



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

THIRD SECTION

CASE OF KORMOŠ v. SLOVAKIA

(Application no. 46092/06)

JUDGMENT

*This version was rectified on 1 December 2011
under Rule 81 of the Rules of Court*

STRASBOURG

8 November 2011

FINAL

08/03/2012

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

In the case of Kormoš v. Slovakia,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ján Šikuta,

Luis López Guerra,

Mihai Poalelungi, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 11 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 46092/06) 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 Slovakian national, Mr Attila Kormoš (“the applicant”), on 8 November 2006.

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

3. The applicant alleged, in particular, that his detention had been unlawful.

4. On 12 January 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Štúrovo.

6. On 5 February 2004 the police arrested the applicant. He was accused of planning a robbery¹ and remanded in custody from that date.

1. Rectified on 1 December 2011: the text read “He was accused of robbery ...” in the former version of the judgment.

7. Several decisions extending the applicant's detention were made. In particular, on 18 November 2004 the Žilina District Court extended his detention in the context of the pre-trial proceedings until 24 January 2005.

8. On 21 January 2005 the public prosecutor indicted the applicant and several other persons before the Žilina Regional Court.

9. The applicant requested to be released, arguing that the Regional Court had not extended his detention after the expiry of the period indicated in the District Court's decision of 18 November 2004.

10. On 20 April 2005 the Regional Court ordered the applicant's release. Upon a complaint lodged by the public prosecutor the Supreme Court decided on 24 May 2005 that the applicant should remain remanded in custody.

11. On 2 June 2005 the Regional Court dismissed the applicant's request for release. On 15 June 2005 the Supreme Court dismissed a complaint by the applicant against that decision.

12. On 22 July 2005 the applicant complained to the Constitutional Court that his detention in the period after 24 January 2005 and the Supreme Court's above decision of 24 May 2005 were both unlawful. In a separate complaint lodged on 31 August 2005 the applicant complained about the refusal to release him in the proceedings leading to the Supreme Court's decision of 15 June 2005.

13. On 5 February 2006 the applicant was released.

14. On 10 May 2006 the Constitutional Court found that the applicant's right under Article 5 § 1 had been violated as a result of the Supreme Court's decision of 24 May 2005. There had been no judicial decision extending his detention after 24 January 2005, and there existed no justification for that situation.

15. The Constitutional Court quashed the Supreme Court's decision of 24 May 2005 in so far as it concerned the applicant and ordered the Supreme Court to reimburse the applicant's costs in the constitutional proceedings. It dismissed the applicant's claim for just satisfaction with reference to a conclusion which a different chamber of the Constitutional court had reached in the case of one of the applicant's co-accused. According to that conclusion, (i) the finding of a violation of Article 5 § 1 provided appropriate redress to the plaintiff and (ii) the Supreme Court's decision of 24 May 2005 was based on that court's earlier practice, which, however, was not in accordance with practice under the Convention.

16. In a judgment of 30 November 2006 the Constitutional Court found that by its decision of 15 June 2005 the Supreme Court had breached the applicant's right under Article 5 § 1 of the Convention. In particular, the Supreme Court should have remedied the situation resulting from the applicant's unlawful detention from 25 January 2005 by ordering his release.

17. The judgment stated, in particular:

“In the Constitutional Court’s view, the jurisdiction of the court involved at the pre-trial stage ended with the filing of the indictment on 21 January 2005. The indictment as such is not a ground for continued detention of a person, as it does not explicitly follow from the law, and it is inadmissible to extend the possibilities of restricting a person’s liberty by extensive interpretation of several provisions of the Code of Criminal Procedure.

However, a court’s decision on detention of a person given at the pre-trial stage can constitute a ground for such person’s detention for a short period following the indictment. Otherwise it would be practically impossible to ensure continued detention of a person after an indictment has been filed. In the circumstances, a ground for the applicant’s detention existed until 25 January 2005. The detention should have been extended by a decision given no later than 25 January 2005 if it was to continue after that date. In the absence of any such decision, the restriction of the applicant’s liberty after 25 January 2005 was unlawful.

The unlawfulness of the applicant’s deprivation of liberty after 25 January 2005 cannot be justified retrospectively, not even by a judicial decision. Subsequent judicial decisions could not have extended the applicant’s detention, as it had ended on 25 January 2005. The only existing possibility was to remand the applicant in custody again. As this was not done, his subsequent deprivation of liberty had no legal ground.”

