



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

FIRST SECTION

CASE OF OVSJANNIKOV v. ESTONIA

(Application no. 1346/12)

JUDGMENT

STRASBOURG

20 February 2014

FINAL

20/05/2014

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

In the case of Ovsjannikov v. Estonia,

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

Isabelle Berro-Lefèvre, *President*,

Elisabeth Steiner,

Khanlar Hajiyeu,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Ksenija Turković,

Dmitry Dedov, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 January 2014,

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

PROCEDURE

1. The case originated in an application (no. 1346/12) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Fjodor Ovsjannikov (“the applicant”), on 7 December 2011.

2. The applicant was represented by Mr A. Lillo, a lawyer practising in Tartu. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his pre-trial detention had been excessively lengthy, and that the proceedings whereby he had sought to have the lawfulness of his detention decided had been unfair.

4. On 19 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Narva.

6. The applicant is an entrepreneur; he was also a member of the Narva City Council and chairman of its financial committee at the material time.

A. The applicant's arrest and remand in custody

7. On 27 October 2010 a criminal investigation was initiated into influence peddling in the municipalities of Ida-Viru County.

8. On 12 July 2011 the applicant was arrested on suspicion of prejudicing free competition, influence peddling, demanding bribes and money laundering.

9. On 13 July 2011 he was presented with a statement outlining the suspicion and was questioned as a suspect. The suspicion was set out over eight pages and contained a detailed factual description and legal classification of the offences the applicant was suspected of having committed. For example, it included descriptions of a number of agreements concluded on specific dates in connection with public tenders and the persons involved in the unlawful practices were named and specific sums of money were mentioned. Furthermore, several persons in respect of whom the applicant had exerted his influence and from whom he had unlawfully demanded specific sums of money were named in it. However, no mention was made of the evidence on which the suspicion was based.

10. Also on 13 July 2011, the prosecutor asked the Viru County Court to issue a detention order concerning the applicant. In the request, firstly, a summary of the suspicions against the applicant was set out. It was further submitted that the materials of the criminal case presented to the court (statements of witnesses and other suspects, copies of contracts, procurement documents, bank account statements, inspection reports and surveillance reports) provided grounds for the assertion that the applicant was very probably linked to the acts of which he was suspected. Furthermore, it was noted that, although the applicant had no prior convictions, he was suspected of the commission of crimes falling under four different Articles of the Penal Code (*Karistusseadustik*), committed over an extended period of time. The bringing of further charges against the applicant could not be excluded since there were hints of other similar episodes. The prosecutor noted that, considering the nature of the crimes the applicant was suspected of (including offences relating to a breach of the duty to maintain integrity), and having regard to his active and leading role in them, there was a reasonable suspicion that, if at liberty, he could compromise the ongoing investigation by tampering with the evidence or exerting pressure on witnesses or other suspects. In the course of the investigation several witnesses (including municipal officials) had repeatedly testified that the applicant had influenced them to take decisions in his favour by threatening them with trouble or loss of employment. There was further information and evidence indicating that the applicant was a wealthy and influential person who was capable of carrying out these threats and affecting processes in the city. It was also mentioned that several of the acts suggested ongoing corrupt behaviour on his part despite the detention

of a number of his accomplices. The prosecutor considered that there was a real risk that, if at liberty, the applicant would contact other persons with a view to hindering the investigation and influence the municipal officials, entrepreneurs and other witnesses who had so far given statements against him and his accomplices. Exerting influence over witnesses or tampering with the evidence were potential offences.

11. Before the hearing on 13 July 2011, the County Court judge examined the case file. The court then heard the prosecutor and the applicant, who was assisted by a lawyer. The lawyer requested access to the materials presented to the court; the prosecutor objected. The County Court decided not to grant the defence access to the materials in question since the law did not provide for such a possibility. The applicant argued, *inter alia*, that a news article concerning the criminal investigation had been published a month and a half earlier and he had had the opportunity to influence the persons involved but had not done so. Moreover, he had suspended his functions at the City Council. He expressed his surprise that statements had been made by persons whom he even did not know. The prosecutor noted, *inter alia*, that the court had been presented with surveillance reports according to which the applicant had been involved in considering the question of the dismissal of certain officials. Thus, he had had a real opportunity to influence the decisions of the municipal authorities.

12. On 14 July 2011 the Viru County Court remanded the applicant in custody. It summarised the suspicions against him, referred to the materials in the case file, and concluded that there was sufficient evidence, such as documentary evidence, witness statements and surveillance materials, for a reasonable suspicion against the applicant. The court reiterated the prosecutor's arguments as to the need for the applicant's detention because otherwise he could damage the investigation (see paragraph 10 above). It considered that remanding the applicant in custody was necessary in order to prevent the commission of further crimes by him.

