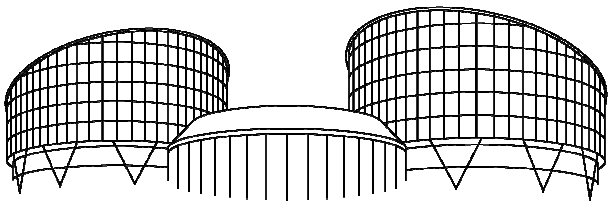

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF MIKOLENKO v. ESTONIA

(Application no. 10664/05)

JUDGMENT

STRASBOURG

8 October 2009

FINAL

08/01/2010

This judgment may be subject to editorial revision.

In the case of Mikolenko v. Estonia,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 10664/05) against the Republic of Estonia 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 Nikolai Mikolenko ("the applicant"), on 3 March 2005.

2. The applicant was represented by Mr M. Ioffe, a lawyer practising in Riga. The Estonian Government ("the Government") were represented by their Agents, Ms M. Hion and subsequently Ms M. Kuurberg, of the Ministry of Foreign Affairs. The Russian Government exercised their right of third-party intervention in accordance with Article 36 § 1 of the Convention and were initially represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant alleged, in particular, that he was deprived of his liberty in violation of Article 5 § 1 of the Convention and that the length of his detention was excessive.

4. On 8 January 2008 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the unlawfulness and length of the applicant's detention to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 in Ukraine and lives in Tallinn.

A. Background of the case

6. The applicant is a former Soviet and Russian Army officer who served from 1983 in the territory of Estonia. After the restoration of Estonian independence, he was refused an extension of his residence permit in that country. His complaints were dismissed by the domestic courts; the final judgment was delivered by the Supreme Court (*Riigikohus*) on 17 April 2003. Subsequently, he lodged an application with the Court, alleging, among other complaints, that his right to respect for his private and family life, guaranteed under Article 8 of the Convention, had been violated by the Estonian authorities. On 5 January 2006 this application was declared inadmissible (see *Mikolenko v. Estonia* (dec.), no. 16944/03, 5 January 2006).

7. The circumstances of the applicant's stay in Estonia and the Estonian authorities' refusal to extend his residence permit, as well as a summary of the relevant domestic and international legal provisions may be found in the decision mentioned above. In brief, although the Estonian authorities had finally refused to extend the applicant's residence permit, he – backed by the Russian Government – was of the opinion that he was still entitled to stay in Estonia under the terms of the agreement concerning social guarantees for retired military personnel of the armed forces of the Russian Federation in Estonia, concluded on 26 July 1994. The agreement provided that retired military personnel, that is persons discharged from the army service and receiving pension could apply for a residence permit in Estonia. According to the Russian Government the applicant was dismissed from the military service on 20 July 1994 for health reasons and excluded from the lists of the military unit on 18 October 1994.

8. The Estonian authorities, to the contrary, considered that he did not fall under the agreement concerning social guarantees but rather under the treaty on the withdrawal of the Russian troops from the Estonian territory, also concluded on 26 July 1994, as he had been in the active military service at the time of the conclusion of the treaty. He had only been assigned to the reserve forces on 4 August 1994 and discharged from the military unit as of 18 October 1994. Accordingly, he had been obliged to leave Estonia under the treaty.

B. The applicant's detention

9. On 21 July 2003 the Citizenship and Migration Board (*Kodakondsus- ja Migratsiooniamet* – hereinafter "the Board") ordered the applicant to leave the country on 17 September 2003 at the latest. He was warned that in the event of failure to comply with the order, he would be expelled immediately. The applicant challenged the order before the Tallinn Administrative Court (*halduskohus*) which, on 24 October 2003, dismissed the complaint. The applicant appealed, but his appeal was dismissed by the Tallinn Court of Appeal (*ringkonnakohus*). On 27 October 2004 the Supreme Court refused leave to appeal.

