



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

FOURTH SECTION

CASE OF OSVÁTHOVÁ v. SLOVAKIA

(Application no. 15684/05)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

21/03/2011

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

In the case of Osváthová v. Slovakia,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 15684/05) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Ms Klára Osváthová (“the applicant”), on 19 April 2005.

2. The applicant was represented by Mr R. Toman, a lawyer practising in Bratislava. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Ms M. Pirošíková.

3. The applicant alleged that her arrest and detention pending trial had been unlawful, that she had not been informed promptly of the reasons for her arrest and of the charge against her, that following her arrest she had not been brought promptly before a judge, that the proceedings against her had fallen short of the applicable requirements and that she had no enforceable right to compensation and no effective remedy.

4. On 8 March 2010 the President of the Fourth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Bratislava.

A. Factual background and criminal proceedings

6. On 17 September 2001 the applicant as seller entered into a contract with A. as buyer concerning some real property essentially comprising arable land.

7. On an unspecified date A. lodged a criminal complaint against the applicant accusing her of having received the purchase price of some 8,600 euros (EUR) only to renege on the contract without returning the price.

8. On 27 May 2005 the applicant was charged with fraud on the basis of A.'s criminal complaint. The decision containing the charge was not served on the applicant until 3 February 2006, when she was questioned by a judge following her arrest (see below).

9. On 19 and 29 September 2005, respectively, a national search for the applicant was launched and the Dunajská Streda District Public Prosecutor's Office (*Okresná prokuratúra*) asked the Dunajská Streda District Court (*Okresný súd*) for a warrant for the applicant's arrest.

It was argued that it was proving impossible to summon the applicant for questioning because she was not responding to summonses, was not living at her registered address (*trvalé bydlisko*) and her whereabouts were unknown.

10. On 3 December 2005 the District Court issued the arrest warrant. It indicated as the underlying reason for the warrant that "[the applicant] [was] not living at her registered address; her whereabouts [were] unknown".

11. From 2 February to 14 March 2006 the applicant was held in pre-trial detention (see below).

12. On 14 and 21 March 2006 the applicant challenged the charge by way of an interlocutory appeal (*sťažnosť*).

13. On 24 March and 12 April 2006, respectively, the investigator interviewed a notary who had drawn up the contract and, following her release from detention, also the applicant.

14. On 25 April 2006 the District Public Prosecutor's Office granted the applicant's interlocutory appeal and dismissed the charge against her on the grounds that the matter was of a civil-law nature and the applicant's actions did not constitute a criminal offence.

B. Arrest and detention

15. At 2 p.m. on 2 February 2006, on the basis of the warrant of 3 December 2005, the applicant was arrested by the police and taken into police custody.

16. At 10.30 a.m. on 3 February 2006 the applicant was brought before a single judge of the District Court for questioning.

17. A record of the questioning was made on a pre-printed form. In so far as the pre-printed section of the record was filled out, it indicates that the applicant was questioned as a person charged (*obvinený*) / suspect (*podozrivý*), that she was informed of the rights that pertain to a person in that procedural position and that she had been handed (*doručené*) / read out (*prečítané*) the decision containing the charge of fraud.

18. The verbatim section which follows the pre-printed section of the record indicates that the applicant acknowledged that she had neither a permanent nor a temporary registered place of residence (*trvalé/prechodné bydlisko*) and that she mainly stayed in monasteries and pastors' offices. She admitted having received and not returned the purchase price and expressed readiness to return it. She explained that she had health problems and that on 13 January 2006 she had fainted in the street.

19. The verbatim section of the record also indicates that, thereafter, the applicant was handed the decision containing the charge of 27 May 2005.

According to the applicant, the decision containing the charges had been handed to her at around 11 a.m.

20. The verbatim section of the record further indicates that the District Court then immediately ordered the applicant to be detained under Article 71 § 1 (a) of the Code of Criminal Procedure ("the CCP" – Law no. 301/2005 Coll., as applicable at the relevant time).