18. The Constitutional Court quashed the Supreme Court’s decision of 15 June 2005, granted the equivalent of 2,818 euros (EUR) to the applicant as just satisfaction and ordered the Supreme Court to reimburse the applicant’s costs.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Code of Criminal Procedure of 1961

19. The following provisions of the Code of Criminal Procedure of 1961 (Law no. 141/1961 Coll., in force until 31 December 2005) are relevant in the present case.

20. Pursuant to Article 71 § 1, a person’s detention in the context of both pre-trial proceedings and during proceedings before a trial court may only last as long as necessary. Where detention in the context of pre-trial proceedings is to exceed six months, it may be extended at a public prosecutor’s request up to one year by a judge or to a maximum of two years by a court’s chamber.

21. Article 71 § 2 provides that a person’s detention in the context of both pre-trial proceedings and during trial must not exceed two years. In justified cases the Supreme Court may extend its duration to a maximum of three years and in cases of particularly serious offences up to five years. Under paragraph 3 of Article 71, a proposal for extension of a person’s detention is to be submitted by a public prosecutor in the pre-trial proceedings and by the president of the court’s chamber during the trial.

22. Article 72 § 1 obliges investigators, prosecutors and judges to examine, at each stage of criminal proceedings, whether reasons for the accused person's detention persist. In pre-trial proceedings a judge is obliged to do so only when deciding on a public prosecutor's proposal to extend detention or to modify the reasons for it or when deciding on an accused person's application for release. Where a reason for an accused person's detention no longer exists, the accused must be released immediately.

23. Article 72 § 2 entitles an accused to apply for release at any time. When the public prosecutor dismisses such an application in the course of pre-trial proceedings, he or she must submit it immediately to the court. The decision on an application for release must be taken without delay. If an application is dismissed, the accused may only renew it fourteen days after the decision has become final unless he or she cites other reasons justifying his or her release.

24. Pursuant to Article 192, where the court carries out a preliminary examination of the indictment of a person who is detained, it shall also decide whether that person is to remain in custody.

2. Practice of the Supreme Court

25. In accordance with the Supreme Court's practice, the time-limits mentioned in Article 71 § 1 of the Code of Criminal Procedure of 1961 concerned exclusively situations where a decision on a public prosecutor's proposal was to be made in the context of pre-trial proceedings. However, where an indictment had been filed within a shorter time than the two-year period mentioned in Article 71 § 1, the law did not require that a request for continued detention of the accused persons be made or that a separate decision should be made on their continued detention, with the exception of cases where the indictment had been filed less than ten days before the expiry of the two-year maximum period of detention.

26. Pursuant to a Supreme Court's standpoint of 1975 (Rt 5/75), Article 192 of the Code of Criminal Procedure requires a court to decide on further detention of the accused where it carries out a preliminary examination of the indictment. Accordingly, where the presiding judge concludes, on the basis of the file, that a preliminary examination of the indictment is not required and considers the detention of the accused to be lawful, there is no need for a separate decision of the court chamber on continued detention of the accused. However, where the accused applies for release, that application must be decided upon without delay, in accordance with Article 72 § 2 of the Code of Criminal Procedure.

3. *Practice of the Constitutional Court*

(a) **Judgment I. ÚS 6/02 of 4 December 2002**

27. In judgment I. ÚS 6/02 the Constitutional Court noted that the Code of Criminal Procedure did not explicitly require that a decision on extension of an accused person's detention be given in cases where an indictment had been filed and where the detention, both at the pre-trial stage and during the trial, had not exceeded two years.

28. It held, however, that the filing of an indictment alone did not as such justify a person's continued detention. The court dealing with the case was required to decide explicitly on further detention of the accused prior to the expiry of the period for which the detention had been extended in the context of pre-trial proceedings.

29. In its judgment the Constitutional Court referred in particular to the guarantees laid down in Article 5 § 1 of the Convention and the Court's judgment in *Stašaitis v. Lithuania* (no. 47679/99, 21 March 2002, §§ 59-61).

30. In that case the Constitutional Court found no breach of Article 5 § 1 as the ordinary court involved, both in the context of a preliminary examination of the indictment and in reaction to the accused person's request for release, had decided that the reasons for the latter's detention persisted. That decision had the same effect as a decision to extend the accused person's detention.

(b) **Judgment I. ÚS 204/05 of 15 February 2006**

31. In the above case, which concerned one of the present applicant's co-accused, the detention in the context of pre-trial proceedings had been extended until 24 January 2005. Prior to its expiry, on 21 January 2005, the accused was indicted. In its judgment the Constitutional Court found that the Supreme Court had breached the plaintiff's right under Article 5 § 1 of the Convention, in that there had been no judicial decision extending his detention after 24 January 2005 and there existed no justification for that situation. It was irrelevant that courts at two levels had dismissed the accused person's application for release on 14 January 2005 and 23 February 2005 respectively, as those decisions related to detention in the context of pre-trial proceedings, that is prior to the filing of the indictment. In those circumstances, any relevant decision on further detention of the accused could have been taken only by the criminal court before which the accused had been indicted.