10. In the meantime, on 29 October 2003, the applicant was arrested. His immediate expulsion was not possible as he only presented his expired passport on arrest, saying that he did not know where his valid Russian passport was. On 31 October 2003 the Tallinn Administrative Court decided, at the request of the police, that the applicant was to be taken to a deportation centre for execution of the deportation order. The Administrative Court authorised his detention for up to two months, starting from 3 November 2003, giving him some time to find his valid passport. The Government have submitted to the Court a copy of the applicant's Russian passport valid until 24 January 2008. The applicant did not present this document in the subsequent proceedings.

11. According to the applicant he lodged an appeal against the Administrative Court's decision of 31 October 2003 but since his detention was subsequently, on 30 December 2003, extended by the Administrative Court, the appeal became void of substance and had to be withdrawn. According to the Government the applicant filed a notice of his intention to appeal, as required by the applicable rules of procedure, but he never actually lodged an appeal.

12. From 4 November 2003 the applicant was detained in the deportation centre in Harku, Harju County.

13. The Government in their submissions have described the deportation centre as an institution with a guarded perimeter kept under visual and electronic supervision. It can accommodate 42 persons in rooms designed for four persons but as a rule no more than two persons are placed in one room. The detainees can use eating and rest areas equipped with television, radio, newspapers and literature. There is table tennis equipment and various board games and the detainees have free access to toilets and shower. Washing and drying machines are available. There are four periods a day (totalling almost ten hours) for outdoor walks. The detainees are served three meals a day, including at least two hot meals; there is a nurse present in the centre four hours a day and, if the need arises, a general practitioner is available. A psychiatrist and a psychologist visit the centre regularly. The detainees can buy additional food and other items through the

centre; they are also allowed to receive parcels, send and receive letters and use the telephone. Furthermore, they can meet consular officials of their country of nationality, defence counsel and ministers of religion. Subject to authorisation they can also be visited by other persons, such as family members.

14. At the request of the Board, the applicant's detention was extended by the Tallinn Administrative Court once every two months. It was open to the applicant to appeal against the rulings of the Administrative Court to the Tallinn Court of Appeal and, thereafter, to the Supreme Court. He did so in some but not in all cases. On each occasion the higher courts dismissed the appeals.

15. The courts found that the applicant's detention was lawful and justified for the purpose of ensuring his expulsion. According to the courts' rulings, the applicant had allegedly lost his valid Russian passport and despite the requests by the Board to the Embassy of the Russian Federation in Estonia ("the Embassy") the latter had not been able to issue a new travel document to the applicant because of his refusal to fill in the required application forms. The Board was ready to issue the applicant a temporary travel document but according to the Russian Embassy it was not possible to add an entry permit to such a document. The courts considered that detention was an appropriate measure to motivate the applicant to co-operate with the authorities and avoid a situation where an expulsion order could not be executed merely because of the applicant's unwillingness. They were of the opinion that the length of the applicant's detention in the deportation centre depended on him alone. The courts also noted that the applicant's deportation might be possible under the Agreement between the European Community and the Russian Federation on readmission once it entered into force.

16. On 8 October 2007 the Tallinn Administrative Court refused to further extend the applicant's detention. It found that the length of his detention had become disproportionate and, in the circumstances, unconstitutional. He was released from the deportation centre the next day.

C. Measures taken by the authorities for the applicant's removal

17. The Board and the Ministry of Foreign Affairs sought possibilities to secure travel documents for the applicant so that he could be removed; they were in contact with the Embassy to that end throughout the applicant's detention. Furthermore, the Board on several occasions requested the applicant to fill in forms required by the Embassy to issue him a passport, but the applicant persistently refused.

1. Measures taken by the Board

18. The Board's attempts to achieve the applicant's removal included the following steps.

19. On 17 November 2003 the Board asked the Russian Embassy to issue the applicant a return certificate. On 10 December 2003 the Embassy replied that the applicant could return to Russia only on the basis of a Russian foreign passport, which he could apply for in person or through a representative.

