court of Kyiv ("the District Court") rejected the investigator's request and placed the applicant under house arrest during the night hours. Having analysed the submitted material, the court found that there was a reasonable suspicion that he had committed the offences of which he was suspected, but that there were insufficient grounds to justify his detention.

11. On 28 November 2019 the District Court decided to change the preventive measure to release on receipt of a personal undertaking from the applicant.

12. The parties did not inform the Court of the outcome of the criminal investigation in respect of the applicant.

II. DEFAMATION PROCEEDINGS BROUGHT BY THE APPLICANT

13. On 16 July 2019 officials of the State Security Service (*Sluzhba bezpeky Ukrainy* – "the SBU") held a press conference regarding the criminal investigation in respect of the applicant, at which they made the following statements:

> "... [the investigation] concerns the judgments [against the applicant] handed down by the US courts [sentencing him to] a total of 50 years' imprisonment. You can see that the judgments were delivered in 2012 and 2014 ..."
>
> "... moreover, owing to the judgments [against the applicant] Interpol issued a Red Notice [concerning him] ..."
>
> "... that is, he has two passports [with different names] ..."
>
> "... as you can see, there is a scheme of illegal activity [organised by the applicant]".

14. On 22 July 2019 the applicant instituted civil proceedings against the SBU officials who had held the press conference, seeking protection of his honour, dignity and business reputation, and refutation of the untruthful information.

15. On 15 April 2021 the Shevchenkivskyi District Court of Kyiv allowed the applicant's civil claim, finding that all the statements mentioned in paragraph 13 above were false and damaging to his honour and dignity. The court also ordered the SBU to publish information about the court decision and to refute the untruthful information it had disseminated about the applicant.

16. The above-mentioned judgment was upheld by the Kyiv Court of Appeal on 21 September 2021. The SBU appealed to the Supreme Court. In his pleadings in reply, the applicant argued, *inter alia*, that the SBU officials had declared him guilty of the commission of crimes. The Supreme Court dismissed the appeal on 24 May 2022 without addressing specifically the applicant's complaint that he had been "declared guilty" by the SBU.

17. The applicant did not seek any compensation in the above-mentioned proceedings and did not inform the Court whether he had instituted separate compensation proceedings in connection with the above findings.

RELEVANT LEGAL FRAMEWORK

18. Article 29 of the Constitution of Ukraine reads as follows:

> "Every person has the right to freedom and personal inviolability.
>
> No one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on the grounds and in accordance with the procedure established by law.

In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours of the time of detention, with a reasoned court decision in respect of the holding in custody..."

19. Article 208 of the CCP authorises arrests without a court order in the following circumstances and makes them subject to the following requirements:

"1. [In the absence of a court order, a] competent official shall be entitled to arrest a person suspected of having committed an offence punishable by imprisonment, only in the following cases:

(1) if the person has been caught whilst committing or attempting to commit an offence; or

(2) if immediately (*безпосередньо*) after a criminal offence, statements by an eyewitness or victim or [a combination] of clear signs on the body, clothing or at the scene indicate that the person has just committed an offence ...

...

4. The ... official who made the arrest shall immediately inform the arrested person, in a language which he or she understands, of the reasons for the arrest and the crime of which he or she is suspected. The official shall also explain to the arrested person his or her rights: to be legally represented; to be provided with medical assistance; to make a statement or to remain silent; to inform [third] parties ... of his or her arrest and whereabouts; to challenge the reasons for the arrest; and other procedural rights set out in this Code.

5. A report shall be drawn up on the arrest of an individual, containing [in particular] the following information: the place, date and exact time (hour and minute) of the arrest ...; the grounds for the arrest; the results of the search of the person; any requests, statements or complaints made by the arrested person; and a comprehensive list of his or her procedural rights and obligations. The arrest report shall be signed by the official who drew it up and by the arrested person. A copy shall be served on the arrested person as soon as his or her signature has been obtained ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

20. The applicant complained that his arrest on 11 July 2019 without a prior court order had been unlawful and arbitrary, in breach of Article 5 § 1 of the Convention, and that he had not had an enforceable right to compensation for his unlawful arrest and detention, in breach of Article 5 § 5. The relevant provisions 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;