That provision allows for the detention of a person if his or her behaviour or other concrete facts give rise to a well-founded concern that he or she would flee or go into hiding in order to avoid prosecution, in particular when the person's identity cannot be immediately established, when the person does not have a fixed abode (*stále bydlisko*) or if the person faces the risk of a heavy penalty.

21. Immediately after she had been remanded in custody, the applicant orally lodged an interlocutory appeal (*sťažnosť*) and asked for her lawyer to be informed of her detention. The interview ended at 11.15 a.m.

22. In a two-page written version of the detention order of 3 February 2006 the District Court established, "on the basis of the case file and the applicant's interview", that there were reasons for detaining her under Article 71 § 1 (a) of the CCP because, "if left at liberty, [the applicant] would seek to frustrate the prosecution by going into hiding". This was so because the applicant "did not live at her registered permanent address, had no registered temporary address and it was not known where she was currently living".

23. On 23 February 2006 the applicant submitted her written grounds of appeal.

24. On 7 March 2006 the District Court sent the case file to the Trnava Regional Court (*Krajský súd*) for determination of the appeal. It arrived there on 9 March 2006.

25. Meanwhile, on 8 March 2006, the investigator attempted to interview the applicant who, however, exercised her right to remain silent.

26. On 9 March 2006 the applicant appointed a new lawyer who inspected the case file on the following day.

27. On 13 March 2006 the applicant's new lawyer submitted in writing further grounds of appeal. He relied on Article 5 of the Convention and advanced four main arguments.

First, before the questioning on 3 February 2006, the applicant had not been informed of her rights as a person facing charges.

Second, the applicant was deprived of her right to oppose her detention effectively because she was informed of the charge against her only after the questioning of 3 February 2006.

Third, the detention order was arbitrary and not susceptible of review owing to the absence of adequate reasoning.

Fourth, the District Court had failed to examine whether there was any "reasonable" suspicion against the applicant which would justify her detention.

28. On 14 March 2006 the Regional Court, sitting in private (*neverejné zasadnutie*), quashed the detention order and ordered the applicant's immediate release.

It found that the matter was of a contractual nature and that the applicant's actions could not be qualified as a criminal offence.

Moreover, the applicant could not have been in hiding because she had no knowledge that she had been wanted on a criminal charge.

The Regional Court concluded that there was no reason for detaining the applicant.

29. Following the decision of 14 March 2006, on the same day, the applicant was released.

30. A written version of the decision of the Regional Court was sent to the applicant's address but returned as she could not be found. It was then sent to her lawyer, who received it on 3 May 2006.

C. Related constitutional complaint

31. On 3 May 2006 the applicant lodged a complaint under Article 127 of the Constitution with the Constitutional Court (*Ústavný súd*).

32. Relying on Article 5 §§ 1 (c), 2, 3 and 4 of the Convention and on their constitutional counterparts, the applicant made four main complaints.

First, after her arrest, the applicant had not been informed promptly of the reasons for it and of the charge against her.

Second, in violation of the applicable procedural rules, the applicant had not been informed of her procedural rights as a person charged.

Third, the decision of the Regional Court of 14 March 2006 lacked adequate reasoning, in particular, because it only dealt with two of the four arguments that she had put forward.

Fourth, a decision regarding the lawfulness of the applicant's detention had not been reached speedily, which was imputable mainly to the District Court.

Invoking Article 5 § 5 and Article 13 of the Convention, the applicant claimed the equivalent of some EUR 3,200 in just satisfaction for non-pecuniary damage and the reimbursement of her legal costs.

33. On 13 September 2006 a three-judge bench of the Constitutional Court declared the complaint inadmissible.

It found that the Constitutional Court had been prevented from examining the first two arguments by the principle of subsidiarity.

As to the third argument, the Constitutional Court acknowledged that the Regional Court had limited its review to two of the applicant's arguments. However, this did not constitute an infringement of the applicant's fundamental rights.