20. On 4 February and 7 April 2004 the Board informed the Embassy that the applicant refused to fill in the required forms. They requested the Embassy's assistance in issuing documents for the applicant and expressed their readiness to provide the applicant with a temporary travel document. The Embassy did not reply to the letters.

21. On 14 June 2004 the Board again reminded the Embassy of the situation and sought their agreement to affix an entry visa to a temporary travel document the Board was ready to issue. On 18 June 2004 the Embassy replied that this was not possible under Russian law.

22. On 23 July 2004 the Board asked the Ministry of Foreign Affairs to request the Embassy to provide the applicant with the requisite papers.

23. On 13 April 2006 the Board requested the Embassy's assistance in issuing documents to the applicant. On 19 April 2006 the Embassy replied that they could issue him a passport upon his request.

24. On 11 June 2007 the Board submitted a request to the Embassy for the applicant to be readmitted on the basis of the readmission agreement. On 26 June 2007 the Embassy replied that the Russian party was of the view that the applicant did not fall under the readmission agreement as he had a legal basis for residing in Estonia (the Estonian-Russian agreement of 1994).

25. On 25 July 2007 the Board again asked the Ministry of Foreign Affairs to request the Embassy to provide the applicant with the requisite papers.

26. On 13 September 2007 the Board asked the Ministry of Foreign Affairs to contact the Immigration Service of the Russian Federation to provide the applicant with papers under the readmission agreement. On 30 October 2007 the Ministry of Foreign Affairs replied that the Russian authorities did not wish to consider the applicant's readmission under the readmission agreement and therefore the readmission application concerning him had not been submitted to the Immigration Service of the Russian Federation. A meeting with the Russian party had been scheduled for November. On 19 November 2007 the Ministry of Foreign Affairs nevertheless transmitted the readmission application to the Immigration Service of the Russian Federation. On 1 December 2007 the Immigration Service replied that the applicant was not subject to readmission under the readmission agreement as he had a legal basis for residing in Estonia.

2. Measures taken by the Estonian Ministry of Foreign Affairs

27. In 2002 and 2003 the Embassy and the Ministry of Foreign Affairs exchanged several notes and memoranda related to the Estonian authorities' refusal to extend residence permits for some retired Russian Federation servicemen. On 2 February 2004 the Ministry of Foreign Affairs expressed readiness to hold bilateral consultations to regulate the matter, as proposed by the Embassy.

28. On 5 June 2006 the Ministry of Foreign Affairs sent a note to the Embassy drawing the Russian authorities' attention to the fact that on 5 January 2006 the European Court of Human Rights had declared inadmissible the applicant's application related to the Estonian authorities' refusal to extend his residence permit. The Ministry of Foreign Affairs asked the Russian authorities to take the necessary steps for the applicant's repatriation and requested their assistance in providing him with papers. On 16 June 2006 the Embassy expressed their readiness to issue the applicant identity documents, provided that the applicant submitted an application in writing.

29. On 26 July 2007 the Ministry of Foreign Affairs requested the Embassy to issue the applicant with the documents necessary for his readmission on the basis of the readmission agreement and transmitted a readmission application in respect of him to the Embassy. On 21 August 2007 the Embassy replied that retired servicemen of the Russian Federation, including the applicant, did not fall under the readmission agreement as they had a legal basis for residing in Estonia. They proposed regulating the matter by negotiation, through diplomatic channels. On 7 September 2007 the Ministry of Foreign Affairs agreed to hold negotiations.

30. On 25 December 2007 the Embassy reiterated that the Russian authorities considered that the applicant did not fall under the readmission agreement.

31. On 4 February 2008 the Ministry of Foreign Affairs confirmed its position that the applicant was subject to the readmission agreement.

32. On 19 February 2008 the Embassy emphasised that the main aim of the readmission agreement, as stated in its preamble, was to strengthen co-operation in order to combat illegal immigration. Any attempt to apply it to other situations was contrary to the principle of implementing international treaties in good faith. In particular, the readmission agreement was not applicable to the retired servicemen to whom the agreement of 1994 concerning social guarantees to retired military personnel applied.

