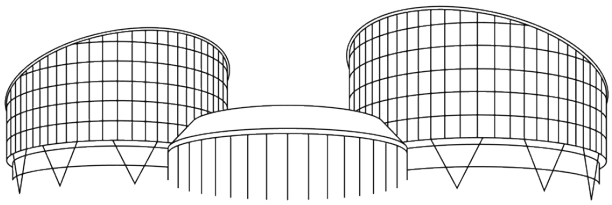

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ADAMOV v. SWITZERLAND

(Application no. 3052/06)

JUDGMENT

STRASBOURG

21 June 2011

This judgment is final but it may be subject to editorial revision.

In the case of Adamov v. Switzerland,

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

Françoise Tulkens, *President,*
David Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 31 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 3052/06) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Yevgeni Olegovich Adamov ("the applicant"), on 16 January 2006.

2. The applicant was represented by Mr M. Harari, a lawyer practising in Geneva. The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger, European Law and International Human Rights Protection Division, Federal Office of Justice.

3. On 19 March 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided that the Chamber would rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

4. The Government of the Russian Federation did not avail themselves of the right to intervene in the proceedings (Article 36 § 1).

5. On 1 February 2011 the Court's Sections were reorganised. The application was assigned to the Second Section (Rules 25 § 1 and 52 § 1 of the Rules of Court).

6. On 31 May 2011 the Chamber decided, further to a request from the applicant, not to hold a hearing in the present case, finding that it did not need to do so in order to discharge its functions under Article 38 of the Convention (Rule 54 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1939 and lives in Moscow.

8. In 2004 criminal proceedings were brought against him in the United States of America. They concerned his alleged misappropriation of funds provided to Russia by the USA during his term as Russian Minister for Energy.

9. On 11 February 2005 he obtained a four-month Swiss visa issued by the Swiss Embassy in Moscow, valid until 10 June 2005. On the visa application form he had indicated, without being more specific, that the main purpose of his journey to Switzerland was to visit his daughter, who was living in Bern.

10. On 21 February 2002 criminal proceedings were opened against the applicant's daughter, by the competent investigating judge for the Canton of Bern, on a charge of money laundering. The suspicions notably concerned sums of money she had allegedly received from her father.

11. On 5 April 2005, when consulting the case file concerning the criminal proceedings against the applicant's daughter, her former lawyer informed the investigating judge that the applicant visited Switzerland from time to time and that he agreed to be questioned in connection with the case in question. The applicant then indicated to his daughter's lawyer that he was prepared to come to Switzerland to be questioned by the investigating judge. He explained that it would suit him if the questioning took place between 20 April and 6 May 2005.

12. On 15 April 2005 the investigating judge thus suggested two possible dates to the new lawyer representing the applicant's daughter, namely 1 and 2 May 2005.

13. After arriving in Switzerland on 20 April 2005 the applicant expressed, through his daughter's lawyer, his preference for 2 May 2005 at 2 p.m. He asked the investigating judge to confirm that date.

14. On the same day the judge duly issued a summons using the appropriate form in accordance with practice in the Canton of Bern. The hearing was scheduled for 2 May 2005 and the summons indicated that any delay in appearance or unjustified absence from the hearing would entail a penalty, with the possibility of using force in the event of non-appearance. The summons, which was addressed to the applicant, was served at his daughter's private address in Bern. A copy was also sent to her lawyer for information purposes.

15. On 28 April 2005 the investigating judge contacted a public prosecutor in Pennsylvania, USA, to find out any information that might be useful in the proceedings against the applicant's daughter. During the

conversation, the judge mentioned that he would be questioning the applicant on 2 May 2005 at 2 p.m.

16. On 29 April 2005 the US Department of Justice sent the Swiss Federal Office of Justice a request for the applicant's provisional arrest in accordance with the extradition treaty of 14 November 1990 between Switzerland and the USA.

17. On the same day the Federal Office of Justice (mutual legal assistance division) issued an "urgent" order for the applicant's arrest that was sent to the investigating judge for the Canton of Bern.

18. On 2 May 2005 at 2 p.m. the applicant appeared before the investigating judge for the Canton of Bern to give evidence in the proceedings against his daughter. When asked why he was in Switzerland he replied that he was visiting for private reasons but also for business.

19. After the interview, which lasted about four hours, the investigating judge notified the applicant that he was under arrest. Two police officers of the Canton of Bern, who had been waiting in a neighbouring room for the interview to finish, immediately took him to the regional prison of Bern.

20. On 3 May 2005 the Federal Office of Justice issued an order for the applicant's provisional detention pending extradition and it was served on the applicant the next day.

21. On 17 May 2005 Russia also applied for his extradition.

22. On the same day, the applicant lodged an appeal with the Appellate Division of the Federal Criminal Court.

23. During his detention the applicant wrote an article, which was published on 6 June 2005 in the Moscow daily newspaper *Izwestija*. He explained that his trip was connected to two projects on which he was working at the time, concerning the export of energy by Russia and technological cooperation, in particular with an energy supplier based in Switzerland.

24. On 9 June 2005 the Federal Criminal Court upheld the applicant's appeal and set aside the extradition arrest order against him. The court took the view that the applicant had been in Switzerland for questioning in the context of criminal proceedings against his daughter, that the summons for the interview of 2 May 2005 should have been served on him through mutual assistance channels and that the protection afforded by the safe-conduct clause, deriving from the requirement of good faith, was also valid for a person examined as a witness who had not been summoned through mutual assistance channels but who had appeared "spontaneously" in Switzerland to give evidence.