13. The applicant's lawyer lodged an appeal with the Tartu Court of Appeal. He contested, *inter alia*, the County Court's reliance on evidence to which the applicant or his lawyer had had no access. He acknowledged that the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*) did not allow the lawyer access to the whole criminal case file at that stage of the proceedings; however, he had only wished to gain access to the material on which the court had based its decision remanding the applicant in custody. He argued that otherwise no meaningful control could be exercised over the court ruling and this was contrary to the Code of Criminal Procedure. He further argued that Article 15 § 1 of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) and Article 5 § 4 of the Convention had been breached.

14. On 17 August 2011 the Tartu Court of Appeal dismissed the applicant's appeal against the detention order. In respect of the complaint

about lack of access to the evidence, the Court of Appeal noted that, under Article 47 § 1 (7) of the Code of Criminal Procedure, counsel had the right to examine the criminal file upon the completion of the pre-trial investigation. As the pre-trial investigation had still been going on, defence counsel had had no right to examine the criminal file.

15. Although no appeal lay against the appeal court's decision, the applicant's lawyer nevertheless filed an appeal with the Supreme Court. He argued that Article 47 § 1 (7) of the Code of Criminal Procedure was not applicable in the circumstances or, alternatively, that that provision was contrary to the Constitution – and should be declared invalid – in so far as it did not allow the defence to have access to the criminal file before the completion of the pre-trial investigation. By a letter of 21 September 2011 the Supreme Court returned the appeal because no appeal lay against the appeal court's decision.

B. The applicant's subsequent requests

1. Request for release on bail

16. In the meantime, on 22 July 2011 the applicant requested release on bail. On 5 September 2011, after a public hearing, the Viru County Court dismissed the request, finding that, if released, the applicant might continue to commit offences. It referred in this context to the applicant's conduct so far – he was suspected of the commission of a number of different offences committed over several years, and it was possible that further charges would be brought against him. In the course of the preliminary investigation witnesses had made statements to the effect that the applicant had exerted influence over them. The information and evidence gathered indicated that the applicant might carry out his threats. There was information that he had continued with corrupt activities despite the detention of several accomplices.

17. On 4 October 2011 the Tartu Court of Appeal dismissed an appeal by the applicant against the County Court's decision of 5 September 2011. It concurred with the lower court's opinion and added that if the applicant was released on bail it could not be excluded that he would obstruct the establishment of the truth in the criminal case, regard being had to the nature of the suspicion, the number of persons involved and the fact that the preliminary investigation was still in its initial stages. On 21 November 2011 the Supreme Court decided not to examine the applicant's appeal.

2. First request for a review of the reasons for detention

18. In the meantime, on 12 September 2011 the applicant's lawyer requested the Viru County Court to review the reasons for the applicant's detention and to release him. A public hearing was held on 21 September

2011 with the participation of the applicant's lawyer and the prosecutor. According to the record of the hearing, the applicant's lawyer said that he was unable to understand how, without having access to the materials of the case, he could possibly counter the prosecutor's argument that the circumstances had not changed and there was no ground to release the applicant. The record of the hearing does not, however, indicate that the lawyer explicitly requested access to the prosecution's evidence.

19. By a decision of 23 September 2011 the Viru County Court dismissed the request for the applicant's release. It was noted in the decision that the court had come to this conclusion after hearing the parties and examining the materials of the criminal case. The court reiterated its position that, considering the circumstances of the offences allegedly committed by the applicant, as well as his active and leading role therein, there was a well-founded risk that the applicant, if at liberty, might tamper with evidence and exert pressure on witnesses and suspects. He was considered to have widespread close political and economic connections and the corresponding influence. Thus, the court considered that there were sound reasons for the applicant's continued detention. No appeal lay against that decision.

3. Request for the applicant's placement under electronic surveillance

20. On 14 October 2011 the applicant requested that his detention be replaced by electronic surveillance as a preventive measure. After a public hearing on 17 November 2011, the Viru County Court dismissed the request on 23 November 2011. It held, *inter alia*, that the grounds for the applicant's detention remained valid. Placement of the applicant under electronic surveillance would enable the applicant's movements to be monitored but it would not be possible to observe whom he communicated with or who visited him. The applicant did not contest the court's ruling.

4. Second request for a review of the reasons for detention

21. In the meantime, on 15 November 2011 the applicant's lawyer again requested the Viru County Court to review the reasons for the applicant's detention and to release him. A public hearing took place on 6 December 2011, with the participation of the applicant's lawyer and the prosecutor. According to the record of the hearing, the applicant's lawyer raised the issue that without access to the case-file materials it was impossible for him to challenge the prosecutor's position. The prosecutor reiterated his arguments about the need to keep the applicant in custody in order to prevent him from exerting influence over the witnesses and the other accused. According to the prosecutor, the investigation was being conducted intensively and the case-file was voluminous. He handed over three volumes of case-file materials to the court but objected to the request of the

defence to be given access to this evidence. The record of the hearing does not contain any information on the court's decision in respect of the defence's access request.

