



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

SECOND SECTION

CASE OF N.C. v. ITALY

(Application no. 24952/94)

JUDGMENT

STRASBOURG

11 January 2001

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
18/12/2002**

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form.

In the case of N.C. v. Italy,

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

Mr A.B. BAKA, *President*,

Mr B. CONFORTI,

Mr G. BONELLO,

Mrs V. STRÁŽNICKÁ,

Mr P. LORENZEN,

Mr M. FISCHBACH,

Mrs M. TSATSA-NIKOLOVSKA, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 15 December 1998, 30 November 2000 and on 14 December 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 24952/94) against Italy lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr N.C. (“the applicant”), on 28 April 1994.

2. The applicant was represented by Mr M. Manfreda, a lawyer practising in San Pietro Vernotico (Brindisi). The Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, and by their coagent, Mr V. Esposito. The President of the Chamber, acceded to the applicant’s request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant complained under Article 5 § 5 that he was not entitled to claim any compensation under Italian law for his detention pending trial, which he maintained had not been in conformity with Articles 5 §§ 1 (c) and 3 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber called upon to examine the case (Article 27 § 1 of the Convention) was constituted according to the provision of Rule 26 § 1 of the Rules of Court.

6. By a decision of 15 December 1998, the Court declared the application admissible.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was the technical director, technical and economic adviser and special representative and agent of company X.

8. On an unspecified date, preliminary investigations were opened against the applicant on suspicion of abuse of power and corruption committed in the course of his functions in 1991.

9. On 16 October 1993 the Public Prosecutor attached to the Brindisi District Court requested that the applicant be either remanded in custody, or placed under house arrest, or prevented from exercising his functions as director of company X, on the ground that there was a serious indication of his guilt resulting from the statements of five witnesses and from the result of an expert opinion carried out in the course of the preliminary investigations. The content of the statements and of the expert opinion had been corroborated by further documents. The applicant appeared to have commissioned Y, the head of urban planning of the Brindisi local authority, as chief engineer for the building of a road ("Strada dei Pittachi") and as co-director of works for the construction of the new district detention centre at Lecce. These appointments were alleged to be a "payment" from company X to Y for delivering false declarations in the approval procedure relating to the projects which company X had submitted for the road-works.

The Public Prosecutor further explained that, given that the applicant maintained his functions in company X, there was a risk that he would commit further similar offences.

10. On 2 November 1993 the Judge for Preliminary Investigations of Brindisi issued a warrant of arrest against the applicant on the ground that the indications of guilt which existed against him, as indicated in the Public Prosecutor's request of 16 October, were serious.

As regards the grounds for precautionary measures, the judge recalled that, as indicated by the Public Prosecutor in his above request, the applicant had maintained his position as Technical Director of company X. The judge considered *inter alia* that, in order to decide what precautionary measure was more suitable in that case, he had to take into account the nature of the conduct under examination. The worst aspects of the applicant's conduct were the failure to observe the rules of the administrative procedure and the waste of public funds, coupled with the breach of the rules on public tendering. This conduct had resulted in a project which showed no respect for the environment, which was very serious, given that "the chaotic and unliveable character of Southern Italian cities is not caused solely by the spreading of common crime but primarily stems from the urban growth pattern (general lack of any effective

regulation and resultant lack of adequate public areas for parking, gardens and relief roads; this unease is tangibly felt in all parts of Brindisi). Abuses relating to management and spending of public funds like those committed in the Strada dei Pittachi project must be considered just as serious as possession of a firearm with its serial number removed or the conduct of a drug addict who robs a tobacconist of a few hundred thousand lire at gunpoint or with the help of accomplices, as often happens in Brindisi. Given the legislator's intention to counter the risk to society in such cases by the most stringent precautionary measure, i.e. detention in prison, this is even more justified in the far more serious case under investigation and is to be considered appropriate and necessary albeit not peremptorily stipulated by Article 275, third paragraph of the Code of Criminal Procedure ("C.P.P.") among the circumstances where detention is mandatory. Otherwise the difference in treatment would be unjustifiable, and therefore unjust". The judge concluded that he was thus firmly convinced that in cases like the one under consideration, "where each act (a) is aimed at the pursuit of reprehensible private interests and (b) is committed by persons who do or should bear a high reputation because of the powers and/or responsibilities which they exercise, the measure of prison detention must be applied (not the measure of house arrest which is very convenient - especially for someone like the accused who is used to living indoors - but not sufficiently deterrent)."

