



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

FOURTH SECTION

**CASE OF LEXA v. SLOVAKIA (no. 2)**

*(Application no. 34761/03)*

JUDGMENT

STRASBOURG

5 January 2010

**FINAL**

*05/04/2010*

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



**In the case of** Lexa v. Slovakia (no. 2),

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 December 2009,

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

## PROCEDURE

1. The case originated in an application (no. 34761/03) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Mr Ivan Lexa (“the applicant”), on 23 October 2003.

2. The applicant was represented by Mr L. Hlbočan and Mr J. Cuper, lawyers practising in Bratislava. The Government of the Slovak Republic (“the Government”) were represented by Mrs A. Poláčková and Mrs. M. Pirošíková, their successive Agents.

3. The applicant alleged, in particular, that he had been remanded in custody contrary to his rights under Article 5 §§ 1 and 4 of the Convention.

4. On 9 May 2006 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in Bratislava. Between 1995 and 1998 he was the Director of the Slovak Information Service (*Slovenská informačná služba*), the Slovakian intelligence service. In September 1998 he was elected as a member of the National Council of the Slovak Republic (the Parliament) for a four-year term.

### **A. Criminal proceedings against the applicant and his detention on remand**

6. The applicant was summoned to give an explanation to a police investigator on 5 December 2002. On that day the investigator arrested the applicant and issued a decision in which he accused him of incitement to commit murder, abuse of authority and the mishandling of information classified as a State secret. The decision stated that the applicant was suspected of having prevented the proper investigation of the offence of abduction of the son of the then President of Slovakia abroad (for further details concerning that case see also *Lexa v. Slovakia*, no. 54334/00, §§ 9-63, 23 September 2008).

7. In particular, the decision referred to an extensive investigation including several statements of experts, documentary evidence obtained from the Slovak Intelligence Service, the examination of 58 witnesses including 8 witnesses whose identity was not disclosed and other evidence. The information thus obtained sufficiently justified the conclusion that the applicant, in his capacity as Director of the Slovak Intelligence Service, had taken the action described below with a view to (i) preventing the offence of abduction of the President's son in 1995 from being elucidated, (ii) threatening F., a former member of the Slovak Intelligence Service, who had confirmed the involvement of the secret service in that offence and who had later been forced to hide abroad and (iii) preventing witness R. from maintaining contact with F. and killing the former. The applicant was accused of offering 2 million Slovak korunas (SKK) to S. to kill R. In that context, the applicant was suspected of having arranged for the monitoring of several persons and had transmitted the information thus obtained to S. despite the fact that it had been classified as "strictly secret". S. had asked at least five persons to kill R. After the first attempt had failed, the perpetrators had activated, in April 1996, an explosive device which had been attached to R.'s car. The car had caught fire and R. had died inside. The investigator's decision referred to a different set of proceedings brought against two persons accused of having activated the device.

8. The applicant immediately filed a complaint against the decision which a public prosecutor dismissed on the same day. The public prosecutor requested that the applicant be remanded in custody pursuant to Article 67 § 1 (a), (b) and Article 67 § 2 of the Code of Criminal Procedure.

9. On 7 December 2002 the applicant, in the presence of two lawyers, was heard by a judge of the Bratislava I District Court. The applicant stated that he knew neither R. nor the persons allegedly involved in his killing. His deprivation of liberty was arbitrary. The evidence on which the investigator relied had not been obtained in accordance with the relevant provisions of the criminal law and, as such, it could not be used in proceedings before a court. The applicant also complained that the

investigator had not allowed him or his lawyers to consult the file without relying on any relevant reason. The judge informed the applicant that he would not put the file at his disposal as, at that stage of proceedings, such action was within the power of the investigator.

10. On the same day the judge remanded the applicant in custody with effect from 5 December 2002. The judge did not accept that there was a risk of the applicant's absconding or influencing witnesses within the meaning of Article 67 § 1 (a) and (b) of the Code of Criminal Procedure. However, the decision stated, with reference to Article 67 § 2 of the Code of Criminal Procedure, that the applicant was charged with an offence carrying a minimum prison sentence of twelve years. The court's decision also stated that the investigator had violated the applicant's right to be presumed innocent by holding that his actions had met the constituent elements of the offences in issue.