22. On 12 December 2011 the Viru County Court dismissed the applicant's request for release. Having heard the parties and examined the materials of the criminal case, it found that the circumstances that had served as grounds for placing the applicant in detention had not ceased to exist. It again referred to the applicant's role in the commission of the offences alleged and considered that, if at liberty, he might tamper with evidence and influence the other accused and witnesses. The court referred to the applicant's widespread close political and economic connections and his corresponding influence. No appeal lay against the decision.

5. The applicant's release

23. On 11 January 2012 the applicant was released from custody and a prohibition on leaving his place of residence was applied to him as a preventive measure.

C. The volume of the criminal case-file and the investigative measures taken during the applicant's detention

24. The Government submitted that the criminal case in issue concerned seven suspects and the material collected during the whole period of the pre-trial investigation (from 27 October 2010 to 1 March 2012) ran to thirteen volumes totalling 3,188 pages.

25. During the applicant's detention another suspect was also arrested and all the suspects were questioned, some of them on several occasions. Further, twenty-one witnesses were interviewed, some of them more than once. The Government also provided a long list of inspection reports relating to various seized items, and documents drawn up during the period in question, as well as numerous enquiries made to various institutions. According to the summary of the pre-trial proceedings drawn up on 1 March 2012, there were seven suspects in the criminal case. The evidence included statements by fifty-three witnesses, ten inspection reports, fifteen replies to enquiries, and other documentary evidence, as well as twenty-six pieces of physical evidence and recordings.

26. On 30 August 2012 a prosecutor drew up a statement of charges against five suspects, including the applicant. On 10 December 2012 the applicant was prosecuted together with four other accused. According to the latest information available to the Court the criminal case was still pending before the domestic courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

27. Article 15 of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) reads as follows:

“Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation, or procedure to be declared unconstitutional.

The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided for in the Constitution or which is otherwise in conflict with the Constitution.”

28. Article 152 of the Constitution provides:

“In court proceedings, the court shall not apply any law or other legislation that is in conflict with the Constitution.

The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.”

29. It can be seen from Articles 33 to 35 of the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*) that an accused, unlike a suspect, has the right to examine the criminal file through his or her counsel. Article 47 § 1 (7) provides that counsel has the right to examine all materials in the criminal file upon completion of pre-trial investigation.

30. Further relevant provisions of the Code of Criminal Procedure, as in force at the material time (until 31 August 2011), are set out below. Certain amendments of no material importance for the present case entered into force on 1 September 2011.

Article 130 – Arrest and grounds for arrest

“(1) Arrest is a preventive measure which is applied with regard to a suspect, an accused or a convicted offender and which means the deprivation of that person’s liberty on the basis of a court ruling.

(2) A suspect or accused may be arrested at the request of a prosecutor’s office and on the basis of an order by a preliminary investigation judge, or of a court ruling if he or she is likely to abscond from the criminal proceedings or continue to commit criminal offences.

(3) In the pre-trial procedure, a suspect or accused shall not be kept under arrest for more than six months. ...

(3-1) In the case of a particularly complex or extensive criminal matter or in exceptional cases arising from international cooperation in criminal proceedings, a preliminary investigation judge may extend the term for keeping [the person] under arrest by more than six months at the request of the Chief Public Prosecutor.

...”

Article 131 – Procedure for arrest

“(1) At the request of a suspect or accused, the prosecutor’s office shall immediately notify his or her counsel of the preparation of an application for an arrest warrant.

(2) On the order of a prosecutor’s office, an investigative body shall convey a suspect or accused with regard to whom an application for an arrest warrant has been prepared before a preliminary investigation judge for the hearing of the application.

(3) In order to issue an arrest warrant, the preliminary investigation judge shall examine the criminal file and interview the person to be arrested with a view to ascertaining whether the application for an arrest warrant is justified. The prosecutor and, at the request of the person to be arrested, his or her counsel shall be summoned before the preliminary investigation judge and their opinions shall be heard.

...

(5) If there are no grounds for arrest, the person shall be released immediately.”

Article 134 – Refusal of arrest and release of arrested person

“...

(2) If the grounds for arrest cease to exist before a statement of charges is sent to the court pursuant to the procedure provided for in Article 226 § 3 of this Code, the preliminary investigation judge or prosecutor’s office shall release the arrested person by means of an order.”

Article 135 – Bail

“(1) At the request of a suspect or accused, a preliminary investigation judge or court may impose bail instead of arrest.

(2) “Bail” means a sum of money paid as a preventive measure by a suspect, accused or another person on his or her behalf into the deposit account of the court. ...

(3) A suspect or accused shall be released from custody after the bail has been received in the bank account of the court.

(4) A court shall determine the amount of bail on the basis of the severity of the potential punishment, the extent of the damage caused by the criminal offence, and the financial situation of the suspect or accused. The minimum amount of bail shall be five hundred days’ wages.

(5) Bail is imposed by a court ruling. For the purposes of the adjudication of an application for bail, the arrested person shall be taken before the preliminary investigation judge; the prosecutor and, at the request of the arrested person, his or her counsel shall be summoned before the judge and their opinions shall be heard.