33. In addition, the representatives of the Ministry of Foreign Affairs repeatedly met Russian officials to discuss possible solutions for the applicant's case. In connection with the readmission agreement there have also been joint committee meetings to discuss issues related to the agreement and to conclude its implementing protocols. In March and September 2007 the Estonian authorities submitted a draft implementing

protocol of the readmission agreement to the Russian party; a copy of the draft protocol was resubmitted to the Russian authorities on 4 March 2008. On 28 April 2008 the Embassy informed the Estonian authorities that the Immigration Service was ready to hold consultations at expert level concerning the implementing protocols in May 2008.

34. The Embassy sent the applicant several letters informing him of the Russian authorities' position in the matter and giving reassurances that the Russian party would try to solve the issues through bilateral dialogue.

D. Subsequent developments

35. On 8 October 2007, the day the applicant's release was ordered by a court (see paragraph 16 above), the Board gave him a written reminder that his expulsion order was still in force. Some further measures were applied as well – the applicant had to reside in his fixed residence, to report to the Board at certain intervals, and to inform the Board of any change in his place of residence or if he left it for an extended period.

36. On 5 February 2008 the Harju County Court, in misdemeanour proceedings, sentenced the applicant to ten days' detention for staying in Estonia without a legal basis. The judgment was upheld in substance by the Tallinn Court of Appeal. On 14 May 2008 the Supreme Court refused, on procedural grounds, to examine the applicant's appeal as it had not been drawn up by a lawyer as required by law.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

37. Section 5 of the Obligation to Leave and Prohibition of Entry Act (*Väljasõidukohustuse ja sissesõidukeelu seadus*), as in force at the material time, defined expulsion as the enforcement of an obligation to leave in the cases and pursuant to the procedure provided by law.

Section 7 of the Act provided that an order to leave Estonia could be issued to an alien who was staying in Estonia without a legal basis and that it had to contain a warning of compulsory execution in the event of failure to comply with it. According to section 8, the compulsory execution was to take place after the sixtieth day following notification of the order.

Section 14(4) of the Act enumerated the instances where expulsion would not be applied. These included the case where expulsion was no longer feasible.

Section 18(1) of the Act stipulated that expulsion of an alien had to be completed within forty-eight hours of his or her arrest. If it was not possible to complete expulsion within that term, the person to be expelled could be placed in a deportation centre, subject to judicial authorisation, until their expulsion, but for no longer than two months (section 23(1)). This term

could be extended at the request of the Board by up to two months at a time (section 25).

Under section 26-4(1) of the Act, the person to be expelled was required to co-operate in the organisation of the expulsion, including co-operating in obtaining the necessary documents for expulsion.

38. On 1 June 2007 an Agreement between the European Community and the Russian Federation on readmission entered into force. The aim of the agreement is to strengthen the parties' co-operation in order to combat illegal immigration more effectively. Article 2 of the agreement, concerning readmission of Russian nationals, reads as follows:

> "1. The Russian Federation shall admit, upon application by a Member State and in accordance with the procedure provided for in this Agreement, any person who does not, or no longer, fulfil the conditions in force for entry to, presence in, or residence on the territory of the requesting Member State provided it is established, in accordance with Article 9 of this Agreement, that such person is a national of the Russian Federation.
>
> The same shall apply to illegally present or residing persons who possessed the nationality of the Russian Federation at the time of entering the territory of a Member State but subsequently renounced the nationality of the Russian Federation in accordance with the national laws of the latter, without acquiring the nationality or a residence authorisation of that Member State or any other State.
>
> 2. After the Russian Federation has given a positive reply to the readmission application, the competent diplomatic mission or consular office of the Russian Federation shall irrespective of the will of the person to be readmitted, as necessary and without delay, issue a travel document required for the return of the person to be readmitted with a period of validity of 30 calendar days. If, for any reason, the person concerned cannot be transferred within the period of validity of that travel document, the competent diplomatic mission or consular office of the Russian Federation shall issue a new travel document with a period of validity of the same duration without delay."