25. On 17 June 2005 the Federal Office of Justice appealed before the Federal Court against the Federal Criminal Court's decision.

26. On 24 and 27 June 2005 the US authorities filed a formal request, dated 2 June 2005, for the applicant's extradition to the USA.

27. On 14 July 2005 the First Public Law Division of the Federal Court upheld the appeal of the Federal Office of Justice.

28. The Federal Court basically took the view that the applicant had been visiting Switzerland for private purposes – to see his daughter – and for business. In its view, the Federal Criminal Court had clearly made an erroneous and incomplete assessment of the facts in finding that the applicant had come to Switzerland in order to give evidence as a witness in criminal proceedings. It was not therefore appropriate to apply Article 12 of the European Convention on Mutual Assistance in Criminal matters of 20 April 1959 or Article 73 of the Federal Law on International Mutual Assistance in Criminal Matters (see paragraphs 31-32 below). The case was referred back to the Federal Criminal Court for examination of the applicant's other arguments (breach of the Russian Government's immunity under international law, and the allegedly political nature of the criminal proceedings against him in the USA).

29. The applicant was held in custody until 30 December 2005 and then extradited to the Russian Federation pursuant to an administrative decision of the Federal Court of 22 December 2005. That court, unlike the administrative authority, the Federal Office of Justice, found that priority had to be given to the Russian extradition request, as the applicant was a Russian national and stood accused of committing criminal acts mainly in that country.

30. In a decision of 6 December 2007 the Federal Criminal Court dismissed, at last instance, a request by the applicant for compensation in respect of his detention pending extradition. The court found that his detention had not been unlawful.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

31. Article 12 of the European Convention on Mutual Assistance in Criminal matters of 20 April 1959, to which both Switzerland and the Russian Federation are parties, contains a safe-conduct clause. That Article reads as follows:

> "1. A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.
>
> 2. A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons.

3. The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned."

32. Section 73 of the Federal Law on international mutual assistance in criminal matters of 20 March 1981 contains a provision on safe conduct in Switzerland:

Section 73: Safe conduct in Switzerland

"1. A person habitually resident abroad and who appears in Switzerland in a criminal case pursuant to a summons may neither be prosecuted nor restricted in his personal freedom on the basis of reasons that pre-date his entry into Switzerland.

2. A person being prosecuted shall enjoy no safe conduct in respect of the offences specified in the summons.

3. The safe conduct provided for in paragraph 1 shall cease when the person leaves Switzerland and at the latest three days after he is permitted to leave by the summoning authorities."

33. The object and purpose of the safe-conduct clause were explained as follows by a Federal Court judgment of 26 April 1978 (ATF 104 Ia 448):

"5. ... The safe-conduct clause, of Swiss origin, was quite naturally inserted in the treaties in order to avoid disguised extraditions. In so far as the treaties laid down the conditions in which a country was obliged to consent to the extradition of criminals to another country, it was appropriate to preclude the situation where a witness, who was summoned to appear in another country, was detained there without heed for the substantive conditions or formalities required for extradition.

Subsequently, the various States generally refrained from laying down, in their extradition or mutual assistance treaties, an obligation for witnesses to appear abroad, as was first the case in the Treaty of 1843 between Belgium and the Netherlands (see Von Martitz, *op. cit.*, and vol. II, p. 722, and 725, no. 37). The same guarantees were nevertheless maintained for witnesses residing in one of the States parties who were summoned in the other and who appeared there voluntarily. The issue gave rise to difficult negotiations between Switzerland and Italy during discussion of the extradition treaty that was to replace one that had been concluded with Sardinia in 1843. On the proposal of the Swiss Government, it was finally decided that a witness could never be forced to appear before the foreign court. When the personal appearance of a witness was required, the Government of his country would advise him to comply with the request. If the witness agreed to leave, in no case could he be arrested or intercepted for an act pre-dating his appearance during his obligatory stay in the place where the judge examining him exercised his duties or while he was travelling (Article 14 of the Convention of 22 July 1868, applicable until the entry into force for Switzerland and Italy of the European Convention on mutual assistance in criminal matters, RS 12, p. 160, cf. FF 1868 III, pp. 444-445, 869-870).

8 (b) ... It is evident that the fact of travelling, in response to a summons, to another country, without having been requested to do so by the Government of the country of residence, does not render the safe-conduct requirement devoid of justification. In

responding to a summons he received as witness and in travelling for that purpose to another country, the individual in question, if he were not guaranteed safe conduct, would be deprived of the benefit of the safeguards provided for in extradition treaties, and it would seem logical to consider that in complying with the summons he should be immune from arrest and prosecution, as the Federal Court previously decided, in respect of inter-cantonal relations, in its aforementioned judgment (ATF 3, p. 245). This is also the opinion that the Federal Council expressed in its dispatch on the interpretation, on this point, of the European Convention ('According to the convention, the interested parties enjoy this immunity regardless of the channel through which the summons is served', FF 1966 I 493.) ...

(c) Some doubt may admittedly exist as to the exact meaning of Article XV, paragraph 2, of the convention between Switzerland and Spain. However, taking account of the terms of this provision and comparing this text with previous texts, it appears that it must indeed be considered that the immunity resulting therefrom applies to any witness who, having been duly summoned, has appeared voluntarily in the other country, without it being necessary to refer to the form of summons provided for in Article XIV or the intervention of the Government of the country of residence as provided for in Article XV, paragraph 1.

