CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF NAKHMANOVICH v. RUSSIA

(Application no. 55669/00)

JUDGMENT

STRASBOURG

2 March 2006

FINAL

02/06/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nakhmanovich v. Russia,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 9 February 2006,

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

PROCEDURE

1. The case originated in an application (no. 55669/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Kazakhstan, Mr Lev Aleksandrovich Nakhmanovich, on 29 December 1999.

2. The applicant was represented before the Court by Ms K. Moskalenko, a lawyer with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his detention pending trial had been unlawful and also excessively long, that his complaint concerning the lawfulness of his detention had not been considered and that the length of the criminal proceedings against him had breached the "reasonable-time" requirement of Article 6 § 1 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 28 October 2004 the Court declared the application partly admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

7. The Government filed observations on the merits of the complaint under Article 6 § 1 of the Convention (Rule 59 § 1). The applicant did not file observations on the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1957 and lives in Jambul, Kazakhstan.

A. Criminal proceedings against the applicant in 1992-1994

9. On 28 October 1992 the Moscow police opened a criminal investigation into the theft of about four thousand million Russian roubles (approximately thirty-five million US dollars) from the Bank of Russia through the use of forged credit notes of the National Bank of Kazakhstan.

10. On 24 December 1992 the applicant was arrested at Moscow Airport on his arrival from Italy and taken into custody. On 26 and 27 December 1992 the applicant confessed to having conspired with Mr Smolenskiy, director of a Russian commercial bank, to steal the money.

11. On 28 December 1992 the applicant was released from custody.

12. On 23 November 1994 the applicant was charged with large-scale fraud, an offence under Article 147 § 3 of the Russian Soviet Federative Socialist Republic (RSFSR) Criminal Code, and ordered to be detained pending trial. As by that time the applicant had fled from Russia, his name was placed on the list of fugitives from justice.

B. The applicant's arrest in Switzerland and extradition

13. On 20 March 1997 the applicant's name was placed on the Interpol wanted list. On 11 September 1997 the Swiss police arrested the applicant in Lugano, Switzerland, with a view to extraditing him.

14. Upon receipt of the documents supporting the extradition request, the Swiss authorities decided on 29 January 1998 to extradite the applicant.

15. On 24 April 1998 the applicant was extradited to Russia, where he was placed in detention facility IZ-48/4 ("Matrosskaya Tishina").

C. Criminal proceedings against the applicant in Russia

1. First review of the lawfulness of the applicant's detention

16. On 15 June 1998 the applicant's counsel asked the Preobrazhenskiy District Court of Moscow to release the applicant. She submitted, in particular, that he had been detained in Switzerland on the basis of the arrest warrant of 23 November 1994 and had remained in custody for more than nine months. In Kazakhstan, his country of nationality, the criminal proceedings against him had been discontinued on the ground that no criminal offence had been committed. In any event, after six years' investigation the investigators had gathered all the available evidence including statements by witnesses, and the applicant could not therefore interfere with the establishment of the truth. Finally, his release was necessary on medical grounds because his health had seriously deteriorated in detention.

17. On 25 June and 8 July 1998 the hearings listed before the Preobrazhenskiy District Court were adjourned because the applicant had not been brought to the court.

18. On 13 July 1998 a deputy Prosecutor General of the Russian Federation authorised an extension of the applicant's detention pending trial until 8 September 1998, that is, for a total of twelve months from the date of his initial detention in Switzerland. The continued detention was justified by reference to the gravity of the offence, the risk that the applicant might abscond and the international obligations undertaken by the Russian authorities in the extradition proceedings.

19. On 14 July 1998 the Preobrazhenskiy District Court took statements from the applicant and his lawyer and from the prosecutor and held that the detention had been imposed and subsequently extended on valid grounds and in compliance with the Code of Criminal Procedure. Accordingly, no grounds for applying a different measure of restraint had been made out.

20. On 3 August 1998 the Moscow City Court upheld the decision of 14 July 1998. The court reiterated in general terms the finding that the applicant's detention was lawful.

2. Extension of the detention period and second review

21. On 29 July 1998 the Prosecutor General authorised an extension of the applicant's detention pending trial until 8 March 1999, that is, for a total of eighteen months. The applicant submitted that no separate extension order had been issued and that the new authorisation had been printed on top of the authorisation of 13 July 1998. He further submitted that he had not been notified of the extension until 10 September 1998.