(5-1) At the request of the Prosecutor’s Office or on its own initiative, the court may, together with the imposition of bail, apply a prohibition on leaving his or her place of residence with respect to a suspect or an accused in accordance with the procedure provided for in Articles 127 and 128 of this Code.

(6) If a suspect or accused absconds from criminal proceedings or intentionally commits another criminal offence or violates the prohibition on leaving his or her residence, the bail shall be transferred into the public revenues on the basis of the court judgment or ruling on the termination of the criminal proceedings, after

deduction of the amount necessary for reimbursement of the expenses relating to the criminal proceedings.

(7) Bail shall be refunded if:

1. the suspect or accused does not violate the conditions of bail;
2. the criminal proceedings are terminated;
3. the accused is acquitted.”

Article 136 – Appeal against arrest or refusal of arrest

“A prosecutor’s office, the person under arrest, or his or her counsel may file an appeal in accordance with the procedure provided for in Chapter 15 of this Code against the court ruling by which the arrest was imposed or refused, an extension of the term for keeping [the person] under arrest, or a refusal to extend the term for keeping [the person] under arrest.”

Article 137 – Review of the reasons for arrest

“(1) An arrested person or his or her counsel may, two months after the arrest, submit a request to the preliminary investigation judge or court for review of the reasons for the arrest. A new request may be submitted two months after the review of the previous request.

(2) A preliminary investigation judge shall hear a request within five days of its receipt. The prosecutor, counsel and, if necessary, the arrested person shall be summoned before the preliminary investigation judge.

(3) In order to adjudicate a request, a preliminary investigation judge shall examine the criminal file. A request shall be adjudicated by a court ruling which is not subject to appeal.

(4) If the term for keeping a person under arrest has been extended for more than six months in accordance with the procedure provided for in Article 130 § 3-1 of this Code, the preliminary investigation judge shall review the reasons for the arrest at least once a month by examining the criminal file regardless of whether a review of the reasons has been requested, and shall appoint counsel for the arrested person if he or she does not have a representative.”

31. Articles 223 and 224 of the Code of Criminal Procedure set out the procedure for a copy of the criminal file to be made available to defence counsel by the Public Prosecutor’s Office upon completion of the pre-trial proceedings.

32. Articles 228 to 230 of the Code of Criminal Procedure provide that a complaint concerning a procedural act or order of an investigative body may be lodged with the prosecutor’s office if the person concerned finds that his or her rights have been violated by a procedural act or order. Further appeals may be lodged with the State Prosecutor’s Office and then a county court.

B. Case-law of the Supreme Court

33. In a decision of 28 May 2008 (case no. 3-4-1-4-08) the Constitutional Review Chamber of the Supreme Court dealt with the courts’

powers to declare legal acts unconstitutional and initiate constitutional review proceedings before the Supreme Court. It held that under Article 15 § 2 and Article 152 § 1 of the Constitution every court had to declare a legal act unconstitutional if it conflicted with the Constitution even if the parties to the proceedings had not made such a claim during the examination of their case. The Supreme Court's plenary session found similarly in a judgment of 8 June 2009 (case no. 3-4-1-7-08). The Supreme Court later reiterated that position, for example in a decision of 30 May 2012 (case no. 3-1-1-48-12) of the Criminal Chamber where it held that a party's claim to have a legal act declared unconstitutional was to be considered a procedural request but that the court examining the case was not bound by it and also had an obligation to declare a legal act unconstitutional where it conflicted with the Constitution but the parties did not make such a claim. According to the Supreme Court, courts had to provide reasons for rejecting a request concerning unconstitutionality.

34. In a decision of 1 November 2011 (case no. 3-4-1-21-11) the Constitutional Review Chamber of the Supreme Court dealt with an individual constitutional complaint concerning an allegation that in criminal proceedings a request by the complainant for a review of constitutionality had been overlooked. The Supreme Court referred to its long-standing case-law according to which the Constitutional Review Court Procedure Act (*Põhiseaduslikkuse järelevalve kohtumenetluse seadus*) did not explicitly provide for a possibility to lodge an individual constitutional complaint with the Supreme Court. However, proceeding from Articles 13, 14 and 15 of the Constitution and the practice of the Convention, the Supreme Court had heard such complaints in cases where the person had no other effective way to obtain judicial protection of his right of recourse to the courts established in Article 15 of the Constitution. In the said case the Supreme Court noted that in the impugned criminal proceedings the complainant had not made an explicit request for the initiation of constitutional review proceedings. Therefore, the court of appeal in that case could not be reproached for not having interpreted the complainant's arguments before it as a request for constitutional review. The Supreme Court concluded that the complainant had had an effective opportunity to protect his fundamental rights by requesting the initiation of constitutional review proceedings. Therefore, his individual constitutional complaint was inadmissible.