11. The applicant filed a complaint which he supplemented several times. He alleged that the District Court judge had not allowed him or his counsel to consult the case file and that the evidence available had not been obtained in accordance with the procedural requirements and did not justify his being accused of the offences in issue. The applicant also submitted that the relevant events had occurred in 1996 and that, subsequently, public authorities had influenced public opinion, indicating that the applicant was responsible for the events in question. Furthermore, the first-instance court had disregarded the applicant's own position, namely that the prosecuting authorities were biased and had striven to remand him in custody by all means. The applicant relied on the Court's case-law under Article 5 §§ 1 and 4 of the Convention.

12. On 7 January 2003 the applicant's counsel requested permission to consult the file. The Bratislava Regional Court permitted them to do so from 9 to 12 a.m. on 14 January 2003.

13. The Bratislava Regional Court dismissed the applicant's complaint against the decision on his detention on remand at a meeting held on 14 January 2003, apparently shortly after the applicant's counsel had consulted the file. The court met *in camera*; the relevant law excluded both the applicant and the public prosecutor from attending.

14. The decision stated that the applicant had been remanded in custody in accordance with the applicable procedural rules and that his detention was justified under Article 67 § 2 of the Code of Criminal Procedure. As to the applicant's argument that he had been accused of the offences in issue arbitrarily, the decision stated that the Regional Court had thoroughly examined the evidence included in the file. It noted that the criminal proceedings against the applicant were at the initial stage only and concluded that the evidence available at that time justified the suspicion that the offences in issue had been committed. The applicant's detention was not arbitrary. As to the applicant's objections to the conduct of the criminal

proceedings, the Regional Court pointed out that they fell within the competence of the public prosecutor in charge of the case.

15. On 14 February 2003 the Bratislava I District Court dismissed the applicant's request for release.

16. On 2 June 2003 a judge of the Bratislava I District Court refused to extend the applicant's detention. The decision stated, *inter alia*, that there had been relevant reasons for the applicant's detention on remand when the Bratislava I District Court had delivered the above decisions of 7 December 2002 and 14 February 2003. The file contained evidence both against the applicant and in his favour. The former type of evidence had been taken in 2000 in the context of criminal proceedings against two other persons. As such it could not be used in the context of the criminal proceedings against the applicant. It was not clear why the investigator had not re-examined the witnesses concerned in the context of the criminal proceedings against the applicant. The reliability of certain statements could be cast into doubt as they had been made by persons linked to organised crime.

17. The judge further held that in the period after 5 December 2002 no evidence had been obtained in support of the accusation against the applicant. Thus during the six months the applicant was detained the investigator and the prosecutor had failed to gather sufficient evidence capable of strengthening the suspicion that the applicant had committed the offence imputed to him. On the contrary, the evidence obtained in the course of the last four months was in favour of the applicant. The ground for his detention had therefore ceased to exist.

18. On 5 June 2003 the public prosecutor ordered the applicant's release.

19. On 21 September 2006 the Special Prosecution Service at the General Prosecutor's Office discontinued the criminal proceedings on the ground that the facts underlying the proceedings had not occurred. The decision stated, *inter alia*, that the file contained no relevant evidence indicating that the applicant had committed the offence imputed to him. There was no proof that the accused persons in the other set of proceedings had committed the offence which, according to the accusation, the applicant had allegedly incited them to commit.

#### **B. Press coverage of the applicant's case and statements of public officials**

20. On 5 December 2002 an extraordinary briefing was held at which the Minister of the Interior provided details concerning the arrest of the applicant. The Minister read out extracts from the decision by which the applicant had been accused.

21. On 6 December 2002 the daily *Sme* with nationwide distribution published an article about the case. It reported on the Minister's statements

at the above briefing. Reference was also made to a statement by a public prosecutor who had pointed out that the decision on the applicant's guilt or innocence lay with a court and had expressed the view that the existing evidence was sufficient.

22. On 10 December 2002 *Sme* published an interview with the investigator who had accused the applicant of the above offences. The investigator stated that the police had had sufficient evidence, comprising both witness statements and documents, to bring criminal proceedings against the applicant.

23. On 14 December 2002 *Sme* reported on statements made by the public prosecutor in charge of the applicant's case. According to those statements, one witness had confirmed that the applicant had offered him SKK 2 million for the killing of the person concerned.