22. On 22 October 1998 the applicant's counsel challenged the extension before the Preobrazhenskiy District Court. She submitted, in

particular, that there was no indication that the applicant had committed an offence on Russian territory; that the authorised period of his detention had expired on 8 September 1998, whereas the applicant had not been notified of the subsequent extension until two days later; and that there was no actual risk that the applicant would abscond or interfere with the investigation.

23. On 13 November 1998 the Preobrazhenskiy District Court dismissed the challenge. It held that there were no grounds for lifting or varying the preventive measure imposed on the applicant, as the detention period had been extended in accordance with the law. The court found that it was not competent to review the lawfulness of, and grounds for, the applicant's placement into custody because that issue had already been determined in the decision of 14 July 1998 (see paragraph 19 above).

24. On 23 November 1998 the applicant's lawyers lodged an appeal. They submitted, in particular, that domestic law permitted the extension of detention beyond the nine-month period only in "exceptional circumstances", whereas in the present case neither the Prosecutor General, who had authorised the extension to eighteen months, nor the District Court that had reviewed his decision, had pointed to any such circumstance.

25. On 9 December 1998 the Moscow City Court upheld the decision of 13 November 1998. The court reiterated that the detention period had been extended lawfully because the applicant had been charged with a serious offence. No other reasons for the continued detention were given.

3. New charges and severing of the applicant's case

26. On 29 December 1998 a new charge was added: the applicant was accused of forging and making use of a State document, an offence under Article 196 § 1 of the RSFSR Criminal Code.

27. On 14 January 1999 the Prosecutor General's Office decided to sever the case against the applicant from that against Mr Smolenskiy, the applicant's co-accused.

28. On 4 March 1999 the case file and the bill of indictment were deposited with the Zamoskvoretskiy District Court of Moscow in preparation for trial.

29. On 22 March 1999 the District Court set the case down for hearing on 6 April 1999. The hearing was subsequently adjourned three times.

30. On 7 May 1999 the District Court found that the applicant's right to consult his lawyers had been unlawfully restricted, with the result that the defence's requests for discontinuation of the proceedings, the applicant's release, the summoning of additional witnesses and the exclusion of certain evidence had not been examined. The court referred the case back to the pre-trial stage (*стадия назначения к слушанию*).

4. Referral of the case back for additional investigation

31. On 20 May 1999 the Zamoskvoretskiy District Court found that the case against the applicant had been unlawfully severed from the case against Mr Smolenskiy. The court considered that the prosecution should complete the investigation into Mr Smolenskiy's offences and that the charges against both co-defendants should be examined together. The court ordered the case to be referred back for additional investigation. The prosecution appealed against the decision.

32. On 18 June 1999 the criminal proceedings against Mr Smolenskiy were discontinued for lack of evidence.

33. On 7 July 1999 the Moscow City Court upheld the decision of 20 May 1999. The court also established other procedural defects: in particular, it ordered that the lawfulness of the discontinuation of criminal proceedings against Mr Smolenskiy be reviewed and that the applicant's bill of indictment be updated accordingly.

34. On 19 July 1999 the applicant's case file was returned to the Prosecutor General's Office.

35. On 23 July 1999 the Prosecutor General's Office lodged an application for supervisory review (*протест в порядке надзора*) against the decisions of 20 May and 7 July 1999 with the Presidium of the Moscow City Court. The prosecution claimed that, in referring the case back for additional investigation, the courts had failed to take into account the imminent expiry of the authorised detention period and had also violated the applicant's right to have the charge against him determined within a reasonable time.

5. Further attempts to obtain a review of the lawfulness of the applicant's detention

36. In July 1999 the applicant's lawyer complained about the unlawfulness of her client's continued detention to the director of the remand centre where the applicant was being held, the deputy Minister of Justice in charge of the Prisons Administration Department (*ГУИН Министерства юстиции РФ*), the Minister of Justice, the acting Prosecutor General and the Preobrazhenskiy District Court (on 26 July 1999). She requested the applicant's release, claiming that his detention after 24 July 1999 had been unlawful as no further extension had been authorised.

37. On 28 July 1999 a senior legal adviser from the Prosecutor General's Office informed the Prisons Administration Department that from the date on which the deputy Prosecutor General had lodged an application for supervisory review the applicant's detention had been "accounted for by the Moscow City Court". The authorities of the remand centre relayed this information to the applicant's lawyer.