(d) This is the solution which was accepted in a very general manner in the Bill on international mutual assistance in criminal matters, submitted to the Federal Assembly by dispatch of 8 March 1976 (FF 1976 II, p. 497).

The Committee of Experts which prepared the draft law expressed the following view on this subject:

'For a long time, treaties in such matters have regularly provided for safe-conducts to be issued to witnesses and experts who, coming from abroad, appear before the authorities of the requesting State in a criminal case in response to a summons served on them in their State of origin. Experience has shown that, unless a safe-conduct is issued, a summons is rarely complied with in such cases. It would not be understood if such protection were granted only pursuant to a treaty. Moreover, the traditional treaty clause does not appear totally sufficient. In principle it would concern witnesses and experts alone, and only when they appear freely. However, detainees may also be witnesses...' (Report of the Committee of Experts, p. 61/62).

..."

34. In an unpublished judgment of 17 May 1995 (1P.289/1995), the Federal Court had occasion to develop its case-law on safe-conduct clauses as follows:

"2 (a) The safe-conduct clause was inserted into international treaties in order to avoid disguised extradition: a witness required to appear in another country cannot be detained there without heed for the substantive conditions or formalities required for extradition (see, for the background to this clause, Federal Court judgment ATF 104 Ia 452ss., point 5). It will in any event be necessary, under Article 12 of the [European Convention on mutual assistance in criminal matters] and section 73 of the [Federal Law on international mutual assistance in criminal matters], for the authorities of the requesting State to have summoned this witness to appear by serving an order for that purpose. That is not the case here, since the investigating judge did not issue the appellant with an order to appear according to the formalities provided for in

Article 17, paragraph 1, of the Geneva Code of Criminal Procedure, taken together with section 31 of the said Law. The appellant cannot therefore, in principle, rely on the immunity attached to an official order when it has not been issued, as in the present case. On this specific point, this case differs from the factual situation underlying the Federal Court judgment ATF 104 Ia 448 cited by the appellant.

(b) The appellant relies on Article 170 of the Geneva Code of Criminal Procedure, under which any person summoned before the investigating judge must be served with a letter or order for that purpose (para. 1); exceptionally, a summons may be addressed by any other means that is necessary in order to reach the witness (para. 2). He submits in this connection that Mr Perret's letter of 8 March 1995 is equivalent in substance to a summons within the meaning of Article 170, paragraph 2, of the Geneva Code of Criminal Procedure.

(c) Article 170 of the Geneva Code of Criminal Procedure enshrines the rule that it is the judge who conducts the proceedings. While the parties have the right to request the examination of witnesses, in accordance with Article 174 of the said Code, the service of an order to appear is exclusively a matter for the judge. As to Article 170, paragraph 2, of the Code, it refers in particular to exceptional cases where, because of the urgency, the judge notifies an order to appear informally, by telephone or cable, for example. However, the wording of this provision does not prevent the judge, if need be, from requesting a lawyer to bring a witness to the hearing; on the other hand, it probably does not empower a lawyer to summon a witness of his own accord, without the judge authorising or being informed of the witness' appearance.

(d) On 7 March 1995 Mr Perret asked the investigating judge to examine I. as a witness, explaining that he would take care of the 'summons' himself. However, neither Mr Perret, nor I. insisted on the service of an order to appear in the form provided for by Article 174, paragraph 1, of the Geneva Code of Criminal Procedure, taken together with section 31 of the said Law. Nevertheless, the lack of reaction on the part of the investigating judge in this regard could be interpreted as an implicit acquiescence to Mr Perret's proposal to call I. as a witness at the hearing of 13 March 1995, on the basis of an informal summons within the meaning of Article 170, paragraph 2, of the Geneva Code of Criminal Procedure. In addition, Mr Perret was entitled to assume that the investigating judge would have served an order to appear on the appellant if a formal request had been made to him, as was the case for the witness M. A diligent lawyer could well have been expected to make sure what the investigating judge had decided. In any event, the judge himself could not have relied on the absence of a formal order to consider that the appellant would have appeared 'spontaneously' at the hearing of 13 March 1995; he could not have been unaware of Mr Perret's request for the appellant's examination. The fact that Mr Perret did not address his letter of 8 March 1995 to the investigating judge, strange as this may seem, makes no difference. From the point when the investigating judge received a request for the appellant to be called to give evidence as a witness it was his duty to take a formal decision on this matter. By failing to do so, the investigating judge created some ambiguity as to his intentions, and the appellant, summoned through the intermediary of Mr Perret, should not have to assume the consequences thereof. The difference in treatment between the witness M. and the appellant in this regard would indeed appear excessive and therefore arbitrary.

Thus, in failing to give a clear decision as to the means of summoning the appellant to the hearing of 13 March 1995, the investigating judge cast doubt in the mind of the appellant, who was entitled to consider, in good faith, that he had been duly

summoned to the hearing of 13 March 1995, as a witness protected by the immunity referred to in Article 12 of the [European Convention on mutual assistance in criminal matters] and section 73 of the [Federal Law on international mutual assistance in criminal matters].

The appeal must therefore be upheld, the order appealed against set aside and the appellant immediately released.

..."