32. With reference to its judgment I. ÚS 6/02 of 4 December 2002, the Constitutional Court held that for a detention to be lawful it must always rely on a court decision. Since May 2006 the Constitutional Court has confirmed that opinion in a number of judgments, including the cases of the applicant and another two of his co-accused.

(c) Judgment I. ÚS 115/07 of 23 October 2007

33. In judgment I. ÚS 115/07 the Constitutional Court confirmed that the filing of an indictment alone does not suffice for continued detention of an accused to be lawful. The court dealing with the criminal case which follows an indictment is required to take a decision on the accused person's detention prior to the expiry of the period for which the latter had been remanded in the context of pre-trial proceedings. The Constitutional Court found a breach of the accused person's right under Article 5 § 1 of the Convention and ordered his immediate release.

4. The Code of Criminal Procedure of 2005

34. The new Code of Criminal Procedure (Law no. 301/2005 Coll.) entered into force on 1 January 2006.

35. Article 76 § 5 provides, *inter alia*, that a court is obliged to decide on further detention of an accused within fifteen days of his or her indictment (or submission for its approval of an agreement between the prosecution and the accused on guilt and punishment) unless it has already decided on detention of the accused under provisions which govern the examination of indictments.

36. The explanatory report to the draft Code of Criminal Procedure of 2005 indicates that the above provision accentuates the judicial control of a person's detention following his or her indictment and that the amendment is also in reaction to the Constitutional Court judgment I. ÚS 6/02 of 4 December 2002.

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

37. The State Liability Act 2003 was enacted with effect from 1 July 2004.

38. Pursuant to section 7, where a decision on arrest, detention or any other deprivation of liberty was quashed as being unlawful or where there was wrongful official action in that context, a person affected by it is entitled to compensation for damage.

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

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

41. In a judgment of 16 March 2007 (in case no. 4C 258/2006) the Brezno District Court allowed 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 which had ended with their acquittal with final and binding effect in 2006. On 22 November 2007 the Banská Bystrica Regional Court upheld that judgment following an appeal by the defendant.

42. In a judgment of 17 August 2009 (in case no. 19C 47/2006) the Bratislava I District Court granted an action for damages by an individual against the State under the State Liability Act 2003 and awarded the claimant a sum 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 the extension by a decision of 12 October 2004 of the claimant's detention pending trial, until 28 April 2005. 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 plaintiff's rights under Article 5 §§ 3 and 4 in connection with the same facts. However, the Constitutional Court had made no award to the claimant of just satisfaction as he had made no claim to that effect.

THE LAW

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

43. The applicant complained that his detention after 24 January 2005 had been unlawful and that he was unable to obtain appropriate redress in that respect in the context of the proceedings leading to the Constitutional Court's judgment of 10 May 2006. He relied on Article 5 § 1 of the Convention, which reads as follows:

“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; (...)

44. The Government contested that argument.

A. Admissibility

45. The Government argued that the complaint under Article 5 § 1 was inadmissible on several grounds. Firstly, the applicant had failed to exhaust domestic remedies, as he had not claimed compensation for his detention under the State Liability Act 2003. Secondly, the application was manifestly ill-founded, as the guarantees of Article 5 § 1 had been complied with. Thirdly, and in any event, given the redress which the applicant obtained in the proceedings before the Constitutional Court, he could no longer be considered a “victim” within the meaning of Article 34 of the Convention.

46. The applicant disagreed. He argued that he had exhausted domestic remedies in that he had sought redress before the Constitutional Court, which had failed to provide him with appropriate redress. At the relevant time there existed no case-law indicating that an action under the State Liability Act 2003 had reasonable prospect of success. His detention after 24 January 2005 had been contrary to Article 5 § 1, as indicated in the Constitutional Court’s judgments.

47. The Court notes that in the present case the applicant submitted to the Constitutional Court the same complaint as he now makes in proceedings under the Convention. The Constitutional Court, which is the supreme authority in Slovakia in charge of protection of fundamental rights and freedoms, addressed its merits and twice concluded that there had been a breach of Article 5 § 1. While the Constitutional Court Act 1993 requires prior use of other remedies available (see *Borovský v. Slovakia*, no. 24528/02, § 27, 2 June 2009), it did not hold that the applicant should have first used the remedy under the State Liability Act 2003.