38. On 4 August 1999 the Minister of Justice sent a letter to the acting Prosecutor General, the relevant part of which read as follows:

> "...on 19 July 1999 the case file was received by the Prosecutor General's Office from the Zamoskvoretskiy District Court of Moscow... [The applicant's] detention period expired on 23 July 1999.
>
> According to the information from the Prosecutor General's Office, the [the applicant's] detention period was suspended in connection with the lodging of the application for supervisory review ... and the transfer of the applicant to the Moscow City Court.
>
> I consider that this approach by the officials of the Prosecutor General's Office is incompatible with the Constitution of the Russian Federation and its criminal-procedure laws.
>
> ...For instance, the criminal-procedure laws do not provide for suspension of the renewed detention period pending examination of an application for supervisory review of the decision to refer the case back for additional investigation... This means that the examination of final judgments, decisions or rulings by means of [supervisory] review does not suspend either the enforcement of the judgment or the [additional] pre-trial investigation if the case has been referred back for additional investigation [by a court decision].
>
> ...Accordingly, in the present case, [the lodging of an application for supervisory review] suspended not the detention period, but the additional investigation, as it is inconceivable that suspension of the detention period in such a case would be conducive to the implementation of a citizen's right to liberty and personal integrity enshrined in Article 22 of the Constitution.
>
> ...In this connection the legislature made provision, in Article 97 of the RSFSR Code of Criminal Procedure, for one and only one option for extending the detention period if a case is referred back for additional investigation, namely that such extension must be authorised by the prosecutor supervising the investigation."

The Minister of Justice invited the Prosecutor General to report within one day on whether the applicant's detention pending trial had been extended as provided for in Article 97 of the Code of Criminal Procedure.

39. On 5 August 1999 a deputy Prosecutor General wrote to the Minister of Justice stating that his office had received the case file on 20 July 1999 and that he had lodged an application for supervisory review without "having taken on the case" ("*не принимая дело к своему производству*"). The letter did not refer to any extension of the applicant's detention.

40. On the same day Mr L., the prosecutor supervising the lawfulness of the enforcement of criminal penalties, sent a faxed request to the remand centre where the applicant was being held, requesting that the applicant should not be released until the Moscow City Court had examined the application for supervisory review.

41. On 12 August 1999 the Presidium of the Moscow City Court quashed the decisions of 7 and 20 May and 7 July 1999 on procedural

grounds and remitted the case to the Zamoskvoretskiy District Court for examination on the merits by a differently composed bench.

42. On 16 August 1999 a judge of the Preobrazhenskiy District Court discontinued the proceedings in connection with the complaint concerning the unlawfulness of the applicant's detention because "on 13 August 1999 the [applicant's] case had been referred to the Zamoskvoretskiy District Court for trial".

43. On 6 October 1999 the case file was returned to the Zamoskvoretskiy District Court. The commencement of the trial was scheduled for 25 November 1999 but was adjourned on three occasions because certain documents from the Prosecutor General's Office were missing or because the presiding judge was involved in other proceedings.

D. The applicant's release from custody and further developments

44. On 20 January 2000 the Zamoskvoretskiy District Court ordered the case to be referred back to the Prosecutor General's Office for additional investigation. It held that the preventive measure imposed on the applicant (detention pending trial) "should remain unchanged".

45. On 4 February 2000 the Investigations Department of the Ministry of the Interior resumed the investigation. On the same day the applicant was released subject to an undertaking that he would not leave the city.

46. In March 2000 the applicant applied for permission to return home. After permission had been granted, he left for Kazakhstan on 12 March 2000.

47. On 3 March and 12 April 2000 the Investigations Department of the Ministry of the Interior asked the Prosecutor General to extend the authorised term of the investigation. On 20 March and 27 April 2000 a deputy Prosecutor General refused a further extension because "the applicant's whereabouts could not be established".

48. On 20 April and 7 June 2000 the applicant's lawyers asked the investigators to inform them of the situation with regard to the criminal proceedings against the applicant; their requests received no response.

49. On 7 June 2000 the applicant's lawyers also requested the prosecution to discontinue the criminal case against the applicant, referring to a decision of 28 April 2000 by the Kazakhstan prosecutors to discontinue the criminal proceedings. On 27 June 2000 the acting head of the department for supervision of investigations of particularly serious cases in the Prosecutor General's Office refused their request on the ground that the offence had been committed on Russian territory and that there were no legal grounds for discontinuing the proceedings against the applicant.