39. In a judgment of 13 November 2006, the Administrative Law Chamber of the Supreme Court (case no. 3-3-1-45-06) found that the assessment of the feasibility of expulsion could not be based on the fact that the person concerned did not wish to leave the country and wanted to stay there. An interpretation to the contrary would have been in conflict with the nature of expulsion as a legal concept.

40. In a judgment of 3 April 2008, the Administrative Law Chamber of the Supreme Court (case no. 3-3-1-96-07) noted that both the Board's request and the court's authorisation for detention had to be based on the law in force at the time of the court proceedings. It pointed out, however, that since expulsion proceedings constituted a dynamic process, due attention had to be given to the prospective changes in legal circumstances which would affect expulsion at the time when the person concerned was expected to be expelled.

THE LAW

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

41. The applicant complained that his right to liberty had been violated by his protracted detention in the deportation centre. He relied on Article 5 § 1 of the Convention which, in so far as relevant, 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:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

42. The Government contested that argument.

A. Admissibility

1. Abuse of the right of petition

43. The Government considered that the applicant had not acted in good faith but had abused his right of petition as he had submitted to the Court information concerning his expulsion proceedings only selectively. They noted, in particular, that he had failed to inform the Court about his alleged loss of his passport and his further attempts to hinder the completion of the expulsion proceedings, including his refusal to fill out the necessary forms for identity documents to be issued. He had been aware of the fact that the Russian authorities had not accepted the solution suggested by the Estonian authorities that the latter issue the applicant a temporary travel document.

44. The applicant disagreed.

45. The Court observes that all the elements referred to by the Government were mentioned in the copies of the domestic decisions submitted by the applicant and therefore the Court was sufficiently informed about the relevant circumstances of the case at the time when it took its decision to give notice of the application to the Government (see the partial decision on admissibility of 8 January 2008). Therefore, this objection is dismissed.

2. Non-exhaustion of domestic remedies

46. The Government argued that the applicant had not exhausted domestic remedies with regard to the issue of his deprivation of liberty or

the legality of his continued detention. In respect of the deprivation of liberty, the Government noted that the applicant had not appealed against the Tallinn Administrative Court's decision of 31 October 2003 whereby his placement in the deportation centre had been authorised. In so far as the applicant's subsequent stay in the deportation centre was concerned, the Government emphasised that the domestic courts, when authorising the extension of his detention in the deportation centre, had dealt with the issue only in the context of extending the stay. If the applicant had believed that the length of his detention had been unlawful, he should have filed a separate claim for damages.

47. The applicant submitted that he had appealed against the Administrative Court's decision of 31 October 2003 but since his detention had been extended by the Administrative Court on 30 December 2003, the appeal had become void of substance and he had withdrawn it.

48. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The Court observes that after the initial decision whereby the applicant's detention was authorised by the Tallinn Administrative Court, his continued detention was subsequently authorised bimonthly by the same court. The Court notes that in the latter proceedings he made use of his right to appeal to the court of appeal and to the Supreme Court on several occasions. Moreover, the applicant was released from the deportation centre after the Tallinn Administrative Court had refused to extend his detention on 8 October 2007. Thus, the Court considers that the domestic authorities have had an opportunity of putting right the alleged violation of the applicant's right to liberty. In the context of the present case it is not of decisive importance whether or not the applicant appealed against the initial decision as at that time the issue of the compatibility of the length of his detention with Article 5 § 1 (f) could not possibly have arisen. As to the question whether the applicant should have filed a separate claim for damages, the Court does not consider that he would have had any prospect of success in such proceedings as his detention had been authorised by administrative courts which had considered it lawful. Therefore, this objection is also dismissed.

