



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

FOURTH SECTION

CASE OF MICHALKO v. SLOVAKIA

(Application no. 35377/05)

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 Michalko 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. 35377/05) 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, Mr Tibor Michalko (“the applicant”), on 23 September 2005.

2. The applicant was represented by Mr J. Havlát, 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, in particular, that his pre-trial detention had been unlawful and arbitrary and that the corresponding procedure had fallen short of the applicable Convention requirements.

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 1969 and lives in Bratislava.

A. Criminal proceedings

6. On 22 March 2004 the Bratislava regional police headquarters commenced a criminal investigation into a suspicious claim for a contractual fine, the mortgage taken out on real property to secure that claim, the expert evaluation of the property and the attempt to sell the property via public auction.

7. On 29 March 2004 the applicant and three other individuals were charged with conspiracy and attempted fraud in connection with the transaction referred to above. The applicant for his part was suspected of having organised the public auction. The charges against him fell within the category of serious offences specified in Article 62 § 1 of the 1961 Criminal Code (Law no. 140/1961 Coll., as applicable at the relevant time – “the CC”) (see paragraph 71 in “Relevant domestic law” below).

The document setting out the charges refers, *inter alia*, to a statement by the alleged victim, documentary evidence and the results of a search of non-residential premises.

The applicant and the other suspects denied the charges and challenged the decision by way of an interlocutory appeal (*stážnosť*).

8. On 31 March 2004 the Bratislava Regional Prosecutor’s Office (*Krajská prokuratúra*) dismissed the interlocutory appeal and upheld the charges. The decision contains a detailed factual description of the charges. A general reference was made to the materials in the investigation file and the evidence previously obtained.

9. The criminal proceedings against the applicant are still pending.

B. Detention order and related constitutional complaint

10. On 29 March 2004 at 12.40 p.m. the police detained the applicant as a suspect (*zadržaný ako podozrivý*) immediately before the public auction mentioned above was due to commence.

11. On 30 March 2004 at 10.10 p.m. the regional prosecutor lodged a request with the Bratislava I District Court (*Okresný súd*) for the applicant and the other suspects to be placed in detention pending trial.

12. On 31 March 2004 the applicant was brought before a single judge of the District Court in order to be examined in connection with the prosecutor’s request.

13. The minutes of the hearing indicate that it commenced at 1 p.m. The applicant denied any wrongdoing and submitted that he had no intention of evading trial or interfering with the administration of justice. He had no knowledge of any other criminal charges against him.

In response to a question put by the regional prosecutor, the applicant acknowledged that the previous day he had been handed a document containing a charge against him for bribery.

At the conclusion of the hearing the District Court ordered the applicant's detention pending trial and the applicant submitted an oral interlocutory appeal.

14. A written version of the detention order of 31 March 2004 was served on the applicant's lawyer on 6 April 2004.

In a two-page document, of which no more than half a page dealt with questions of substance, the District Court observed that the accused, including the applicant, were being prosecuted for extremely serious offences and that the applicant was facing tax evasion charges in Košice.

It could therefore be said that the accused had a manifest inclination to commit property offences, which gave rise to fears that the persons concerned, including the applicant, would continue their criminal activities within the meaning of Article 67 § 1 (c) of the Code of Criminal Procedure (Law no. 141/1961 Coll., as applicable at the relevant time – “the CCP”).

15. On 19 April 2004 the applicant submitted the grounds of his appeal, which ran to eighteen pages. He relied on Article 5 of the Convention, explained in detail the private-law aspects of the impugned transaction and argued that there was no criminal case to answer.

The applicant further submitted that he had no knowledge of any tax evasion charges against him and that the assertion of the prosecution service to that effect had not been substantiated and should therefore not be taken into account, in accordance with the principle of adversarial proceedings.

The applicant added that on 16 April 2004 he had returned his licence to organise public auctions. There was therefore no risk that he would continue criminal activities and he should be released.

In the alternative, the applicant offered a detailed pledge under Article 73 § 1 (b) of the CCP that he would live in accordance with the law, would not interfere with the course of justice and would make himself available for the purposes of his prosecution.

16. On 6 May 2004, in a private session (*neverejné zasadnutie*), the Bratislava Regional Court (*Krajský súd*) dismissed the applicant's interlocutory appeal against his detention. In a decision the written version of which ran to less than five pages and concerned all four accused, the Regional Court referred to the “evidence previously obtained” and quoted entire passages from the request of the regional prosecutor of 30 March 2004 for the applicant and the other suspects to be placed in detention pending trial. As the regional prosecutor had submitted, the applicant was facing tax evasion charges in Košice and this assertion had not been rebutted. Moreover, as the applicant himself admitted when questioned on 31 March 2004, he had also been charged with bribery and the document setting out the charge had been served on him in person.

“Having examined the materials in the case file”, the Regional Court “concluded” that all the formal requirements had been met for placing the applicant and the other suspects in detention pending trial. It was not up to

a court but to the prosecution service at that stage of the proceedings to examine whether there was a sufficient basis for the charges. The regional prosecutor had reviewed and upheld the charges. The Regional Court held specifically that the principle of adversarial proceedings had been invoked out of context by the applicant in the pre-trial proceedings and that it only applied to the trial on the merits.

The Regional Court also observed that the applicant's pledge under Article 73 § 1 (b) of the CCP was not sufficient at that stage of the proceedings owing to the nature of the case, which took priority over the applicant's exclusion from the application of that provision under paragraph 3 of Article 73 (see paragraph 71 in "Relevant domestic law" below).

The decision was served on the applicant on 10 June 2004.

17. On 9 July 2004 the applicant lodged a complaint with the Constitutional Court (*Ústavný súd*) under Article 127 of the Constitution (Constitutional Law no. 460/1992 Coll., as amended – "the Constitution").

He argued that his detention had been unlawful *ab initio* on the ground that when it began he had not been brought before a judge within the period of twenty-four hours required by Article 8 § 3 of the Charter of Fundamental Rights and Freedoms (Constitutional Law no. 23/1991 Coll.) (*Listina základných práv a slobôd* – "the Charter"). It was true that the time-limit for bringing a detained person (*zadržaná osoba*) before a judge under Article 17 § 3 of the Constitution, as amended with effect from 1 July 2001 (Constitutional Law no. 90/2001 Coll.), was forty-eight hours. However, neither the Constitution nor any other legislation had expressly repealed the Charter and an implicit repeal was not permissible. The Charter guaranteed him broader legal protection and had to be applied in his case.

18. The applicant further contended that the courts had failed independently to examine the existence of any "reasonable suspicion" against him and, explaining the private-law dimension of the impugned transaction, argued that there was no criminal case to answer.

19. The applicant went on to argue that he had no knowledge of any tax evasion charges against him, that there was no evidence of any such charges having actually been raised against him and that, therefore, an assertion to that effect was not a ground for detaining him.

20. The applicant also claimed that the decisions of 31 March and 6 May 2004 had been one-sided in favour of the prosecution, that they lacked adequate reasoning and were generally arbitrary and that he had not had sufficient opportunity to take part in the proceedings as they had been held *in camera*.

21. Lastly, the applicant argued that the Regional Court had entirely omitted to give a formal ruling on his offer of a pledge under Article 73 § 1 (b) of the CCP, and that the proceedings on his appeal against his detention had not been speedy.

22. On 9 February 2005 the Constitutional Court declared the complaint inadmissible as being manifestly ill-founded. It held that all the formal requirements had been met for remanding the applicant in custody and that the Constitutional Court was not a court of appeal and therefore had no power to review as such the assessment of the facts and the interpretation and application of the law by the ordinary courts.

23. As to the discrepancy between the time-limits for bringing a detained person before a judge under the Charter (twenty-four hours) and the Constitution (forty-eight hours), the Constitutional Court held that, pursuant to Article 152 § 4 of the Constitution, the constitutional provision prevailed.

24. The principles of adversarial proceedings and equality of arms did not apply in proceedings concerning pre-trial detention and, specifically, in remand proceedings. It had been open to the applicant to substantiate his claim that he was not being prosecuted on other charges and, as he had not done so, the claim could not be accepted.

25. The decisions of the District Court and the Regional Court were to be understood in their entirety and any possible shortcomings in the reasoning of the former had been repaired by the latter.

26. A pledge under Article 73 § 1 (b) of the CCP did not arise either under the Convention or under the CCP in cases of detention under Article 67 § 1 (c) of the CCP such as that of the applicant which, moreover, was expressly excluded by Article 73 § 3 of the CCP, in conjunction with 62 § 1 of the CC.