50. According to the Government, the criminal proceedings against the applicant in Russia had been discontinued on 28 April 2000 by a decision of the Investigations Department of the Ministry of the Interior, on the ground

that the applicant's involvement in the offence could not be proved. The decision indicated, in particular, that "further proceedings in the case [had been] impossible because the Prosecutor General's Office [had] refused a further extension of the authorised investigation period". On an unspecified date the investigator had allegedly informed the applicant of that decision by telephone, but had been unable to send a copy of the decision to the applicant because he had not known his address. In June 2000 the same information had allegedly been communicated to Ms Orozalieva, the applicant's lawyer.

51. On 16 January 2004 Ms Orozalieva asked the Investigations Department of the Ministry of the Interior for a copy of the decision to discontinue the criminal proceedings against the applicant. She indicated that she had learnt of its existence in October 2003, during a conversation with a senior investigator dealing with particularly serious cases in the Prosecutor General's Office.

52. On 17 February 2004 the deputy head of the Investigations Department of the Ministry of the Interior replied to her that "on 27 December 2000 case file no. 81684 [had been] sent to the Prosecutor General's Office and [had] not yet been returned to the Investigations Department of the Ministry of the Interior; the documents [could not] therefore be provided".

II. RELEVANT DOMESTIC LAW

53. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic (Law of 27 October 1960, "the old CCrP").

54. "Preventive measures" or "measures of restraint" (*меры пресечения*) included an undertaking not to leave a town or region, personal surety, bail and detention pending trial (Article 89). A decision ordering detention pending trial could be taken by a prosecutor or a court (Articles 11, 89 and 96).

55. At the material time – before the amendments of 14 March 2001 – detention pending trial was authorised if the accused had been charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case. If the accused had been charged with a serious or particularly serious criminal offence – a category which included large-scale fraud – he could be remanded in custody on the sole ground of "the dangerous nature of the crime" (Article 96).

56. The detainee or his representative could challenge the detention order before a court. The judge was required to review the lawfulness of, and grounds for, the order no later than three days after receipt of the relevant papers. The review was to be conducted *in camera* in the presence

of a prosecutor and the detainee's counsel or representative. The judge could either dismiss the challenge or set aside the pre-trial detention and order the detainee's release (Article 220-1).

57. After arrest the suspect was placed in custody "pending investigation". The maximum permitted period of detention "pending investigation" was two months, but it could be extended up to eighteen months in "exceptional circumstances". Extensions were authorised by prosecutors of ascending hierarchical levels. No extension of detention "pending investigation" was possible beyond eighteen months. The period of detention "pending investigation" was calculated up to the day when the prosecutor sent the case to the trial court (Article 97).

58. From the date on which the prosecutor forwarded the case to the trial court, the defendant's detention was "before the court" (or "during trial"). Within fourteen days of receipt of the case file (if the defendant was in custody), the judge was required either (1) to set the trial date; (2) to refer the case back for additional investigation; (3) to stay or discontinue the proceedings; or (4) to refer the case to a court with jurisdiction to hear it (Article 221). Upon receipt of the case file, the judge had to determine, in particular, whether the defendant should remain in custody or be released pending trial (Articles 222 § 5 and 230) and to rule on any application by the defendant for release (Article 223).

59. The trial court could refer the case back for additional investigation if it established that procedural defects existed that could not be remedied at the trial. In such cases the defendant's detention was again classified as "pending investigation" and the relevant time-limit continued to apply. If, however, the case was referred back for additional investigation but the investigators had already used up all the time authorised for detention "pending investigation", a supervising prosecutor could nevertheless extend the detention period for one additional month starting from the date on which he received the case file. Subsequent extensions could be granted only if the detention "pending investigation" had not exceeded eighteen months (Article 97).

60. If the authorised detention period had expired and no information about an extension order had been communicated to the director of the remand centre, the latter had to release the detainee by his own decision (Article 11). A prosecutor and his deputy had a duty to release anyone who had been detained unlawfully or after expiry of the detention period authorised by law or by a judicial decision (Article 11 and also section 33 § 2 of the Federal Law on Prosecutors' Offices in the Russian Federation, no. 2202-I of 17 January 1992).