34. As to the remaining complaint, concerning the length of the proceedings to review the lawfulness of the applicant's detention, the Constitutional Court established that it had in total taken thirty-four days (from the detention order of 3 February to 9 March 2006) for the District Court to transmit the case file to the Regional Court for determination of the applicant's appeal.

However, it should be taken into account that the applicant had submitted the grounds of her appeal in writing only on 23 February 2006. After that date, the District Court had transmitted the case file to the Regional Court within fourteen days (on 9 March 2006). Although the conduct of the District Court could not be described as “expeditious” (*urýchlené*), it did not amount to a violation of the applicant's rights under Article 5 § 4 of the Convention. It was true that, after the Regional Court's decision of 14 March 2006, it was not until 3 May 2006 that the written version of the decision was served on the applicant. Nevertheless, this was of no practical consequence because the applicant must have learned of the decision on 14 March 2006, when she was released, and the decision was subject to no further appeal. The bench concluded that, in those circumstances, the remaining complaint was manifestly ill-founded.

35. The presiding judge, however, did not share the majority view and gave a dissenting opinion. According to him, it was “highly debatable” whether the complaint concerning the lack of speediness in the proceedings regarding the applicant's appeal against her detention was manifestly ill-founded. The presiding judge pointed out that it had taken thirty-four days for the District Court to transmit the case file to the Court of Appeal. Referring to previous practice and, in particular, to a decision in case file

number III. ÚS 126/05, he concluded that the complaint should have been declared admissible.

36. The decision of the Constitutional Court was served on the applicant on 10 November 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. State Liability Act 2003 (Law no. 514/2003 Coll., as amended)

37. Under the Act the State bears liability for damage caused by public authorities *inter alia* by unlawful arrest, detention (*zadržanie*) or other deprivation of personal liberty (section 3(1)(b)), decisions concerning detention on remand (*väzba*) (section 3(1)(c)) and wrongful official actions (section 3(1)(d)).

38. The right to compensation for damage caused by a decision on arrest, by detention (*zadržanie*) or by other deprivation of personal liberty is vested in the person who was subjected to it, provided that the decision was quashed as being unlawful or a wrongful official action had taken place in connection with it (section 7).

39. The right to compensation for damage caused by a decision concerning detention on remand (*väzba*) is vested in the person who was detained on remand, provided that the criminal proceedings against him or her have been dropped (section 8(5)(a)) or he or she has been acquitted (section 8(5)(b)) or the matter has been referred to another authority (section 8(5)(c)).

40. However, no such right arises when the person concerned himself or herself gave cause for the detention on remand (section 8(6)(a)).

41. The State is also liable for damage caused by wrongful official action, which comprises, *inter alia*, a public authority's failure to take an action within the time-limit set, inactivity or any other unlawful interference with the rights and legally recognised interests of individuals and legal entities (section 9(1)).

42. The right to compensation for damage caused by wrongful official action is vested in the person who suffered the damage (section 9(2)).

43. Under section 17 the compensation is to cover pecuniary damage, including loss of profit, and, where appropriate and necessary, non-pecuniary damage.

B. Judicial practice in respect of the State Liability Act 2003

44. In a judgment of 16 March 2007 (in case no. 4C 258/2006) the Brezno District Court granted an action for damages by two individuals against the State under the State Liability Act 2003 and ordered the

defendant to pay the costs of their defence in a criminal trial that had ended with their acquittal.

On 22 November 2007 the Banská Bystrica Regional Court upheld the judgment following the defendant's appeal.

45. On 14 October 2009 the Bratislava Regional Court granted an appeal (case no. 2Co 238/2008) in an action by an individual against the State under the State Liability Act 2003 for damages and awarded him an amount of money in compensation for non-pecuniary damage caused by detention on remand in the context of a criminal trial that had ended with his acquittal.

