

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

FIFTH SECTION

CASE OF CUCULOVIC v. SWITZERLAND

(Application no. 28865/17)

JUDGMENT

Art 5 § 3 • Applicant's pre-trial detention extended on new and unrelated factual and legal grounds, the initial charges having been dropped, without hearing him in person

Prepared by the Registry. Does not bind the Court.

STRASBOURG

19 February 2026

FINAL

19/05/2026

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



In the case of Cuculovic v. Switzerland,

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

Kateřina Šimáčková*, President*,
María Elósegui,
Georgios A. Serghides,
Andreas Zünd,
Diana Sârcu,
Mykola Gnatovskyy,
Sébastien Biancheri*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 28865/17) 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 Swiss national, Mr Nebojsa Cuculovic ("the applicant"), on 11 April 2017;

the decision to give notice of the application to the Swiss Government ("the Government");

the parties' observations;

Having deliberated in private on 27 January 2026,

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

INTRODUCTION

1. The case mainly concerns an alleged violation of Article 5 § 3 of the Convention in that the applicant's pre-trial detention was extended on the basis of a new, unrelated set of facts and grounds, the initial charges having been dropped, without him having been personally heard in that connection.

THE FACTS

2. The applicant was born in 1995 and lives in Zofingen. He was represented by Mr K. Melunovic, a lawyer practising in Aarau. The Government are represented by their Agent, Mr Xavier-Baptiste Ruedin, of the Federal Office of Justice.

3. The facts of the case may be summarised as follows.

4. On 15 October 2016 the applicant was arrested on suspicion of common assault and making threats against B., and of violating the Narcotics Act. The public prosecutor sought that the applicant be held in pre-trial detention, but on 18 October 2016 the Compulsory Measures Court of the Canton of Aargau, after hearing the applicant in person on the same day, rejected that application owing to the lack of a specific ground for detention, and ordered the applicant's immediate release. The public prosecutor's office appealed against that ruling, and on 20 October 2016 the Court of Appeal

granted the appeal suspensive effect and ordered the applicant's continued detention pending a decision on the appeal.

5. On 27 October 2016 B. notified the public prosecutor's office in writing that he wished to withdraw all criminal complaints against the applicant, of which the public prosecutor's office informed the Court of Appeal by a letter dated 28 October 2016.

6. On 7 November 2016 the public prosecutor's office presented new facts and grounds for detention to the Court of Appeal relating to the applicant's having driven without a license and committed serious traffic violations. The applicant received a copy of the letter.

7. On 18 November 2016 B. confirmed the withdrawal of his criminal complaints during an interview with a public prosecutor. On the same day the applicant requested his immediate release from custody on the basis that the criminal complaints against him had been withdrawn. Since the offences of common assault and making threats both required a formal complaint to be prosecuted, the necessary procedural prerequisites for prosecution had ceased to exist. The applicant did not comment on the new facts and grounds for detention presented by the public prosecutor's office.

8. On 21 November 2016 the Court of Appeal upheld the appeal brought by the public prosecutor's office based on the new facts and grounds submitted by the public prosecutor for the applicant's detention. It overturned the order of the Compulsory Measures Court and ordered that the applicant be held in pre-trial detention for a provisional period of three months. Regarding the charges of common assault and making threats, the Court of Appeal held that there was no longer an urgent suspicion of a crime because of the final withdrawal of the relevant complaints. However, in the absence of a prohibition on new arguments or evidence being presented, the facts and grounds newly ascertained by the public prosecutor's office could be used in the appeal proceedings. In connection with the newly submitted facts, there was both a strong suspicion of guilt and a risk of recidivism.

9. The applicant appealed against that judgment, and on 19 December 2016 the Federal Supreme Court upheld the applicant's appeal in part. It found that the applicant's deprivation of liberty from 28 October to 21 November 2016 had not been based on a judicial decision that met the legal requirements contained in Article 5 § 1 of the Convention. The Court of Appeal should have lifted the pre-trial detention order when it learned of the withdrawal of the criminal complaints on 28 October 2016. Regarding the new facts and grounds for detention, the public prosecutor's office should have filed a new application for detention with the Compulsory Measures Court, which would have had to respect the applicant's rights under Article 5 § 3 of the Convention. Nevertheless, the Court of Appeal had been able to review the detention in the light of the new grounds. The mere absence, for a certain period of time, of a detention order issued in accordance with the relevant legal provisions within the meaning of Article 5 § 1 of the

Convention did not, in itself, justify release from detention if and in so far as the substantive requirements for deprivation of liberty were met. The Court of Appeal, having full jurisdiction, had had to assess the grounds for detention based on the relevant facts and grounds as known at the moment of its assessment, and not merely on the facts and grounds known by the Compulsory Measures Court. Since the public prosecutor's submissions of 7 November 2016 regarding the new facts and grounds for detention had been served on the applicant, no violation of the right to be heard could be identified. The Court of Appeal had also been correct in approving the new facts and grounds for detention.

