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EGMR (Nr. 70276/01) - Urteil der ersten Kammer vom 19. Mai 2004 (Gusinskiy v. Russland)

Recht auf Freiheit und Sicherheit (hinreichender Verdacht nach Art. 5 Abs. 1 lit. c EMRK; Rechtmäßigkeit und Gesetzmäßigkeit der Inhaftierung: Inkorporation des nationalen Rechts, qualitative Anforderungen an das Gesetz bei Art. 5 EMRK und Prüfung des nationalen Rechts durch den EGMR; Schutz vor Willkür); immanente Geltung der rule of law innerhalb der EMRK; Verbot der zweckentfremdenden Berufung auf Schranken der EMRK durch den Staat (hier: Missbrauch des Strafverfahrens und der Untersuchungshaft zur Erzwingung des Verkaufs eines Medienunternehmens); Freiheit der Person; Rechtsstaatsprinzip.

Art. 5 Abs. 1 lit. c EMRK; Art. 18 EMRK; Art. 2 Abs. 2 GG; Art. 104 Abs. 2 Satz 1 GG; Art. 20 Abs. 3 GG

Leitsätze des Bearbeiters

1. Strafverfahren und die Untersuchungshaft dürfen durch den Staat nicht zu verfahrensfremden Zwecken eingesetzt werden (hier: Einsatz als Druckmittel im Rahmen einer Vertragsverhandlung). Wenn ein staatliches Unternehmen einen inhaftierten Beschwerdeführer zur Unterzeichnung einer die Verfahrenseinstellung umfassenden Abmachung auffordert, die ein Staatsminister mit seiner Unterschrift bestätigt und die von einem staatlichen Untersuchungsbeamten später umgesetzt wird, muss der EGMR davon ausgehen, dass die Strafverfolgung des Betroffenen genutzt wurde, um diesen einzuschüchtern und damit eine Verletzung des Art. 18 in Verbindung mit Art. 5 EMRK annehmen.

2. Art. 5 Abs. 1 EMRK gewährt die Freiheit der Person im klassischen Sinne: Umfasst ist nur der Schutz der körperlichen Bewegungsfreiheit. Art. 5 EMRK schützt nicht gegen die Einleitung eines Strafverfahrens als solche.

3. Der für eine Festnahme nach Art. 5 Abs. 1 lit. c EMRK erforderliche hinreichende Verdacht setzt voraus, dass die Behörden im Zeitpunkt der Anklage hinreichende Beweise für eine Anklage gesammelt haben oder diese während der Inhaftierung sammeln. Eine unmittelbar erfolgende Anklage oder eine unmittelbare Vorführung vor einem Gericht ist nicht erforderlich. Es stellt jedoch einen essentiellen Bestandteil des Schutzes gegen willkürliche Inhaftierungen dar, dass der Verdacht auf vernünftigen Anhaltspunkten beruhen muss. Ein nur in gutem Glauben angenommener Verdacht genügt nicht: Es müssen Fakten oder Informationen vorliegen, die einen objektiven Betrachter davon überzeugen können, dass die betroffene Person eine Straftat begangen haben könnte.

4. Hinsichtlich der nur auf die gesetzlich vorgeschriebene Weise zulässigen Inhaftierung bezieht sich die EMRK in erster Linie auf das nationale Recht. Sie bestimmt die Pflicht zur Beachtung der materiellen und prozeduralen Regelungen des nationalen Rechts und sie fordert qualitativ ergänzend ein, dass jede Freiheitsentziehung mit dem Zweck des Art. 5 EMRK, den Einzelnen vor willkürlichen Freiheitsentziehungen zu schützen, vereinbar ist. In erster Linie haben dabei die nationalen Institutionen das nationale Recht zu interpretieren und anzuwenden. Da jedoch gemäß Art. 5 Abs. 1 EMRK eine Verletzung des nationalen Rechts auch eine Verletzung der EMRK bedeutet, kann und muss der EGMR eine bestimmte Überprüfung vornehmen, ob das nationale Recht gewahrt worden ist.