46. In a judgment of 17 August 2009 (case no. 19C 47/2006) the Bratislava District Court granted an action for damages by an individual against the State under the State Liability Act 2003 and awarded the claimant an amount of money in compensation for non-pecuniary damage caused by wrongful official action in connection with his detention pending a criminal trial.

The impugned wrongful official action concerned extension of the claimant's detention pending trial.

The action was preceded by a judgment of the Constitutional Court of 19 October 2005 (case no. I. ÚS 65/05) in which the Constitutional Court found a violation of the claimant's rights under Article 5 §§ 3 and 4 in connection with the same facts.

However, the Constitutional Court was unable to award the claimant damages as he had made no claim for damages.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION IN CONNECTION WITH THE LENGTH OF THE PROCEEDINGS CONCERNING THE LAWFULNESS OF THE APPLICANT'S DETENTION

47. The applicant complained that the lawfulness of her detention had not been decided speedily as provided for in Article 5 § 4 of the Convention, which reads as follows:

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Admissibility

48. The Government relied on the Court's judgment in *N.C. v. Italy* ([GC], no. 24952/94, ECHR 2002-X) and argued that the applicant had failed to comply with the requirement under Article 35 § 1 of the Convention to exhaust domestic remedies.

In particular, the Government argued that the applicant had failed to claim compensation from the State under the State Liability Act 2003 in respect of both “wrongful official action” and “detention on remand in proceedings that were dropped”.

49. The Government referred to the relevant domestic practice and asserted that, under both headings, the applicant could have obtained compensation in respect of both pecuniary and non-pecuniary damage.

50. The Government also submitted that it was not a pre-requisite for a claim for damages in respect of wrongful official conduct to have a previous finding by the Constitutional Court of a violation of the claimant's fundamental rights.

51. The Government finally claimed that, as the case against the applicant had been dropped, she could by law have claimed damages in respect of detention on remand in a trial that was discontinued, without having to establish any actual unlawfulness or arbitrariness.

52. The applicant, in reply, considered that none of the existing domestic judicial decisions concerned a case comparable to hers. According to her, it was not fair to make her bear the consequences of an absence of domestic practice to support the Government's claim, which she considered to be speculative.

53. More specifically, the applicant argued that it was impossible for her to seek damages “in respect of detention on remand in proceedings that were dropped” under section 8(6)(a) of the State Liability Act 2003, which excluded claims for damages when the person concerned himself or herself had given cause for the detention. Formally speaking, the applicant had been remanded under Article 71 § 1 (a) of the CCP to prevent her from absconding or going into hiding.

54. In sum, the applicant considered that the remedies advanced by the Government were not available in practice at the relevant time.

55. As to the exhaustion of domestic remedies in the particular circumstances of the present case, the Court distinguishes two different positions in particular – on the one hand, the position in respect of the applicant's complaint concerning the alleged lack of “speediness” in the proceedings by which the lawfulness of her detention was decided and, on the other hand, the applicant's complaints under Article 5 §§ 1 (c), 2 and 3 (see paragraphs 85 to 95 below).

The Court will first examine the exhaustion of domestic remedies in respect of the former complaint.

56. The Court reiterates that where there is a choice of remedies, the exhaustion requirement must be applied to reflect the practical realities of the applicant's position, so as to ensure the effective protection of the rights and freedoms guaranteed by the Convention. Moreover, an applicant who has used a remedy which is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Adamski v. Poland* (dec.), no. 6973/04, 27 January 2009, with further references).

57. In the present case, in respect of her complaint that the proceedings for review of the lawfulness of her detention had not been “speedy”, the applicant had sought protection of her fundamental rights before the Constitutional Court under Article 127 of the Constitution.

58. The Constitutional Court, as the supreme authority for the protection of human rights and fundamental freedoms in Slovakia, had jurisdiction to examine the applicant's complaint and to afford her redress if appropriate (see, *mutatis mutandis*, *Lawyer Partners A.S. v. Slovakia*, nos. 54252/07, 3274/08, 3377/08, 3505/08, 3526/08, 3741/08, 3786/08, 3807/08, 3824/08, 15055/08, 29548/08, 29551/08, 29552/08, 29555/08 and 29557/08, § 45, ECHR 2009-..., with further references).