27. Finally, the Constitutional Court observed that it had taken seventy-one days (from 31 March to 10 June 2004) for the Regional Court to rule on the applicant's interlocutory appeal against detention and to have the decision served on him. However, the applicant had not submitted the grounds of his appeal until 19 April 2004 and the Regional Court had ruled on 6 May 2004, which was not an excessively long time. The period between the making and serving of the decision was not to be taken into account as the decision was not subject to appeal and had become final and binding (*právoplatnosť*) on the day it was made.

The decision of the Constitutional Court was served on the applicant on 23 March 2005.

C. Request for release and related constitutional complaint

28. On 4 August 2004 the applicant requested release. By law the request fell to be determined first by the regional prosecutor, who dismissed it and on 10 August 2004 forwarded it *ex officio* to the District Court for judicial determination.

29. On 7 September 2004 a single judge of the District Court ordered the applicant's release on the ground that his continued detention was no longer justified.

30. On 12 October 2004 the Regional Court quashed the decision of 7 September 2004 following an interlocutory appeal by the prosecutor, and ruled that the applicant should remain in detention. The decision was served on the applicant and his lawyer on 19 and 23 November 2004 respectively.

31. On 21 January 2005 the applicant lodged a complaint with the Constitutional Court under Article 127 of the Constitution. He contended mainly that there had been no hearing and that he had been deprived of an opportunity to reply to the prosecutor's appeal. The applicant also complained that the decision of 12 October 2004 had been arbitrary and that the proceedings on his request for release had not been speedy.

32. On 14 September 2006 the Constitutional Court declared the complaint inadmissible as out of time. With reference to its previous decisions in cases nos. III. ÚS 90/03, III. ÚS 188/03, III. ÚS 332/04 and II. ÚS 246/06, the Constitutional Court observed that when a decision under the CCP which was final was served on a complainant and his or her lawyer, the applicable two-month time-limit for challenging such decision by way of a constitutional complaint started on the day when the decision was served on the complainant. In the applicant's case, the time-limit started to run on 19 November 2004 and ended on 19 January 2005, whereas his complaint had not been lodged until 21 January 2005.

D. Extension of detention and related constitutional complaint

33. On 17 September 2004 the regional prosecutor requested the District Court to authorise an extension of the detention of the applicant and all his co-defendants until 29 December 2004.

34. On 21 September 2004 a single judge of the District Court rejected the request.

35. On 14 October 2004 the Regional Court quashed the decision of 21 September 2004 following an interlocutory appeal by the prosecutor, and ruled that the applicant should remain in detention until 29 December 2004. The decision was served on the applicant on 29 October 2004 and on his lawyer on 2 November 2004.

36. The applicant lodged a complaint with the Constitutional Court on 30 December 2004 under Article 127 of the Constitution. The complaint arrived at the Constitutional Court on 2 January 2005.

37. The applicant contended mainly that there had been no hearing on the prosecutor's request for extension of his detention and on the prosecutor's appeal and that he had been deprived of an opportunity to reply to that appeal. He also complained that the decision of 14 October 2004 had been arbitrary and that the proceedings had not been speedy.

38. On 1 June 2005 the Constitutional Court declared the complaint inadmissible as having been lodged out of time. It observed that the extension of the applicant's detention had become final and binding

(*právoplatnosť*) on the day when the Regional Court quashed the decision of the District Court and resolved the matter itself, irrespective of when a written copy of the Regional Court's decision had been served on the parties.

The Constitutional Court held that, therefore, the two-month time-limit in the present case had commenced on 14 October 2004 and ended on 14 December 2004, whereas the constitutional complaint had not reached the Constitutional Court until 2 January 2005.

The Constitutional Court also observed that, even if the two-month time-limit were to be counted from the date of service of the impugned decision on the applicant, which was 29 October 2004, the applicant's constitutional complaint was out of time.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Charter of Basic Rights and Freedoms (*Listina základných práv s slobôd*)

39. The Charter was introduced into the legal order by way of a constitutional law which was enacted by the Federal Assembly of the Czech and Slovak Federal Republic on 9 January 1991 and which entered into force on 8 February 1991. It is a valid law in Slovakia today.

40. Pursuant to Article 1 § 1 of that constitutional law, constitutional legislation (*ústavné zákony*), other Acts of Parliament (*zákony*) and legal regulations (*d'alšie právne predpisy*), and their interpretation and implementation, must be compliant with the Charter.

41. Under Article 8 § 3 of the Charter, a person arrested as a suspect or on the basis of a charge against him or her (*zadržaná osoba*) must be brought before a judge within twenty-four hours. The judge must examine the arrested person and decide whether he or she should be remanded in custody or released, within twenty-four hours of his or her presentation.

B. The Constitution (*Ústava*)

42. The Constitution was adopted by the National Council of the Slovak Republic on 1 September 1992 and its relevant part entered into force on 1 January 1993. It has the status of constitutional legislation in Slovakia.

43. Pursuant to Article 17 § 3, as in force until 30 June 2001, a person arrested as a suspect or on the basis of a charge against him or her (*zadržaná osoba*) had to be brought before a judge within twenty-four hours of the arrest. The judge had to examine the person and order detention pending trial or release within twenty-four hours of presentation.

44. Some provisions of the Constitution were amended with effect from 1 July 2001. Since then, pursuant to Article 17 § 3, a person arrested as a suspect or on the basis of a charge against him or her (*zadržaná osoba*) has had to be brought before a judge within forty-eight hours of arrest. The judge has to examine the detained person and order his or her detention pending trial or release within forty-eight hours and, in the case of particularly serious offences, within seventy-two hours of presentation.

45. Under Article 152, which has not been affected by any amendments, constitutional legislation, other Acts of Parliament and other generally binding legal regulations remain in force in the Slovak Republic, provided that they are not contrary to the Constitution (§ 1). Their interpretation and application must be compliant with the Constitution (§ 4).

C. The Constitutional Court Act (Law no. 38/1993 Coll., as amended)

46. Section 53(3) provides that a complaint to the Constitutional Court may be lodged within two months of the date on which the decision in question has become final and binding or on which a measure has been notified or notice of other interference with the complainant's interests has been given. As regards measures and other types of interference, this period commences when the complainant has a practical possibility of becoming aware of them.

47. Under section 31a, except where otherwise provided or where the nature of the matter at hand precludes their application, the provisions of the Code of Civil Procedure and the CCP are to be applied accordingly in proceedings before the Constitutional Court.

D. The State Liability Act 1969 (Law no. 58/1969 Coll.) and practice of the ordinary courts in its application

48. Until 30 June 2004 State liability for damage caused by decisions concerning pre-trial detention was governed by Chapter (*hlava*) 2 of Part (*časť*) 1 of the Act on State Liability for Damage Caused by a State Body's Decisions or Erroneous Official Action (*Zákon o zodpovednosti za škodu spôsobenú rozhodnutím orgánu štátu alebo jeho nesprávnym úradným postupom* – “the State Liability Act 1969”).

49. Persons deprived of their liberty had a claim against the State for damages when the criminal proceedings against them were dropped or they were acquitted (section 5(1)).

However, such compensation was excluded when the persons concerned were responsible for their own detention, in particular when they had tried to abscond or had otherwise given rise to the facts on which the decision concerning their detention was based.

50. Section 18(1) rendered the State liable for damage caused in the context of carrying out functions vested in public authorities resulting from wrongful official action of persons entrusted with the exercise of those functions. An award of compensation could be made when the plaintiff showed that he or she had suffered damage as a result of the wrongful official action of a public authority, quantified its amount, and showed that there was a causal link between the damage and the wrongful action in question.

51. The State Liability Act 1969 was traditionally interpreted and applied as not allowing for compensation to be awarded for non-pecuniary damage unless it was related to the deterioration of a person's health (see, for example, *Pavletić v. Slovakia*, no. 39359/98, § 55, 22 June 2004, and *Havala v. Slovakia* (dec.), no. 47804/99, 13 September 2001).

52. By its judgment of 31 May 2007 in an appeal on points of law (no. 4 Cdo 177/2005) concerning an action for damages under the State Liability Act 1969, the Supreme Court upheld the view that neither that Act nor an action for protection of personal integrity provided a legal basis for awarding compensation in respect of non-pecuniary damage caused by unlawful detention.

The State Liability Act 1969 was, however, to be interpreted in line with Article 5 § 5 of the Convention which presupposed compensation for non-pecuniary damage and which, pursuant to Article 154c § 1 of the Constitution, prevailed over the statutory text.