THE LAW

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

35. The applicant, relying on Article 5 § 1 of the Convention, alleged that his detention pending extradition had been "unlawful". He took the view that the Swiss authorities had wrongly refused to apply the safe-conduct clause in his case. Even if the Court were to find that the clause was not applicable to his situation, the stratagem of the Swiss authorities in circumventing the requisite formalities had to be regarded, in his view, as incompatible with Article 5 § 1 of the Convention, the relevant part of which reads as follows:

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

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

36. The Government contested that argument.

A. Admissibility

37. 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

I. The parties' arguments

(a) The applicant

38. The applicant argued that, in so far as the Government had claimed that his visit to Switzerland was for purely private and business reasons, they had completely disregarded the fact that negotiations had taken place between him and the investigating judge through the intermediary of his daughter and her lawyer in order to find a hearing date and that it had always been clear that he was going to be questioned in Switzerland as a witness. The fact that he had not sought a formal summons as required by the European Convention on mutual assistance in criminal matters and that he had accepted a more informal means of being called to give evidence, through the intermediary of his daughter and her lawyer, had been used by the Federal Court to deprive him of his rights under that convention. Moreover, the applicant argued that the investigating judge's conduct had been particularly arbitrary and in clear breach of international law as he should have complied automatically with the rules of that convention.

39. The applicant further observed that the investigating judge had proposed two precise hearing dates and had then issued a summons according to the practice in the Canton of Bern. The judge's decision to question him in the context of criminal proceedings was thus subject to the European Convention on mutual assistance in criminal matters and to the Federal Law on international mutual assistance in criminal matters. Accordingly, the applicant concluded that the summons addressed to him by the investigating judge on 20 April 2005 at his daughter's address in Bremgarten clearly did not comply with the requirements of that convention. No provision thereof authorised a requesting State to serve notice to appear on an individual residing in another State otherwise than by sending the summons via the competent authorities of the foreign State in which the person concerned permanently resided (see, in particular, Articles 7, 10 and 15 of that convention).

40. The applicant further observed that the investigating judge had evidently been aware that it was advantageous for him to secure the applicant's presence in his office for questioning without going through the complex formalities laid down in the European Convention on mutual assistance in criminal matters, particularly as compliance with the rules would have involved numerous steps related to his status as former minister, for example the lifting of his immunity. If the investigating judge had complied with the rules of the European Convention on mutual assistance in criminal matters, the applicant's questioning could clearly not have taken place within a period of fifteen days from the time when it was first

discussed between the judge and the defence. Moreover, it was even likely that the decision to question the applicant would have met with obstacles stemming from his status as former minister and that the hearing would quite simply not have taken place, because of a failure to obtain authorisation from the Russian authorities.

41. The applicant disputed the Government's opinion that he could not rely on the safe-conduct clause because he was visiting Switzerland for private and commercial reasons. Such an interpretation of the situation was clearly erroneous because it would disregard the fact that, even assuming his visit was for those reasons, the applicant was also aware, from conversations and correspondence between himself, his daughter's lawyers and the investigating judge, that the latter had decided, on 20 April 2005, to question him in order to obtain information in the proceedings against his daughter. On leaving Russia he had thus known that he would be questioned by the investigating judge on 1 or 2 May 2005 in connection with the proceedings against his daughter. Like anyone else in that situation, he was also aware that he was obliged to comply with the investigating judge's decision to question him.

42. In addition, the applicant contended that the Swiss authorities had not acted in good faith in the method used against him. In his submission, it was obvious, as a matter of basic common sense, that he would never have agreed to the investigating judge's decision to question him if he had known that the Swiss authorities did not intend to afford him the protection of safe conduct on his appearance. He observed that the principle of good faith required the application of safe-conduct protection from the beginning of his discussions with the investigating judge and his daughter's lawyers on the subject of his questioning in Bern, absent the formalities laid down in the European Convention on mutual assistance in criminal matters.

43. In the applicant's view, the lack of good faith on the part of the Swiss authorities did not stop there and the precise chronology of events showed that the investigating judge had triggered the request for urgent arrest with a view to his extradition to the USA. He alleged that, when it had become virtually certain for the judge that the applicant would be in his office on 2 May 2005, he had made contact with the competent US authority and had informed it that he would be questioning the applicant shortly afterwards. That telephone call, made on the afternoon of 28 April 2005, had left the competent US authorities time to draft and send to the Federal Office of Justice, on 29 April 2005, an "urgent" request for arrest with a view to extradition on the basis of which the Office, that same day, had sent an arrest order to the investigating judge for the Canton of Bern.

44. Having regard to the foregoing, the applicant argued that the chain of events, from 28 April 2005 onwards, revealed a stratagem that was intended to deprive him of liberty and to enable his extradition to the USA whereas it was known that extradition would not have been possible from his State of

nationality, Russia. The applicant further pointed out that his only mistake was to have trusted the Swiss authorities in failing to envisage that they might use against him his willingness to cooperate in the criminal proceedings being conducted in the Canton of Bern.

45. For all these reasons, the applicant submitted that there had been a violation of Article 5 § 1 of the Convention.

(b) The Government

46. The Government argued that the provisions on mutual assistance were applicable when the requested State was called upon to take measures at the request of the requesting State, or at least to tolerate activity by the latter on its territory, for example the service of a procedural document. They took the view that, in the present case, the applicant had himself made contact with the Swiss authorities from Russia, through the intermediary of his daughter's representative. At the time when a date had been agreed for his questioning by the investigating judge, on 20 April 2005, namely twelve days before the scheduled date, he was already in Switzerland. For those reasons the present case, as far as the questioning was concerned, had not involved any inter-State cooperation in a context of mutual legal assistance. Consequently, the provisions on mutual assistance, and more specifically the safe-conduct clause, could not, in the Government's view, be regarded as applicable in the present case.