5. Ein nationales Gesetz im Sinne des Art. 5 Abs. 1 EMRK muss auch mit der rule of law vereinbar sein, die allen Artikeln der EMRK immanent ist. Dies bedeutet in dieser Hinsicht, dass ein Gesetz, welches eine Freiheitsentziehung gestattet, hinreichend zugänglich und präzise sein muss, um jedem Risiko einer willkürlichen Freiheitsentziehung vorzubeugen. Ein nationales Gesetz, das Freiheitsentziehungen abweichend vom geregelten Normalfall bei "außergewöhnlichen Umständen" zulässt, genügt diesen Anforderungen nicht.

6. Art. 18 EMRK hat innerhalb der EMRK keine selbständige Bedeutung. Die Bestimmung kann nur in Verbindung mit anderen Artikeln der EMRK angewendet werden; es kann jedoch auf eine Verletzung des Art.

18 EMRK in Verbindung mit einem anderen Artikel erkannt werden. Art. 18 EMRK ist nur anwendbar, wenn ein Recht oder eine Freiheit der EMRK betroffen ist, das bzw. die von der EMRK gestatteten Einschränkungen unterliegt.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

7. The applicant was born in 1952. 2

8. The circumstances of the case, as submitted by the parties, are as follows. 3

A. The initial investigation against the applicant 4

9. The applicant is the former Chairman of the Board and majority shareholder of ZAO Media Most, a Russian private media holding company, comprising NTV, a popular television channel. 5

10. On 2 November 1999 the applicant was interviewed by the senior special cases investigator of the General Prosecutor's Office (the "GPO"), Mr Nikolayev. It appeared from the transcript of this interview that the interview concerned an investigation into a State-owned enterprise known as FGP RGK "Russian Video" ("Russian Video") in respect of the transfer of a broadcasting licence to a limited liability company, OOO "Russian Video-11th Channel" ("OOO Russian Video") in violation of various provisions of the Civil Code. 6

11. After the interview a witness record form was completed and signed by both the applicant and Mr Nikolayev. The applicant was allowed to review the notes made of the interview and to add his own comments. The investigating officer noted on the form that the applicant had been awarded the Friendship of the Peoples Order. 7

12. In 2000 Media Most had an intense controversy with OAO Gazprom, a natural gas monopoly controlled by the State, over Media Most's debts to Gazprom. 8

13. After Gazprom had discontinued the negotiations on the debts, Media Most's offices in Moscow were searched by special force units of the GPO and the Federal Security Service. A number of documents and other material were seized as evidence for an investigation into infringements of privacy allegedly carried out by the security staff of Media Most. 9

14. On 15 March 2000 Mr Nikolayev opened a criminal investigation against the applicant (criminal case no. 18/191012-98) in respect of allegations of fraud. This case was consolidated with the criminal investigation in the case no. 18/221012-98 against R., an executive of Russian Video which concerned allegations of embezzlement. The allegations in both cases related to the business relations between Russian Video and OOO Russian Video and in particular to the inclusion of Media Most in OOO Russian Video and an increase in the statutory capital which resulted in a redistribution of the shareholders' interests. 10

B. The applicant's imprisonment on 13 June 2000 11

15. On 11 June 2000 the applicant was summoned to attend the offices of the GPO at 5.00 p.m. on 13 June 2000 to be questioned as a witness in relation to another criminal case. At the time when the summons was issued by the GPO the applicant was out of the country but nevertheless made arrangements to return to Russia. Upon his arrival at the GPO's offices on 13 June 2000, the applicant was arrested and imprisoned in the Butyrka prison pursuant to an order made on 13 June 2000 by Mr Nikolayev. 12

16. The order stated that, pursuant to Articles 90-92 and 96 of the Code of Criminal Procedure ("CCrP"), Mr Nikolayev considered that the crime of fraud, of which the applicant was suspected, constituted a grave public threat and was punishable by imprisonment only, and that the applicant might interfere in establishing the truth in relation to the case and attempt to evade investigation and trial. 13