10. On 5 January 2017 the Federal Supreme Court rejected the applicant's request for revision of the Federal Supreme Court's judgment with the aim of being immediately released from pre-trial detention on the basis that he had not been personally heard by the Court of Appeal and that the proceedings before it had not been a review of his deprivation of liberty, but rather the (re)ordering of such detention.

RELEVANT LEGAL FRAMEWORK

11. The relevant provisions of the Swiss Code of Criminal Procedure, as in force at the material time, read as follows:

Article 220 § 1 – Definitions

"Pre-trial detention begins when it is ordered by the compulsory measures court and ends with the receipt by the court of first instance of the indictment, the accelerated commencement of a custodial sanction or with the accused's release during the investigation."

Article 222 – Appellate remedies

"A detainee may contest decisions ordering, extending or ending his or her pre-trial detention or detention pending the outcome of proceedings before the appeals authority, subject to Article 233."

Article 228 – Application for release from pre-trial detention

"1. The accused may apply to the public prosecutor at any time, in writing or orally on record, for release from pre-trial detention, subject to paragraph 5 below. The application must be accompanied by a brief statement of grounds.

2. If the public prosecutor grants the application, it shall release the accused from pre-trial detention immediately. If it does not wish to grant the application, it shall pass the same together with the case files no later than three days after receipt to the compulsory measures court accompanied by a statement of its opinion.

3. The compulsory measures court shall send the opinion to the accused and his or her defence lawyer and allow them three days to respond.

4. The compulsory measures court shall decide at the latest within five days of receiving the response or of the expiry of the time-limit mentioned in paragraph 3

above. If the accused expressly waives the right to a hearing, the decision may be given in written proceedings. Article 226 paragraphs 2-5 also applies, *mutatis mutandis*.

5. The compulsory measures court may in its decision specify a period of a maximum of one month within which the accused is not permitted to lodge a further application for release."

Article 390 – Written Procedure

"1. Any person who wishes to seek an appellate remedy for which this Code stipulates a written procedure must file the relevant petition.

...

5. The relevant court may order a hearing, either of its own motion or at the request of a party."

Article 397 – Procedure and decision

"An appeal lodged under Article 393 shall be dealt with by written proceedings.

..."

12. The relevant law has evolved since the events in the present case. In particular, since 1 April 2025, Article 222 of the Swiss Code of Criminal Procedure explicitly stipulates that only the detainee may contest decisions ordering, extending or ending his or her remand or preventive detention.

THE LAW

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

13. The applicant complained that the right of the public prosecutor's office to introduce completely new facts and grounds for detention, as well as evidence, in a purely written appeal procedure, without the accused and detained person being heard in person, had led to a violation of his rights under Article 5 §§ 1 and 3. Article 5 of the Convention, in so far as relevant, 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:

...

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

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by

law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

14. The Government contested the complaint.

15. The Court, being the master of characterisation to be given in law to the facts of the case (see *Margaretić v. Croatia*, no. 16115/13, § 75, 5 June 2014), considers that this complaint falls to be examined under Article 5 § 3 of the Convention exclusively.

A. Admissibility

1. The parties' arguments

16. The Government submitted that the applicant had failed to exhaust the domestic remedies. Although the appeal procedure in detention cases is generally conducted in writing in accordance with Article 397 § 1 of the Swiss Code of Criminal Procedure, pursuant to Article 390 § 5 of the same Code (see paragraph 11 above) oral proceedings may be ordered by a court either of its own motion or upon request, which the applicant did not make. Since the applicant was aware of the new facts and grounds presented by the public prosecutor's office, he had also had the opportunity to comment on them, either in writing or in the context of a hearing, which would have been granted to him had he request it.

17. The applicant replied that he had not requested an oral hearing because the Court of Appeal had almost always rejected such requests in the past, and such a request would therefore have been futile and ineffective for the purposes of Article 35 of the Convention.

2. The Court's assessment

18. The Court considers that the question of exhaustion of domestic remedies as argued by the parties should be joined to the merits, since it is closely linked to the substance of the applicant's complaint.

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

B. Merits

1. The parties' arguments

20. The applicant submitted that in the proceedings before the Court of Appeal the grounds for his detention had not been merely supplemented, but completely replaced. As already established by the Federal Supreme Court in its judgment of 19 December 2016, following B.'s withdrawal of the criminal complaints a completely new set of proceeding should have been initiated

regarding the new facts and evidence, and the public prosecutor's office should have submitted a fresh detention application. He should then have been required to have been heard again in those new proceedings.