47. The Government argued that, in so far as the applicant had claimed that the authorities had used a stratagem to secure his presence in Switzerland, the sequence of events showed clearly that his arrest had not been the result of any ruse or trickery on the part of the authorities. First, as it had already been established, the applicant had taken the decision to go to Switzerland of his own accord, regardless of his questioning by the investigating judge. In particular, his version of the events according to which he had already known, on leaving Russia, where and when the questioning would take place was not correct. The Government pointed out that at the time when the applicant had informed the investigating judge that he was prepared to be questioned in Switzerland and when the judge had suggested precise dates, the investigating judge had not yet had any contact with the US authorities. It was only on 28 April 2005 that the investigating judge had contacted the US authorities. That contact had been unrelated to the applicant's scheduled questioning and had concerned the preparation of a request for mutual assistance to be sent by Switzerland to the USA in the proceedings against the applicant's daughter.

48. The prompt reaction by the US authorities, which the next day had sent the Federal Office of Justice a provisional arrest request by e-mail, fax and express post, showed that the USA had not been informed before the telephone conversation in question that the applicant was in Switzerland. If the arrangement of a hearing with the applicant had been a stratagem to

obtain his extradition to the United States, the investigating judge would most probably not have waited three weeks before informing that country of the applicant's visit.

49. Moreover, the Government argued that, having received advice from his lawyers, especially those in the USA, and being a frequent traveller, the applicant must have been aware of the risks that he was taking when travelling abroad. He could not now attribute to the Swiss authorities the responsibility for a visit that he would have made anyway.

50. In view of the foregoing, the applicant's detention had not been in breach of the principle of good faith. In compliance with the provisions of domestic and international law, it had been decided and executed in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1. It did not therefore constitute a violation of that Article.

2. The Court's assessment

(a) General applicable principles

51. The Court reiterates that, in proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008, and *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III). The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see, *mutatis mutandis*, *K.-F. v. Germany*, 27 November 1997, § 70, *Reports* 1997-VII; *Čonka v. Belgium*, no. 51564/99, § 42, ECHR 2002-I; and *D.G. v. Ireland*, no. 39474/98, § 74, ECHR 2002-III).

52. 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. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court should exercise a certain power to review whether national law – legislation or case-law – has been observed (see *Baranowski v. Poland*, no. 28358/95, §§ 50 and 54, ECHR 2000-III, and *Minjat v. Switzerland*, no. 38223/97, § 39, 28 October 2003).

53. It is essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, being sufficiently precise to allow the individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Minjat*, cited above, § 40).

54. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Amuur*, cited above, § 50; *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports* 1996-V; and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in that provision extends beyond lack of conformity with national law, such that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67).

55. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see *Saadi*, cited above, § 68).

56. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*, 18 December 1986, Series A no. 111; *Čonka*, cited above; and *Saadi,* cited above, § 69). For arbitrariness to be excluded, conformity with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 is required in respect of both the ordering and the execution of the measures involving deprivation of liberty (see *Winterwerp*, cited above, § 39; *Bouamar v. Belgium*, 29 February 1988, § 50, Series A no. 129; and *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X).

57. The Court would further point out that the Convention does not prevent cooperation between member States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (see *Öcalan v. Turkey* [GC], no. 46221/99, § 86, ECHR 2005-IV, and the reference cited therein). Inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161, and *Öcalan*, cited above, § 88).

58. The Convention contains no provisions concerning the circumstances in which extradition may be granted or any preliminary procedure to be followed. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical or disguised extradition cannot as such be regarded as contrary to the Convention (see *Öcalan*, cited above, § 89, and the reference cited therein).

59. The Court's case-law further shows that the Convention does not preclude the legitimate use by national authorities of certain stratagems in order, for example, to counter criminal activities more effectively (see *Čonka*, cited above, § 41). However, not every ruse can be justified, especially when it is implemented in such a way that the principles of legal certainty are tarnished (see *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 58, 13 January 2009). Furthermore, the intention to deprive or otherwise affect an individual's physical liberty should not, in the normal course of events, be consciously hidden by the authorities. In such a situation, the individual should be able to avail himself, if need be, of an available and effective remedy aimed at opposing the authorities' interference and thus preserving his liberty (ibid., § 53).

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

60. The Court observes that the second part of Article 5 § 1 (f) applies to a person "against whom action is being taken with a view to deportation or extradition". In the present case, the US authorities requested the applicant's provisional arrest pursuant to the extradition treaty of 14 November 1990 between Switzerland and the USA. On the basis of that treaty, he was arrested and detained in order to be extradited to the United States. Accordingly, the Court takes the view that the applicant's detention falls within the scope of Article 5 § 1 (f) of the Convention, a point that is not in dispute between the parties.

61. The Court would emphasise at the outset that, in its duly reasoned judgment of 14 July 2005, the Federal Court, ruling on an appeal from the Federal Office of Justice, found in substance that the applicant's detention had been "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention. Moreover, the fact that the applicant was not ultimately extradited to the United States of America but to the Russian Federation was not the result of a finding that his detention had been unlawful, but can be explained by the priority given by the Federal Court, in its judgment of 22 December 2005, to the extradition request lodged by Russia, which was the applicant's State of nationality. Lastly, it should be observed that the justified nature of the detention was confirmed by a decision dated 6 December 2007 of the Federal Criminal Court, which rejected a request for compensation by the applicant.