17. The applicant remained in custody until 16 June, during which time he was interrogated twice: on 14 and 16 June. 14

18. The interrogation of 14 June took place in the presence of the applicant's lawyers. It was explained to the applicant before the interview that he was suspected of committing a large-scale fraud under Article 159 § 3 (b) of the Criminal 15

Code. More particularly, the charges were based on the allegation that in 1996-97, by means of the establishment of various commercial entities (including Media Most), broadcasting functions were fraudulently transferred from Russian Video, a State-owned company, to OOO Russian Video, a private company, thereby stripping Russian Video of the 11th TV Channel, with a value of 10 million US dollars ("USD"). It was alleged that in 1997, the applicant, in concert with R., began using the 11th TV Channel for his own purposes, without payment to the State.

19. The applicant declined to comment in detail on the investigation, other than to state that he found it to demonstrate an ignorance of Russian law and a "political contract" against him. 16

20. In the record of the interview Mr Nikolayev noted that the applicant had been awarded the Friendship of the Peoples Order. 17

21. On 15 June 2000 the applicant's lawyers lodged a petition with Mr Nikolayev complaining that the applicant's arrest was unlawful as it did not comply with Article 90 of the CCrP, that the applicant was subject to an amnesty against imprisonment as a result of the award of the Friendship of Peoples Order and the Amnesty Act passed on 26 May 2000, and that the suspicions against the applicant were inconsistent, absurd and false. 18

22. In addition, the applicant's lawyers lodged a complaint with the Tverskoy District Court of Moscow under Article 220 § 1 of the CCrP claiming that the imprisonment was unlawful and requesting the applicant's immediate release. The grounds for the complaint were that the arrest order was issued in violation of Articles 90, 92 and 96 of the CCrP since there were no exceptional circumstances to justify the applicant's detention before the laying of charges, nor any grounds for imprisonment on the basis of the charges made. The arrest order was issued with apparent political motivation and the imprisonment constituted an excessive restraint and was unnecessary. Furthermore, there were no grounds to suspect that the applicant intended to hide from the investigation nor any reason to believe that he would interfere with the investigation. Finally, the applicant was subject to an amnesty from punishment and preliminary imprisonment due to having been awarded the Friendship of the Peoples Order. 19

23. On 16 June 2000 Mr Nikolayev charged the applicant with fraud under Article 159 § 3 (b) of the Criminal Code. On the same day the applicant was interrogated in the presence of his lawyers. The applicant refused to sign the record of the interrogation because he did not understand the charges laid. The applicant noted on the record that he considered the charges to be legally absurd and that he did not admit any guilt in relation to them. The applicant again declared that the investigation was being used by the authorities to discredit him and demanded his immediate release from imprisonment. 20

24. On the same day, 16 June, Mr Nikolayev ordered the applicant's release from custody in exchange of an undertaking not to leave the country. The applicant was released at 10 p.m. on 16 June 2000. 21

25. After the applicant's release, Mr Nikolayev issued summonses for the applicant to appear for further questioning on 22 June and 3, 11 and 19 July 2000. The applicant attended for questioning but refused to answer the questions that were put to him. 22

26. The applicant asked Mr Nikolayev a number of times to permit him to leave the country for personal and business reasons. Mr Nikolayev refused without giving any detailed reasons. 23

C. The "July Agreement" and termination of prosecution 24

27. During the applicant's imprisonment between 13 and 16 June 2000, the Acting Minister for Press and Mass Communications, Mr Lesin, offered to drop the criminal charges against the applicant arising out of the Russian Video matter if the applicant sold Media Most to Gazprom at a price to be determined by Gazprom. 25

28. Whilst the applicant was in prison, Gazprom asked him to sign an agreement in return for which the applicant was told that all criminal charges against him would be dropped. The agreement between Gazprom and the applicant was signed on 20 July 2000 (the "July Agreement") and included in Annex 6 a provision calling, among other things, for the cessation of the criminal prosecution against the applicant in relation to Russian Video and for a guarantee of his security. This provision read as follows: 26