11. The applicant was arrested on 3 November 1993.

12. On the same day he filed with the Brindisi District Court an application for release from detention or, failing that, house arrest, arguing that there was no "serious indication of guilt" within the meaning of Article 273 of the Code of Criminal Procedure, and that there were no grounds whatsoever for precautionary measures.

13. On 9 November 1993, the applicant filed with the Brindisi District Court's registry further grounds for his application. He reiterated that there was no evidence against him, and that there were no grounds for precautionary measures: no need to prevent interference with the course of justice, as the investigations had already been almost completed; no danger of flight, as the applicant had never showed any intention to abscond and had instead been very co-operative upon his arrest; and in particular no need for prevention of crime. In this respect, the applicant stressed that Article 274 (c) C.P.P. requires that there be a concrete danger - by reasons of the particular circumstances of the case and of the personality of the accused - that the latter would commit further offences, whereas the grounds indicated by the judge for preliminary investigations were extremely vague and hypothetical. Furthermore, the applicant had a clean record.

14. Finally, the applicant *inter alia* drew the court's attention to the established case-law to the effect that, when a precautionary measure is considered a significant period of time after the committal of the offence,

account must be taken of the accused's conduct after the committal of the offence. Insofar as he was concerned, in the two years that had elapsed after the offence of which he was accused, he had not been accused or charged with any similar or different offence.

15. Following a hearing on 11 November 1993, the court in a decision of 13 November 1993 held that there undoubtedly existed a "serious indication of guilt" against the applicant. It further held that "there undoubtedly was a danger of his committing further crimes within the meaning of Article 274 (c) C.P.P. considering how the accused succeeded in unlawfully attaining the economic ends identified". It thus rejected his application for release. However, given that the applicant had a clean record, the court upheld his subsidiary request and placed him under house arrest.

16. On 23 November 1993 the applicant appealed on points of law against the refusal to release him, on the ground that his detention on remand was in breach of Articles 273 and 274 (c) C.P.P.. He stressed in particular that the Brindisi District Court had not given any reasons for the application of precautionary measures within the meaning of Article 274 (c) C.P.P.

17. On 30 November 1993 the applicant filed a request with the Brindisi Judge for the Preliminary Investigations to revoke the order for his being kept under house arrest, as he had resigned from his office of technical director of company X.

18. This application was rejected by the Judge for Preliminary Investigations on 3 December 1993 on the grounds of the short period of time elapsed since the application of the measure, which moreover had been changed into a more lenient one, and of the seriousness of the accusation. The judge explained that the applicant could have the possibility of using his experience and professional skills either on his own account or in the employment of another company.

19. On 6 December 1993, the applicant appealed to the Brindisi District Court against this decision. He underlined that the previous decisions had been based on the need for prevention of crime, and in particular on the circumstance that the applicant had maintained his position in company X. Accordingly, now that he had resigned, such need did not exist any more.

20. In a decision of 20 December 1993 the court pointed out that all previous decisions on the applicant's detention were based on Article 274 (c). It held that, given that the applicant had resigned and in the light of the time already elapsed since the application of the measure and of the personality of the accused, there were no longer any grounds for his detention on remand. It accordingly ordered his immediate release.

21. On 28 February 1994 the applicant withdrew his appeal on points of law of 23 November 1993, which was acknowledged on 8 March 1994.

22. By a judgment of 15 April 1999, the Brindisi District Court acquitted the applicant on the ground that the facts had not occurred

(“*perché il fatto non sussiste*”). This judgment became final on 14 October 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. Articles 273 and 280 of the Code of Criminal Procedure (“C.P.P.”) set out the conditions for precautionary measures (*misure cautelari*), namely the existence of serious evidence of guilt (“*gravi indizi di colpevolezza*”) in respect of a crime punishable with life imprisonment or detention for more than three years.

24. Article 274 C.P.P. provides in addition that precautionary measures can be ordered for the following reasons: prevention of interference with the course of justice (Article 274 (a)), danger of flight (274 (b)) and prevention of crime (274 (c)).