59. The Court further notes that the course of action chosen by the applicant is normally considered to be effective for the purposes of the domestic-remedies rule under Article 35 § 1 of the Convention. Moreover, the Constitutional Court entertained the applicant's complaint without requiring her first to exhaust the remedy now relied on by the Government. In these circumstances, the Court cannot but find that the applicant's course of action as to the remedies used was reasonable and appropriate.

60. Moreover, the Court notes that, in its decision of 13 September 2006, the Constitutional Court found the applicant's complaint about the alleged lack of “speediness” of the proceedings in issue manifestly ill-founded (see paragraph 34 above).

61. The Court considers that the dismissal of the applicants' complaint by the Constitutional Court distinguishes the present case from the above-mentioned case (see paragraph 46 above) where, after having obtained from the Constitutional Court a finding of a violation of his rights under Article 5 §§ 3 and 4 of the Convention, the victim of such violation was successful in claiming damages under the State Liability Act 2003.

Moreover, and in any event, the Court finds that any persuasive value of that judgment is relative in view of the fact that it appears to be a one-off finding, originating from a lower court, and there is no indication whether it has been tested on appeal, and if so with what result.

62. Furthermore, if it had jurisdiction in the present case under the State Liability Act 2003 in respect of alleged wrongful official action, in relation to the applicant's complaint that the proceedings in question were not “speedy” an ordinary court would have been confronted with the same

question as the Constitutional Court when it ruled on the applicant's constitutional complaint (by way of contrast and comparison, see paragraph 92 below).

The Court has not found any reason to conclude that there was any realistic prospect that an ordinary court would have arrived at conclusions contrary to those of the Constitutional Court.

63. Accordingly, the applicant was not required to have recourse to the remedy referred to by the Government. The Government's objections to the admissibility of the present complaint must therefore be rejected.

64. Observing, *inter alia*, the opinion expressed by the dissenting Constitutional Court judge (see paragraph 35), the Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits.

The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

65. The Government argued that the period between 3 February 2006, when the applicant lodged her oral interlocutory appeal, and 23 February 2006, when she filed the grounds of her appeal in writing, was imputable to the applicant.

66. The fact that the District Court had waited for the applicant to submit the grounds of her appeal before transmitting the appeal to the Regional Court for determination was logical and beneficial for the applicant because it had allowed her to substantiate her appeal and thus to increase its chances of success.

67. The Government emphasised that the applicant had learned of the outcome of the proceedings by implication on the day when her appeal had been determined, because it was on that very day that she had been released.

Any possible postponements in the subsequent period were due to the fact that it had proved impossible to reach the applicant and serve her with the written version of the decision at her address, and the decision had had to be served through the intermediary of her lawyer.

68. The applicant, in reply, reiterated her complaint and submitted that there had been no legitimate reason for the District Court to wait until 9 March 2006 and the transmission of the file to the Regional Court for a review of the lawfulness of her detention further to her oral interlocutory appeal of 4 February 2006. She emphasised that the length of the proceedings in question was to be viewed with reference to her personal situation and the fact that a right as important as that to liberty was at stake.

69. The Court reiterates that Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of the detention and ordering its termination if it proves unlawful. In order to determine whether the requirement that a decision be given “speedily” has been complied with, it is necessary to effect an overall assessment where the proceedings were conducted at more than one level of jurisdiction. The question whether the right to a speedy decision has been respected must – as is the case for the “reasonable time” stipulation in Articles 5 § 3 and 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, the conduct of the domestic authorities, the conduct of the applicant and what was at stake for the latter (for recapitulation of the applicable principles, see *Mooren v. Germany* [GC], no. 11364/03, § 106, ECHR 2009-...).