62. The Court is therefore called upon to determine whether the applicant's detention was "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1. In this connection, it observes that the applicant's allegations contained two main parts: first, he contended that the Swiss authorities had wrongly refused to grant him the benefit of the safe-conduct clause. Second, and regardless of the answer to the first question, he argued that the stratagem used by the national authorities, in circumventing the formal conditions for summoning witnesses to give evidence in Switzerland, was at odds with the principle of good faith and thus infringed Article 5 § 1 of the Convention.

63. The Court will therefore examine in turn these two aspects of the complaint.

(i) Alleged breach of the safe-conduct clause

64. As to whether the applicant was entitled to rely on the safe-conduct clause, he regarded as improper the Government's argument to the effect that he was in Switzerland for private and business purposes and that the European Convention on mutual assistance in criminal matters, and more specifically its safe-conduct clause, were not therefore applicable to his situation.

65. In this connection, the Court would point out that the aim of the safe-conduct clause is to avoid the situation where a witness who is required to give evidence in another country is then detained there without the substantive and procedural conditions for extradition being fulfilled. The witness thus enjoys immunity from arrest or prosecution in respect of any charges or convictions that pre-date his departure from the territory of the requested State (see the Federal Court judgment ATF 104 Ia 448, paragraph 33 above).

66. The Court observes that the applicant did not visit Switzerland specially to give evidence in the criminal proceedings against his daughter, but freely chose to go there, independently of the fact that he would be questioned by the investigating judge. The applicant indeed indicated clearly, in his testimony to the investigating judge of the Canton of Bern, on 2 May 2005, that he was visiting Switzerland of his own accord to see his daughter and for business. The professional purpose of his visit to Switzerland is also apparent from an article by the applicant that was published on 6 June 2005 in the newspaper *Izwestija*.

67. In addition, the Court finds that no "summons" to appear before the Swiss authorities had been served on the applicant in his State of residence, in accordance with Article 12 of the European Convention on mutual assistance in criminal matters and section 73 of the Federal Law on international mutual assistance in criminal matters (see paragraphs 31-32 above). It should also be noted that the applicant was already in Switzerland when the investigating judge issued him with a summons to appear for

questioning on 2 May 2005, that summons being sent to his daughter's private address in Bern. As no inter-State cooperation, in terms of mutual legal assistance, was involved in the present case, it follows that there was no need to protect the applicant from arrest or prosecution in respect of prior offences or convictions and that the safe-conduct clause was not therefore applicable in his case. The present case can be distinguished in this connection from those that led to the above-mentioned judgments of the Federal Court (see paragraphs 33-34 above), in which the individuals concerned had appeared in Switzerland in response to a summons issued by the prosecution authorities, albeit improperly.

68. Moreover, the Court shares the Government's opinion that the applicant, who travelled frequently and had access to legal advice, must have been aware of the risks that he was taking by going abroad, especially in view of the criminal proceedings opened against him in the USA in 2004. There is no evidence that he ever raised the issue of safe-conduct protection himself when he agreed to be questioned by the investigating judge. By consenting to travel to Switzerland without availing himself of the safeguards in the relevant mutual legal assistance instruments, he knowingly waived the benefit of the immunity that the safe-conduct clause would have accorded.

(ii) Alleged breach of the principle of good faith

69. Secondly, the applicant claimed that the Swiss authorities had used inadmissible stratagems in order to deprive him of his immunity against arrest or prosecution. In this connection the Court would reiterate the above-mentioned principle: whilst the use by the authorities of certain stratagems to counter criminal activities is not *per se* at odds with the principle of good faith, in the light of the Convention, not every ruse can be justified (see the case-law cited above in paragraph 59).

70. In the present case the Court observes that, on the basis of the information that the applicant would be going to Switzerland for private and business purposes and that he was prepared to give evidence in the case concerning his daughter, the investigating judge summoned him to appear on 2 May 2005, one of the dates proposed by the applicant himself. It can thus been seen that the judge did not use any ruse or trickery to secure the applicant's presence in Switzerland.

71. Subsequently, as a result of a telephone conversation about the proceedings against the applicant's daughter, the investigating judge informed a public prosecutor in Pennsylvania that he would be questioning the applicant on the agreed date. On the basis of that information, the US Department of Justice sent the Swiss authorities a request for the applicant's provisional arrest pursuant to the extradition treaty of 14 November 1990 between Switzerland and the USA. Further to that request the Federal Office of Justice issued, in compliance with the formalities, an arrest order that was

sent to the investigating judge, who ordered the applicant's arrest. He was arrested as planned on 2 May 2005 after his questioning in the proceedings concerning his daughter. The next day, the applicant's detention was confirmed by an order of provisional detention pending extradition issued by the Federal Office of Justice. In view of the foregoing, the Court finds that the Swiss authorities did not show any bad faith in dealing with the applicant and that, in informing the US authorities of his presence in Switzerland, they acted in compliance with their obligations of inter-State cooperation against cross-border crime.

(iii) Conclusion

72. The Court, taking note of the duly reasoned decisions of the domestic authorities, finds that the applicant's detention with a view to his extradition to the USA, being based on a valid arrest order and pursuing the purpose of inter-State cooperation in fighting cross-border crime, infringed neither the safe-conduct clause nor the principle of good faith. The detention was therefore ordered "in accordance with a procedure prescribed by law", namely both Swiss law and international law.

73. Accordingly, in the present case there has been no violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

Admissibility

74. The applicant further claimed that the refusal to apply the safe-conduct clause in his case and the arbitrary treatment he had received could be explained by the fact that he was a former Minister for Energy of the Russian Federation. He relied in this connection on Article 14, taken together with Article 5 of Convention. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

75. The Court finds that this complaint had not been raised before the domestic courts. It must therefore be dismissed for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 5 § 1 admissible and the remainder of the application inadmissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 5 § 1 of the Convention.