25. Article 274 (c) reads as follows: (precautionary measures are ordered) “where, given the specific nature and circumstances of the offence and having regard to the character of the suspect or the accused as shown by his conduct, acts or criminal record, there is a genuine risk that he will commit a serious offence involving the use of weapons or other violent means against the person or an offence against the constitutional order or an offence relating to organised crime or a further offence of the same kind as that of which he is suspected or accused”.

26. Detention pending trial ordered or maintained in breach of Article 274 does not give rise to a right to compensation under Articles 314 and 315 C.P.P..

27. Under Article 275 § 3 C.P.P., detention pending trial can only be ordered if all other precautionary measures appear to be inadequate. Where there is serious evidence that the offence of being a member of a mafia-type organisation has been committed, there is a rebuttable presumption that the necessity for detention pending trial exists.

28. Article 292 C.P.P. provides *inter alia* that the detention order must contain the explanation of the actual grounds for the precautionary measure and of the specific evidence of guilt, including the factual elements on which the evidence is based and the grounds for its pertinence, and must take into account also the time elapsed since the committal of the offence.

29. Article 314 § 1 C.P.P. provides that anyone who has been acquitted in a judgment that has become final – on the grounds that the case against him has not been proved, he has not committed the offence, no criminal offence has been committed or the facts alleged do not amount to an offence at law – is entitled to equitable reparation for any period he has spent in detention pending trial, provided that misrepresentations or fault on his part were not contributory factors in his being detained.

30. Under Article 314 § 2 C.P.P., a person whose detention pending trial has been found, in a final decision, to have been ordered or maintained in

breach of Articles 273 and 280 C.P.P., is entitled to compensation. An application for reparation under Article 314 C.P.P. must be made within eighteen months after the judgment becomes final. The maximum award is 100,000,000 Italian lire (Article 315 C.P.P.).

AS TO THE LAW

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

31. The applicant contended that he was not entitled to compensation although his detention on remand had not been in conformity with Article 5 §§ 1 (c) and 3. He alleged a breach of Article 5 § 5 of the Convention. The relevant parts of Article 5 read as follows:

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

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

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

32. The Court recalls that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see the *Wassink v. the Netherlands* judgment of 27 September 1990, Series A no. 185-A, p. 14, § 38). The right to compensation under paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions.

It follows that the first issue to be determined in the present case is whether the disputed detention was in conformity with paragraphs 1 and 3 of Article 5.

A. Whether the applicant was “deprived of his liberty”

33. It is undisputed that the applicant’s detention between 3 November 1993 and 13 November 1993, and his house arrest between 13 November and 20 December 1993 amounted to “deprivation of liberty” within the meaning of Article 5 § 1 of the Convention.

34. The purpose of this deprivation of liberty was to bring the applicant before the competent legal authority on reasonable suspicion of having committed an offence. Consequently, the detention at issue falls to be examined under Article 5 § 1 c) of the Convention.

B. The conformity of the applicant’s detention with paragraph 1 (c) of Article 5*1. The applicant’s detention between 3 November and 2 December 1993***(a) The parties’ submissions**

35. The applicant maintained in the first place that, contrary to what the competent authorities had claimed, there was no serious evidence that he was guilty. The very presumption underlying the charge appeared blatantly erroneous as it was based on misrepresentation of the facts. The appointment of Y had not been decided, as said by the Public Prosecutor, by company X but directly by the mayor of Brindisi. Secondly, the applicant’s responsibility for Y’s appointment had been established on the premise that the body with decision-making powers in this respect was part of a company controlled by company X. The following facts had not been taken into account: the applicant was not a member of the Board of Directors of this body (which was independent and not controlled by company X); he had not appointed anybody, but simply recommended three candidates; Y’s appointment had been made in the applicant’s absence. The “indication of guilt” against the applicant was therefore unsubstantiated and not serious, and the remand measure at issue was arbitrary and based solely on the presumption referred to in Article 274 (c) of the Code, i.e. the danger of recurrence of acts similar to that charged.

36. In this respect, the applicant stressed that the concept of necessary precautions against recurrence of the offence is common to Article 5 § 1 (c) of the Convention and Article 274 (c) of the Italian Code of Criminal Procedure, and has the same substance and scope under both systems.