This line of reasoning was followed in judgments of the Banská Bystrica Regional Court of 26 March 2009 and Nitra Regional Court of 26 February 2010 when deciding on appeals nos. 12Co 5/2009 and 6Co 237/2009. As the decisive events had taken place prior to 1 July 2004, the courts applied the State Liability Act 1969 and not the State Liability Act 2003.

E. State Liability Act 2003 (Law no. 514/2003 Coll.) and practice of the ordinary courts in its application

53. In June 2002 the Minister of Justice submitted to the Government a draft bill providing for a new legislative framework for official liability.

The bill was accompanied by an introductory report (*predkladacia správa*) in which the Minister observed, *inter alia*, that the old State Liability Act had been on the statute book since 1969 and that, owing to subsequent changes to the social system and the adoption of the Convention, there was a new understanding of the concept of State liability for damage, which called for the introduction of new legislation.

54. The bill was later submitted to Parliament with an explanatory report, the relevant part of which stated that it was necessary to extend the current concept of the right to damages to incorporate just satisfaction in respect of non-pecuniary damage as well as pecuniary damage. The purpose

of the proposed Act was, *inter alia*, to render the mechanism of compensation for damage caused by public authorities more effective and thereby reduce the number of cases in which claimants were obliged to seek redress before the European Court of Human Rights.

55. The bill was adopted with effect from 1 July 2004 (*Zákon o zodpovednosti za škodu spôsobenú pri výkone verejnej moci*) and replaced the State Liability Act 1969.

56. 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)).

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

58. 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 rights and legally recognised interests of individuals and legal entities (section 9(1)).

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

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

61. The Act applies only to damage caused by decisions and wrongful official action occurring after it entered into force (section 27(1)).

Liability for damage resulting from decisions and wrongful official action that took place before the entry into force of the Act falls under the State Liability Act 1969.

62. 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 on charges of 2005 that had ended with their acquittal with final and binding effect in 2006.

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

63. 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 2005 in the context of a criminal trial on charges of the same year that had ended with his acquittal with final and binding effect in 2006.

64. In a judgment of 17 August 2009 (in 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 an extension by a decision of 12 October 2004 until 28 April 2005 of the claimant's detention pending trial.

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

However, the Constitutional Court had been unable to award the claimant damages as he had made no claim to that effect.

F. Practice of the Constitutional Court in respect of Article 8 of the Charter

65. In its decisions of 9 June and 8 September 2004 and 13 January 2005, in cases nos. I. ÚS 100/04, I. ÚS 141/04 and I. ÚS 2/05 respectively, the First Chamber of the Constitutional Court held that, by virtue of Article 152 §§ 1 and 4 of the Constitution, the time-limit of forty-eight hours under the Constitution took precedence over the time-limit of twenty-four hours under the Charter. The same position was taken by the Second, Third and Fourth Chambers of the Constitutional Court in decisions of 6 February 2005, 22 November 2006, 30 June 2004, 5 October 2005 and 9 March 2005 in cases nos. II. ÚS 38/05, II. ÚS 369/06, III. ÚS 220/04, III. ÚS 273/05 and IV. ÚS 64/05, and appears to have been taken by the First Chamber and the Fourth Chamber of the Constitutional Court in their decisions of 16 December and 25 August 2004 in cases nos. I. ÚS 239/04 and IV. ÚS 235/04.

G. Practice of the Constitutional Court in respect of section 53(3) of the Constitutional Court Act

66. In a decision of 23 August 2006 in case no. II. ÚS 246/06, the Second Chamber of the Constitutional Court took the view that, in respect of final decisions under the CCP which were served on both the complainant and his or her lawyer, the decisive date for the start of the two-month time-limit was the date when the decision was served on the complainant. The same position was taken by the Third Chamber of the Constitutional Court in decisions of 26 March and 21 August 2003 and 3 November 2004 (cases nos. III. ÚS 90/03, III. ÚS 188/03 and

III. ÚS 332/04). The conclusion of the Constitutional Court in all these decisions in respect of the two-month time-limit is supported by analysis.

67. The same line of interpretation was followed by the Constitutional Court in subsequent decisions, including those of 20 June and 14 September 2006, 17 April 2008, 12 February, 24 June and 8 September 2009 and 21 January 2010 in cases nos. II. ÚS 166/06, II. ÚS 288/06, IV. ÚS 131/08, IV. ÚS 37/09, I. ÚS 177/99, III. ÚS 281/09 and IV. ÚS 9/2010.

68. On 13 January 2005, in case no. I. ÚS 2/05, the First Chamber of the Constitutional Court declared admissible part of a complaint under Article 127 of the Constitution which was lodged with the Constitutional Court on 7 December 2004, concerning a decision that had been served on the complainant on 6 October 2004, while he was in detention, and on his lawyer on 7 October 2004. The decision contains no analysis in respect of the two-month time-limit.

From the case file concerning application no. 30011/05 it transpires that the above-referred decision of the Constitutional Court of 13 January 2005 was notified in writing and was served on the complainant on 9 February 2005.

69. In decision of 25 November 2004 in case no. IV. ÚS 372/04 the Constitutional Court took as decisive for the commencement of the two-month time-limit the date when an interlocutory appeal was determined, irrespective of when the decision was served on the detained complainant and his lawyer.

H. The Code of Criminal Procedure

70. At the relevant time and until 31 December 2005, criminal procedure in Slovakia was governed by the 1961 Code of Criminal Procedure. This Code has been amended numerous times.

71. Under Article 73 a court or a single judge had the power to release pending trial persons arrested in order to prevent them from absconding or continuing their criminal activities within the meaning of Article 67 § 1 (a) and (c), if a guarantee was provided on their behalf or if they gave a pledge that they would live in accordance with the law, cooperate with the authorities and make themselves available for the purposes of the prosecution.

Under Article 73a a court or a single judge had similar powers to release the accused pending trial on payment of bail.

However, persons charged with certain serious offences defined in Article 62 § 1 of the CC were excluded from the scope of these provisions (Article 73 § 3 and 73a § 1).

72. The time-limit for delivering a detained person to a court was laid down in Articles 76 § 4 and 77 § 1.

73. Until 31 July 2001 a person arrested as a suspect or on the basis of a charge against him or her (*zadržaná osoba*) had to be released or brought before a judge with a request for a detention order within twenty-four hours of arrest.

74. On 1 August 2001 an amendment took effect, pursuant to which a person arrested as a suspect or on the basis of a charge against him or her had to be released or brought before a judge with a request for a detention order within forty-eight hours of arrest.

75. Under Article 143 § 1, which remained unchanged throughout the relevant period, interlocutory appeals were to be lodged within three days of service of the decision appealed against. If the decision was served on both the accused and his or her lawyer, the time-limit started to run on the later date of service.

I. Practice of the Constitutional Court in respect of conditions for release

76. In its decisions of 8 October 2004 and 26 October 2005, in cases nos. I. ÚS 100/04 and I. ÚS 239/04, the Constitutional Court found a violation of an individual's rights under Article 5 § 3 of the Convention on account of the ordinary courts' failure to examine on the substance and formally to make a ruling on the complainant's pledge, given in the context of his application for release from detention pending trial, that he would live in accordance with the law.

The Constitutional Court observed that the relevant provisions of the CCP by operation of law did not allow for the replacement of the complaint's detention by his pledge. These provisions were however to be interpreted in line with Article 5 § 3 of the Convention, which called for the possibility of a release on conditions, and, pursuant to Article 154c § 1 of the Constitution, prevailed over the statutory text.

J. Practice of the ordinary courts in respect of Article 8 of the Charter

77. In a decision of 16 February 2006 the Trnava Regional Court overturned a detention order issued by the Galanta District Court on 3 February 2006 and ordered the release of the detainee. The Regional Court did so having "examined the written interlocutory appeal of the person charged as submitted by his defence counsel ... and [having] appraised itself of the objections raised therein".

The objections in question included a claim that the authorities had failed to observe the twenty-four-hour time-limit under the Charter for bringing the person charged before a judge. Nevertheless, the Regional Court made

no specific reference to that argument and offered no reasons other than those mentioned above.

K. Rules on making legislation

78. The rules on making legislation were approved by the National Council of the Slovak Republic by way of a resolution passed on 18 December 1996 and published in the Collection of Laws under the number 19/1997.

79. The rules apply to constitutional legislation and other Acts of Parliament (Article 1 § 1) and provide, *inter alia*, that amendments to legislation are to be made by means of a direct and explicit amendment and that indirect or implicit amendments are impermissible (Article 11 § 1).