3. Conclusion as to admissibility

49. 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 submissions of the parties

(a) The applicant

50. The applicant argued that he had not been detained for the purpose of his deportation and considered that the real reason for his detention had been to force him to co-operate and apply for a Russian passport. He emphasised, however, that deportation meant execution of the obligation to leave by the force of the State, and that the authorities had had no reason to count on his co-operation as in his opinion his stay in Estonia had a legal basis. The extension of his detention – whereby the domestic courts referred to his failure to fulfil his obligation to co-operate with the authorities – had actually become a form of punishment and a means of breaking his will. Even assuming that the authorities had initially pursued a legitimate aim, they had later wished to force him to sign the documents and thereafter waited for the changes in international law to take effect.

The applicant pointed out that the exceptions to the right to liberty, listed in paragraph 1 of Article 5, had to be interpreted narrowly and that detention ceased to be justified under subparagraph (f) if the deportation proceedings were not conducted with due diligence.

(b) The Government

51. The Government maintained that the applicant's detention had been lawful under domestic law. The only purpose of his detention had been his expulsion from Estonia; this was demonstrated by the pertinent court decisions as well as by the other steps taken by the authorities. The applicant's refusal to co-operate had only extended the period of his detention. The Government pointed out that the feasibility of expulsion could not be assessed on the basis of whether the person concerned wished to leave the country or not. They also emphasised that in 2006 and 2007 the Estonian authorities could legitimately presume that after the entry into force of the EU-Russia readmission agreement on 1 June 2007 there would be an additional basis for the applicant's expulsion. The Estonian authorities could not have foreseen that the Russian party would not comply with its obligations under that agreement.

52. The Government argued that periodic judicial review of the applicant's detention had constituted a sufficient guarantee against arbitrariness. Moreover, it had been repeatedly explained to the applicant what he needed to do in order to be released. At the same time, international and diplomatic channels had been used to find other possibilities for the applicant's expulsion.

53. The Government insisted that the applicant's own behaviour had contributed to a significant extent to the length of his detention. They pointed out that the applicant, claiming that he had lost his passport, had shown no readiness to apply for a new identity or travel document; nor had the Russian authorities been ready to issue him such a document in the absence of his application or to accept a temporary travel document the Estonian authorities could have issued. The Government pointed to the efforts made by the Estonian authorities through diplomatic channels to find a solution to the situation, and to the fact that they had presumed that the applicant's expulsion would prove easier after the entry into force of the EU-Russia readmission agreement. They emphasised that when it had become clear that the applicant's expulsion was not realistically possible at the time, he had been released from the deportation centre.

54. In conclusion, considering the time-consuming nature of communication between states and the unwillingness of the receiving State to co-operate, as well as the applicant's own intentional failure to present an identity document and refusal to apply for one, plus the fact that he had enjoyed completely appropriate conditions throughout, his stay in the deportation centre had been in conformity with Article 5 § 1 (f).

2. The third-party intervener's arguments

55. The Russian Government agreed in substance with the applicant's arguments. They considered that the applicant's protracted detention had been in violation of Article 5 § 1. They noted that the Estonian authorities had found out shortly after the applicant's arrest that it was impossible to deport him without travel documents and that such documents could not be obtained without his co-operation. The applicant's detention had been aimed at breaking his will and forcing him to sign documents needed for him to leave the country. In the opinion of the Russian Government the applicant's conduct could not have justified such a long period of detention. They pointed out that after his release less severe measures, such as police control, had been applied and there had been no reason why such measures could not have been applied before.

3. The Court's assessment

(a) Whether the applicant's detention fell within the scope of Article 5 § 1 (f)

56. The Court reiterates that subparagraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds of deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...).

57. In the present case, the Government contended that the applicant was deprived of his liberty with a view to expulsion and that his detention had been permissible under subparagraph (f) of Article 5 § 1. The applicant and the Russian Government contested that argument, considering that the real purpose of his detention had been to break his will and to force him to co-operate. They were of the opinion that, even assuming that his detention had initially been aimed at his expulsion, this had soon proved impossible and the detention had become a punitive measure.