...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

21. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

22. The applicant submitted that the arrest report had not contained clear reasons capable of justifying his "warrantless" arrest. He added that he had been asleep when the police had entered the hotel room and that he therefore could not have been arrested in the circumstances described in the arrest report (see paragraph 8 above).
23. The Government submitted that the applicant's arrest had been in accordance with domestic law and that its lawfulness had been reviewed by the domestic court during the examination of the investigator's application for his detention.
24. The Court notes that the general legal standard of a suspect's arrest in Ukraine requires the judge's involvement in the proceedings before the actual arrest is made, by giving an authorisation of such arrest. It is undisputed between the parties that the applicant's arrest was made with reference to Article 208 of the CCP, which, taken together with Article 29 of the Constitution of Ukraine (see paragraph 18 above), contains an exhaustive list of exceptions and forms the legal basis in the Ukrainian legal system for a suspect's arrest without a prior judicial warrant.
25. While the "lawfulness" of a deprivation of liberty under domestic law is the primary consideration, it is not always the decisive one. The Court must, in addition, be satisfied that it 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 manner (see *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 84, 24 June 2010). Furthermore, in order for a deprivation of liberty to be considered free from arbitrariness, it does not suffice that this measure is executed in conformity with the letter of national law; it must also be necessary in the circumstances (see *Khayredinov v. Ukraine*, no. 38717/04, § 27, 14 October 2010, and *Korneykova v. Ukraine*, no. 39884/05, § 34, 19 January 2012).
26. In this connection, the Court observes that the arrest report cited the above-mentioned Article 208 § 1 of the CCP as the reason for the applicant's arrest without a prior judicial warrant (see paragraphs 8 and 19 above). This provision, setting out exceptions from the general rule requiring a court decision for the arrest of an individual, had to be interpreted narrowly. Furthermore, specific grounds justifying the application of one of the exceptions that it listed exhaustively had to be established unequivocally at the time of the taking of such a measure (see *Strogan v. Ukraine*, no. 30198/11, § 87, 6 October 2016).
27. The Court furthermore refers to Article 208 § 5 of the CCP which provides that a report about an individual's arrest must contain the grounds for that arrest. This is particularly relevant in the circumstances of the present case, in which the provision of Article 208 § 1 of the CCP was merely mentioned (see paragraph 8 above), while neither the arrest report nor the search report contained any specific information or relied on any concrete circumstances to explain what crime the applicant had committed before his arrest or what signs clearly indicated that he had just committed a crime. It could not therefore be claimed that the authorities faced an urgent situation falling within one of

the exceptions under Article 208 § 1 of the CCP such as, for example, arresting a person in *flagrante delicto*.

28. In a number of its judgments in similar cases relating to the period when the CCP adopted in 1960 (with subsequent amendments) was applicable in Ukraine, the Court found, with reference to Article 106 of that Code[1], that when the arrest report failed to include the specific information indicating that the arrest was carried out in an urgent situation, it did not constitute a meaningful guarantee against arbitrary deprivation of liberty (see *Grinenko v. Ukraine*, no. 33627/06, § 83, 15 November 2012; *Malyk v. Ukraine*, no. 37198/10, §§ 27-29, 29 January 2015; and *Kotiy v. Ukraine*, no. 28718/09, § 45, 5 March 2015). The Court considers that its findings made in the above-mentioned cases are equally relevant for the purposes of examination of the present case in view of the fact that the same defective practice of giving insufficient details in arrest reports is at issue.

29. Having regard to the above considerations, the Court finds that the applicant's arrest and detention between 11 and 12 July 2019 on the basis of the investigator's decision was incompatible with the requirements of Article 5 § 1 of the Convention. There has therefore been a violation of that provision.

2. Alleged violation of Article 5 § 5 of the Convention

30. The applicant also complained that he had not had an enforceable right to compensation for the violation of his right under Article 5 § 1.

31. The Government submitted that Ukrainian legislation provided for the possibility of claiming compensation for unlawful detention subject to a judicial decision acknowledging such unlawfulness. That was not, however, applicable to the circumstances of the present case, because the domestic courts had presumed the applicant's detention to be lawful.

32. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 of that Article. The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, ECHR 2012, with further references).

33. In the present case, the Court has found a violation of Article 5 § 1, in conjunction with which the present complaint is to be examined. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore ascertain whether the applicant has an enforceable right at domestic level to compensation for damage.

34. The Court observes that the issue of compensation for unlawful detention is regulated in Ukraine by the Act of 1 December 1994 on the procedure for claiming compensation for damage caused to citizens by the unlawful acts of bodies of inquiry, pre-trial investigation authorities, prosecutor's offices and courts (see *Dubovtsev and Others v. Ukraine*, nos. 21429/14 and 9 others, § 48, 21 January 2021). The right to compensation arises, in particular, where the unlawfulness of the detention has been established by a judicial decision (see, for example, *Vadym Melnyk v. Ukraine*, nos. 62209/17 and 50933/18, § 92, 16 September 2022).