80. Identical rules were adopted by the Government in the form of a resolution passed on 8 April 1997 under the number 241 and published in the Collection of Laws under the number 372/2000.

81. Under section 2 of the Collection of Laws Act (Law no. 1/1993), anything that has been published in the Collection of Laws is presumed to have become known to all those concerned on the day of publication. This presumption is non-rebuttable.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

82. The applicant raised a number of generic complaints which can be summarised as follows: (i) that he had not been brought before a judge within twenty-four hours of his arrest as required under the Charter; (ii) that there were no reasons for his continued detention and that it was arbitrary; (iii) that the principles of adversarial proceedings and equality of arms had not been complied with in the remand proceedings and in the proceedings concerning the prosecutor's request for extension of the applicant's detention and the applicant's request for release; (iv) that in the remand proceedings the courts had failed to deal adequately with his arguments concerning the lack of a "reasonable suspicion" against him and the lack of reasons for detaining him pending trial; (v) that the decisions of 31 March, 6 May and 12 and 14 October 2004 had generally lacked adequate reasoning; (vi) that the courts had failed to rule on his offer of a pledge under Article 73 § 1 (b) of the CCP; (vii) that the proceedings in respect of the applicant's interlocutory appeal against detention, his request for release and the prosecution's interlocutory appeal against the decision of

21 September 2004 had not been “speedy”; and (viii) that the decisions of the Constitutional Court of 9 February and 1 June 2005 and 14 September 2006 had infringed the applicant’s right to compensation in respect of his wrongful detention.

The applicant relied on Article 5 §§ 1 (c), 3, 4 and 5 of the Convention, which provide as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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.

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

1. The Government’s objection of non-exhaustion of domestic remedies

(a) The parties’ arguments

83. The Government argued in general that the applicant had failed to comply with the requirement of Article 35 § 1 of the Convention to exhaust domestic remedies in that he had failed to claim compensation from the State under the State Liability Act 1969 and the State Liability Act 2003 in respect of “wrongful official action” (see paragraphs 50 and 58 above).

84. The Government referred to the current judicial practice (see paragraphs 52 and 62 to 64 above) and asserted that both under the State

Liability Act 1969 and the State Liability Act 2003 the applicant could have obtained compensation in respect of both pecuniary and non-pecuniary damage.

85. The applicant submitted, in reply, that the State Liability Act 2003 was inapplicable for two reasons.

First, under section 8(5), compensation for damage caused by decisions concerning detention could only be awarded if the proceedings were dropped, the detained person was acquitted or the matter was referred to another authority, none of which applied in his case as his proceedings were still pending.

Second, in accordance with section 27, only damage caused by decisions and actions that took place after the entry into force of the Act could be the subject of compensation under the State Liability Act 2003.

(b) The Court's assessment in respect of the complaints under Article 5 §§ 1, 3 and 4 of the Convention

86. The Court considers that in respect of the requirement to exhaust domestic remedies a distinction has to be made between, on the one hand, the applicant's complaints under Article 5 §§ 1, 3 and 4 of the Convention and, on the other hand, his complaint under Article 5 § 5 of the Convention.

87. As to the complaints under Article 5 §§ 1, 3 and 4 of the Convention, which concern lawfulness and justification of the applicant's deprivation of liberty and conformity of the relevant procedure with the Convention requirements, the Court observes that the remedies advanced by the Government are only compensatory in nature.

88. In particular, the Court observes that these remedies were not aimed at and capable of redressing the applicant's situation in its essence, that is to say to bring about an end to his continuing deprivation of liberty and rectification of the alleged shortcomings in the proceedings (see *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Pavletić v. Slovakia*, no. 39359/98, § 69, 22 June 2004 and, *mutatis mutandis*, *Smatana v. the Czech Republic*, no. 18642/04, § 111, 27 September 2007).

These remedies had to be examined by the civil courts and there is no indication that such courts could in any way interfere with matters concerning the applicant's continued detention on remand that fall within the jurisdiction of the criminal courts (see *Haris v. Slovakia*, no. 14893/02, § 38, 6 September 2007).

89. The Court considers that for these reasons alone the Government's objection cannot be sustained in so far as it concerns the complaints under Article 5 §§ 1, 3 and 4 of the Convention.

(c) The Court's assessment in respect of the complaint under Article 5 § 5 of the Convention, in connection with the complaints under Article 5 § 3 of the Convention concerning the right to be released pending trial and under Article 5 § 4 concerning procedural guarantees in the remand proceedings

90. As to the complaint under Article 5 § 5 of the Convention, the Court will first examine the position in respect of the applicant's complaints under Article 5 § 3 of the Convention concerning his right to be released pending trial and under Article 5 § 4 concerning procedural guarantees in the remand proceedings.

91. The Court observes that these complaints essentially relate to the decisions of 31 March and 6 May 2004, the latter of which was served on the applicant on 10 July 2004 and was not subject to appeal.

92. Pursuant to its section 27, which has been so interpreted and applied by the ordinary courts (see paragraphs 52 and 61 above), the State Liability Act 2003 however only applies to events that took place after its entry into force on 1 July 2004.

For this reason alone, in so far as the Government rely on the State Liability Act 2003 as regards the applicant's complaint under Article 5 § 3 of the Convention in respect of his right to be released pending trial and his complaints under Article 5 § 4 in respect of procedural guarantees in the remand proceedings, their objection cannot be sustained.

93. As to the State Liability Act 1969, the Court reiterates first of all that, at the relevant time, the State Liability Act 1969 was interpreted and applied as not allowing for compensation to be awarded for non-pecuniary damage unless it was related to the deterioration of a person's health (see, for example, *Pavletić v. Slovakia*, cited above, § 55 and *Havala v. Slovakia*, cited above). In so far as the Government relied on recent developments in the ordinary courts' practice (see paragraph 52 above), the Court observes that such developments took place in 2009 and 2010 and that the impugned decisions were taken in 2004.

94. The Court further observes that, in its decision of 9 February 2005, the Constitutional Court found that the applicant's complaints of a violation of his right to be released pending trial and of the procedural guarantees in the remand proceedings were manifestly ill-founded (see paragraphs 22 and 24 to 27 above). It therefore was not in a position to award him any compensation in that respect.

95. The Court also observes that, if entertaining jurisdiction in the present case under the State Liability Act 1969 in respect of alleged wrongful official action, an ordinary court would be confronted with the same questions as the Constitutional Court when ruling on the applicant's complaints as specified in the previous paragraph.

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.

96. Accordingly, as to the complaint under Article 5 § 5 of the Convention, in connection with the applicant's complaint under Article 5 § 3 of the Convention concerning his right to be released pending trial and his complaints under Article 5 § 4 concerning procedural guarantees in the remand proceedings, the Government's objections to admissibility must be rejected.

(d) The Court's assessment in respect of the remaining complaints under Article 5 § 5 of the Convention

97. The Court considers that it is not called upon to rule separately on the Government's objection in relation to the remaining complaints under Article 5 § 5 of the Convention as they are, in any event, inadmissible for the respective reasons given below.

2. Bringing of the applicant before a judge within the time-limit under the Charter

98. The applicant complained that he had not been brought before a judge within twenty-four hours of his arrest as required under the Charter.

He reiterated his arguments from the domestic proceedings (see paragraph 17 above), relied on the decision of the Trnava Regional Court of 16 February 2006 in an unrelated case (see paragraph 77 above) and pointed to the statutory rules on making legislation, under which indirect or implicit amendments to legislation had never been permissible (see paragraphs 78 to 81 above).

99. The Government maintained that the time-limit rule under the Constitution and the CCP, as in force at the relevant time, was legally authoritative, that this time-limit was defined beyond dispute and that the provisions of the Charter relied upon were inapplicable in the applicant's case.

As to the temporal application of the Charter, the Government relied on Article 152 of the Constitution (see paragraph 45 above) and pointed to the consistent practice of the Constitutional Court in applying it (see paragraph 65 above).

In the Government's view, the legal relevance of the decision of the Trnava Regional Court of 16 February 2006 was limited in that it was vaguely worded and, in any event, unique and without precedent or follow-up.

100. The Court considers that the complaint falls to be examined under Article 5 § 1 (c) of the Convention.

101. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially

refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. It is in the first place for the national authorities, and notably the courts, to interpret domestic law, and in particular, rules of a procedural nature, and the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. However, since under Article 5 § 1 of the Convention 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, *Toshev v. Bulgaria*, no. 56308/00, § 58, 10 August 2006, and *Öcalan v. Turkey* [GC], no. 46221/99, § 84, ECHR 2005-IV).

102. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court has stressed that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Paladi v. Moldova* [GC], no. 39806/05, § 74, ECHR 2009-..., and *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III).

103. Turning to the circumstances of the present case, the Court observes that the legal rules concerning the time-limit for bringing an individual before a judge are provided for at the level of constitutional legislation and under other Acts of Parliament.

The constitutional rules are embodied in the Charter and the Constitution, while the other statutory rules are laid down in the CCP.

From the early 1990s the applicable time-limit was defined in all these sources of legislation as twenty-four hours, calculated from the time when the restriction on the individual’s personal liberty began.

In 2001 the Parliament of the Slovak Republic enacted amendments to the Constitution and the CCP which extended the relevant time-limit to forty-eight hours. However, the provisions of the Charter were not affected by these amendments and the legislative status quo has persisted until the present day.

104. In these circumstances, although it is aware that the doctrine of binding precedent is not as such formally recognised in Slovakia, the Court finds judicial practice to be of consequence.

105. In that connection, the Court observes that the case-law of the Constitutional Court, both prior to the events of the present application and subsequent to them, appears to be quite extensive and unequivocally uniform in acknowledging the precedence of the forty-eight-hour time-limit

under the Constitution over the twenty-four-hour time-limit under the Charter (see paragraph 65 above). In developing this position, the Constitutional Court has relied on the legal maxim *lex posterior derogat legi priori* and the provisions of Article 152 of the Constitution. The latter appear to provide a sound, albeit indirect, basis for favouring the Constitution over any other legislation, including the Charter (see paragraph 45 above).

106. The Court observes that a divergent view was expressed by the Trnava Regional Court in its decision of 16 February 2006 (see paragraph 77 above). However, the Regional Court did not explain its position in express terms and, in any event, its decision does not appear to have been followed.

107. As to the rules on making legislation relied on by the applicants, the Court would observe that they were adopted by resolutions of the Parliament and the Government and that they were published in the Collection of Laws. However, they do not have the legal status of an Act of Parliament and their legally binding nature and effect are somewhat unclear, especially in the face of the uniform case-law and convincing reasoning of the Constitutional Court.

108. In the light of the above considerations the Court finds no reason relating to the principle of legal certainty and no other grounds to reach a conclusion other than that the applicable law was in conformity with the Convention and that the legal time-limit for bringing the applicant before a judge was the time-limit under Article 17 § 3 of the Constitution and Articles 76 § 4 and 77 § 1 of the CCP, as in force at the relevant time, that is to say forty-eight hours.

109. The Court observes that the applicant's claim essentially rests on the Charter-based argument. Neither before the Court nor at the domestic level did he make any complaint about non-observance of the forty-eight-hour time-limit or, generally, of not having been brought before a judge "promptly" in terms of Article 5 § 3 of the Convention.

110. It follows that, to the extent that the relevant part of the application has been substantiated and domestic remedies have been exhausted, it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention. The same conclusion accordingly applies to the relevant part of the applicant's complaint under Article 5 § 5 of the Convention.

3. "*Reasonable suspicion*" for the purposes of the applicant's arrest

111. As before the domestic courts (see paragraphs 15 and 18 above), the applicant contended that the courts had failed to establish the existence of any "reasonable suspicion" against him for the purpose of arresting and detaining him, because the impugned transaction had been of a private-law nature.

112. The Court considers that this complaint falls to be examined under Article 5 § 1 (c) of the Convention. It reiterates that the “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in that provision.

Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Labita v. Italy* [GC], no. 26775/95, § 155, ECHR 2000-IV).

113. The Court also 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, for example, *Gusinskiy v. Russia*, no. 70276/01, § 53, ECHR 2004-IV, and *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B).

Nor is it necessary that the person detained should ultimately have been charged or brought before a court. The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which were the grounds for detention (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A, and *Lexa v. Slovakia (no. 2)*, no. 34761/03, §§ 46-50, 5 January 2010).

114. In the present case, the applicant was arrested on 29 March 2004 as he and the three other suspects were about to effect a complex transaction involving the forcible sale of real property at a public auction. On the same day he and the other suspects were charged with conspiracy and attempted fraud. The public prosecution service upheld the charges on 31 March 2004, following the suspects’ interlocutory appeal.

In these decisions the authorities relied, *inter alia*, on statements by the victim, documentary evidence and the results of a search of non-residential premises, and described in detail the charges pursued (see paragraph 7 above).

115. As regards the early stage of the criminal proceedings against him (see, for example, *McKay v. the United Kingdom* [GC], no. 543/03, § 45, ECHR 2006-X) and the restriction of his liberty (by way of contrast, see paragraphs 128 to 141 below), the Court considers that the suspicion against the applicant relied on by the domestic courts was reasonable within the meaning of the previously cited case-law.

It follows that the relevant part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention. The same conclusion accordingly applies to the relevant part of the applicant’s complaint under Article 5 § 5 of the Convention.

4. Right to be released pending trial

116. The applicant contended that he had been arbitrarily denied release pending trial as the courts had refused to consider his offer of a pledge under Article 73 § 1 (b) of the CCP.

117. The Government acknowledged that the complaint was not manifestly ill-founded, in the light of the Court's judgment in *Caballero v. the United Kingdom* ([GC], no. 32819/96, ECHR 2000-II).

118. The Court considers that this complaint is to be examined under Article 5 § 3 of the Convention and notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

5. Procedural guarantees other than "speediness" in the remand proceedings

119. The applicant complained that in the remand proceedings the decisions had been based on unsubstantiated assertions made by the prosecution service, that the courts had failed to deal adequately with his arguments as to a "reasonable suspicion" against him and the reasons for detaining him, that the decisions generally lacked adequate reasoning, that the courts had failed to rule on his offer of a pledge under Article 73 § 1 (b) of the CCP and that the decision of 6 May 2004 had been given in private without the applicant being allowed to appear in person.

120. The Government submitted that the applicant had been examined in person by the remanding judge on 31 March 2004 and that there had been no new facts requiring his re-examination at the Regional Court's private session on 6 May 2004, in which the prosecution service had not taken part either.

The Government also submitted that the Regional Court had examined both the substantive and procedural elements concerning the applicant's detention and had adequately addressed, and had for that matter rejected, his objections. In that connection the Government pointed to the conclusions of the Constitutional Court in its decision of 9 February 2005 to the effect that the proceedings had been adversarial and that the reasons given by the courts had been comprehensible and had not contradicted each other.

The Government concluded that the proceedings had been effective for the purposes of Article 5 § 1 of the Convention.

121. In addition to his above-mentioned contentions the applicant observed, in reply, that in his interlocutory appeal he had offered a specific detailed pledge under Article 73 § 1 (b) of the CCP and had submitted a new material fact, namely that he had returned his licence to organise public auctions; both these elements had called for an examination in his presence.

122. The Court considers that this part of the application is to be examined under Article 5 § 4 of the Convention and notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

6. *“Speediness” of the remand proceedings*

123. The applicant complained that the proceedings in respect of his interlocutory appeal of 31 March 2004 had not been speedy.

124. The Government submitted that the period between 31 March 2004, when the applicant had lodged his interlocutory appeal orally, and 19 April 2004, when he had submitted the grounds of his appeal in writing, was imputable to the applicant. They relied on the findings of the Constitutional Court in its decision of 9 February 2005 to the effect that the period after 6 May 2004, when the Regional Court had decided on the applicant’s interlocutory appeal, was not to be taken into account because by that decision the applicant’s detention order had become final and the applicant had been free to apply for release irrespective of when the decision had been served on him.

125. The applicant pointed out, in reply, that it had only been meaningful for him to formulate the written grounds of his appeal after the written version of his detention order had been served on him on 6 April 2004. He conceded that the period prior to 19 April 2004, when he had lodged the written grounds of his appeal, was imputable to him. However, the period under consideration had not ended until the service of the Regional Court’s decision on him on 10 June 2004. In that connection the applicant objected that he had been in a position to make an informed request for release only after the decision to uphold his detention order had been communicated to him with reasons, when a written version of it was served on him on 10 June 2004.

126. The Court considers that this complaint falls to be examined under Article 5 § 4 of the Convention and notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

7. *Enforceable right to compensation in respect of alleged shortage of procedural guarantees in the remand proceedings*

127. The Court considers that this complaint is to be examined under Article 5 § 5 of the Convention.

Recalling its findings as to the exhaustion of domestic remedies (see paragraphs 86 to 89 above), the Court considers 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.