58. The Court observes that the applicant was refused an extension of his residence permit, was ordered to leave the country and was warned that his failure to leave would result in his expulsion. As he failed to leave within the time-limit and his immediate expulsion was impossible because of lack of travel documents, an administrative court authorised his placement in the deportation centre on the basis of the Obligation to Leave and Prohibition of Entry Act. Thus, the Court has no reason to doubt that the applicant's detention, at least initially, fell within the scope of Article 5 § 1 (f).

(b) Whether the applicant's detention was arbitrary

59. The Court reiterates that Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, 19 February 2009, and *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports of Judgments and Decisions* 1996-V).

60. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place

and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *A. and Others v. the United Kingdom*, cited above, § 164, and, *mutatis mutandis*, *Saadi*, cited above, § 74).

61. As concerns the compliance of the applicant's detention with national law in the present case, the Court observes that the domestic courts, in extending his detention every two months, found it lawful. The Court further observes that sections 23 and 25 of the Obligation to Leave and Prohibition of Entry Act, relied on by the domestic authorities, provided a legal basis for such detention.

62. However, as noted above, compliance with domestic law is not in itself sufficient to establish lack of arbitrariness and further elements, referred to in paragraph 60 above, must be examined in this context. One of these elements is the length of the detention, which should not exceed that reasonably required for the purpose pursued.

63. The court reiterates that deprivation of liberty under Article 5 § 1 (f) is justified only for as long as deportation proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under this subparagraph (see, *mutatis mutandis*, *Quinn v. France*, 22 March 1995, § 48, Series A no. 311).

64. The Court observes that the applicant's detention with a view to expulsion was extraordinarily long. He was detained for more than three years and eleven months. While in the beginning of his detention the domestic authorities took steps to have documents issued to him, it must have become clear quite soon that these attempts were bound to fail as the applicant refused to co-operate and the Russian authorities were not prepared to issue him documents in the absence of his signed application, or to accept a temporary travel document the Estonian authorities were ready to issue. Indeed, the Russian authorities had made their position clear in both respects by as early as June 2004. Thereafter, although the Estonian authorities took repeated steps to solve the situation, there were also considerable periods of inactivity. In particular, the Court has been provided with no information on whether any steps with a view to the applicant's deportation were taken from August 2004 to March 2006 (see paragraphs 18 to 33 above).

65. What is more, the applicant's expulsion had become virtually impossible as for all practical purposes it required his co-operation, which he was not willing to give. While it is true that States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory" (see, for example, *Saadi*, cited above, § 64, with further references), the aliens' detention in this context is nevertheless only permissible under Article 5 § 1 (f) if action is being taken with a view to their deportation. The Court considers that in the present case the applicant's further detention

cannot be said to have been effected with a view to his deportation as this was no longer feasible.

66. It is true that at some point the Estonian authorities could legitimately have expected that the applicant could be removed on the basis of the EU-Russia readmission agreement once it entered into force, as under this agreement the Russian authorities were required to issue travel documents to persons to be readmitted irrespective of their will. However, the agreement entered into force only on 1 June 2007, which was about three years and seven months after the applicant was placed in detention. In the Court's opinion the applicant's detention for such a long time even if the conditions of detention as such were adequate could not be justified by an expected change in the legal circumstances.

67. The Court also notes that after the applicant's release on 9 October 2007 he was informed that he still had to comply with the order to leave. He was obliged to report to the Board at regular intervals (see paragraph 35 above). Thus, the authorities in fact had at their disposal measures other than the applicant's protracted detention in the deportation centre in the absence of any immediate prospect of his expulsion.

68. The foregoing considerations are sufficient to enable the Court to conclude that the grounds for the applicant's detention – action taken with a view to his deportation – did not remain valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.

There has accordingly been a violation of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government reiterated that the applicant had not exhausted domestic remedies since he had failed to lodge a complaint and claim damages before an administrative court. Alternatively, the Government argued that the applicant's release from detention had constituted sufficient redress. Should the Court nevertheless find that the applicant had sustained

non-pecuniary damage, the Government requested the Court to award him a reasonable sum.