Done in French, and notified in writing on 21 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Tulkens, Sajó and Pinto de Albuquerque is annexed to this judgment

F. T.
S.H.N.

JOINT DISSENTING OPINION OF JUDGES TULKENS, SAJÓ AND PINTO DE ALBUQUERQUE

1. This case concerns the detention in Switzerland, from 2 May to 30 December 2005, of the former Russian Minister for Energy, with a view to his extradition to the USA. He was ultimately extradited to the Russian Federation on account of the priority of the request.

2. The Swiss authorities secured the applicant's presence in Bern so that he could give evidence as a witness in criminal proceedings against his daughter, and they allegedly took advantage of this summons to arrest him with a view to his extradition. Under Article 5 § 1 of the Convention, the main question that arises is that of the application of the safe-conduct clause, as provided for in Article 12 of the European Convention on mutual assistance in criminal matters of 20 April 1959, to which both Switzerland and the Russian Federation are parties.

3. We do not share the conclusion of the majority, who have concluded that the applicant's detention for almost eight months with a view to his extradition was ordered "in accordance with a procedure prescribed by law". We thus wish to explain the reasons for our dissent.

4. It should be noted at the outset that a difference of opinion can be seen between the Federal Criminal Court's decision of 9 June 2005 and that of the Federal Court of 14 July 2005. The former took the view that the protection provided by the safe-conduct clause in Article 12 of the European Convention on mutual assistance in criminal matters was applicable to the applicant (see paragraph 24 of the judgment), whilst the latter found the opposite, considering that the Federal Criminal Court had given an erroneous and incomplete assessment of the facts (see paragraph 28 of the judgment).

5. In this context, the chronology of the events is important. On 5 April 2005 the applicant made it known that he was prepared to go to Switzerland to be questioned as a witness by the investigating judge in connection with criminal proceedings against his daughter for money laundering. On 15 April 2005, *before he left Russia*, the investigating judge suggested to her lawyer two possible dates for a hearing at the court in Bern. The applicant arrived in Switzerland on 20 April 2005. On the same day the investigating judge issued a summons in accordance with the practice in the Canton of Bern, scheduling the hearing for 2 May 2005. The summons was sent to the private address of the applicant's daughter. After a conversation on 28 April 2005 between the investigating judge and a public prosecutor in Pennsylvania, who was thus informed of the applicant's presence in Switzerland, the US Department of Justice, on 29 April 2005, sent a request for the applicant's provisional arrest to the Federal Office of Justice, which ordered his urgent arrest that same day. At the end of the hearing of 2 May

2005, the investigating judge informed the applicant that he was under arrest.

6. It can clearly be seen from the case file that the summoning of the applicant by the investigating judge on 15 April 2005 did not constitute a *formal* notification in compliance with the requirements of the European Convention on mutual assistance in criminal matters, the provisions of which include the safe-conduct clause (Article 12). Neither did it comply with Recommendation R (83)12 of the Committee of Ministers of the Council of Europe of 23 September 1983, concerning safe conduct for witnesses under the European Convention on mutual assistance in criminal matters, which emphasises the importance of meeting all the requirements of the summons, in particular by expressly pointing out the scope of that guarantee in the requesting State. In the applicant's submission, having regard to the negotiations that had taken place with the investigating judge prior to his departure, it was clear that he was going to be questioned as a witness, and this explained why he had accepted a more informal means of calling him for questioning on 2 May 2005 in the proceedings concerning his daughter.

7. The safe-conduct principle is clear: "A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party" (see paragraph 31 of the judgment). Admittedly, if the individual subsequently commits offences in the requesting State the immunity will not apply, just as it does not apply if he or she remains in the requesting State for a period exceeding that for which the immunity has been granted.

8. This is a principle of international law which has been recognised and enshrined in numerous *multilateral treaties* (see Article 7 § 18 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; Article 18 § 27 of the United Nations Convention against Transnational Organized Crime, 2000; Article 46 § 27 of the United Nations Convention against Corruption, 2003) and *bilateral treaties* (for example: Article 27 § 1 of the mutual legal assistance treaty between the USA and Switzerland; Article 34 § 2 of the mutual legal assistance treaty between the USA and Turkey; Article 9 § 1 of the mutual legal assistance treaty between the USA and the Netherlands), and the headquarters agreements of international courts and tribunals (Article 26 of the Headquarters Agreement between the International Criminal Court and the Host State, 2007; Article 18 of the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Criminal Tribunal for the former Yugoslavia, 1994; Article 18 of the Agreement between the United Nations and the United

Republic of Tanzania concerning the Headquarters of the International Tribunal for Rwanda, 1995).

9. This principle has also been recognised by the *international criminal tribunals*. It was applied, for example, in the decision of the International Criminal Tribunal for the former Yugoslavia of 25 June 1996 on the defence motions to summon and protect defence witnesses, and on the giving of evidence by video-link, in which the Chamber observed that "[o]rders for safe conduct as provided for between countries protect a person from persecution and restriction of liberty in the requesting country in relation to acts which preceded his departure from the requested country for purposes of appearing and testifying in response to a request". The Chamber further noted that safe conduct provisions had been included in nearly all mutual assistance treaties and several multilateral agreements[1]. More recently, the safe conduct principle has been reiterated, for example in the same Tribunal's judgment of 12 June 2007 in the *Martić*[2] case and in the decisions of the International Criminal Tribunal for Rwanda in *Nyiramasuhuko*, 17 June 2005, and *Joseph Nzirorera*, 24 March 2009[3].