35. In a decision of 10 June 2010 (case no. 3-4-1-4-10) the Constitutional Review Chamber of the Supreme Court dealt with a complaint where a person who was to be detained was denied access to the evidence on the basis of which his detention had been decided. The Supreme Court declined to rule on the merits of the case in constitutional review proceedings, noting that other proceedings were available to the person concerned for the judicial protection of his rights. He could seek protection of his rights and also challenge the constitutionality of the rules

of criminal procedure within the criminal proceedings in his case. The Supreme Court noted that in the case of the complainant's request for the review of the reasons for his arrest, he was in substance complaining about the acts of the prosecutor. However, he had not made a complaint to the State Prosecutor's Office, from which an appeal lay to the preliminary investigation judge of a county court. The latter was entitled to declare the relevant regulation unconstitutional, order the prosecutor to release the evidence, and initiate constitutional review proceedings before the Supreme Court. In respect of the initial arrest warrant, the Supreme Court found that the complainant could have requested a declaration of unconstitutionality of the underlying legislation when challenging the arrest warrant before a court of appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

36. The applicant complained about the length of his pre-trial detention. The Court considers that this complaint falls to be examined under Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

37. The Government contested the applicant's argument.

A. Admissibility

38. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicant complained about the length of his pre-trial detention. In his view it had not been shown that the investigative measures taken during his detention could not have been taken if he had been allowed to remain at liberty. No investigative measures had been taken in respect of him personally during his six-month detention. The applicant noted that it was common for prosecutors to request the detention of a suspect for the

period of the potential prison term and then propose a plea bargain agreement. He also noted that information about the ongoing criminal investigation had been published in the press long before he had been remanded in custody, so that if he had wished to influence witnesses he could already have done so before his detention.

40. The Government were of the opinion that the applicant's remand in custody for six months had been compatible with Article 5 § 3, as active pre-trial proceedings had been in progress throughout the whole six months. The applicant's detention during that period had been necessary to prevent him from damaging the pre-trial investigation by destroying, altering or removing evidence, or by influencing witnesses or other suspects.

41. The Government argued that the applicant's criminal case had been complicated, involving seven suspects and a number of different crimes and episodes. Measures had had to be taken in order to control and limit the defendants' contact between themselves and with other persons. The investigation had been extensive – thirteen volumes of material totalling three thousand pages had been collected during the pre-trial investigation. During the period of the applicant's pre-trial detention all the suspects had been questioned on several occasions; interviews had also been conducted with twenty-one witnesses. Very extensive work had been carried out, including the inspection of documents, computers and various data relating to the tenders and transactions in question. The Government had provided a detailed list of all the investigative measures taken during the period in question.

42. The Government noted that the County Court on four occasions, the Court of Appeal on two occasions, and the Supreme Court on one occasion had all found that the grounds for the applicant's detention had not ceased to exist. The possibility of releasing the applicant on bail or placing him under electronic surveillance had been examined but the courts had found that these measures would not have ruled out the risk that he could obstruct the establishment of the truth or influence witnesses.

2. The Court's assessment

(a) General principles

43. According to the Court's case-law, the presumption under Article 5 is in favour of release. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (see *Bykov v. Russia* [GC], no. 4378/02, § 61, 10 March 2009; *Castravet v. Moldova*, no. 23393/05, § 30, 13 March 2007; and *McKay v. the United Kingdom*

[GC], no. 543/03, § 41, ECHR 2006-X). Article 5 § 3 of the Convention cannot be seen as unconditionally authorising detention provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012, and *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I). When deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at the trial (see *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000).

44. Continued detention can therefore 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 others, *Bykov*, cited above, § 62; *McKay*, cited above, § 42; and *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI).

45. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned public-interest requirement 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, for example, *Bykov*, cited above, § 63; *McKay*, cited above, § 43; and *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

46. The persistence of reasonable suspicion that the person arrested has committed an offence is a *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (see, among other authorities, *McKay*, cited above, § 44; *Letellier v. France*, 26 June 1991, § 35, Series A no. 207; and *Yağcı and Sargin v. Turkey*, 8 June 1995, § 50, Series A no. 319-A). The Court reiterates that the burden of proof in these matters should not be shifted to the detained person by making it incumbent on him to demonstrate the existence of reasons warranting his release (see *Bykov*, cited above, § 64, and *Ilijkov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001).

(b) Application of these principles to the present case

47. Turning to the present case, the Court observes that the criminal proceedings in respect of the applicant concerned several counts of different crimes related to corruption, such as prejudicing free competition, influence peddling, demanding bribes and money laundering. The Court notes that the statement of suspicion presented to the applicant and summarised in the prosecutor's detention request and the courts' decisions included detailed descriptions of the facts on which the suspicion was based. The degree of detail in these descriptions was such as to allow a conclusion to be drawn that the prosecuting authorities had collected substantial evidence concerning the suspected offences. The Court is therefore satisfied that there existed a reasonable suspicion that the applicant had committed the offences in question.