He stressed that, under the Court’s case-law (Neumeister and Wemhoff cases) the Court has to examine, in addition to the grounds for detention, each of the reasons invoked in the relevant decisions, in order to ascertain whether they are “relevant and sufficient”, i.e. whether they have been

clearly and specifically indicated (Latellier case). As to the danger of recurrence of offences (Matznetter judgment), the Court has held it to be consistent with Article 5 in the presence of other special circumstances such as long persistence of criminal behaviour, magnitude of the damage incurred by the victim, and dangerousness of the person charged. In the Stögmüller case the Court ruled out the applicant's dangerousness owing to the fact that he had committed no further offences over a long period.

The interpretation and application of Article 274 (c) of the Italian Code of Criminal Procedure have identical effects to those developed so far in the Court's case-law. The Italian courts, concerning the necessary "reality" of the danger of re-offending, have repeatedly ruled that this is alien to purely conjectural arguments (generally, see Cass. I, 18/12/90, Cuzi), and have pointed out the need for concurrent fulfilment of the two requirements constituted by the material circumstances and the dangerousness of the accused (which can normally be inferred from criminal-law and judicial precedents) (see for example Cass. I, 11/2/91, Fabiano and Cass. I, 27/3/1991, Trovato).

37. The applicant underlined in particular that there exist plentiful domestic decisions specifying that when a precautionary measure affecting a person is to be applied after a considerable time has elapsed since the offence was committed, the existence of the need for precautions referred to in Article 274 (c) C.P.P. must be assessed, *inter alia* according to the offender's conduct subsequent to the criminal act (Vercelli District Court, 25/3/1991, Belletato, in Giur. It., II, § 249). The principle evolved in the case-law had later been taken over by the legislator with the reformulation of Article 292 of the C.P.P.: indent c) of the second paragraph now expressly provides that, in order to determine the precautions required, regard must also be had to the time elapsed since the commission of the (alleged) offence.

38. In the present case, the applicant considered that the impugned measures had not been taken in conformity with the aforementioned criteria. Indeed, no reference had been made, and therefore no importance attached, to the fact that he had no previous convictions and no charges pending against him, nor had any reference been made or importance attached to the fact that from the time of the alleged offence to the time when the measures were imposed (two years) he had not been involved in any legal proceedings. Moreover, no real inquiry had been made concerning his character. To the contrary, the competent authorities had relied on arbitrary grounds. In his request of 16 October 1993, the Prosecutor had merely noted that, as the applicant was still carrying on his occupation, "this circumstance, in conjunction with the part played by the professional man in the case, indicated the reality of the danger that, if released, the person under investigation might commit other offences of the same type as those which are the subject of the proceedings." In its order of 2 November 1993,

the Preliminary Investigation Judge had relied on grounds which were utterly arbitrary. He had admitted that the precautionary detention measure had been applied on grounds of equity instead of the law. The conditions for the imposition of precautionary detention were blatantly inconsistent both with the provisions of Article 5 § 1 (c) of the Convention and with the terms of Article 274 (c) C.P.P. Finally, in its decision of 13 November 1993, the Brindisi Court had simply stated as a self-evident fact: “there was no doubt that in the present case the need for precautions referred to in Article 274 (c) C.P.P. existed, considering how the accused had succeeded in unlawfully attaining the economic ends identified”. This statement, according to the applicant, amounted to a breach of the principle of presumption of innocence contained in Article 6 § 2 of the Convention.

39. The Government argued that the applicant’s detention on remand was in accordance with Articles 272, 280, 285 and 274 (c) C.P.P. as there existed reasonable and serious suspicion that the applicant was guilty and there existed a danger that he would commit further crimes, as he was still technical director of company X and the building works were still in progress. The detention order was only revoked after the applicant had resigned from his position as technical director, as the ground for the precautionary measure then ceased to pertain. The Government thus consider that the applicant’s detention was compatible with Article 5 § 1 (c) of the Convention.

(b) The Court’s assessment

(i) Whether the detention in issue was “lawful” and free from arbitrariness

40. The Court must first determine whether the detention was “lawful”, including whether it complied with “a procedure prescribed by law”. The Convention here refers back to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, amongst others, the *Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 850, § 50).