"The Parties realise that a successful implementation of the Agreement is only possible when individuals and legal entities acquire and exercise their civil rights by their own will and in their own interests, without any compulsion by other parties to make any such acts. The above currently requires meeting certain interrelated conditions, namely:

- termination of the criminal prosecution against Mr Vladimir Aleksandrovich Gusinskiy under the criminal case initiated against him on 13 June 2000, his re-classification as a witness in the said case, suspension of the restraint in the form of an order not to leave. In case this condition is not ensured, the Parties are relieved of performance of their obligations hereunder;

- provision to Mr Vladimir Aleksandrovich Gusinskiy and other shareholders (stockholders) and executives of the [Media Most subsidiaries] of guarantees of their security and protection of their rights and freedoms, including the right freely to travel, to choose the place of stay and residence, freely to leave the Russian Federation and to return to the Russian Federation without any obstacles;

- refraining from taking any steps, including making public statements, dissemination of information by the Organisations, their shareholders and executives, causing damage to the fundamentals of the constitutional regime and violation of the integrity of the Russian Federation, undermining the security of the State, incitement of social, racial, national and religious discord, leading to discrediting institutions of the Russian Federation State power."

29. Annex 6 was signed by the parties and endorsed by the signature of Mr Lesin. 27

30. Following the signing of the "July Agreement", the criminal prosecution against the applicant in connection with Russian Video was stopped by a stay of prosecution and restraint cancellation order made by Mr Nikolayev on 26 July 2000. The order read as follows: 28

"The analysis of the evidence confirms the illegal nature of [the applicant's] doings. However, the actions of the head of ZAO Media Most V.A. Gusinskiy along with criminal legal norms contain the elements of substantive law. In view of the specific nature of this action it is impossible to attribute it to separate legal spheres.

In the course of the investigation V.A. Gusinskiy understood the unlawfulness of the acquisition of the right to another's property and in this connection he provided a reimbursement for the damage he caused, having assigned his share in the statutory capital of OOO "Russian Video-11th Channel" to the State. Apart from that, he significantly made up for the harm caused to the interests of the State by voluntarily transferring ZAO Media Most shares to a legal entity controlled by the State.

The steps taken by the accused can be viewed as extenuating circumstances and they evidence his sincere repentance which in conjunction with other positive characterising details and the lack of past criminal record allows a decision to be taken to relieve V.A. Gusinskiy from criminal prosecution."

31. Simultaneously the restraint by way of the order not to leave the country was lifted. On that day the applicant left Russia and on 21 August 2000 went to his villa in Sotogrande, Spain. 29

32. Following the applicant's departure from the country, Media Most refused to honour the "July Agreement", claiming that it had been entered into under duress. 30

D. Judicial review of the applicant's arrest 31

33. On 20 June 2000 the Tverskoy District Court closed the proceedings initiated on the applicant's complaint about the unlawfulness of the detention. The court found that the complaint could not be examined since the order of imprisonment had by this time been cancelled, and since only those actually detained could appeal against detention. 32

34. On appeal, this decision was upheld by the Moscow City Court on 11 July 2000. 33

E. The Media Most loan investigation 34

35. On 27 September 2000 Mr Nikolayev initiated a further criminal investigation against the applicant. The new charge was brought under Article 159 § 3 (b) of the Criminal Code and concerned fraudulent obtaining of loans by Media Most. The applicant was not provided with a copy of the order initiating the proceedings. However, according to the information gathered by the applicant's lawyers, the criminal investigation was instituted on the basis of an application filed by Gazprom with the GPO on 19 September 2000. Gazprom asked the GPO to investigate the spending of funds obtained by Media Most and, in particular, whether the loan complied with the activities permitted by the charter of Media Most, whether the funds were used for their intended purpose and whether the management of Media Most had violated any law in relation to the loans. Gazprom, a State-owned company, was involved as a guarantor of the loans. 35