24. Finally, on 16 December 2002 *Sme* published an article about the judge of the Bratislava I District Court who had remanded the applicant in custody. The article indicated that the judge had been aware that the applicant had been summoned to appear before a police investigator on 5 December 2002. At that time the judge had been on duty and he had had a premonition that "something would happen". The judge expressed the view that the case had fallen to be dealt with by him by pure chance. The judge had had only one day to study the file, which comprised several hundred pages. The hearing of the applicant prior to his detention on remand had lasted 4 hours. The judge confirmed that, according to documents included in the file, one witness had confirmed that the applicant had asked him to eliminate a witness against him for SKK 2 million.

### **C. Constitutional proceedings**

25. On 13 March 2003 the applicant filed a complaint with the Constitutional Court. He alleged a violation of his rights under Article 5 §§ 1, 3 and 4 and under Article 6 §§ 1, 2 and 3 of the Convention. He also relied on several constitutional provisions.

26. As regards the proceedings leading to the Bratislava I District Court's decision to remand him in custody, the applicant complained that the judge had not allowed him and his counsel to consult the case file, indicating that such a decision was within the competence of the investigator. The applicant thus could not show that his accusation had been based on evidence which had been obtained by unlawful means and which, for that reason, could not be used in proceedings before a court. The judge had not examined whether relevant reasons for the applicant's detention had existed.

27. The applicant further complained that the judge of the Bratislava I District Court had subsequently given an interview in which he had made comments on the applicant's deprivation of liberty and disclosed details

from the case file. The applicant affirmed that those statements had been made in the context of a campaign launched against him. His rights to a fair hearing and to be presumed innocent had thereby been violated.

28. As regards the decision given by the Bratislava Regional Court on 14 January 2003, the applicant complained that the principle of equality of arms had been breached as he had not had sufficient time, after his counsel had consulted the file, to supplement his complaint against the decision on his detention on remand. He had been accused on the strength of evidence obtained contrary to the relevant provisions of the Code of Criminal Procedure in that it had been taken previously within the framework of another set of proceedings. That had been a deliberate attempt to diminish his ability to defend himself. That evidence could not be used in proceedings before courts, including proceedings concerning his detention on remand.

29. On 16 April 2003 the Constitutional Court rejected the complaint. The decision stated that the Constitutional Court lacked the power to review the factual findings of ordinary courts in matters relating to detention on remand. The Constitutional Court found that in the context of the criminal proceedings brought against him the applicant risked a minimum prison term of twelve years. The material condition for his detention on remand under Article 67 § 2 of the Code of Criminal Procedure had therefore been made out. Both courts had examined the file and concluded that the evidence available justified the suspicion that the applicant had been involved in the offences concerned. However, a “reasonable suspicion” that a person had committed an offence did not require the existence of proof. In respect of this part of the applicant’s complaint the Constitutional Court concluded that it lacked the power to substitute the decision-making of the ordinary courts on the applicant’s detention on remand.

30. The Constitutional Court further declared manifestly ill-founded the complaints under Article 5 § 3 and Article 6 of the Convention. It noted that the applicant had been assisted by two advocates during his examination by the judge of the District Court. He had had an adequate opportunity to defend his rights. As to the alleged violation of Article 5 § 4 of the Convention, the Constitutional Court held that it had been open to the applicant to bring proceedings with a view to challenging the lawfulness of his detention on remand. However, he had not availed himself of that right. There was no causal link between the conduct of the ordinary courts in the proceedings in issue and the applicant’s right under Article 5 § 4 of the Convention. As regards the principle of equality of arms enshrined in Article 6 of the Convention, it was not applicable to proceedings in which the courts deprive a person of liberty for the purpose of his or her criminal prosecution.

31. Finally, the Constitutional Court noted that the applicant had filed his complaints under Articles 6 §§ 1 and 2 of the Convention about the

statements made by the District Court judge more than two months after he had learned about the article in issue. In that respect, the statutory time-limit had not been respected.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Code of Criminal Procedure

32. Article 65 § 1 gives the accused person the right to consult the file with certain restrictions enumerated therein. Paragraph 2 provides that, at the pre-trial stage, the public prosecutor or the police authority can only refuse a person access to a file concerning him or her for exceptional reasons.

33. Article 67 § 2 provides that an accused person can be remanded in custody where he or she is prosecuted for an offence punishable with a minimum prison sentence of eight years.