48. To the extent that the Government argued that the applicant could have sought compensation under the State Liability Act 2003 on the basis of the Constitutional Court’s judgments, the Court notes that the Constitutional Court, after finding a breach of Article 5 § 1, also decided on the applicant’s claims for just satisfaction. In that respect the present case is different from that on which the Government relied (see paragraph 42 above), in which the Constitutional Court had been unable to award the claimant just satisfaction as he had made no claim to that effect. In any event, the relevant decision of the ordinary court was subsequent to the facts of the present case.

49. The Court has not found any reason to conclude that there was any realistic prospect that in the present applicant’s case an ordinary court would have arrived at conclusions contrary to those of the Constitutional Court. The Government’s objection relating to the applicant’s failure to exhaust domestic remedies must therefore be dismissed (see also, *mutatis mutandis*, *Štetiar and Šutek v. Slovakia*, nos. 20271/06 and 17517/07, §§ 69-75, 23 November 2010, or *Aydemir v. Slovakia*, no. 44153/06, §§ 46-53, 8 February 2011).

50. Given that the Government disagreed with the Constitutional Court's conclusion as to the alleged breach of Article 5 § 1, the Court considers that their objection concerning the applicant's status as a victim is closely linked and should be joined to the merits of that complaint.

51. The Court considers that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. It cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

(a) The applicant

52. The applicant argued that his detention after 25 January 2005 had been unlawful, for reasons which the Constitutional Court had indicated in its judgment I. ÚS 6/02 of 4 December 2002 and a number of judgments delivered subsequently, including those of 10 May and 30 November 2006, in the applicant's case. The position set out in the Constitutional Court's judgments put an end to the practice of ordinary courts, which had been applied in the applicant's case and which was contrary to Article 5 § 1, namely of not providing appropriate guarantees for judicial control of deprivation of liberty of accused persons following their indictment.

(b) The Government

53. The Government argued that the applicant's detention after 24 January 2005 had been in accordance with the law. They relied on Article 72 § 1 of the Code of Criminal Procedure of 1961, which obliged judges to examine, at each stage of criminal proceedings, whether reasons for the accused person's detention persisted, and on the existing practice of ordinary courts described above. The maximum permissible duration of the applicant's detention was laid down in the Code of Criminal Procedure of 1961 and it had not been exceeded. His detention after 24 January 2005 had therefore an appropriate legal basis and was neither arbitrary nor otherwise contrary to Article 5 § 1.

54. The Government further argued that in *Pavlik v. Slovakia* (no. 74827/01, judgment of 30 January 2007) the Court had found no breach of Article 5 § 1, despite the fact that the applicant's detention had not been covered by a judicial decision for nearly one month.

55. At the relevant time there was no established practice of the Constitutional Court as, prior to the facts of the present case, it had addressed the point in issue in a single judgment, namely I. ÚS 6/02 of 4 December 2002. The only actual change in its approach had been in the context of proceedings brought by the applicant and by his co-accused.

56. The new approach consisted of an interpretation of the guarantees under Article 5 § 1 of the Convention which was broader than that which the Court gave to that provision under its case-law. In particular, the Government argued that while Article 5 § 1 required a legal basis in domestic legal order for a detention to be lawful, it did not follow from the Court's case-law that lawful detention of a person should be based exclusively on an explicit judicial order.

2. The Court's assessment

(a) Recapitulation of the relevant principles

57. The relevant principles are set out, for example, in *Mooren v. Germany* [GC] (no. 11364/03, §§ 72-81, ECHR 2009-...; with further references). They can be summed up as follows.

58. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down an obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention.

59. A period of detention is, in principle, "lawful" if it is based on a court order. However, the Court has considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1.

60. It has further acknowledged that the speed with which the domestic courts replaced a detention order which had either expired or had been found to be defective is a relevant element in assessing whether a person's detention must be considered arbitrary. Thus, in the context of subparagraph (c) of Article 5 § 1, a period of more than a year following a remittal from a court of appeal to a lower-level court, in which the applicant remained in a state of uncertainty as to the grounds for his

detention, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant's detention arbitrary (see *Khudoyorov v. Russia*, no. 6847/02, §§ 136-137, ECHR 2005-X (extracts)).

61. In the *Jėčius v. Lithuania* judgment (no. 34578/97, 31 July 2000, §§ 56-64, ECHR 2000-IX) the Court found that the sole fact that the case had been transmitted to the court did not constitute a "lawful" basis for detention within the meaning of Article 5 § 1 of the Convention, and that it could not extend or replace the valid detention order required by domestic law.