48. The Court notes that according to the domestic authorities' findings, the applicant was an influential person who possessed the means and contacts to exert pressure on persons connected to the suspected offences as accomplices or witnesses. Indeed, several of the offences the applicant was suspected of involved the use of such influence. Thus, the Court considers that the domestic judicial authorities sufficiently reasoned their decisions in respect of the grounds for the applicant's continued detention, such as the danger that he might tamper with evidence and exert pressure on witnesses and co-defendants (which they saw as potential offences).

49. The Court further notes that the applicant spent six months in detention before he was released and the preventive measure was changed to a prohibition on leaving his place of residence. During that period the applicant lodged an appeal against his initial detention order and requested a review of the legality of his continued detention on two occasions. He also requested release on bail – appealing against the refusal up to the Supreme Court – and asked to have his detention replaced by electronic surveillance as a preventive measure. The courts concluded, on the basis of the materials of the criminal case, that the danger that the applicant would compromise the investigation outweighed the presumption in favour of his liberty, and that the alternative preventive measures were not sufficient to prevent the risk of the applicant obstructing the establishment of truth. Although the reasoning provided by the courts in their various decisions was broadly similar, the Court does not find that reproachable. It observes that the courts did not use a standard formula but rather referred to specific suspicions, and that they displayed a consistent approach to the considerations justifying the need for the applicant's continued detention. The Court discerns no reasons for concluding that the domestic courts failed in their duty of weighing the genuine public-interest requirement of fighting crime against the rule of respect for individual liberty laid down in Article 5 of the Convention. It also notes in this context that considerations relating to the risk of a suspect's committing further offences or compromising the investigation

involve a degree of probabilistic assessment and are not susceptible of firm proof.

50. As regards the applicant's claims that the fact of the ongoing criminal investigation had been publicly known through the information published in the media with the prosecutor's authorisation, and that no investigative measures had been taken in respect of him during his detention, the Court notes that the allegation about the publication of the information is unsubstantiated and, in any event, it considers that these arguments relate in substance to the methods of investigation and such facts alone cannot render the applicant's pre-trial detention devoid of purpose.

51. The Court is therefore satisfied that the applicant's detention was based on "relevant" and "sufficient" grounds.

52. As regards the question whether the domestic authorities displayed "special diligence", the Court observes that the criminal proceedings in question were of considerable complexity, regard being had to the number of suspects and the fact that the criminal acts had been committed over a period of several years, as well as the number of witnesses and the volume of the documentary and other evidence collected and analysed (in this connection, see paragraphs 24 and 25 above). The Court thus considers that the national authorities displayed the required diligence in the conduct of the proceedings. It does not appear that during the applicant's pre-trial detention there were any periods of inactivity attributable to the investigating authorities. The Court also observes that while an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the authorities to clarify fully the facts in issue (see *Sopin v. Russia*, no. 57319/10, § 47, 18 December 2012, and *Bqk v. Poland*, no. 7870/04, § 64, 16 January 2007).

53. Having regard to the foregoing, the Court considers that there has been no violation of Article 5 § 3 of the Convention.

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

54. The applicant complained that he had not been given access to the evidence in the case file on the basis of which the lawfulness of his detention and his requests for release had been examined. He relied on Article 5 § 4 of the Convention, which reads as follows:

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

55. The Government contested that argument.

A. Admissibility

1. *The parties' submissions*

56. The Government argued that the applicant had not exhausted domestic remedies. It had been open to him to request the setting aside of the relevant provisions of the Code of Criminal Procedure – under which the reasons for remand in custody were to be reviewed by a court on the basis of the criminal file and defence counsel had the right to examine the file only upon completion of pre-trial proceedings – by contesting their constitutionality in the light, *inter alia*, of the Convention and the case-law of the European Court of Human Rights. He could have made such a request in an appeal against the County Court's original ruling of 14 July 2011 remanding him in custody, within the proceedings initiated by himself for the review of the lawfulness of his detention, or within the proceedings concerning his requests for the replacement of the preventive measure. He could also have made such a request in a complaint procedure against the prosecutor (under Articles 228-231 of the Code of Criminal Procedure). However, the applicant had not made any such request and had therefore failed to make use of an effective remedy. Had the court examining the matter granted the applicant's request and set aside the relevant provisions of the Code of Criminal Procedure, it would also have ordered the prosecutor to disclose the case-file materials.

57. Referring to the Supreme Court's decisions in cases nos. 3-4-1-21-11 and 3-1-1-48-12 (see, respectively, paragraphs 34 and 33 above), the Government argued that the fact that the Estonian courts could also rule on the constitutionality of a legal provision on their own initiative had not relieved the applicant from the obligation to make a specific request as provided for in Article 15 of the Constitution. They considered request concerning the alleged unconstitutionality raised in the applicant's appeal to the Supreme Court (see paragraph 15 above) irrelevant since such an appeal had no legal basis and was therefore clearly inadmissible.