34. Article 74 § 1 provides that a complaint is available against a decision to remand a person in custody.

35. Under Article 163 § 1, where the facts established sufficiently justify the conclusion that a criminal offence was committed by a particular person, the investigator or police authority shall deliver a decision, without delay, accusing that person of the offence in issue. The accused is to be notified of the decision within three days and not later than at the beginning of his or her first examination.

### B. Supreme Court's practice

36. In accordance with the Supreme Court's practice (Rt 95/1999), when considering whether reasons for remanding a person in custody exist, the authorities may have regard exclusively to circumstances and findings which have their basis in the procedural steps aimed at the establishment of evidence and which are relevant for the conclusion that a statutory reason exists for detaining a person in custody.

37. In decision Tpj 3/95 of 23 October 1995 the Supreme Court held that the detention on remand of a person under Article 67 § 2 of the Code of Criminal Procedure is lawful where the accused person is prosecuted for an offence punishable with a minimum prison term of eight years provided that a justified suspicion exists that the person concerned committed the offence imputed to him or her. The above minimum prison term as such does not render an accused person's detention mandatory in each case. Article 67 § 2 permits a decision not to remand such an accused person in custody where it is justified by the circumstances of the case or the situation of the accused.

38. In decision NtvI-20/02 of 10 January 2003 the Supreme Court expressed the view that the minimum prison term set out in Article 67 § 2 of the Code of Criminal Procedure could be the sole reason for a person's detention only for a limited time, in particular at the initial stage of criminal proceedings. If a person was detained for longer, further relevant reasons were required.

## THE LAW

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

39. The applicant complained that his detention had been unlawful because there were no grounds for reasonable suspicion that he had committed an offence and because the evidence on which his accusation had been based was inadmissible in the criminal proceedings against him. He relied on Article 5 § 1 of the Convention, which reads as follows:

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

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

40. The Government initially contested that argument but in their subsequent submissions they admitted that the complaint raised serious issues from the point of view of the Convention.

#### **A. Admissibility**

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

## **B. Merits**

### *1. The parties' submissions*

42. The applicant maintained that he had been remanded in custody for strictly formal reasons, namely, because he risked a heavy penalty within the meaning of Article 67 § 2 of the Code of Criminal Procedure. The file contained no relevant evidence on the basis of which the applicant could be reasonably suspected of having committed the offences imputed to him. The courts had failed to examine to what extent the accusation against the applicant was justified and his detention necessary, in particular with due regard to the circumstances of the case and the applicant as an individual.

43. The possibility of remanding a person in custody for reasons set out in Article 67 § 2 of the Code of Criminal Procedure entailed the risk of abuse and arbitrariness. In the applicant's view, his deprivation of liberty was a case in point. In this respect the applicant pointed out that at the relevant time he had been a representative of a political party and that he had been remanded in custody at a time when local elections were to be held.

44. In their observations submitted in September 2006 the Government argued that the applicant had been detained in accordance with the requirements of Article 5 § 1 (c) of the Convention. He had been remanded in custody pursuant to Article 67 § 2 of the Code Criminal Procedure and there had been a reasonable suspicion that he had committed the offences in issue. The fact that the evidence on which the authorities relied could not formally be used in the criminal proceedings against the applicant did not affect the position.

45. In their subsequent submission of January 2007 the Government referred to the prosecutor's decision to discontinue the criminal proceedings given on 21 September 2006 and also to the Bratislava I District Court's decision dismissing the request for an extension of the applicant's detention. On the basis of those decisions the Government expressed certain doubts as to whether there had been a reasonable suspicion that a criminal offence imputable to the applicant had been committed justifying his detention on remand. They left the determination of that issue to the Court.

### *2. The Court's assessment*

#### **(a) Recapitulation of the relevant principles**

46. The relevant practice of the Court is set out, for example, in *Baranowski v. Poland*, no. 28358/95, §§ 50-51, ECHR 2000-III; *K.-F. v. Germany*, 27 November 1997, §§ 50-54, *Reports of Judgments and Decisions* 1997-VII; and *O'Hara v. the United Kingdom*, no. 37555/97, §§

34 and 36, ECHR 2001-X, all with further references. It can be summarised as follows.

47. 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 the primary but not always a 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, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.