70. In the present case the applicant lodged her interlocutory appeal orally immediately after the detention order had been pronounced on 3 February 2006 and submitted the grounds of her appeal in writing on 23 February 2006.

After the District Court had transmitted the case file to the Regional Court for determination of the appeal on 9 March 2006, the applicant submitted further written grounds of her appeal on 13 March 2006.

The appeal was eventually granted on 14 March 2006 and the applicant was released on that very day. Following an unsuccessful attempt at serving the written version of the decision on the applicant directly, it was eventually served on her through her lawyer on 3 May 2006.

71. The Court reiterates that according to its case-law the period under consideration under Article 5 § 4 of the Convention begins with the lodging of the application with the domestic authorities and, in the absence of a public pronouncement of the decision, ends on the day the decision is communicated to the applicant or to his representative (see, *mutatis mutandis Koendjibiharie v. the Netherlands*, judgment of 25 October 1990, Series A no. 185-B, § 28; *Singh v. the Czech Republic*, no. 60538/00, § 74, 25 January 2005; and *Cabala v. Slovakia*, no. 8607/02, § 68, 6 September 2007).

72. The applicant requested that the lawfulness of her detention be decided by lodging her interlocutory appeal on 3 February 2006 and the decision to release her was taken after thirty-eight days, on 14 March 2006.

73. The Court observes that the decision of 14 March 2006 was not pronounced publicly and that it was served on the applicant at a later point. It recognises that a detained person has a legitimate interest in learning the detailed reasons for the termination of his or her detention.

However, in circumstances such as those obtaining in the present case, the Court finds it more appropriate to examine specific delays imputable to

those involved rather than making an abstract finding as to when the period under consideration ended.

The proceedings under examination thus lasted at least thirty-eight days, in which period the applicant's appeal was judicially examined by a single court.

74. The Court has found nothing to justify a conclusion that the applicant's detention case was of any particular complexity.

In view of the clear conclusions of the Regional Court and the District Public Prosecutor's Office to the effect that the case was essentially civil-law in nature and that there were no reasons for detaining the applicant (see paragraphs 14 and 28 above), the truth of the matter appears to be quite the contrary.

75. As to the conduct of the applicant, it is true that twenty days passed between the date when she lodged her interlocutory appeal orally and the date when she submitted the grounds of her appeal in writing. Furthermore, the Court accepts that the period necessary for serving the written version of the Regional Court's decision may have been somewhat affected by difficulties in reaching the applicant which are imputable to her.

76. As to the conduct of the authorities, however, the Court notes that it took fourteen days from 23 February 2006 to transmit the applicant's appeal to the Regional Court for determination on 9 March 2006, and that it took these fourteen days after twenty days had already passed since the applicant was remanded in custody. It then took the Regional Court an additional five days to make a rather straightforward decision.

The Court finally observes that the period of forty-nine days between the taking of the decision of 14 March 2006 and having it served on the applicant cannot be entirely explained by reasons imputable to the applicant.

The Court finds that the seriousness of these delays, totalling at least nineteen days, is aggravated by the fact that, as established by the Regional Court, the applicant's detention was wholly unjustified.

77. Regard being had to the Court's case-law on the subject (see, for example, *Sanchez-Reisse v. Switzerland*, 21 October 1986, §§ 59-60, Series A no. 107; *M.B. v. Switzerland*, no. 28256/95, § 31, 30 November 2000; *G.B. v. Switzerland*, no. 27426/95, § 27, 30 November 2000; *Rehbock v. Slovenia*, no. 29462/95, § 85, ECHR 2000-XII; *Sarban v. Moldova*, no. 3456/05, § 120, 4 October 2005; *Kadem v. Malta*, no. 55263/00, §§ 44-45, 9 January 2003; *Sakik and Others v. Turkey*, 26 November 1997, § 51, Reports 1997-VII; and *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, §§ 57-58, Series A no. 77), the foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a speedy determination of the lawfulness of the applicant's remand in custody.

II. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION IN CONNECTION WITH THE LENGTH OF THE PROCEEDINGS CONCERNING THE LAWFULNESS OF THE APPLICANT'S DETENTION

78. The applicant complained that she did not have an enforceable right to compensation for the violation of her right to have the lawfulness of her detention decided speedily. She relied on Article 5 § 5 of the Convention, which provides as follows:

“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

79. The parties advanced essentially the same arguments as mentioned above in paragraphs 48 to 54.

80. 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

81. The Court reiterates that Article 5 § 5 of the Convention 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. 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 *N.C. v. Italy*, cited above, § 49, and also *Pavletić v. Slovakia*, no. 39359/98, § 95, 22 June 2004).

82. In the present case the Court has found a violation of Article 5 § 4 of the Convention (see paragraph 77 above).

It must therefore establish whether or not the applicant had or now has an enforceable right to compensation for the breach of Article 5 § 4 of the Convention.

83. The Court observes first of all that the applicant's complaint under Article 127 of the Constitution in that regard was unsuccessful on the merits (see paragraph 34 above) (see *Boris Popov v. Russia*, no. 23284/04, § 84, 28 October 2010) and that the applicant was not required, for the purposes of Article 35 § 1, to test the other remedy advanced by the Government because of the lack of realistic prospects of success (see paragraph 62 above) (see *Sakık and Others v. Turkey*, cited above, § 59). At the same

time, there is no support in the text of either of these pieces of legislation and no domestic jurisprudence has been shown to exist to the effect that a compensation claim can be made in a domestic court based on the findings made by the European Court.

84. The foregoing considerations are sufficient to enable the Court to conclude that neither before nor after the findings made by the European Court has the applicant had an enforceable right to compensation for the violation of her rights under Article 5 § 4 of the Convention (see paragraph 77) (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 67, Series A no. 145-B).

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

III. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 (c), 2 AND 3 OF THE CONVENTION AND A RELATED ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

85. The applicant complained that her detention on remand had been unlawful; that she had not been informed promptly of the reasons for her arrest, of the charge against her and of her procedural rights; that she had been denied the right to oppose her detention effectively, because she had been informed of the charge against her only after being questioned on 3 February 2006; and that she did not have an enforceable right to compensation in that respect. She relied on Article 5 §§ 1 (c), 2, 3 and 5 of the Convention.

86. The Government and the applicant, in reply, raised essentially the same arguments as mentioned in paragraphs 48 to 54 above.

87. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted.

88. The Court further reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention 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 Court. However, the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time (see *Aliiev v. Ukraine*, no. 41220/98, § 105, 29 April 2003).

89. The Court also reiterates that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. The Court has recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in

reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *İlhan v. Turkey* [GC], no. 22277/93, §§ 58-59, ECHR 2000-VII).

90. As has already been reiterated in paragraph 56 above, where there is a choice of remedies the exhaustion requirement must be applied to reflect the practical realities of the applicant's position, so as to ensure the effective protection of the rights and freedoms guaranteed by the Convention. Moreover, an applicant who has used a remedy which is apparently effective and sufficient cannot be required also to have tried others that were also available but probably no more likely to be successful (see *Adamski v. Poland*, cited above).

91. In the instant case the criminal charge against the applicant was dropped with final effect as the matter was not criminal but civil in nature (see paragraph 14 above).

The Court observes that this situation falls precisely within the ambit of sections 8(5)(a) and 17 of the State Liability Act 2003, which provides for compensation of both pecuniary and non-pecuniary damage to any person who was subjected to detention pending trial if the criminal proceedings against him or her were dropped.

92. The Court observes that the subject matter of the proceedings in an action for damages under sections 8(5)(a) and 17 of the State Liability Act 2003 would have been different from that in the proceedings in the applicant's constitutional complaint. Therefore, unlike in the complaint concerning the length of the proceedings to review the lawfulness of the applicant's detention, the general court examining the action for damages in respect of "detention on remand in proceedings that were dropped" would not have been faced with a contrary conclusion by the Constitutional Court (by way of contrast and comparison, see paragraph 62 above).