62. In *Stašaitis*, (cited above, §§ 68-69) the Court held that uncertainty had been created by the judicial authorities' merging of detention decisions with other procedural acts, resulting in a lack of clarity regarding the lawfulness of the applicant's detention. In that case the Court of Appeal retroactively reinstated a detention order issued more than a year before, but gave no reasons for its decision in that respect. In doing so it took no account of the applicant's current situation. The Court concluded that the decision did not constitute a "lawful" basis for the applicant's continued remand in custody.

63. In the *Žirovnický v. the Czech Republic* judgment (no. 23661/03, §§ 58-62, 30 September 2010), the Court found a breach of Article 5 § 1 as no detention warrant had been issued by a court or other judicial body authorising the applicant's continued remand in custody for a period exceeding one month.

(b) Application of the relevant principles to the present case

64. In the present case the Constitutional Court acknowledged a breach of the applicant's rights under Article 5 § 1 on two occasions, but the Government expressed their disagreement with such decisions. In view of such situation the Court is required to take a stand on the point of issue.

65. It would be justified for the Court to reach a contrary conclusion to that of the Constitutional Court only if it was satisfied that the latter had misinterpreted or misapplied the Convention provision or the Court's jurisprudence under that provision or reached a conclusion which was manifestly unreasonable (see, *mutatis mutandis*, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 174 *in fine*, ECHR 2009-..., and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 51-53, 30 November 2010).

66. The Constitutional Court found that the domestic law did not list indictment as a ground for continued detention of an accused. It considered inadmissible the practice of extending the statutory possibilities of restricting a person's liberty by extensive interpretation of several provisions of the Code of Criminal Procedure.

67. The Court concurs with the reasons put forward by the Constitutional Court which it finds to be in line with its above case-law. It considers that the purpose of Article 5, namely to protect individuals from arbitrary deprivation of liberty, is served in an appropriate manner where there is a mandatory formal judicial review requiring a decision which gives reasons for a person's detention after his or her case has been submitted to the trial court and, as the case may be, the detention order issued at the pre-trial stage has expired.

68. The Court has noted that a judicial review of this kind was allowed for in Article 76 § 5 of the Code of Criminal Procedure of 2005, also with reference to the above Constitutional Court's judgment I. ÚS 6/02. However, that development did not concern the present case.

69. The foregoing considerations are sufficient to enable the Court to conclude, in line with the Constitutional Court's judgments, that the applicant's detention after the expiry of the detention order given at pre-trial stage fell short of the requirement of lawfulness within the meaning of Article 5 § 1.

(c) The victim status of the applicant

70. In view of the above conclusion, which concurs with that of the Constitutional Court on the applicant's case, it remains to be examined whether the applicant can still claim to be a victim in that respect.

71. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive the applicant of his or her status as a "victim", within the meaning of Article 34 of the Convention, unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Rosselet-Christ v. Slovakia*, no. 25329/05, § 49, 26 October 2010, with further references).

72. Since the Constitutional Court explicitly acknowledged a breach of the applicant's right under Article 5 § 1, the only issue which arises in that respect in the present case is whether the redress afforded to him can be considered as appropriate.

73. When determining such issue the Court will have regard to its own practice in similar cases. This does not imply that in situation where domestic authorities awarded a sum to the applicant with a view to redressing the breach found, such sum must correspond to the Court's award. The issue must be determined in light of all relevant circumstances including the nature of the breach and the way and speediness in which it was established by domestic authorities for which it is in the first place to ensure respect for rights and freedoms guaranteed by the Convention. The level of just satisfaction granted at national level must nevertheless not be manifestly inadequate in the particular circumstances of the case (see also *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 65-107, ECHR 2006-V;

Scordino v. Italy (no. 1) [GC], no. 36813/97, §§ 178-213, ECHR 2006-V; or *Becová v. Slovakia* (dec.), no. 23788/06, 18 September 2007).

74. In its second judgment, delivered on 30 November 2006, the Constitutional Court granted the applicant the equivalent of EUR 2,818 as just satisfaction, noting that the Supreme Court had not remedied the situation resulting from the applicant's unlawful detention (see paragraphs 15 and 18 above). At the time of the Constitutional Court judgments the applicant had been released.

75. The Court considers that the sum awarded as just satisfaction in the second judgment, albeit not negligible as such, is not sufficient to provide the applicant with appropriate redress in the circumstances. When reaching this conclusion the Court had regard, in particular, to the importance of the right to liberty and security as enshrined in Article 5 § 1, the duration of the applicant's detention which the Constitutional Court had found to be unlawful, and other criteria which it has applied for the determination of just-satisfaction awards under Article 41 of the Convention (among most recent judgments see, *mutatis mutandis*, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 114, 7 July 2011; *Hadžić and Suljić v. Bosnia and Herzegovina*, nos. 39446/06 and 33849/08, § 49, 7 June 2011, with further references; or *Ganea v. Moldova*, no. 2474/06, § 35, 17 May 2011).