48. It is also a requirement under Article 5 § 1 that the arrest and detention be effected for the purpose of bringing the person concerned before the competent legal authority, *inter alia*, on reasonable suspicion of having committed an offence.

49. The “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case.

50. The standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest. The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation.

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

51. In the present case the applicant was accused of several offences on the ground that he was suspected of having prevented the proper investigation of the offence of abduction of the son of the then President of Slovakia abroad. A judge of the Bratislava I District Court remanded the applicant in custody. With reference to the actions of which the applicant had been accused the judge held that the applicant’s detention was necessary within the meaning of Article 67 § 2 of the Code of Criminal Procedure. Subsequently the Bratislava Regional Court upheld that decision. It held, with reference to the documents included in the file, that the evidence available at that time justified the suspicion that the offences in issue had been committed.

52. In these circumstances the Court accepts that the applicant was remanded in custody in accordance with the domestic law on the ground that he was accused of a criminal offence and for the purpose of being

brought before the competent legal authority which was to determine whether or not that suspicion was justified. His detention therefore fell under Article 5 § 1 (c) of the Convention.

53. The parties' views differed as to whether the applicant could have been reasonably suspected of having committed the offences imputed to him.

54. The domestic authorities referred to an extensive investigation including statements of experts, documentary evidence obtained from the Slovak Intelligence Service, the examination of 58 witnesses and other evidence. They considered that the information thus obtained sufficiently justified the conclusion that the applicant, in his capacity as Director of the Slovak Intelligence Service, had taken action with a view to (i) preventing the offence of abduction of the President's son in 1995 from being elucidated, (ii) threatening a former member of the Slovak Intelligence Service, and (iii) arranging for the elimination of a witness.

55. Thus the accusation against the applicant was of a serious nature. Specific and quite detailed reasons were given. There is no indication that the relevant information had not actually been obtained and documented. The Court can therefore accept that such reasons would have been capable of satisfying an objective observer, at the relevant time, that the applicant may have committed an offence. The applicant has not substantiated his allegation that the investigation was not conducted in good faith or that his arrest and detention were effected for a purpose other than investigating the allegations made against him.

56. The Court has had regard to the applicant's argument that the information against him had been obtained in a different set of criminal proceedings and that it could not, as such, be used before a court in the context of his trial. It also noted that the applicant was ultimately not tried by a court as the prosecution concluded, in 2006, that the offence in issue had not been committed.

57. However, those facts do not necessarily mean that the suspicion against the applicant was unsubstantiated when he was remanded in custody or that the purpose of his detention was otherwise not in accordance with Article 5 § 1 (c). In particular, the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 § 1 does not 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, for example, *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B). As stated above, the object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest or detention.

58. In view of the above considerations, the Court accepts that the applicant's detention on remand was compatible with Article 5 § 1 of the Convention.

Accordingly, there has been no violation of that provision.

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

59. The applicant complained that in the proceedings in which he had challenged the lawfulness of his detention on remand he had been prevented from defending his rights in an appropriate manner. He relied on Article 5 § 4 of the Convention, which provides:

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

### A. Admissibility

60. In their observations submitted in 2006 the Government contested the applicant's complaint. In their subsequent observations, submitted in 2007, they admitted, with reference to the Court's practice, that an issue arose as regards the fairness of the proceedings in which the lawfulness of the applicant's detention had been reviewed. As to the fact that the Bratislava Regional Court had not heard the applicant prior to deciding on his complaint, the Government maintained that the applicant had not raised it in his complaint to the Constitutional Court.

61. The applicant maintained that the guarantees of Article 5 § 4 had not been complied with.

62. The Court notes that, at the relevant time, the domestic law did not provide for hearing an accused or a counsel when examining the accused person's complaint against a judge's decision to remand him or her in custody. The Constitutional Court held that it lacked jurisdiction to examine complaints lodged by natural or legal persons when the determination of the point in issue involved the preliminary question of conflict of legal rules (see, for example, *Urbárska obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, §§ 80 and 88, ECHR 2007-XIII (extracts)). The Government's objection must therefore be dismissed.

63. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

## B. Merits

### 1. *The parties' submissions*

64. The applicant maintained that the proceedings in issue had been unfair because, in particular, neither he nor his counsel had had an adequate opportunity to submit arguments on the basis of the information contained in the file and because the regional court had not heard him.