58. The applicant disagreed. He insisted that the courts had not been prevented from setting aside unconstitutional legal provisions and that they had been obliged to do so even in the absence of any arguments by the parties to that effect. Moreover, the Code of Criminal Procedure did not explicitly prohibit the access of the defence to the case-file materials in proceedings remanding an accused in custody. The applicant's counsel had requested access to the case-file materials at the hearing in which the applicant's remand in custody had been dealt with. Furthermore, he had requested the setting aside of the relevant provisions of the Code of Criminal Procedure in an appeal to the Supreme Court.

2. The Court's assessment

59. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). Whereas Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of effective remedies designed to challenge decisions already given. It normally also requires that complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003; and *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010).

60. In respect of the question whether the applicant in the present case has exhausted domestic remedies, the Court notes that in his appeal to the Court of Appeal against the detention order of 14 July 2011 he explicitly complained about lack of access to the material on which the lower court had based its decision. Reference was made, *inter alia*, to the breach of Article 15 § 1 of the Constitution and Article 5 § 4 of the Convention (see paragraph 13 above). Furthermore, at the hearing of 6 November 2011 the applicant's counsel clearly requested the County Court to grant him access to the materials of the criminal file presented to the court by the prosecutor (see paragraph 21 above).

61. The Court considers that access to the material in question was indeed what the applicant sought in the domestic proceedings, and his complaint before this Court concerned the same matter. The Court has taken note of the applicant's argument that it was possible to interpret the Code of Criminal Procedure in such a way that the defence could have been given access to the material in question. The Government disagreed in substance. The Court reiterates that it is not its task to resolve matters concerning the interpretation of the domestic law (see, among many others, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 100, ECHR 2010) including, in the present case, the question whether the applicant could have been granted the requested access without the underlying provisions of the law of procedure being declared unconstitutional. However, the Court considers that the applicant raised the question of access to the prosecution material sufficiently before the domestic courts. The same domestic courts were also empowered to set aside unconstitutional legal provisions of their own motion if they found

that the Code of Criminal Procedure could not be interpreted as permitting the granting of the applicant's request (see the summary of the Supreme Court's decision of 30 May 2012 in paragraph 33 above). As concerns the Supreme Court's decision of 1 November 2011, referred to by the Government in this context (see paragraph 34 above), the Court considers that that decision dealt with the question whether it was possible for a complainant to raise a constitutionality issue before an ordinary court, with the emphasis on the ensuing inadmissibility of the individual constitutional complaint before the Supreme Court if the said possibility existed. Thus, that decision is not, as such, decisive for resolving the question whether domestic remedies have been exhausted for the purposes of Article 35 of the Convention.

62. Having regard to the fact that the applicant raised the question of lack of access to the materials of the criminal file before the competent courts examining the matter, and to the Supreme Court's case-law cited above, the Court considers that the Government's plea of non-exhaustion must be dismissed.

63. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

64. The applicant complained that Article 5 § 4 of the Convention had been breached in that he had not been given access to the evidence on the basis of which the lawfulness of his detention and his requests for release had been examined. The applicant argued that the fact that the defence had not been allowed access to the material on which the prosecution and the court had relied had rendered the public hearings virtually useless as the defence had been unable to meaningfully contest the prosecution's position. Thus the principle of equality of arms had been breached.

65. No convincing reasons had been given in the court's decisions as to why it had been necessary to withhold the names of witnesses. The applicant challenged the Government's argument that, according to the prosecutor, the disclosure of the names of the witnesses could have had negative repercussions for them. He considered that claim to be unsubstantiated and illogical since the witnesses must have felt the same fear throughout the pre-trial investigation, which had lasted for years, and the applicant's temporary detention would therefore have provided them with no relief.

66. The applicant argued that although he had been presented with a statement outlining the suspicion against him, there had been no reference to the specific evidence on which it had been based. He could indeed assume that the complaints about him influencing city administration officials had originated from a person with whom he had had a work-related conflict, but without knowing the specific accusations he could not present counter-arguments and evidence to disprove the groundless allegations and thus defend himself against slander.

67. The Government argued that the fact that the applicant's remand in custody had been decided by the court, pursuant to the Code of Criminal Procedure, on the basis of the criminal file, and that defence counsel had had no access to the file at that time, had not meant that the defence had been unaware of the grounds and reasons for his remand in custody. By the time of the court hearing at which his remand in custody was decided, the defence had had at its disposal the prosecutor's request, as well as the suspicion statement presented to the applicant. According to the record of the hearing, the applicant had been aware which persons had given statements against him. Thus, he had been aware which witnesses might have claimed that they were afraid of potential pressure by the applicant. The Government contended that at the time of being taken into custody he had had a sufficiently clear overview of why he was a suspect and of the circumstances under which his detention for a certain period during the pre-trial investigation was sought. The Government was of the opinion that the essential information for the assessment of the lawfulness of the detention had been made available in an appropriate manner to the suspect's lawyer.

68. The Government further contended that subsequently, on both occasions when she had reviewed the reasons for the applicant's continued detention, the preliminary investigation judge had examined the updated criminal case file prior to coming to the conclusion that the applicant's release could damage the investigation, as the prosecutor had argued. This had ensured the protection of the rights of the applicant and served as a guarantee against the prosecutor using his position to the detriment of the applicant.