76. The applicant can thus still claim to be a "victim" of a breach of his rights within the meaning of Article 34 of the Convention, and the Government's objection in this respect must be dismissed.

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

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

78. The applicant complained that the Constitutional Court had not displayed due diligence when dealing with his complaint of 22 July 2005. He relied on Article 5 § 4 of the Convention, which provides:

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

A. The arguments of the parties

79. The Government maintained that the guarantees of Article 5 § 4 do not extend to proceedings before the Constitutional Court. Those proceedings were governed by different legal provisions from the proceedings before criminal courts. They were separate from and independent of proceedings before criminal courts and were of a specific nature, as they concerned alleged breaches of the applicant's fundamental

rights and freedoms. A complaint to the Constitutional Court could not be regarded as an ordinary remedy against criminal courts' decisions related to the applicant's detention. In any event, the Government considered this complaint to be manifestly ill-founded.

80. The applicant disagreed.

B. The Court's assessment

1. Applicability of Article 5 § 4 to proceedings before the Constitutional Court

81. The Court held Article 5 § 4 applicable to proceedings before the Constitutional Court of the Czech Republic (see *Smatana v. the Czech Republic*, no. 18642/04, §§ 46 and 122-123, 27 September 2007; *Fešar v. the Czech Republic* (no. 76576/01, §§ 57-60 and 69, 13 November 2008). In *Knebl v. the Czech Republic* (no. 20157/05, § 102, 28 October 2010) the Court held that in respect of complaints of unlawfulness or excessive length of detention the guarantee of a "speedy review" had to be respected in proceedings before the Constitutional Court.

82. In *Stephens v. Malta* (no. 2), (no. 33740/06, §§ 83 and 85-90, 21 April 2009), the Court held that the intervention of the Constitutional Court, which had to be regarded in the particular circumstances of that case, fulfilled the requirements of Article 5 § 4.

83. In several applications against Croatia the Court reiterated that while Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention, a State which institutes such a system must in principle accord detainees the same guarantees on appeal as at first instance. The Court held that the same applies in a system which provides for a constitutional complaint against decisions ordering and extending detention. It found a breach of Article 5 § 4 due to the Croatian Constitutional Court's failure to review the lawfulness of the applicants' detention (see *Getoš-Magdić v. Croatia*, no. 56305/08, §§ 100-106, 2 December 2010; *Hađi v. Croatia*, no. 42998/08, §§ 43-47, 1 July 2010; or *Peša v. Croatia*, no. 40523/08, §§ 122-126, 8 April 2010).

84. As to the present case, the Court has held that a complaint under Article 127 of the Constitution of the Slovak Republic is a remedy which applicants, including those who complain about a breach of their rights under Article 5, are normally required to use for the purpose of Article 35 § 1 of the Convention prior to lodging an application under the Convention (see, for example, *Osváthová v. Slovakia*, no. 15684/05, §§ 57-59, 21 December 2010, and *Štetiar and Šutek v. Slovakia*, nos. 20271/06 and 17517/07, §§ 71-72, 23 November 2010).

85. Lawfulness is a pre-requisite for a person's detention to be considered compatible with Article 5 § 1 of the Convention and its constitutional equivalent. When examining complaints alleging a breach of Article 5 § 1 of the Convention, the Constitutional Court has to assure itself as to whether the statutory requirements were complied with. When finding that a person's detention is unlawful, it concludes that there has been a breach of the plaintiff's fundamental rights and freedoms. In such cases the Constitutional Court has jurisdiction, *inter alia*, to quash the decisions of ordinary courts and, if appropriate, order the release of the detained person (see above, paragraphs 31-33).

86. The requirement under Article 5 § 4 for a speedy review of the lawfulness of detention is similar to the guarantee of a hearing within a reasonable time incorporated in Article 6 § 1 of the Convention. The latter procedural guarantee was found to extend to constitutional proceedings the purpose of which was to determine whether there had been a breach of the plaintiffs' fundamental rights in the course of prior proceedings before ordinary courts where such proceedings concerned determination of one's civil rights or obligations or of a criminal charge (see, for example, *Süßmann v. Germany*, 16 September 1996, §§ 45-46, *Reports of Judgments and Decisions* 1996-IV; and *Keszeli v. Slovakia* (no. 2), no. 34200/06, § 21-23, 21 December 2010).

87. In view of the above, the Court considers that the guarantees incorporated in Article 5 § 4 of the Convention extend also to proceedings before the Constitutional Court in Slovakia.