61. The investigator could issue a reasoned decision discontinuing the criminal proceedings, which he had to sign and date. A copy of the decision had to be sent to the prosecutor. At the same time the suspect and the victim

had to be informed of the decision in writing and have the procedure for lodging an appeal explained to them (Article 209).

THE LAW

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

62. The applicant alleged a violation of Article 5 § 1 (c) of the Convention in that his detention pending trial had been unlawful at least from 24 July to 12 August 1999. The relevant part of Article 5 § 1 provides:

> "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...".

63. The Government submitted that the applicant had not been found guilty by any judicial decision. In those circumstances his detention could "hardly be considered reasonable" and he should have applied for compensation for unlawful prosecution and detention.

64. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX, and *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III).

65. The Court observes, and it has not been disputed by the parties, that after expiry of the detention period authorised by the prosecutor's order of 29 July 1998 (see paragraph 21 above) and until the District Court's decision of 20 January 2000 prolonging the application of the preventive measure, there was no decision – either by a prosecutor or by a judge – authorising the applicant's detention pending trial.

66. In the period from 4 March to 20 May 1999 and again from 6 October 1999 to 20 January 2000 the applicant was kept in detention on the basis of the fact that the criminal case against him had been referred to the court competent to try the case (see paragraphs 28 and 43 above).

67. The Court has already examined and found a violation of Article 5 § 1 of the Convention in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment has been lodged with the trial court. The Court has held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – was incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see *Ječius*, cited above, §§ 60-64, and *Baranowski*, cited above, §§ 53-58).

68. The Court sees no reason to reach a different conclusion in the present case. It reiterates that for the detention to meet the standard of "lawfulness", it must have a basis in domestic law. The Government, however, did not point to any legal provision which permitted a defendant to continue to be held once the authorised detention period had expired. The Russian Constitution and the rules of criminal procedure vested the power to order or prolong detention pending trial in prosecutors and courts (see paragraph 54 above). No exceptions to that rule were permitted or provided for, no matter how short the duration of the detention. As noted above, during the relevant period there was neither a prosecutor's order nor a judicial decision authorising the applicant's detention. It follows that the applicant was in a legal vacuum that was not covered by any domestic legal provision.

69. Furthermore, in the period from 20 May to 6 October 1999 no domestic authority assumed responsibility for the applicant's continued detention. The District Court ordered that the case be referred back for additional investigation, thus shifting the responsibility for the applicant's detention onto the prosecution, but the Prosecutor General's Office did not agree with that decision and challenged it, first on appeal and then by way of supervisory review proceedings. Even after the intervention of the Minister of Justice himself, who pointed out that the Prosecutor General's Office had unlawfully refused to extend the applicant's detention in breach of his constitutional right to liberty, the deputy Prosecutor General did nothing to remedy the violation and failed to specify, in his reply to the Minister, the specific basis of the applicant's detention. In fact, it appears that by that time the unlawfulness of his detention was fully apparent to the Prosecutor General's Office. The legal basis was so conspicuously lacking that the prosecutor L. sent a non-procedural faxed communication to the director of the remand centre where the applicant was detained, prohibiting

his release (see paragraph 40 above). The Court finds it particularly disturbing that the prohibition emanated from the prosecutor, who had no apparent authority to extend the applicant's detention. What is more, his primary function was to ensure compliance with the rules of criminal procedure in remand centres, and the Code of Criminal Procedure and the Federal Law on Prosecutors' Offices imposed on him a statutory duty to release anyone detained without a legal basis (see paragraph 60 above). It is also a source of concern to the Court that the non-procedural communication was deemed by the director of the remand centre to constitute sufficient grounds for not releasing the applicant, and thereby not discharging his legal obligation to release the person held in custody after the authorised detention period had expired (ibid.).

70. Finally, the Court observes that, although the District Court upheld the pre-trial detention measure in respect of the applicant on 20 January 2000, it did not give any reasons for its decision. In this connection, the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (see *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002).

71. The District Court's decision did not set a time-limit for the applicant's continued detention or refer to the provisions of the Code of Criminal Procedure on which it was based. This left the applicant in a state of uncertainty as to the legal basis and grounds for his detention after that date. Its failure to give reasons for its decision was all the more regrettable since the applicant had by then spent more than ten months in custody without a valid decision by a court or a prosecutor. In these circumstances, the Court considers that the District Court's decision of 20 January 2000 did not afford the applicant the adequate protection from arbitrariness which is an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1 of the Convention.