41. It does not suffice that the deprivation of liberty is executed in conformity with national law; it must also be necessary in the circumstances. Article 5 also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (*Witold Litwa v. Poland*, no. 26629/95, § 73, ECHR 2000-; *K.-F. v. Germany* judgment of 27 November 1997, *Reports* 1997-VII, p. 2674, § 63). In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as “lawful” (see the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, p. 18, § 39).

42. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1

failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see the *Scott v. Spain* judgment of 18 December 1996, *Reports* 1996, p. § 57, and the *Bouamar v. Belgium* judgment of 29 February 1988, Series A no. 129, p. 21, § 49).

43. The Court notes that under Articles 273 and 274 of the Italian Code of Criminal Procedure, detention pending trial can only be ordered if there exists serious evidence of guilt (see paragraph 23 above) and where there is a need for precautionary measures (paragraph 24 above). Under Article 274 (c) of the Code of Criminal Procedure, the danger of committal of further offences must be assessed in the light of the personality of the accused and particularly of the latter's behaviour or record (see paragraph 28 above). Pursuant to Article 292 C.P.P., the remand order must contain the explanation of the actual grounds for the precautionary measure and must take into account also the time elapsed since the committal of the offence (see paragraph 30 above).

α The existence of serious evidence of guilt

44. As regards the evidence of guilt, the Court recalls that the "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (*Labita v. Italy* [GC], n° 26775/95, § 155, ECHR 2000-). What may be regarded as reasonable will however depend on all the circumstances (see the *Fox, Campbell and Hartley v. the United Kingdom* judgment of 30 August 1990, Series A no. 182, p. 16, § 32).

45. The Court recalls in particular that the reasonable suspicion referred to in Article 5 § 1 (c) of the Convention does not mean that the suspected person's guilt must at that stage be established. It is precisely the purpose of the investigation that the reality and nature of the offences laid against the accused should definitely be proved (see *Eur. Comm. HR, Contrada v. Italy*, no. 27143/95, dec. 14.01.97, D.R. 88, p. 112). Sub-paragraph (c) of Article 5 § 1 does not even presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody (see the *Erdagöz v. Turkey* judgment of 22 October 1997, *Reports* 1997-VI, p. 2314, § 51).

46. In the instant case, the allegations against the applicant came from the statements by five witnesses and from the result of an expert opinion, which had been corroborated by the documents gathered in the course of the preliminary investigations (see paragraph 9 above).

47. The applicant has not disputed that the authorities disposed of certain elements which suggested his responsibility, but has submitted factual

arguments with a view to proving that the indications of his guilt could have been easily countered, had the facts been investigated in more detail. The Court considers however that it is not its task to assess whether these elements, which concern the merits of the accusation, ought to have been known to or examined in greater detail by the authorities at the time when they issued the detention order. Its task is to examine whether the elements of which the authorities had knowledge at the time when the order was issued were reasonably sufficient to believe that he had committed an offence. The Court has examined these elements and has not disclosed any manifestly unreasonable or arbitrary conclusions drawn by the competent authorities from them. It thus sees no reason to doubt that the elements of which the authorities disposed were sufficient to believe, at that time, that the applicant had committed the offence.

β The danger of re-offending

48. The Court notes that the Judge for the Preliminary Investigations based his order of 2 November 1993, besides on the evidence of guilt, on the fact that the applicant had maintained his position as technical director of company X and was thus in a position to commit further similar offences. The Court does not find this reason to be manifestly unreasonable or arbitrary. In particular, the Court does not find that the mere fact that in the above decision there is no explicit consideration of the applicant's clean record or of the circumstance that he was not alleged to have re-offended during the two years which had elapsed after the alleged offence is sufficient to conclude that the Judge for the Preliminary Investigations did not take these elements into account, as required under Italian law.

49. As regards the decision of 13 November 1993, the Court notes that the Brindisi District Court again relied on the existence of serious evidence of guilt, and explained the existence of a danger of the applicant's re-offending by reference to "how he (had) succeeded in unlawfully attaining the economic ends identified". The Court considers that, despite its conciseness, this decision fulfils the requirement of Article 274 (c) C.P.P., that the "particular modalities of the case" be taken into account when ordering precautionary measures.