36. On 1 November 2000 Mr Nikolayev issued a further summons for the applicant to attend the GPO on 13 November, to be presented with charges and for interrogation. The applicant did not attend. 36

37. As the applicant did not attend the GPO, on 13 November 2000 Mr Nikolayev amended the order for the applicant's prosecution. He re-instigated the charges for fraud under Article 159 § 3 of the Criminal Code but in connection with another incident, and imposed a measure of restraint of imprisonment. The order was passed to the Russian National Interpol Bureau. The charges alleged that the applicant had fraudulently obtained loans. 37

38. The applicant was arrested in Spain pursuant to the international arrest warrant on 11 December 2000 and imprisoned in Spain on 12 December 2000. On 22 December 2000 the applicant was released from prison on bail of USD 5.5 million and confined to house arrest in his villa in Sotogrande. 38

39. Following the applicant's lawyers' application, on 26 December 2000 the Tverskoy District Court of Moscow ruled that the initiation of the Media Most loan investigation had been unlawful because the evidence gathered by the investigating authorities had disclosed no elements of fraud sufficient to institute criminal proceedings. 39

40. On 5 January 2001 the Moscow City Court set aside the judgment of 26 December 2000 on the ground that no court appeal lay against investigating authorities' decisions to institute criminal proceedings. 40

41. Following proceedings in the Spanish courts, on 4 April 2001 a judgment was given in the applicant's favour rejecting the request by the Russian authorities for the applicant's extradition from Spain. Declining the extradition request the National Court (*Audiencia Nacional*) said: 41

"[I]t is possible to observe in the documents furnished by [the applicant]... certain noteworthy and peculiar circumstances—which are unusual in the sphere of judicial claims for fraud—which, although they do not themselves lead to the conclusion that we are dealing with an irregular claim filed for a political purpose, [illegible] that the Court cannot but consider [the applicant's] argument as not completely without foundation as far as the facts and interferences are considered and as not inconceivable and not discountable on the basis of logical criteria and experience.

The Court considers the following circumstances of the case to be peculiar:

1. The agreement of 20 July 2000 ... of sale by [the applicant] to Gazprom-Media of a parcel of shares... [Annex 6]—a supplementary agreement which is not common in relationships between sellers and purchasers of securities—concludes with two signatures, one of which is the habitual signature of the representative of Gazprom-Media ... which appears in the body of the contract and in other annexes and another signature which at first sight does not coincide with [the applicant's] normal signature—in the agreement, annexes and stamps in this extradition procedure. [The applicant] claims that this is the signature of a member of the Russian Government.

2. ... Six days after the date of the agreement, [the applicant], who stood accused in the proceedings [concerning Russian Video] with a promise not to leave the country, was exempted from liability in the said proceedings and the measure restricting his freedom was lifted...

3. [The applicant's] statements at the extradition hearing with regard to the pressure and coercion suffered, which he gives as the reasons prompting him to sign the agreement of 20 July 2000...

4. The judgment of the Tverskoy District Court of 26 December 2000...

These peculiarities of the case must inevitably have legal significance for the judicial ruling on this extradition request since the fact that the Court has perceived them... obliges it, for reasons of legal security and effective judicial protection ... to stretch to the extreme the judgment of double incrimination, analysing the grounds for the accusation in view of the need to provide due legal protection..."

F. Further developments 42

42. On 19 June 2002 Judge Merkushov, a Deputy President of the Supreme Court, lodged an application for supervisory review of the decisions of the Tverskoy District Court of 20 June 2000 and the Moscow City Court of 11 July 2000. The judge maintained that it was the lawfulness of detention rather than detention itself which should have been the subject of the judicial review. He requested the Presidium of the Moscow City Court to remit the case for a fresh examination by the Tverskoy District Court. 43