72. The Court notes that the argument concerning the non-exhaustion of domestic remedies has been dismissed (see paragraph 48 above). It finds that the applicant has suffered non-pecuniary damage as a result of the violations found. Deciding on an equitable basis, and having regard to the specific circumstances of the present case and to the applicant's behaviour in particular, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

73. The applicant also claimed 40,731.30 kroons (EEK – approximately corresponding to EUR 2,603) for the costs and expenses incurred before the domestic courts and the Court.

74. The Government pointed out that most of the invoices submitted by the applicant concerned costs not related to the present case. Only translation costs in the amount of EEK 3,260.40 (EUR 208) were related to the proceedings before the Court but this sum had in fact not been paid by the applicant.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court notes that in the present case only costs in the amount of EUR 208 were related to this case either at the domestic level or before the Court. Regard being had to the information in its possession and the above criteria, the Court awards the applicant EUR 208 in respect of costs and expenses, plus any tax that may be chargeable to the applicant, and dismisses the remainder of his claims under this head.

C. Default interest

76. 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

1. *Declares* unanimously the remainder of the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* by six votes to one

(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, the following amounts, to be converted into Estonian kroons at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) EUR 208 (two hundred and eight euros) in respect of costs and expenses;

(iii) any tax that may be chargeable to him on the above amounts;

(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;

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

Done in English, and notified in writing on 8 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Maruste is annexed to this judgment.

P.L.
C.W.

DISSENTING OPINION OF JUDGE MARUSTE

1. I agree with the majority that the overall length of the applicant's detention was too long. But my point of view is that this case does not belong to the family of ordinary expulsion cases and should be assessed differently. It has to be noted also that this case is only about length of detention pending expulsion and not about the substantive question of expulsion. The latter complaint was declared inadmissible on 5 January 2006.

2. Firstly, unlike ordinary expulsion cases this case has a specific international law background – a bilateral treaty on the withdrawal of Russian troops from Estonian territory. Under the terms of that treaty, the applicant was obliged to leave the country (*pacta sunt servanda*!). Furthermore, it was established through free and fair court proceedings that he did not have any legal grounds to stay in Estonia (see paragraphs 7 and 8 of the judgment). No humanitarian ground was established for military servicemen of approximately 50 years of age to stay in the country. It should be noted that sections 23 and 25 of the Obligation to Leave and Prohibition of Entry Act, relied on by the domestic authorities, provided a legal basis for the applicant's detention.

3. Secondly, the applicant's own obstructive behaviour has to be taken into account. It has been shown by the Estonian authorities that he had been issued a valid Russian passport. Even assuming that he had lost it, it could easily have been replaced by a new passport or other travel document immediately if he had agreed to sign an application form. At the same time it has also to be noted that in spite of their treaty obligation and the commitments concerning readmission signed with the EU on 25 May 2006, the relevant authorities of the applicant's country of origin showed clear unwillingness to cooperate and put a stop to the applicant's sufferings. Under that agreement between the EU and Russia the Russian authorities were required to issue travel documents to persons to be readmitted, irrespective of their will.

4. Thirdly, as concerns the argument that the authorities could have applied more lenient measures, such as police supervision, to ensure the applicant's compliance with his obligation to cooperate and execute his expulsion, it must be reiterated that detention under Article 5 § 1 (f) does not have to be considered "necessary"; provided that the detention concerns a person against whom action is being taken with a view to deportation, it may suffice that such detention is considered "appropriate" (see *Agnissan v. Denmark*, (dec.) no. 39964/98, 4 October 2001). States have a recognised sovereign right to control entry and stay on their territory and should have the power to expel those who do not have the right to stay. In sum, the lengthy stay in the detention centre was to a large extent caused by the applicant himself and by his country of origin.

5. Lastly, I consider it very problematic to award compensation in cases where the violation has occurred (or even been achieved) through manifestly obstructive behaviour in defiance of law and order and valid judicial decision.