65. The Government referred to the case-law of the Court, admitted that this complaint raised an issue under Article 5 § 4 and left the determination of the matter to the Court.

### 2. *The Court's assessment*

#### (a) **Recapitulation of the relevant principles**

66. The relevant practice of the Court is set out, for example, in *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts); *Łaszkiiewicz v. Poland*, no. 28481/03, §§ 77-78, 15 January 2008; *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009; *Lebedev v. Russia*, no. 4493/04, §§ 70-77, 25 October 2007; and *Lietzow v. Germany*, no. 24479/94, §§ 44 and 47, ECHR 2001-I, all with further references. It can be summed up as follows.

67. By virtue of Article 5 § 4, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, within the meaning of Article 5 § 1, of their deprivation of liberty. The proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. However, they must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. It is thereby not decisive whether the review was prompted by an application for release lodged by the defence or a request for detention introduced by the prosecution. In order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceedings take place.

68. Although the Convention does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord the detainees the same guarantees on appeal as at first instance.

69. The fundamental guarantees under Article 5 § 4 include, *inter alia*, the right to an effective hearing by the judge examining an appeal against detention. Proceedings concerning an appeal against detention must ensure equality of arms between the parties. One of the most important implications of equality of arms is the right of access to the investigation file; the opportunity of effectively challenging the statements or views which the prosecution bases on these documents presupposes in principle that the defence has access to them. The appraisal of the need to remand an individual in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case.

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

70. In the present case the applicant lodged a complaint against the Bratislava I District Court's decision to remand him in custody. On 7 January 2003 he requested that his counsel should be allowed to consult the file, which they had not been able to examine at the time when the applicant had been remanded in custody and which contained extensive documents comprising several hundred pages (see paragraphs 9, 12 and 24 above).

71. The regional court allowed the counsel to examine the file from 9 to 12 a.m. on 14 January 2003. It dismissed the applicant's complaint against the decision on his detention on remand at a session held on 14 January 2003, shortly after the applicant's counsel had consulted the file. The court met *in camera*.

72. Thus, although the regional court allowed the counsel of the applicant to consult the file, neither they nor the applicant had a practical possibility of submitting arguments, be it in writing or orally, challenging the reliability of the evidence included in the file.

73. It is true that the accusation and the district court's decision of 7 December 2002 gave some details about the facts grounding the suspicion against the applicant. However the information provided in this way was only an account of the facts as construed by the investigator and the district court judge. It is hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence which he seeks to be given access to (see also *Garcia Alva v. Germany*, no. 23541/94, § 41, 13 February 2001).

74. Having regard to the foregoing, the Court considers that the procedure before the Bratislava Regional Court which reviewed the lawfulness of the applicant's detention on remand failed to ensure equality of arms since the applicant could not adequately challenge the grounds underlying his prosecution and detention in that context. In these circumstances, there is no need to examine the applicant's complaint that the regional court had not heard him.

75. Accordingly, there has been a violation of Article 5 § 4 of the Convention.

### III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

76. The applicant further complained that the facts of the case also amounted to a breach of his rights under Article 5 §§ 3 and 5, Article 6 §§ 1, 2, 3 (b) and (c) and under Article 18 of the Convention.

However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence and are not covered by the above conclusions under Article 5 §§ 1 and 4 of the Convention, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### **A. Damage**

78. The applicant claimed compensation in respect of non-pecuniary damage, the amount of which he left to the discretion of the Court.

79. The Government were of the view that a finding of a violation of the applicant's rights under Article 5 would provide in itself sufficient satisfaction to the applicant.

80. The Court awards the applicant 2,000 euros (EUR) in respect of non-pecuniary damage.

## **B. Costs and expenses**

81. The applicant also claimed EUR 9,430.46 for the costs and expenses incurred before the Constitutional Court and the Court. That sum comprised the fees of two advocates (EUR 2,726.97) and translation costs (EUR 6,703.49).

82. The Government objected to the amount claimed. They asked the Court to award compensation only for the reasonably incurred costs and expenses.

83. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria and noting that the applicant was only partly successful in his complaints, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads.

## **C. Default interest**

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

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the complaints under Article 5 §§ 1 and 4 concerning the lawfulness of the applicant's detention and the proceedings concerning its review admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 5 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Nicolas Bratza  
President