43. On 18 July 2002 the Presidium of the Moscow City Court granted the application. 44

44. On 26 September 2002 the Tverskoy District Court examined the substance of the complaint about the detention. At the hearing, the representative of the defendant, the GPO, argued that at the time of the applicant's arrest he could have interfered with the course of justice because he had been the head of Media Most and therefore had unlimited possibilities to influence witnesses and had had access to written evidence. Furthermore, as the applicant had had dual citizenship and a travel passport, he could escape abroad. With regard to the applicant's allegation that he had been entitled to an amnesty, the prosecutor noted that documentary proof that the applicant had indeed held the award had only been submitted on 15 June 2000, i.e. after the arrest, and the next day the applicant had been released. The Tverskoy District Court confirmed the reasons of the GPO. It found that, in the light of the explanations of the representative of the GPO, the wording of the detention order of 13 June 2000 could not have been seen as strained and hypothetical. As to the award, the court found that the criminal procedure law contained no restriction on application of measures of restraint to a person subjected to an act of amnesty. 45

II. RELEVANT DOMESTIC LAW 46

… 47

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION 48

48. The applicant complained under Article 5 of the Convention that his detention was effected in the absence of a reasonable suspicion of having committed an offence, did not comply with the domestic procedure and was ordered without regard to the provisions of the Amnesty Act. Article 5, insofar as relevant, reads as follows: 49

"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;..."

A. Reasonable suspicion 50

49. First, the applicant alleged that both criminal cases against him were instituted without any legal basis. 51

1. Arguments of the parties 52

50. The Government contested this allegation. They maintained that the applicant's detention on 13 June 2000 was motivated by a reasonable suspicion that he had committed a large-scale fraud punishable under Article 159 § 3 (b) of the CCrP. 53

51. The applicant contended that he had no case to answer. With regard to the Russian Video investigation, he submitted that his behaviour did not fall under the legal definitions of fraud and complicity. With regard to the Media Most loan investigation, he submitted that the GPO had in fact tried artificially to criminalise credit relations between two legal persons. 54

2. The Court's assessment 55

52. The applicant claims that neither the Russian Video nor the Media Most loan investigations were based on a "reasonable suspicion". 56

The Court recalls first that in proclaiming the "right to liberty", Article 5 § 1 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person (see *Engel v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 58). 57

Since the Russian authorities did not physically detain the applicant in connection with the Media Most loan case, the applicant cannot claim to be a victim of a breach of Article 5 in this respect. The Court will therefore limit its examination of the existence of a "reasonable suspicion" with the Russian Video case. 58

53. The Court reiterates that in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c) it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1099, Series A no. 145-B, § 53). Neither is it necessary that the person detained should ultimately have been charged or taken before a court. The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention (see *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, § 55). However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words "reasonable suspicion" mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, § 32). 59

54. The Court points out that it has once found a violation of Article 5 § 1 (c) where a person was detained on charges of misappropriation of State funds even though his actions—granting funds in assistance and loans to developing countries—could in no way imply criminal liability for decisions of this nature (see *Lukanov v. Bulgaria*, judgment of 20 March 1997, *Reports of Judgments and Decisions* 1997-II, §§ 42-46). 60

55. The present application is, however, different. In the Russian Video case, the investigating authorities suspected the applicant of having fraudulently, by a number of sham transactions, deprived a State-owned company of the right to broadcast TV signals. The authorities evaluated the damage caused to the State at USD 10 million and qualified the applicant's actions as a criminal offence under Article 159 § 3 (b) of the CCrP. 61

The Court considers that the evidence gathered by the investigating authorities could "satisfy an objective observer" that the applicant might have committed the offence. 62

B. Lawful detention 63

56. The applicant alleged next that his detention was not "lawful" because the domestic procedure was not observed. In particular, there had been no "exceptional circumstances" required by Article 90 of the CCrP to justify his detention before the laying of charges. Furthermore, contrary to the requirements of Article 89 of the CCrP, there had been no evidence to show that he would flee the investigation or interfere with the establishment of the truth if he remained at large. 64

The applicant also complained that his detention was not "lawful" because by virtue of the Amnesty Act he was exempt from criminal prosecution. 65