35. The Court further notes that, as long as the applicant's arrest is in formal compliance with the domestic legislation, it is impossible for him to claim compensation in that regard at the national level. Furthermore, there is no legally envisaged procedure in Ukraine for bringing proceedings to seek compensation for the deprivation of liberty found to be in breach of one of the other paragraphs by the Court (see *Sinkova v. Ukraine*, no. 39496/11, § 82, 27 February 2018).

36. This means that one of the principles of Article 5 § 5 – namely, that the effective enjoyment of the right to compensation guaranteed by it must be ensured with a sufficient degree of certainty (see *Stanev*, cited above, § 182) – has not been met in the present case.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

38. The applicant complained that the statements of the SBU officials mentioned in paragraph 13 above had violated his right to be presumed innocent under Article 6 § 2 of the Convention, which reads as follows:

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

Admissibility

39. The Government submitted that the applicant had lost victim status as the domestic courts had acknowledged the violation of his right to be presumed innocent in the context of the defamation proceedings. They further stated that he had not sought any other measures to protect the right in question.
40. The applicant disagreed with the Government stating that the defamation proceedings successfully pursued by him could not be considered an effective domestic remedy in respect of his complaint under Article 6 § 2.
41. The Court sees no reason to deal with the Government's objection regarding the loss of victim status since the above complaint is any event inadmissible for the following reasons.
42. First of all, the applicant has not claimed that he used a criminal-law remedy in respect of his complaint under Article 6 § 2, namely raising the issue in the course of the criminal investigation (see *Shagin v. Ukraine*, no. 20437/05, §§ 71-72, 10 December 2009; and *Dovzhenko v. Ukraine*, no. 36650/03, § 42, 12 January 2012).
43. The Court further observes that by the decision of the Shevchenkivskyi District Court of Kyiv of 15 April 2021 issued in the defamation proceedings, the statements of which the applicant complained were found to be untruthful and damaging to his honour and dignity (see paragraph 15 above). The Court also notes that the claimant would have been able to obtain compensation as a result of successful defamation proceedings, if he had sought it.
44. Even though the applicant did not consider the defamation proceedings an effective domestic remedy in respect of his complaint under Article 6 § 2 (see paragraph 38 above), the Court, having regard to its case-law (for instance, *Marchiani v. France* (dec.), no. 30392/03, 27 May 2008; *Gutsanovi v. Bulgaria*, no. 34529/10, §§ 176-78, ECHR 2013 (extracts); *Januškevičienė v. Lithuania*, no. 69717/14, §§ 58-59, 3 September 2019; *Mamaladze v. Georgia*, no. 9487/19, § 65, 3 November 2022; *Okropiridze v. Georgia*, nos. 43627/16 and 71667/16, § 113, 7 September 2023; and *Rimšēvičs v. Latvia* (dec.), no. 31634/18, § 49, 10 October 2023) considers that in Ukraine a civil-law remedy may, in principle, be an effective way of addressing a complaint relating to allegedly prejudicial statements made in respect of ongoing criminal proceedings, either alone or in combination with a criminal-law remedy.
45. In the present case, the Court notes that the applicant, when instituting defamation proceedings, did not refer to his right to be presumed innocent. It was only in the proceedings before the Supreme Court that he did raise an additional argument that the SBU officials had "declared him guilty" of the commission of crimes (see paragraph 16 above). Having in mind that the scope of review before the Supreme Court was limited to the contents of the appeal in cassation formulated by the defendant in the civil case (the SBU), it is clear that the applicant's additional argument raised by him for the first time in the above proceedings had hardly any prospect of being examined on the merits.

46. The above-mentioned circumstances bring the Court to the conclusion that the applicant failed to sufficiently raise the issue about the alleged breach of his presumption of innocence through either a criminal-law or a civil-law remedy. In these circumstances, this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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."

48. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.
49. The Government contested that claim.
50. The Court awards the applicant EUR 1,800 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 1 and 5 of the Convention concerning the lawfulness of the applicant's arrest without a prior court order and the absence of an enforceable right to compensation for his unlawful arrest and detention 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 § 5 of the Convention;

4. *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 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 23 May 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

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[1] According to that provision, the official conducting a criminal inquiry shall be entitled to arrest a person suspected of a criminal offence for which a penalty involving deprivation of liberty may be imposed only on one of the following grounds: 1) if the person is discovered whilst or immediately after committing an offence; 2) if eyewitnesses, including victims, directly identify this person as the one who committed the offence; 3) if clear traces of the offence are found either on the body of the suspect, or on his clothing, or with him, or in his home.