72. It follows that during the period from 4 March 1999 until his release on 4 February 2000 there was no "lawful" basis for the applicant's detention pending trial.

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

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

73. The Court will also examine whether the applicant's right to trial within a reasonable time or to release pending trial, guaranteed under Article 5 § 3 of the Convention, was respected. Article 5 § 3 provides:

> "3. 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."

74. The Government made no comments on the merits of the complaint.

A. Period to be taken into consideration

75. The Court observes that the applicant's detention pending trial lasted from 11 September 1997, the date on which he was detained in Switzerland, until 4 February 2000, the day of his release. The total duration thus amounted to two years, four months and twenty-four days. The Court has competence *ratione temporis* to examine the period after the ratification of the Convention by Russia on 5 May 1998. In carrying out its assessment, it will not lose sight of its above finding that the final period of the applicant's detention pending trial until his release was not in accordance with the provisions of Article 5 § 1 of the Convention (see *Goral v. Poland*, no. 38654/97, §§ 58 and 61, 30 October 2003, and *Stašaitis*, cited above, §§ 81-85).

B. The reasonableness of the length of detention

76. The lawfulness of, and grounds for, the applicant's continued detention were examined by the District Court on 14 July and 13 November 1998 and by the City Court on 3 August and 9 December 1998. In their decisions the courts confirmed the lawfulness of the applicant's detention by reference to the sole fact that he had been charged with a serious criminal offence.

77. The Court observes that Russian criminal-procedure law, as it stood at the material time, allowed a defendant to be remanded in custody and held in detention pending trial on the sole ground of the dangerous nature of the crime committed by the accused (see paragraph 55 above). Accordingly, the domestic courts were not required to demonstrate the existence of any other grounds warranting the person's detention.

78. According to the Court's constant case-law, the gravity of the charge cannot by itself serve to justify long periods of detention pending trial (see *Rokhlina v. Russia*, no. 54071/00, § 66, 7 April 2005; *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; and *Ilijkov v. Bulgaria*, no. 33977/96, § 81, 26 July 2001). This is particularly true in cases such as the present one where the characterisation in law of the facts – and thus the sentence faced by the applicant – was determined by the prosecution without judicial control of the issue as to whether the evidence gathered supported a reasonable suspicion that the applicant had committed the offence imputed to him.

79. The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, warrants a departure from the rule of respect for individual liberty. Any

system of mandatory detention pending trial is incompatible *per se* with Article 5 § 3 of the Convention, it being incumbent on the domestic authorities to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty (see *Rokhlina*, cited above, § 67). Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is permissible only in exhaustively enumerated and strictly defined cases (see *Ilijkov*, cited above, §§ 84-85, with further references).

80. The Court finds that by failing to address concrete relevant facts and by relying solely on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which cannot be regarded as "sufficient". The authorities thus failed to justify the applicant's continued detention pending trial (see *Rokhlina*, cited above, § 69).

There has therefore been a violation of Article 5 § 3 of the Convention.

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

81. The applicant complained under Article 5 § 4 of the Convention that his complaint about his unlawful detention had never been examined because on 16 August 1999 the Preobrazhenskiy District Court had refused to consider its merits. Article 5 § 4 provides:

> "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."

82. The Government submitted that the judicial documents relating to that period had been prematurely destroyed due to a lack of space in the archives. They made no comments on the merits of the complaint.

83. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of that detention and ordering its termination if it proves unlawful (see *Rokhlina*, cited above, § 74, with further references).

84. In the present case the applicant's complaint about the unlawfulness of his detention was not examined on the ground that the criminal case against him had been submitted for trial in the meantime (see paragraph 42 above). The District Court expressly refused to rule on whether the applicant's detention during that period had been lawful. It follows that the applicant was denied the right to a judicial decision concerning the lawfulness of his detention pending trial. Moreover, the Court observes that

no such ground for discontinuing proceedings concerning the lawfulness of detention pending trial was provided for in domestic law.