8. Request for release and request for extension of detention

128. The applicant contended that there had been no reasons for his continued detention, that his continued detention had been arbitrary, that the principles of adversarial proceedings and equality of arms had not been complied with in the proceedings on his request for release and in the prosecutor's request for extension of his detention, that the decisions of 12 and 14 October 2004 had generally lacked adequate reasoning, that the proceedings in respect of his request for release and the prosecutor's request for extension of his detention had not been "speedy" and that the decisions of the Constitutional Court of 1 June 2004 and 14 September 2006 had breached his right to compensation in respect of wrongful detention.

129. The Government objected that the applicant had failed to exhaust domestic remedies because he had not filed his constitutional complaints against the decisions on his request for release and on the prosecution's request for extension of his detention in time.

130. They submitted that the Constitutional Court's interpretation of the relevant rules in respect of the statutory two-month time-limit was settled and congruent with the interpretation given in the decision of 14 March 2006 in the applicant's case.

The decision of the Constitutional Court of 13 January 2005 in case no. I. ÚS 2/05, which was relied upon by the applicant, had no bearing on that contention as it had been no more than a random and single occurrence.

131. As to the Constitutional Court's decision of 1 June 2005, the Government conceded that a different time-limit-commencement date had been taken into account. They pointed out, however, that the Constitutional Court had also noted that even if the time-limit had been counted from the day when the impugned decision had been served on the applicant, that is to say 29 October 2004, his constitutional complaint of 30 December 2004 would still have been out of time.

132. The applicant disagreed and contested the Government's argument concerning the principle of legal certainty. In that context he pointed to the differing decisions of the Constitutional Court (see paragraphs 68 and 69 above).

He further submitted that, in any event, no case-law of the Constitutional Court that post-dated his constitutional complaint of 21 January 2005 could be taken into account in the assessment of his own situation.

133. The Court reiterates that in order to exhaust domestic remedies as required by Article 35 § 1 of the Convention, applicants should use the remedies available in compliance with the formal requirements and time-limits laid down in domestic law, as interpreted and applied by the

domestic courts (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

134. The Court observes that a complaint under Article 127 of the Constitution is normally considered to be one of the remedies that an applicant is required to exhaust for the purposes of Article 35 § 1 of the Convention in respect of individual complaints under Article 5 § 4. The Court further observes that such complaint is subject to a two-month time-limit and that, pursuant to section 53(3) of the Constitutional Court Act, that time-limit starts to run on the date when the decision in question has become final and binding or when the measure in question has been notified or notice of other interference with the complainant's interests has been given (see paragraph 46 above).

135. As regards decisions concerning detention, a question arises as to whether the decisive moment is the date of service of such decisions on the detainee or on his or her lawyer. Whilst bearing in mind the limitation noted above (see paragraph 104 above), in establishing which law is applicable the Court will nevertheless scrutinise existing judicial practice.

136. To that end, it appears that there had been at least three admissibility decisions by the Constitutional Court, before the applicant lodged his constitutional complaints on 2 and 21 January 2005, in which the Constitutional Court had legally explained and congruently decided that the decisive date was the date of service of the impugned decision on the detainee (see paragraph 66 above).

137. A divergent decision favouring the applicant's interpretation of the relevant law appears to have been taken only once (see paragraph 68 above) and has not been followed. Moreover, it contains no analysis whatsoever in respect of the two-month time-limit.

138. Nevertheless, the Court observes that the Constitutional Court decision relied upon by the applicant was taken on 13 January 2005 and notified in writing on 9 February 2005 (see paragraph 68 above). The applicant therefore could not have taken it into account when making his constitutional complaints on 30 December 2004 and 21 January 2005 (see paragraphs 31 and 36 above).

139. Even if he could have taken it into account, the Court considers that the applicant, who was at all times represented by a lawyer, undoubtedly could and should have known about the existing practice. Should there have been any doubts as regards the decisive date in connection with the decision of the Constitutional Court of 13 January 2005, the Court considers that in the circumstances of the present case the risk inherent in using the remedy at the time in question was for the applicant to assume. In reaching this conclusion the Court has taken into account *inter alia* the fact that the time limit for lodging a complaint under Article 127 of the Constitution is as long as two months, that there is no indication that the applicant did not have

ample opportunity to lodge his complaint earlier and that, consequently, the essence of the remedy at issue was not impaired.

140. In so far as the applicant relied on the decision of the Constitutional Court of 25 November 2004 in case no. IV. ÚS 372/04 (see paragraph 69 above), the Court observes that it provides an even stricter interpretation of the relevant law and accordingly does not favour the applicant's individual case.

141. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Merits

1. Right to be released pending trial

142. The parties made no separate submissions other than as mentioned above (see paragraphs 116 and 117 above).

143. The Court reiterates that Article 5 § 3 is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999).

144. The Court observes that, within the meaning of the distinction mentioned in the precedent paragraph, the facts of the present case and the relevant part of the applicant's complaints are not concerned with the initial stages following the applicant's arrest but rather the period pending the applicant's trial.

145. In that respect, the Court reiterates that the presumption is in favour of release (see *McKay v. the United Kingdom*, cited above, § 41) and that the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. Indeed, Article 5 § 3 of the Convention in its second limb lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial" (see *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000) and judicial authorities cannot be said to have a choice between these two components (see *Neumeister v. Austria*, 27 June 1968, p. 37, § 4, Series A no. 8).

146. The Court observes that in the present case the Constitutional Court held on 9 February 2005 that the release of the applicant in exchange for accepting his pledge that he would live in accordance with the law was excluded by operation of the relevant provisions of the CCP and the CC (see

paragraph 26 above). This conclusion however appears to run counter to the findings of the Constitutional Court in judgments of 8 October 2004 and 26 October 2005 in an unrelated case (see paragraph 76 above).

147. The Court considers that this worrying discrepancy in decision-making practice not only raises general questions related to the principle of legal certainty but also a specific question as to the compatibility of the legal regime governing the applicant's detention and its application in the applicant's case, having regard to the Article 5 § 3 right to release pending trial, with or without conditions (see *Caballero v. the United Kingdom*, cited above, §§ 21 and 24; *S.B.C. v. the United Kingdom*, no. 39360/98, §§ 22-23, 19 June 2001, *Boicenco v. Moldova*, no. 41088/05, §§ 134-138, 11 July 2006 and *Krejčíř v. the Czech Republic*, nos. 39298/04 and 8723/05, § 100, ECHR 2009 ...). As to these questions, however, the Court reiterates that its task is not to rule on legislation *in abstracto* (see, for example, *Allen v. the United Kingdom*, no. 18837/06, § 40, 30 March 2010).

The Court will therefore not express a view as to the general compatibility with the Convention of the applicable domestic legal framework and the lack of possibilities for the applicant to be released pending trial subject to conditions.

148. The Court notes in particular the conclusions of the Regional Court, when ruling on 6 May 2004 on the applicant's interlocutory appeal against detention, that the applicant's pledge under Article 73 § 1 (b) of the CCP could not be accepted due to the nature of the case and not because of the possible legal obstacle in Article 73 § 3 of the CCP (see paragraph 16 above).

The Court will examine whether the decision to deny the applicant release pending trial in these circumstances was in conformity with Article 5 § 3 of the Convention.

149. In that respect, the Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 *et seq.*, ECHR 2000 XI).

150. The Court also reiterates that it is the task of the national judicial authorities to examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *McKay v. the United Kingdom*, cited above, § 43).

151. In the present case the decision to remand the four accused, including the applicant, and the decision to dismiss their interlocutory appeal against detention were based, in so far as the applicant is concerned, on the following elements: the applicant was being prosecuted for an extremely serious offence, he was facing tax evasion charges in Košice and a further charge of bribery and, therefore, the applicant had a tendency to commit property offences. These elements were established with reference to submissions by the prosecution service, “evidence previously obtained” and “the materials in the case file”.

152. The applicant, for his part, appealed against his detention on the following grounds: the impugned transaction was of a private-law nature, the applicant had no knowledge of any tax evasion charges against him, the assertion of the prosecution service to that effect had not been substantiated and should therefore not be taken into account, the applicant had returned his licence to organise public auctions and there was accordingly no risk that he would continue criminal activities.

153. The Court observes that the applicant’s argument concerning the alleged tax evasion charges and the return of his licence have never received a judicial answer and that the ordinary court’s conclusions made in reliance on “evidence previously obtained” and “the materials in the case file” are abstract and stereotyped (see, *mutatis mutandis*, *Bakhmutskiy v. Russia*, no. 36932/02, § 141, 25 June 2009) and as such not susceptible of review on account of lack of reference to concrete facts and analysis.