1. Arguments of the parties 66

(a) The Government 67

57. The Government contested these allegations. 68

58. First, with regard to the compliance with the domestic procedure, they admitted that Article 90 of the CCrP did not include a list of "exceptional circumstances" in which detention was possible before the laying of charges. However, such circumstances were to be determined individually in each particular case. 69

The Government asserted that the applicant had been suspected of a serious crime—large-scale concerted fraud. The crime constituted a grave public threat and was punishable by imprisonment only. Therefore, the investigative authorities had decided to take the applicant into custody. Article 96 of the CCrP, as in force at the material time, permitted detention on the ground of seriousness of the offence alone. 70

Besides, the investigating officer had suspected that the applicant might abscond. The suspicion had been caused by the applicant's being aware that on charges of a similar offence in a different criminal case another person, R., had been arrested due to his engagement in criminal activities in respect of Russian Video. The applicant had also been aware of the seriousness of the crime he had been suspected of and of a possibility of his preventive arrest. The fears that the applicant might go into hiding had later turned out to be justified. 71

59. Secondly, with regard to the amnesty, the Government submitted that under section 8 of the Amnesty Act all criminal proceedings against persons awarded medals and orders of the USSR or Russia were to be stopped regardless of the gravity of the charges. 72

On 28 June 2000 the Amnesty Act was amended in such a way that the offence imputed to the applicant under Article 159 § 3 (b) of the CCrP was no longer in the list of the offences to which the amnesty extended. 73

In any event, the criminal laws did not prohibit the detention of persons entitled to benefit from the amnesty. 74

The Government also asserted that at the time of the arrest the investigating authorities did not know that the applicant was awarded the Friendship of the Peoples Order. The investigating authorities first learned about it at the time of the applicant's release on 16 June 2000. Under the law, once the investigating officer learned about the award he should have stopped the criminal proceedings, if the applicant agreed. However, since the case-file contained no information on whether the applicant had agreed to the termination of the proceedings, the investigating authorities continued the proceedings as they ordinarily would. 75

(b) The applicant 76

60. With regard to the compliance with the domestic procedure, the applicant agreed with the Government that neither Article 90 of the CCrP nor any other provision defined clearly what the term "exceptional circumstances" stood for. 77

He argued further that the suspicion that he could flee from the investigation had been unfounded. The charge brought against him had had nothing in common with the charges brought against R. who had been taken into custody on charges of tax evasion almost two years before the applicant's arrest. It had been absurd to suspect that the applicant could flee from the investigation because of R.'s arrest. 78

Until the very moment of the arrest the activities of the GPO had neither directly nor indirectly indicated that the applicant had been suspected of a grave offence and therefore might be taken into custody. On 2 November 1999 the applicant had been questioned as a witness in the criminal case against R., and the questions he had been asked provided no grounds to presume that he had been suspected of committing offences and so might be arrested. Furthermore, the interview had shown that the applicant had been fully prepared and willing to help in supplying any information that the investigating officer might require. The applicant's overall behaviour prior to his arrest could not have been the basis for a suspicion that he might flee from the investigation and the court. Even though the applicant could have stayed abroad, he had always immediately returned to Moscow if it had been required. 79

61. With regard to the amnesty, the applicant disagreed with the Government's interpretation of the Amnesty Act. According to him, it is illogical that a person who is subject to amnesty from charge is not subject to an amnesty in regard to an arrest relating to that charge. 80

The applicant argued that the Government's reference to the amendment of the Amnesty Act of 28 June 2000 was irrelevant as it came about after the applicant's arrest. It would be absurd to suggest that this amendment retrospectively made the applicant's arrest lawful. 81

The applicant claimed that the investigating authorities did know that he had been awarded the Friendship of the People Order at the time of his arrest. Mr Nikolayev had himself recorded this fact in the questioning records of 2 November 1999 and 14 June 2000. 82

2. The Court's assessment 83

62. The Court recalls first that 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, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. 84

In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. Like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. 85

Quality in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness (see, with necessary changes made, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, § 50). 86