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

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

85. The applicant complained under Article 6 § 1 of the Convention about a breach of the "reasonable-time" requirement as regards the length of the criminal proceedings against him. Article 6 § 1 provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

86. The Government submitted that from 28 March 1994 to 28 April 1998 the applicant had been a fugitive from justice and that his flight had delayed the criminal proceedings against him. The case had been a complex one because the applicant had changed his depositions on many occasions and because letters rogatory had been sent to Kazakhstan and Austria. Thus, the length of the proceedings had been accounted for by "objective causes". Furthermore, an inquiry carried out by the Prosecutor General's Office had not confirmed the allegation that the applicant's right to be informed of the discontinuation of criminal proceedings against him in a timely fashion had been violated because he had been informed of that decision by telephone.

A. Period to be taken into consideration

87. As regards the starting-point of the criminal proceedings, there is no dispute between the parties that they commenced in 1992. The Court need not decide whether the period during which the applicant absconded to Switzerland should be deducted from the overall duration (but see *Girolami v. Italy*, judgment of 19 February 1991, Series A no. 196-E, § 13) because, in any event, it has competence *ratione temporis* to take into account only the period after 5 May 1998, the date when the Convention was ratified by Russia.

88. The determination of the final date of the proceedings is more difficult in the circumstances of the present case. According to the Court's case-law, the period to be taken into consideration in determining the length of criminal proceedings normally ends with the day on which a charge is finally determined or the proceedings are discontinued (see, among many authorities, *Kalashnikov v. Russia*, no. 47095/99, § 124, ECHR 2002-VI).

89. On the other hand, the Convention institutions have consistently taken the view that Article 6 is, in criminal matters, "designed to avoid that a person charged should remain too long in a state of uncertainty about his fate" (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A

no. 9, p. 40). It means that the period to be taken into consideration lasts until the situation of the person concerned has ceased to be affected as a result of the charges levelled against him and the uncertainty concerning his legal position has been removed. If a decision to discontinue criminal enquiries is made, the person ceases to be affected and is no longer suffering from the uncertainty which Article 6 seeks to limit, from the moment that decision is communicated to him (see *X. v. the Netherlands*, no. 9433/81, Commission decision of 11 December 1981, Decisions and Reports 27, p. 233).

90. The Court observes that the Government produced a copy of a decision discontinuing the criminal proceedings against the applicant which bore the date of 28 April 2000. It notes that, under domestic law (see paragraph 61 above), the applicant was entitled to be served *ex officio* with a written copy of the decision to discontinue the criminal proceedings against him.

91. The Court cannot accept the Government's contention that service of the decision had been impossible because the investigator had not known the applicant's address (see paragraph 50 above). Firstly, it is peculiar that the investigators authorised the departure of the applicant, a suspect in a criminal case, to another State but did not note the address where he could be reached if necessary. Furthermore, it was accepted that the investigator had the applicant's phone number and could contact him at that number. Hence, when calling the applicant on the phone, the investigator could have inquired about his address. Finally, a copy of the decision could have been served on the applicant's counsel in Moscow.

92. Furthermore, the Court is not satisfied that the decision discontinuing the criminal proceedings against the applicant was indeed issued on the date indicated therein, namely 28 April 2000. It observes that on 27 June 2000 the head of a department of the Prosecutor General's Office formally refused the applicant's counsel's request for discontinuation of the proceedings against the applicant (see paragraph 49 above). The Government did not explain why the authority supervising the investigation of the criminal case would have been unaware of a decision to discontinue the proceedings which had allegedly been made three months earlier. This omission was still more inexplicable, given that the investigator had been under a statutory obligation to inform the supervising prosecutor of any such decision (see paragraph 61 above). A further cause of doubt for the Court is the fact that in 2004, in other words, almost four years later, the Ministry of the Interior, the very authority which had allegedly issued the decision to discontinue the proceedings, was not in a position to produce a copy of it, referring the applicant's counsel back to the Prosecutor General's Office (see paragraphs 51 and 52 above).

93. The Court finally notes that for the first time the full text of the decision discontinuing the criminal proceedings against the applicant was

enclosed with the Government's observations of 1 April 2004, submitted in response to the Court's enquiry about the current status of those proceedings.

94. In the particular circumstances of the present case, the Court considers that the uncertainly in the applicant's legal position as regards the criminal charges brought against him was removed only once the applicant could take cognisance of the full text of the decision discontinuing the criminal proceedings. This happened some time in April 2004 when the Court's letter enclosing the Government's observations of 1 April 2004 reached the applicant's representative. The Court therefore accepts 15 April 2004 as the end date of the proceedings at issue. Hence, in the post-ratification period the criminal proceedings against the applicant lasted five years and eleven months.