154. Having regard to all the elements, including the fact that the proceedings in respect of the applicant’s interlocutory appeal against detention were short of the applicable guarantees (see paragraphs 156 to 165 below), the Court concludes that reasons given by the domestic courts for denying him release cannot be considered “relevant” and “sufficient” and thus compatible with the applicant’s right under Article 5 § 3 of the Convention to release pending trial. There has therefore been a violation of that Article.

2. Procedural guarantees other than “speediness” in the remand proceedings

155. The parties made no separate submissions other than as mentioned above (see paragraphs 119 to 121 above).

156. The Court reiterates that, by virtue of Article 5 § 4, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, within the meaning of Article 5 § 1, of their deprivation of liberty (see *Lexa v. Slovakia* (no. 2), cited above, §§ 66 and 67, with further references).

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the

detained person (see, among many other authorities, *A. and Others v. the United Kingdom*, cited above, § 204, and *Sanchez-Reisse v. Switzerland*, 21 October 1986, § 51, Series A no. 107).

In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 162, *Reports* 1998-VIII). The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B).

Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see, among many other authorities, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII).

In order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceedings take place (see *Lexa v. Slovakia (no. 2)*, cited above, § 67).

Although Article 5 § 4 of the Convention does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see, for example, *Moisyev v. Russia*, no. 62936/00 § 160, 9 October 2008; *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B; and *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224).

157. In the present case the substantive part of the order for the detention of the applicant mostly contained conclusions without any link to specific facts or elements of analysis as a starting-point. The decision of 6 May 2004 in respect of the applicant's appeal against the detention order showed that the appeal court did not make its own assessment of the reasons arguing for and against the applicant's detention, but rather endorsed without more the reasons advanced by the prosecutor. The Court will revert to this matter below (see paragraph 162 below).

158. In that respect the Court reiterates that one of the principal aims of Article 5 is to ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion (see, *mutatis mutandis*, *Amuur v. France*, 25 June 1996, § 42, *Reports* 1996-III). It considers that this aim is put at risk if the domestic courts render decisions concerning detention without giving individual factual and legal reasons that can be reviewed (see, *mutatis mutandis*, *McKay v. the United Kingdom*, cited above, § 43; *Bakhmutskiy*

v. Russia, cited above, § 141 *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 79, ECHR 2009-... (extracts); *Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003; *Nikolova v. Bulgaria*, cited above, § 61; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts); *Aleksanyan v. Russia*, no. 46468/06, § 179, 22 December 2008).

159. The Court also observes that, before being remanded in custody, the applicant was examined by a single judge of the District Court. Neither the applicant nor his representative was examined again on the subject of the applicant's detention (by way of contrast and comparison, see *Mamedova v. Russia*, no. 7064/05, § 90, 1 June 2006, and *Jankauskas v. Lithuania* (dec.), no. 59304/00, 16 December 2003), despite the applicant, in his interlocutory appeal against his detention, having submitted new material facts and legal arguments. These comprised in particular the submission that he had returned his licence to organise public auctions, which was why there was no longer any risk that he would continue his criminal activities, and also extensive argumentation in support of the private law nature of the impugned transaction.

160. Furthermore, the Court finds it of relevance that in his interlocutory appeal against his detention the applicant offered a detailed pledge under Article 73 § 1 (b) of the CCP to live in accordance with the law, which the Regional Court rejected principally for reasons of substance (see paragraph 16 above), without questioning the applicant in person and affording him an opportunity to describe his personal situation (see, in particular, *Mamedova v. Russia*, cited above, § 91).

161. The Court considers that in view of all the circumstances, including those mentioned in the subsequent paragraphs, and the particular brevity of the reasons offered by the District Court for the detention order against the applicant, Article 5 § 4 of the Convention called for his interlocutory appeal to be heard orally.

162. The Court further observes with concern the pronouncements made by the Regional Court and the Constitutional Court in their respective decisions of 6 May 2004 and 9 February 2005 to the effect that it was not up to a court but solely to the prosecution service at that stage of the proceedings to examine whether there was a sufficient basis for the charge, that the principle of adversarial proceedings had been taken out of context in the pre-trial proceedings and that it only applied to the trial on the merits, and that the principles of adversarial proceedings and equality of arms did not apply in proceedings concerning pre-trial detention and, specifically, in remand proceedings (see paragraphs 16 and 24 above). This position appears to run directly counter to the object and purpose of the judicial guarantees inherent in Article 5 § 4 of the Convention.

163. On the factual level, the Court notes that the domestic courts held that it was for the applicant to bear the burden of proving that he had not been previously charged, while the prosecution's claim to the contrary

appears to have been wholly unsubstantiated (see paragraphs 16 and 24 above).

164. Leaving aside the general question of whether such a negative burden of proof can be borne at all, the Court finds that its distribution in the present case was not compatible with the equality-of-arms principle.

165. The foregoing considerations, taken together, are sufficient for the Court to conclude that the procedure for review of the lawfulness of the applicant's remand in custody, viewed as a whole, was not compatible with Article 5 § 4 of the Convention. There has accordingly been a violation of that provision.

3. *"Speediness" of the proceedings in the applicant's interlocutory appeal against detention*

166. The parties made no separate submissions other than as mentioned above (see paragraphs 123 to 125 above).

167. 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 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, their conduct by the domestic authorities and by 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-...).

168. In the present case the applicant lodged his interlocutory appeal orally immediately after the detention order had been issued on 31 March 2004. A decision was given on the appeal on 6 May 2004. The decision was, however, not delivered publicly and the applicant only learned of it when a written version of it was served on him on 10 June 2004 (see, for example, *Cabala v. Slovakia*, no. 8607/02, § 68, 6 September 2007, and *Singh v. the Czech Republic*, no. 60538/00, § 74, 25 January 2005).

Although, admittedly, the applicant could have lodged a request for release after the decision on his appeal had been taken and before it was served on him, the Court accepts that effective exercise of the right to request a review of his detention necessitated knowledge of the decision and the underlying reasons (by way of contrast and comparison, see *Singh v. the Czech Republic*, cited above, §§ 74 and 76).

The proceedings under examination thus lasted seventy days.

169. The Court observes that in this period the applicant's interlocutory appeal was judicially examined by a single court, the Regional Court.

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

As to the conduct of the applicant, it is true that he did not file written reasons for his appeal until 19 April 2004. However, the Court accepts that he could only do so meaningfully after the detention order had been served on him on 6 April 2004. The period of thirteen days between 6 and 19 April 2004 is therefore imputable to the applicant.

As regards the conduct of the authorities, the Court notes in particular that it took seventeen days, from 19 April 2004 until 6 May 2004, to give a decision on the applicant's appeal with written reasons, and a further thirty-five days, until 10 June 2004, to serve the decision on him.

171. Regard being had to the Court's case-law on the subject (see, for example, *Sanchez-Reisse v. Switzerland*, cited above, §§ 59-60; *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.

4. Enforceable right to compensation in respect of wrongful detention and the Constitutional Court decision of 9 February 2005

172. The Government submitted that the applicant had at his disposal a complaint under Article 127 of the Constitution.

Other than that and as mentioned above (see paragraphs 83 to 85 above) the parties made no separate submissions.

173. 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* [GC], no. 24952/94, § 49, ECHR 2002-X, and *Pavletić v. Slovakia*, cited above, § 95).

174. In the present case the Court has found a violation of Article 5 § 3 of the Convention (see paragraph 154 above) and a compound violation of Article 5 § 4 of the Convention (see paragraphs 165 and 171 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.

175. 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 paragraphs 22 to 27 above) (see *Boris Popov v. Russia*, no. 23284/04, § 84, 28 October 2010).

176. As to the other remedies advanced by the Government, the State Liability Act 1969 and the State Liability Act 2003, the Court observes that the applicant was not required, for the purposes of Article 35 § 1 of the Convention, to test them as at the relevant time the former offered him no reasonable prospects of success and the latter was inapplicable *ratione temporis* (see paragraphs 92 to 96 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.

177. 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 violations of his rights under Article 5 §§ 3 and 4 of the Convention (see paragraphs 154, 165 and 171) (see *Brogan and Others v. the United Kingdom*, cited above, § 67).

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

178. Lastly, the applicant claimed that the decisions of the Constitutional Court of 1 June 2005 and 14 September 2006 had breached his rights under Articles 13 and 14 of the Convention because they were based on an inconsistent interpretation and application of the two-month time-limit for bringing an individual complaint under Article 127 of the Constitution.