50. In the light of the aforementioned, the Court does not find that the conclusion of the national authorities that there was a genuine risk that the applicant might re-offend was arbitrary.

γ Conclusion

51. In these circumstances, the Court considers that the applicant's detention between 3 November and 2 December 1993 was in conformity with Article 5 § 1 (c) of the Convention. Further, it does not find that the content of the decision of 13 November 1993 raises any separate issue under Article 6 § 2 of the Convention.

2. *The applicant's detention between 3 and 20 December 1993*

52. The applicant maintained that the order of 3 December 1993 refusing his application for release was “obstinate and wrongful”. The ground for the detention pending trial had always been the fact that the applicant had maintained his functions in company X. Given that he had resigned, it was logical to release him. The Judge for the Preliminary Investigations, however, held that the risk of re-offending persisted in the light of the circumstance that the applicant's experience and professional skills were such as to make it easy for him to resume his allegedly unlawful activities either on his own account or in the employment of companies other than company X (see paragraph 18 above). The applicant contended therefore that his detention after 3 December 1993 was arbitrary.

53. The Government underlined that the applicant's detention between 3 and 20 December 1993 was not rendered unlawful by the mere fact that the remand order was subsequently set aside on appeal.

54. The Court recalls that a period of detention will in principle be lawful if it is carried out pursuant to a court order, and that a subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see the *Benham v. the United Kingdom* judgment of 10 June 1996, *Reports* 1996-III, p. 753, § 42 and the *Tsirlis and Kouloumpas v. Greece* judgment of 29 May 1997, *Reports* 1997-III, p. 924, § 58).

55. The Court observes that the applicant's detention in the period in question was not unlawful under national law. Nor did the mere fact that the decision of 3 December 1993 was set aside on appeal affect the lawfulness of the detention.

56. The applicant though has alleged that his detention was arbitrary, in that the Judge for the Preliminary Investigations refused to apply the relevant legislation and case-law correctly, and relied on a totally arbitrary ground for refusing to release him (his possibility of using his professional skills on his own or on behalf of other companies).

57. The Court, however, does not find this ground to be irrelevant or arbitrary (see the *Matznetter v. Austria* judgment of 10 November 1969, Series A no. 10, p. 33, § 9 *in fine*). It thus does not find the applicant's detention between 3 and 20 December 1993 to have been incompatible with Article 5 § 1 (c) of the Convention.

C. The conformity of the applicant's detention with paragraph 3 of Article 5

58. The Court must examine whether, having regard to the circumstances of the case under consideration, the period during which the applicant was detained on remand exceeded the "reasonable time" referred to in Article 5 § 3 of the Convention.

59. The Court recalls that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must 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 ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (*Labita v. Italy* [GC], No. 26772/95, ECHR 2000-IV, § 153).

60. In the present case, the Court notes that the period of detention on remand of which the applicant complains is of one and a half months only, two weeks of which were house arrest. It observes that, in addition to the cogency of the case against the applicant, the main reasons referred to by the District Court were the seriousness and nature of the offence and the danger of re-offending. The Court finds that these reasons were both relevant and sufficient. It further finds that detention was not unduly prolonged by the way the case was handled.

Accordingly, the Court considers that the length of the detention on remand complained of did not exceed the reasonable time referred to in Article 5 § 3 of the Convention.

D. The existence of an enforceable right to compensation

61. The Court recalls that the right to compensation under paragraph 5 presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions. In the light of its findings above that the applicant's detention was in conformity with Article 5 §§ 1 and 3 of the Convention, it considers that there has been no violation of Article 5 § 5 of the Convention in the present case.

FOR THESE REASONS, THE COURT

Holds, by 4 votes to 3, that there has been no violation of Article 5 § 5 of the Convention.

Done in English, and notified in writing on 11 January 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

András BAKA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Bonello, joined by Mrs Strážnická and Mrs Tsatsa-Nikolovska, is annexed to this judgment.

A.B.B.
E.F.