B. Compliance with the "reasonable-time" requirement

95. The Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Rokhlina*, cited above, § 86).

96. The Court is not convinced by the Government's arguments that the length of the proceedings was due to the complexity of the case, which related only to two counts of fraud and forgery, or to "objective causes". It considers, rather, that the conduct of the domestic authorities led to substantial delays in the proceedings. In this connection it notes that for almost two years in the post-ratification period the applicant was held in custody – a fact which required particular diligence on the part of the courts dealing with the case to administer justice expeditiously (see *Rokhlina*, cited above, § 89).

97. Thus, the opening of the trial in 1999 was delayed by several months because, as the District and then City Courts subsequently determined, the rights of the defence had been unlawfully restricted and the severing of the case against Mr Smolenskiy had been procedurally defective. A further delay was attributable to the conduct of the Prosecutor General's Office, as it refused to abide by the courts' decisions and sought to overturn them by way of supervisory review proceedings. After the case was set down for trial, it does not appear that any hearings took place between October 1999 and January 2000. Finally, the most significant delay resulted from the domestic authorities' persistent failure to inform the applicant about the status of the criminal proceedings against him. The latter delay spanned several years.

98. Having regard to the foregoing, the Court considers that the length of the proceedings did not satisfy the "reasonable-time" requirement. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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. Pecuniary damage

100. The applicant claimed 140,000 US dollars (USD) in respect of pecuniary damage. This amount represented his loss of earnings as chairman of the board of the Jambul Commercial Bank (Kazakhstan) during the twenty-eight months of his detention.

101. The Government contested this claim. They noted, firstly, that only the period of unlawful detention which the applicant had complained about could be taken into consideration. In any event, the applicant could have sought compensation for unlawful prosecution and detention before the domestic authorities, but had not done so. His claim was therefore not justified.

102. The Court notes that the decision to prefer criminal charges against the applicant was not the subject of its review in the present case. There was no causal link between the violations found and the alleged loss of earnings. The Court therefore finds no reason to award the applicant any sum under this head.

B. Non-pecuniary damage

103. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

104. The Government submitted that the amount of compensation should be determined on the basis of the Court's case-law in similar cases, such as the case of *Kalashnikov v. Russia* (cited above). They maintained that the applicant's complaints under Article 6 § 1 were ill-founded and that no compensation should be awarded.

105. The Court notes that it has found a combination of particularly grievous violations in the present case. The applicant, who was never convicted of any criminal offence, spent more than two years in custody and the overall length of the criminal proceedings against him was excessive.

His detention was unlawful for more than ten months and, when "lawful", was not based on sufficient grounds. Finally, he was denied the right to have the lawfulness of his detention examined. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, the Court awards the entire amount claimed by the applicant under this head, plus any tax that may be chargeable.

C. Costs and expenses

106. The applicant claimed an unspecified amount for the costs incurred in connection with the extradition proceedings in Switzerland. Relying on documentary evidence, he further claimed 25,400 Russian roubles (RUR) for his representation before the domestic courts by Ms Moskalenko, and RUR 28,800 and RUR 28,925 for his representation in Strasbourg by Ms Moskalenko and Ms Orozalieva respectively. He further claimed the equivalent of USD 6,044.14 which he had spent on personal hygiene articles and food during his detention.

107. The Government submitted that the extradition costs had not been related to the substance of his complaints to the Court. Ms Orozalieva's fees in connection with the Strasbourg proceedings were not to be reimbursed because she had never been officially appointed as his representative before the Court. As to Ms Moskalenko's fees, the Government submitted that the applicant had failed to produce any documents showing that these amounts had actually been paid.

108. The Court notes that the extradition proceedings fall outside the scope of the present application and that the applicant's complaints concerning the conditions of detention were declared inadmissible. Accordingly, these expenses are not to be reimbursed. On the other hand, the Court is satisfied, on the basis of the documents and receipts produced, that the applicant incurred certain costs in connection with his representation by Ms Moskalenko and Ms Orozalieva in the domestic and Strasbourg proceedings. Regard being had to the fact that a part of his application was declared inadmissible, the Court awards him EUR 2,500 in respect of costs and expenses, plus any tax that may be chargeable.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

2. *Holds* that there has been a 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* that there has been a violation of the "reasonable-time" requirement of Article 6 § 1 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 2 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President