69. The Government reiterated that the procedure under Article 5 § 4 did not always need to be attended by the same guarantees as those required under Article 6 for criminal or civil litigation. They emphasised that, in addition to the fact that the applicant had been able to attend the court hearings and repeatedly request reviews of the reasons for keeping him in detention, the examination of the case file by the preliminary investigation judge or by the Court of Appeal as independent judicial bodies prior to deciding the issue of detention had compensated for the fact that neither the applicant nor his counsel had been able to have access to the criminal case file in the initial stages of the proceedings. The need for criminal investigations to be conducted efficiently implied that part of the

information collected during them had to be kept secret in order to prevent suspects from tampering with evidence and impeding the course of justice.

70. The Government noted that, according to the prosecutor, people had been seriously afraid to provide any statements in the applicant's case. They were afraid of possible abuses of power or that they would lose their job, and it had been very difficult to find persons to agree to provide statements. The prosecutor had informed the Government that at least two of the witnesses had in fact been dismissed from the city administration by the time of the submission of the Government's observations. Thus, granting the defence an opportunity to examine the witness statements in more detail and thus to challenge them would have increased the risk of their influencing and intimidating the witnesses even further and would have endangered the whole criminal investigation right from the initial stage.

71. The Government also stated that there was a compelling public interest in the investigation in question, which concerned suspected high-level corruption in the city of Narva. There was also a strong public interest in keeping secret certain police investigation methods and in the protection of the fundamental rights of other persons. The Government noted that even in principal criminal proceedings some material could be left undisclosed from the defence provided there existed sufficient safeguards; this applied even more to proceedings under Article 5 § 4, which did not require the same strict guarantees as Article 6. The Government considered that the review of the reasons for detention by the judge had been a sufficient guarantee.

2. The Court's assessment

(a) General principles

72. The Court reiterates that proceedings conducted under Article 5 § 4 of the Convention before a court examining an appeal against detention must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (see, among other authorities, *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009; *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts); *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001).

73. Any restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes are counterbalanced in

such a way that the individual still has a possibility effectively to challenge the allegations against him (see *Piechowicz v. Poland*, no. 20071/07, § 203, 17 April 2012, with further reference to *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009).

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

74. The Court notes that in the present case it is not disputed that neither the applicant nor his counsel was given access to the criminal file or the material presented by the prosecutor to the court deciding the issues of the applicant's remand in custody and the lawfulness of his continued detention.

75. The Court further notes that it is unable to assess, on the basis of the material available to it, what exact role the evidence withheld from the applicant played in his remand in custody. Having regard to the fact that the prosecution presented the evidence to the County Court, which examined it prior to taking its decision to remand the applicant in custody, it can be presumed that it had a certain importance.

76. The Court accepts that the prosecutor's request to the County Court for the applicant to be remanded in custody, and particularly the suspicion statement presented to the applicant before that, contained a detailed description of the facts forming the basis of the suspicion against him. Thus, the applicant appears to have been able, at least to a certain extent, to contest the existence of the "reasonable suspicion" against him, although the fact that he was unaware of the evidence relied on by the prosecution must have made contesting the prosecution's allegations more difficult. The Court considers that the applicant's handicap was even greater as regards the evidence on the basis of which the prosecution argued, and the courts concluded, that he might tamper with evidence and exert pressure on witnesses.

77. In this context, the Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them has to be kept secret in order to prevent suspects from tampering with evidence and impeding the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to his or her lawyer (see *Lietzow v. Germany*, no. 24479/94, § 47, ECHR 2001-I, and *Garcia Alva*, cited above, § 42). In the present case, however, the courts found in substance that they were prevented by the law of procedure from even considering whether it was indeed imperative to completely withhold the evidence from the defence. Thus, the Court considers that there were not sufficient counterbalancing factors in the present case to allow the applicant to effectively challenge the allegations against him.

78. There has therefore been a violation of Article 5 § 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

79. Lastly, the applicant complained under Article 5 §§ 1 (c) and 3 about the grounds for and the procedure in respect of his initial placement in detention.

80. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the provisions cited. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. The applicant claimed compensation for non-pecuniary damage and asked the Court to make an appropriate award.

83. The Government were of the opinion that, as the Convention had not been violated in respect of the applicant, there was no basis for awarding any compensation. Furthermore, they submitted that, should the Court find a violation of the applicant's rights, the finding of a violation would constitute sufficient just satisfaction. Should the Court nevertheless decide to make an award for non-pecuniary damage, the Government called on it to determine a reasonable sum.

84. Having regard to all the circumstances of the present case, the Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 4,900 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

85. The applicant did not make a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

86. The Court considers it appropriate that the default interest rate 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* the complaints concerning the length of the applicant's pre-trial detention and the lack of access to the evidence in the procedure for the review of the lawfulness of his pre-trial detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds* unanimously,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,900 (four thousand nine hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 20 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President