DISSENTING OPINION OF JUDGE BONELLO
JOINED BY JUDGES STRÁŽNICKÁ
AND TSATSA-NIKOLOVSKA

1. The applicant was deprived of his liberty, in the course of criminal investigations, for 48 days. At the end of his trial he was acquitted on the ground that the facts attributed to him had not occurred. He sought redress in accordance with Article 5 § 5, as no right to compensation exists in the circumstances in the domestic system.

2. The Court has repeatedly held that for detention to be lawful in terms of the Convention, it must firstly be in accordance with domestic law. For a precautionary measure such as pre-trial detention to conform with Italian law, it has to satisfy at least two conditions. There must exist serious indications of guilt, together with a genuine risk that the suspect will, if not kept in a state of detention, commit further offences. The judge is under an obligation to state the specific reasons which induce him to fear that the suspect would re-offend.¹ Any breach of any of these conditions would render the detention unlawful.

3. In the present case the only reason given by the Brindisi District court on 13 December 1993 when extending the applicant's pre-trial detention, was the following: "there undoubtedly was a danger of his (the applicant's) committing further crimes... considering how the accused succeeded in unlawfully attaining the economic ends identified". In other words: there is a danger that the accused will re-offend, as he has already committed the criminal acts with which he is charged.

4. I fully endorse the Court's case law that the mere fact that a person was finally acquitted of the offence charged, does not automatically render his pre-trial deprivation of liberty unlawful.¹ Detention pending judgement would, on the other hand, be unlawful if it violated the requirements of national law, or of the Convention.

5. The majority found lawful the further detention of the applicant, ordered by the Brindisi court, and did not distance itself from that court's conclusions that there was a danger of the applicant committing further crimes, considering that he had already succeeded in committing previous crimes. With this finding I disagree.

6. Firstly, for a detention to be lawful according to Italian law, the court is under an obligation to give, in detail, the reasons which induced it to conclude that there existed a danger of re-offending. The Brindisi court

¹ Article 292 of the Italian Code of Criminal Procedure.

¹ See *Benham v. United Kingdom*, 10 June 1996, Vol 3, p. 753, § 42; *Kouloumpas v. Greece*, 29 May 1997, Vol. 3, p. 924, § 58.

failed majestically in this obligation. This, alone, would render the detention illegitimate.

7. Secondly, Italian case law stresses that the existence of a real possibility of re-offending is “alien to purely conjectural arguments”.² As it is, the Brindisi court tied its persuasion that the applicant could re-offend, to the persuasion that he had already offended before. This was not pure conjecture. It was a mistaken, improper and false conjecture based on a false, improper, and mistaken premise. The Brindisi court relied exclusively on guesswork, and guesswork has a disturbing habit of letting you down.

8. Thirdly, in assuming that the applicant could commit other criminal offences, the Brindisi court banked on what is, in essence, a violation of the presumption of innocence. That court assumed that the applicant was guilty, and proceeded to pull the presumption of innocence inside out. Basing itself on a mischievous abuse of an illegitimate ‘presumption of guilt’ it concluded that, once guilty, always guilty. The majority has, in substance, found no reasons to disassociate itself from this bizarre damage to the presumption of innocence.

9. Fourthly, Italian case law underlines that relevant considerations to be taken into account when determining the risks of re-offending are the accused’s personality, including his behaviour prior to being charged, and his conduct after the facts with which he stands charged. The accused applicant had never been convicted of a single offence, nor had he any other criminal charges pending, nor was there any allegation that he had ‘re-offended’ after that facts with which he stood charged. These considerations, sensibly deemed determining by the Italian legal system, were exemplarily disregarded by the Brindisi court.

10. That court only identified the applicant’s previous (inexistent) crimes as the basis of the risk of committing further crimes. The majority has not found it offensive to legal logic to accept that there existed reasonable fears of ‘re-offending’ when there had never been any ‘offending’ at all in the first place. That is where, sadly, we go separate ways.

11. The Convention confers on the Court the power (and the duty) to review whether domestic law has been complied with in matters of deprivation of liberty.³ It is a power which, to my way of seeing, the Court has used rather economically in the present case.

12. The applicant – innocence certified by court – was dispossessed of his liberty for 48 days. It is a matter of regret that Italian law does not grant him any hope of redress. It is a matter of greater regret that neither did a court of human rights.

² See § 36

³ See § 42