2. Scope of the guarantee of a speedy review

88. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12; and *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release (see, among other references, *Getoš-Magdić v. Croatia*, cited above, § 100; or *Stephens v. Malta* (no. 2), cited above, § 83).

89. In *Stephens v. Malta* (no. 1) (no. 11956/07, §§ 15, 23, 24 and 102, 21 April 2009) the Court held that the right guaranteed in Article 5 § 4 was only applicable to persons deprived of their liberty, and had no application for the purposes of obtaining, after release, a declaration that a previous detention or arrest was unlawful. In that case the applicant lodged the constitutional remedy on 12 November 2004 and the Constitutional Court determined the issue on 23 November 2004. Prior to that,

on 22 November 2004 the applicant had been released on bail. Paragraph 103 of the judgment reads:

“The Court observes that the applicant made his application for release while he was in detention. However, a decision was given by the Constitutional Court only on 24 November 2004, by which time he had been released on bail... Thus, although at the time of his application to the domestic courts the applicant was entitled to a review in accordance with Article 5 § 4, this provision no longer applied at the time of the Constitutional Court’s judgment. Consequently, it is not necessary for the Court to examine whether the proceedings concerning the applicant’s detention satisfied the safeguards of Article 5 § 4 of the Convention.”

90. In *S.T.S. v. the Netherlands* (no. 277/05, §§ 43-50 and 58-62, 7 June 2011) the Court found a breach of Article 5 § 4 as, *inter alia*, the lawfulness of the applicant’s detention had not been decided speedily. That breach related to proceedings in which the Supreme Court concluded, 294 days after the applicant had lodged his appeal on points of law, that its determination had become devoid of interest. It held, in particular, that the detention authorisation in issue had lapsed in the meantime. In the judgments against Croatia referred to in paragraph 83 above the domestic courts involved refused to review the lawfulness of the applicants’ detention because a fresh decision extending their detention had meanwhile been adopted. Such way of proceeding raised also an issue as to the effectiveness of the review both in *S.T.S.* and the applications against Croatia in issue.

91. In particular, in *S.T.S.* (paragraph 61) the Court concluded that by declaring the applicant’s appeal on points of law as having been devoid of interest the Supreme Court had deprived that remedy of whatever further effect it might have had. It pointed out that a former detainee may well have a legal interest in the determination of his or her detention even after having been liberated as an issue can arise, for example, in giving effect to the “enforceable right to compensation” guaranteed by Article 5 § 5 of the Convention.

92. In the present case a similar issue does not arise as the Constitutional Court found a breach of the applicant’s right under Article 5 § 1 of the Convention and, in the judgment of 30 November 2006, awarded him just satisfaction notwithstanding that the applicant had been released in the meantime. For the Court, it is this aspect which makes the present case dissimilar from *S.T.S.* or the Croatian cases referred to above.

93. The primary purpose of Article 5 § 4 is to ensure to a person deprived of liberty a speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The Court considers that the requirement of speediness is therefore relevant, from that perspective, while that person’s detention lasts (see, by analogy, *Stephens v. Malta* (no. 1) cited above, § 103). While the guarantee of speediness is no longer relevant for the purpose of Article 5 § 4 after the person’s release, the guarantee of efficiency of the review should continue

to apply even thereafter since, as stated in *S.T.S.*, a former detainee may well have a legitimate interest in the determination of his or her detention even after having been liberated.

94. In these circumstances, the Court considers that the reasoning in *Stephens v. Malta* (no. 1) does not prevent it from considering, subject to compliance with the other admissibility requirements, the present applicant's complaint of a lack of speediness of the constitutional proceedings intervening between the date his constitutional complaint was lodged and the date he was released. Otherwise, the applicant would have been deprived of protection of his rights under Article 5 § 4 for a period of more than six months. In this respect, the Court reiterates that the Convention is intended to guarantee rights that are "practical and effective" (see *Oluić v. Croatia*, no. 61260/08, § 47, 20 May 2010).

95. The applicant was released on 5 February 2006, the alleged breach of his right to a speedy review of the lawfulness of his detention by the Constitutional Court therefore ended on that date. Since the application was introduced on 8 November 2006, in that respect the applicant did not comply with the six-month time-limit laid down in Article 35 § 1 of the Convention (see also *Krowiak v. Poland*, no. 12786/02, § 49, 16 October 2007; or *Kołaczyk v. Poland* (dec.), no. 13794/02, 9 January 2007).

96. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

97. Lastly, the applicant complained that he did not have an effective remedy at his disposal in respect of his complaints under Article 5 §§ 1 and 4. He relied on Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Alleged violation of Article 13 in conjunction with Article 5 § 1

98. The Government maintained that the applicant did not have an arguable complaint. In any event, the applicant had had an effective remedy, namely a complaint to the Constitutional Court.

99. The applicant disagreed. He argued that he had not obtained appropriate redress in proceedings before the Constitutional Court.

100. The Court notes that the Constitutional Court, in two separate judgements, found that there had been a breach of the applicant's rights

under Article 5 § 1. It ordered the reimbursement of the applicant's costs and, in the second judgment, granted EUR 2,818 as just satisfaction to the applicant. The Constitutional Court had the power to order the applicant's release, but the applicant was no longer detained at the time of its judgments.

101. Thus the applicant had a remedy at his disposal at the national level to enforce the substance of the right under Article 5 § 1. The fact that the redress obtained at the domestic level was not sufficient for the Convention purposes does not render the remedy under Article 127 of the Constitution in the circumstances of the present case incompatible with Article 13 of the Convention (see also, *mutatis mutandis*, *Šidlová v. Slovakia*, no. 50224/99, § 77, 26 September 2006, and *Mošat' v. Slovakia*, no. 27452/05, § 27, 21 September 2010).

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

B. Alleged violation of Article 13 in conjunction with Article 5 § 4

103. The Court reiterates that Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

104. The Court has found above that the applicant's complaint under Article 5 § 4 of the Convention was inadmissible. In these circumstances, the applicant has no arguable claim for the purposes of Article 13 of the Convention.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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

107. The applicant claimed 570,000 euros (EUR) in respect of non-pecuniary damage.

108. The Government considered the sum claimed to be excessive.

109. The Court notes that the applicant obtained partial redress in respect of his complaint under Article 5 § 1 in the second set of proceedings before the Constitutional Court (see paragraph 18 above). In the circumstances, it considers it appropriate to award the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

110. The applicant also claimed EUR 2,915.80 for costs and expenses incurred before the Court.

111. The Government considered that the Court should grant the applicant compensation only in respect of those costs and expenses which he had reasonably incurred.

112. 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 documents in its possession and the above criteria, the Court awards the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Joins* to the merits the question whether the applicant retained the victim status in respect of the complaint under Article 5 § 1;
2. *Declares* unanimously the complaint under Article 5 § 1 concerning the lawfulness of the applicant's detention admissible and, by a majority, the remainder of the application inadmissible;
3. *Holds* by four votes to three that there has been a violation of Article 5 § 1 of the Convention and dismisses the Government's preliminary objection as regards the victim status of the applicant;

4. *Holds* by four votes to three

(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, the following amounts:

(i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and

(ii) 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;

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

Done in English, and notified in writing on 8 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Gyulumyan, Myjer and López Guerra is annexed to this judgment.

J.C.M.
S.Q.

JOINT DISSENTING OPINION OF JUDGES GYULUMYAN, MYJER AND LÓPEZ GUERRA

We voted for a finding of no violation of Article 5 § 1 of the Convention.

We have no difficulty whatsoever with the line of reasoning as laid down in paragraphs 57-63 (recapitulation of the relevant principles) and 64-69 (application of the relevant principles to the present case). However, we do not fully agree with paragraphs 75-77 as regards the victim status of the applicant. The Constitutional Court indeed explicitly acknowledged a breach of the applicant's right under Article 5 § 1 of the Convention. It then awarded the applicant the equivalent of EUR 2,818 in just satisfaction.

In our opinion this level of just satisfaction was not manifestly inadequate or unreasonable in the particular circumstances of the case. That the acceptable amount at the national level may be lower than the compensation usually awarded by the Court in similar cases has to do with the fact that there is a clear difference between a final resolution of the matter at the national level by the appropriate authority – through the express acknowledgment that a violation has taken place and the awarding of appropriate and sufficient redress – and the situation in which it is the Court itself which must decide on the issue in the absence of any acknowledgment of a violation by the State.

The Court expressly acknowledged this in paragraph 139 of its Grand Chamber judgment of 29 March 2006 in the case of *Cocchiarella v. Italy* (no. 64886/01, ECHR 2006 V), where it ruled that:

“the amount it will award in respect of non-pecuniary damage may be less than that indicated in its case-law where the applicant has already obtained a finding of a violation at domestic level and compensation by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is fully in keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.”

The above-mentioned approach has not been followed in the present judgment, where the majority, in awarding the full EUR 12,000 in respect of non-pecuniary damage, having regard to its own practice in similar cases, acted as if the express acknowledgment of violation by the Constitutional Court was of no relevance for the amount of the damage.