10. International *legal opinion* has also pointed out that the safe conduct principle derives from the more general principle of good faith, which should protect the trust of a witness who voluntarily complies with a legal assistance request from another State[4].

11. In the present case, one particular factor appears essential and decisive in our view: the judicial authorities' actions seem to *run counter to their own guidelines and national authorities in such matters*. In recent guidelines the Federal Office of Justice has itself explained that safe conduct should be guaranteed to witnesses who have not been notified through the appropriate international legal assistance mechanism[5]. This position reflects the well-established opinion in international law that safe conduct must also apply to witnesses or experts who have been notified in an informal or illegal manner[6]. Furthermore, the Federal Court itself gave a

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[1] Case no. IT-94-1-T, *Prosecutor v. Duško Tadić alias "Dule"*, decision of 25 June1996, § 9. See also F.P. KING and A.-M. LA ROSA, "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996", *European Journal of International Law*, 1997, vol. 8, no. 1, p. 151; A.-M. LA ROSA, *Juridictions pénales internationales. La procédure et la preuve*, Paris, Presses universitaires de France, 2003, pp. 279 et 280.

[2] Affaire no. IT-95-11-T, *Prosecutor v. Milan Martić*, judgment of 12 June 2007, § 534.

[3] See K. MARGETTS and P. HAYDEN, "Current Developments at the Ad Hoc International Criminal Tribunals", *Journal of International Criminal Justice*, 2009, vol. 7, no. 5, p. 1178.

[4] See, to this effect, R. ZIMMERMANN, *La coopération judiciaire internationale en matière pénale*, Brussels, Bruylant, 2009, p. 199, and P. POPP, *Grundzüge der internationalen Rechtshilfe in Strafsachen*, Basel, Helbing & Lichtenhahn, 2001, p. 51, note 82.

[5] *L'entraide judiciaire internationale en matière pénale : directives*, Bern, Office fédéral de la justice, 1998, p. 39; and this passage can also be found in the 2010 edition of the same guidelines, p. 83.

[6] H. GRÜTZNER and P.-G. PÖTZ (dir.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd edition, Heidelberg, 1992, vol. III, "observations préliminaires", no. 15 ; P. POPP,

ruling to this effect on 17 May 1995, rightly recognising the right to safe conduct even though the notification by the national authorities had been made known to the person concerned informally by counsel.

12. In those circumstances we believe that it is reasonable to argue, as the Federal Criminal Court did, that the applicant could have assumed in good faith that he would benefit from protection under Article 12 of the European Convention on mutual assistance in criminal matters.

13. The majority conclude that "[b]y consenting to travel to Switzerland without availing himself of the safeguards in the relevant mutual legal assistance instruments, he knowingly waived the benefit of the immunity that the safe-conduct clause would have provided" (see paragraph 68 of the judgment). We believe that such an allegation is ill-founded and speculative. Moreover, it is hardly compatible with the very *raison d'être* of Article 5 of the Convention, namely protection against arbitrariness.

14. Article 5 § 1 of the Convention requires that any deprivation of liberty must be "in accordance with a procedure prescribed by law"; moreover, the authorised cases of deprivation of liberty are limited to those listed in the text itself. It is well-established case-law that Article 5 must be interpreted strictly by the Court, as only a narrow interpretation of those exceptions is consistent with the aim of that provision (see, *mutatis mutandis*, *K.-F. v. Germany*, 27 November 1997, § 70, *Reports of Judgments and Decisions* 1997-VII; *Čonka v. Belgium*, no. 51564/99, § 42, ECHR 2002-I*;* and *D.G. v. Ireland*, no. 39474/98, § 74, ECHR 2002-III). In addition, for arbitrariness to be excluded, conformity with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 is required in respect of both the ordering and the execution of the measures involving deprivation of liberty (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Bouamar v. Belgium*, 29 February 1988, § 50, Series A no. 129; and *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X).

15. In the present case, we therefore take the view that the applicant's deprivation of liberty was not "in accordance with a procedure prescribed by law" within the meaning of Article 5 of the Convention, since he did not enjoy safe-conduct immunity. In the light of the *raison d'être* of Article 5, a person who is notified informally should be granted the same immunity as a person notified according to the applicable formalities. In any event, the errors committed by the requesting State in the application of the convention of 29 April 1959 could not deprive the applicant of his right to liberty under the Convention.

16. Lastly, the applicant could not be placed at a disadvantage on account of the fact that he had accepted the request for judicial assistance.

Grundzüge der internationalen Rechtshilfe in Strafsachen, *op. cit.*; and C. MARKEES, "Entraide internationale en matière pénale – Troisième partie : autres actes d'entraide", *Fiches Juridiques Suisses*, no. 423c, ch. 125, "sauf-conduit", no. 3.

His voluntary hearing as a witness on 2 May 2005 clearly facilitated the intergovernmental cooperation provided for by the 1959 European Convention on mutual assistance in criminal matters. The essence of safe conduct lies precisely in the link established between a witness who agrees to cooperate with the courts and the temporary immunity granted to that witness, regardless of the circumstances surrounding the notification. That link was broken when the respondent State failed to recognise the applicant's immunity.

17. For all these reasons we cannot but conclude that there has been a violation of Article 5 § 1 of the Convention.