63. In the present case, the applicant was remanded in custody before being charged. Such detention was an exception from the general rule laid down in Article 89 of the CCrP, according to which measures of restraint were to be applied after charges had been laid. This exception was permitted by Article 90 of the CCrP in "exceptional circumstances". The parties agree that the CCrP did not reveal the meaning of this expression. 87

The Government have not submitted any instances—whether confirmed by court decisions or not—of cases which have been considered to disclose "exceptional circumstances" in the past. 88

64. It has not been shown that this rule—on the basis of which a person could be deprived of his liberty—met the "quality of law" requirement of Article 5. 89

65. In the light of the above finding, it is not necessary to consider whether the applicant's situation met the substantive requirements of the law. 90

66. With regard to the amnesty, the Court reiterates that the "lawfulness" of detention essentially means conformity with national law (see *Amuur*, cited above, § 50). It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see, for example, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, § 41). 91

67. The Government accepted that by virtue of the Amnesty Act the investigating officer should have stopped the proceedings against the applicant once he learned that the applicant held the Friendship of the Peoples Order. Although the Government claimed that the investigating officer first learned about that fact on 16 June 2000, they did not deny that the same investigating officer had himself entered the information about the award in the questioning records of 12 November 1999 and 14 June 2000. The Court therefore finds that by 13 June 2000 the authorities did know, or could have been reasonably expected to know, that the criminal proceedings against the applicant should be stopped. 92

68. The Court agrees with the applicant that it would be irrational to interpret the Amnesty Act as permitting detention on 93

remand in respect of persons against whom all criminal proceedings must be stopped. There has, therefore, been a breach of the national law.

69. There has accordingly been a violation of Article 5 of the Convention. 94

II. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 5 95

70. The applicant also complained that his detention represented an abuse of power. He claimed that by detaining him the authorities intended to force him to sell his media business to Gazprom on unfavourable terms and conditions. The Court will consider this complaint under Article 18 of the Convention which provides: 96

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." 97

A. Arguments of the parties 98

1. The Government 99

71. The Government denied this allegation. They maintained that the applicant had not submitted any evidence to show that if he had not sold his business under the "July Agreement", he would not have been released. 100

2. The applicant 101

72. The applicant submitted that the facts of the case spoke for themselves. He reiterated that the authorities were motivated by a wish to effectively silence his media and, in particular, its criticisms of the Russian leadership. The applicant highlighted that when Media Most did not comply with the "July Agreement" because it had been signed under duress, the GPO initiated the Media Most loan investigation. 102

B. The Court's assessment 103

73. The Court recalls that Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention. There may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone. It follows further from the terms of Article 18 that a violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention (see *Kamma v. the Netherlands*, no. 4771/71, Commission's report of 14 July 1974, (DR) 1, p. 4; *Oates v. Poland* (dec.), no. 35036/97, 11 May 2000). 104

74. The Court has found above in §§ 52-55 that the applicant's liberty was restricted "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". However, when considering the allegation under Article 18 of the Convention the Court must ascertain whether the detention was in addition, and hence contrary to Article 18, applied for any other purpose than that provided for in Article 5 § 1 (c). 105

75. The Government did not dispute that the "July Agreement", namely Annex 6 to it, linked the termination of the Russian Video investigation with the sale of the applicant's media to Gazprom, a company controlled by the State. The Government did not dispute either that Annex 6 was signed by the Acting Minister for Press and Mass Communications. Lastly, the Government did not deny that one of the reasons for which Mr Nikolayev closed the proceedings against the applicant on 26 July 2000 was that the applicant had made up for the harm caused by the alleged fraud by transferring Media Most shares to a company controlled by the State. 106

76. In the Court's opinion, it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies. The facts that Gazprom asked the applicant to sign the "July Agreement" when he was in prison, that a State Minister endorsed such an agreement with his signature, and that a State investigating officer later implemented it by dropping the charges, insistently suggest that the applicant's prosecution was used to intimidate him. 107

77. In such circumstances the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for alien reasons. 108

FOR THESE REASONS, THE COURT UNANIMOUSLY