179. The Court has found above that the applicant's objections in relation to the Constitutional Court decisions of 1 June 2005 and 14 September 2006 were devoid of merit (see paragraphs 128 to 141 above). It does not discern any arguable issue under Articles 13 and 14 of the Convention.

It follows that the applicant's complaints under those Articles are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

180. 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

181. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage, emphasising the repercussions that his detention had had on his private, family and social life.

182. The Government considered the claim overstated.

183. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 7,000 under that head.

B. Costs and expenses

184. The applicant claimed EUR 8,085 for legal costs and expenses, submitting itemised invoices from his lawyer.

The invoices concerning the proceedings before the Constitutional Court and the Court totalled EUR 3,079.13 and were issued in the name of the applicant. The remaining invoices were issued in the name of another person with the same surname.

The applicant also claimed EUR 150 for administrative expenses and EUR 50 for postal expenses incurred both at the national level and before the Court.

185. 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 before the Constitutional Court and the Court was overstated.

The Government pointed out that the invoices concerning the remaining legal fees had been issued in the name of a different person than the applicant and objected that the claims concerning the administrative and postal expenses were not supported by evidence.

186. 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 154, 165, 171 and 177 above), the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of

EUR 2,000 to cover legal representation before the Constitutional Court and the Court.

C. Default interest

187. 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 (i) the complaint under Article 5 § 3 of the Convention; (ii) the complaint under Article 5 § 4 of the Convention concerning the alleged lack of an effective procedure by which the applicant could challenge the lawfulness of his remand in custody; (iii) the complaint under Article 5 § 4 of the Convention concerning the alleged lack of a speedy determination of the lawfulness of the applicant's remand in custody; and (iv) the complaint under Article 5 § 5 of the Convention concerning the alleged lack of an enforceable right to compensation in relation to the alleged violations of Article 5 § 3 of the Convention and Article 5 § 4 of the Convention in the remand proceedings;
2. *Declares* inadmissible the remainder of the application;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
4. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the lack of an effective procedure by which the lawfulness of the applicant's remand in custody could be decided;
5. *Holds* there has been a violation of Article 5 § 4 of the Convention on account of the lack of a speedy review of the lawfulness of the applicant's remand in custody;
6. *Holds* that there has been a violation of Article 5 § 5 of the Convention on account of the lack of an enforceable right to compensation in relation to the violation of the applicant's rights under Article 5 §§ 3 and 4 of the Convention;

7. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 2,000 (two thousand 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;

8. *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

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

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE GARLICKI

1. I agree that there has been a violation of Article 5 § 5 in this case. However, in my opinion, some issues concerning the interpretation of that provision deserve additional comment. Article 5 § 5 requires that everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 §§ 1-4 must have an enforceable right to compensation. It seems to me that the text of Article 5 § 5 suggests three conclusions.

Firstly, in respect of the holder of the duty: the duty to provide compensation lies with the domestic authorities. In other words, any situation in which someone becomes a victim of arrest or detention in violation of Article 5 must create a right to compensation on the part of the victim and that right must be enforceable at the domestic level.

Secondly, in respect of the substance: the right to compensation arises only if a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court. In other words, the finding of a “substantive” violation of Article 5 §§ 1-4 constitutes a prerequisite for the creation of the right provided for in Article 5 § 5 (see paragraph 173 of the judgment).

Finally, in respect of the timing: as long as there is no – domestic or European – finding that there has been a violation of any of the provisions of Article 5 §§ 1-4 (or of any provisions of domestic law which are identical in substance), no right to compensation can arise. In other words, the right to compensation does not have any autonomous existence; it comes into being only when a “substantive” violation has been established.

2. Three different scenarios may be distinguished here:

- the domestic authorities establish a violation of Article 5 §§ 1-4 (or a provision of domestic law which is identical in substance) but – under domestic law – this does not give rise to any right to compensation;

- at first the domestic authorities consider the detention or arrest to be “lawful”, but the European Court later decides otherwise and establishes a violation of Article 5 §§ 1-4; this finding by the European Court does not, however, trigger any right to compensation at the domestic level;

- at first the domestic authorities consider the detention or arrest to be “lawful”, but the European Court later decides otherwise and establishes a violation of Article 5 §§ 1-4; this finding confers on the victim an enforceable right to compensation at the domestic level.

3. The first scenario was addressed by the Court in *Houtman and Meeus v. Belgium* (no. 22945/07, §§ 45-47, 17 March 2009). The Court found a violation of Article 5 § 5 and observed that “[l]a conclusion de la cour d’appel quant à la violation de la procédure légale s’analyse alors en une reconnaissance que la requérante a subi une privation de liberté contraire à

l'article 5 § 1 de la Convention [...] En refusant d'indemniser les requérants, les juridictions nationales n'ont pas interprété et appliqué le droit interne dans l'esprit de l'article 5 § 1" (§ 46).

4. The second scenario was addressed by the Court in *Brogan and Others v. the United Kingdom* (29 November 1988, Series A no. 145-B). The Court found a violation of Article 5 § 5 and observed that "[a] claim for compensation for unlawful deprivation of liberty may be made in the United Kingdom in respect of a breach of domestic law (see paragraph 41 above on false imprisonment). As Article 5 is not considered part of the domestic law of the United Kingdom, no claim for compensation lies for a breach of any provision of Article 5 which does not at the same time constitute a breach of United Kingdom law; the applicants were arrested and detained lawfully under domestic law but in breach of paragraph 3 of Article 5. This violation could not give rise, either before or after the findings made by the European Court in the present judgment, to an enforceable claim for compensation by the victims before the domestic courts" (§§ 66-67).

The *Brogan* formula is still regarded as the core precedent. It seems, however, that it governs directly only the second of the above-mentioned scenarios. In *Brogan*, the Court attached decisive weight to the fact that UK law (as it stood at the material time) excluded any possibility of compensation following the judgment of the European Court. This was more or less the same situation as the one we have now in *Michalko*. Before the European Court adopted its judgment, the detention had been assessed as "lawful" by the domestic authorities and therefore no compensation claim could be recognised. After the European Court judgment, the substantive characterisation of the detention changed and the detention was characterised as defective, but still no compensation claim was recognised under domestic law.

5. The third scenario has not been adequately addressed by the Court as yet. It is clear that, once the European Court has overruled the domestic findings as to the compatibility of an arrest or detention with Article 5 §§ 1-4, a right of compensation must arise. In assessing whether there has been a violation of Article 5 §§ 5, the Court should examine how domestic law responds to the new situation, that is, the situation created by its judgment.

I do not think that it is reasonable to find an immediate violation of Article 5 § 5 if two conditions are met:

- the domestic law accepts a claim of compensation based exclusively on a violation of the Convention as found in a judgment of the European Court;
- this compensatory remedy has already been confirmed in the practice of the domestic courts.

In such a situation, the "winner" in the Strasbourg proceedings would have a possibility of obtaining compensation at the domestic level. Thus, it

would be premature to find a violation of Article 5 § 5 in addition to the finding of a “substantive” violation of Article 5.

The right to compensation must come after the finding of “unlawfulness” as a necessary consequence of such unlawfulness (at domestic and/or European level). It would be illogical to reverse that order and to assume that the right to compensation can arise before the “unlawfulness” of the arrest or detention has been established.

6. I am inclined to think that the Court has not always followed that logic. For example, in *Boris Popov v. Russia* (no. 23284/04, 28 October 2010), it was observed that “the national courts at two levels of jurisdiction examined the claims on the merits but found that the applicant’s arrest and detention had been lawful as a matter of Russian law and, as noted by the appeal court, under Article 5 § 1 (c) of the Convention” (§ 84). The Court rejected that assessment and decided that there had been a violation of Article 5 § 1 (c). At the same time, the Court noted that “the national authorities, including courts, are expected to interpret and apply national law in the light of the Convention, as interpreted by the Court. By failing to apply the above standards, the national courts did not enforce the applicant’s right to compensation” (§§ 85-86).

The Court’s position in *Popov* seems to be based on two principal considerations. First, the Court ruled that although the domestic courts had found the detention to be lawful they had erred in their judgments and should have applied the Convention in the correct manner. This is hard to contest.

But the Court then went one step further and based the violation of Article 5 § 5 on the finding that the domestic courts should have arrived at a different conclusion as to the lawfulness of the detention. Thus, compensation claims were recognised retroactively as being enforceable from the moment when the original violation took place, but well before that violation had been validly established. This is hard to accept because, under Article 5 § 5, a compensation claim must be preceded by a final finding of a violation of any of the remaining paragraphs of Article 5. As long as no such finding has been made, there is no legal basis for any compensatory action under domestic law.