93. In particular, the Court observes that in an action for damages under sections 8(5)(a) and 17 of the State Liability Act 2003 in respect of "detention on remand in proceedings that were dropped", the applicant would not have had to prove that his detention was contrary to substantive or procedural law or arbitrary.

Although the matters to be established in such an action are different from those to be examined under Article 5 §§ 1, 2 and 3 of the Convention, this of itself is not decisive because the compensation due to the applicant by way of such an action would in principle be linked to the fact, scope and mode of deprivation of the applicant's liberty (see, *mutatis mutandis*, *N.C. v. Italy*, cited above, §§ 55-57).

94. The Court concludes that in the circumstances of the present case the remedy advanced by the Government in respect of the applicant's complaints under Article 5 §§ 1 (c), 2 and 3 of the Convention, which was designed specifically for situations such as that of the applicant, was available to the applicant both in theory and in practice with reasonable prospects of success and was accordingly one to be used for the purposes of Article 35 § 1 of the Convention. In arriving at this conclusion the Court has taken account of the applicant's individual circumstances, including the fact that following her arrest she was legally represented before the ordinary courts, the Constitutional Court as well as the Court.

95. It follows that the applicant's complaints under Article 5 §§ 1 (c), 2 and 3 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies and that the related complaint under Article 5 § 5 of the Convention is manifestly ill-founded and must be rejected in accordance with its Article 35 §§ 3 and 4.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION IN CONNECTION WITH THE REASONING OF THE DECISION OF 14 MARCH 2006

96. Relying on Article 5 § 4 of the Convention, the applicant complained that the Regional Court had examined only some but not all of her arguments.

97. The Court observes that the purpose of the applicant's appeal against detention was to have the lawfulness of her detention decided as envisaged under Article 5 § 4 of the Convention. The Regional Court held in its impugned decision that the applicant's actions could not be qualified as a criminal offence and that there was no reason for detaining her. It consequently ordered the applicant's release.

98. The court finds that, in view of its content and effect, the purpose of the applicant's appeal against her detention was served by the Regional Court's decision of 14 March 2006 and that, in so far as substantiated, the applicant can accordingly not claim to be a victim of a violation of her rights protected under Article 5 § 4 of the Convention other than the right to have the lawfulness of her detention decided "speedily".

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

99. Lastly, the applicant complained that she did not have an effective remedy at her disposal in respect of the above-mentioned violations. She relied on Article 13 of the Convention.

100. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the applicant's rights under that provision.

It follows that the remainder of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. 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

102. The applicant claimed 6,000 euros (EUR) in respect of non-pecuniary damage.

103. The Government considered the claim excessive.

104. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 1,200 under that head.

B. Costs and expenses

105. The applicant also claimed EUR 2,500.79 for legal assistance, submitting itemised invoices from her lawyer, and EUR 50 for administrative expenses plus EUR 30 for postal expenses incurred both at the national level and before the Court.

106. Relying on the Court's judgment of 18 October 1982 in the case of *Young, James and Webster v. the United Kingdom* ((former Article 50) Series A no. 55, § 15), the Government considered that the claim in respect of legal fees was excessive. They objected that the claims concerning administrative and postal expenses were not supported by evidence.

107. 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 are reasonable as to quantum.

In the present case, regard being had to the violations found (see paragraphs 77 and 88 above), the documents in its possession and the above

criteria, the Court considers it reasonable to award the sum of EUR 700 to cover legal representation both at the national level and before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* admissible the complaints under Article 5 §§ 4 and 5 of the Convention in respect of the alleged lack of a speedy determination of the lawfulness of the applicant's remand in custody and the alleged lack of an enforceable right to compensation in that respect;
2. *Declares* inadmissible the remainder of the application;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 700 (seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President