21. The Government was of the opinion that Article 5 § 3 of the Convention was not applicable. The word "promptly" in Article 5 § 3 implied that the right to be brought before a competent judge refers to the point in time at which a person was first deprived of his or her liberty under the circumstances described in Article 5 § 1 (c) of the Convention. That also applied in cases where there was a substitution of the grounds for detention. B.'s withdrawal of his criminal complaints did not automatically lead to the conclusion of the criminal proceedings; instead, as was also established by the Federal Supreme Court in its judgment, a dismissal of the proceedings would have been required for that to happen. Since the proceedings were not dismissed – and even if that had been unlawful – the proceedings had not in fact concluded, and therefore there had been no need to bring new proceedings or to seek a new order for the applicant's pre-trial detention.

2. The Court's assessment

(a) Applicability of Article 5 § 3

22. Article 5 § 1 contains an exhaustive list of permissible grounds for deprivation of liberty. Given that the applicability of sub-paragraph (c) of Article 5 § 1 triggers also the protection provided by Article 5 § 3, which constitutes an important additional guarantee for an arrested person, and considering that the Government contests its applicability, the Court considers it appropriate to analyse first whether that sub-paragraph is applicable to the present case (see *Harkmann v. Estonia*, no. 2192/03, § 32, 11 July 2006).

23. The Court observes that the applicant was detained on 15 October 2016 on suspicion of common assault and making threats against B., as well as of violating the Narcotics Act. On 18 October 2016 the Compulsory Measures Court rejected the public prosecutor's application that the applicant be held in pre-trial detention owing to the lack of a specific ground for detention, and ordered the applicant's immediate release. The public prosecutor appealed against that ruling, and on 20 October 2016 the Court of Appeal granted the appeal suspensive effect and ordered the applicant's continued detention pending a decision on the appeal (see paragraph 4 above). After B. had withdrawn all his criminal complaints against the applicant on 27 October 2016 (see paragraphs 5 and 7 above), on 21 November 2016 the Court of Appeal upheld the appeal of the public prosecutor's office on the basis of new facts and grounds for detention presented by the latter. It overturned the order of the Compulsory Measures Court and ordered that the applicant be held in pre-trial detention for a provisional period of three months (see paragraph 8 above). Subsequent to an

appeal lodged by the applicant, the Federal Supreme Court in a judgment of 19 December 2016 found in the applicant's favour in part, in so far as it ruled that the applicant's deprivation of liberty from 28 October to 21 November 2016 had not been based on a judicial decision that met the legal requirements under Article 5 § 1 of the Convention, and that the Court of Appeal should have lifted the pre-trial detention order when it learned of the withdrawal of the criminal complaints on 28 October 2018 (see paragraph 9 above).

24. In these circumstances, the Court considers it evident that all of the above-mentioned measures applied in respect of the applicant – his initial arrest on 15 October 2016, the continued detention ordered on 20 October 2016 and the order on 21 November 2016 that he be held in pre- trial detention – were undertaken for the purpose of bringing him before the competent legal authority on suspicion of having committed an offence.

25. The Court concludes that the applicant's detention fell within the ambit of sub-paragraph (c) of Article 5 § 1 of the Convention. Given that sub- paragraph (c) was applicable, paragraph 3 of Article 5 also comes into play and the Court will proceed to examine whether the more stringent guarantees afforded by Article 5 § 3 were complied with (see *Harkmann*, cited above, § 35).

26. The Court further notes that, in essence, the Government's argument as to the alleged inapplicability of Article 5 § 3 of the Convention was based on their assertion that it does not provide for a right to be brought before a judge again where the initial charges have been replaced by new, unrelated charges. However, that is an argument concerning the merits of the complaint and it will be examined below.

(b) Compliance with Article 5 § 3

(i) General principles

27. The Court reiterates that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see, for example, *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III).

28. Article 5 § 3 is aimed at ensuring prompt and automatic judicial review of police or administrative detention ordered in accordance with the provisions of Article 5 § 1 (c) (see, for example, *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 51, Series A no. 77; *Aquilina*, cited above, §§ 48-49; and *McKay v. the United Kingdom* [GC], no. 543/03, § 34, ECHR 2006-X).

29. The Court reiterates that the judicial review on the first appearance of an arrested individual must above all be prompt, to allow detection of any

ill- treatment and to keep to a minimum any unjustified interference with individual liberty.

30. Moreover, the review must be automatic and cannot depend on an application from the detained person; in this respect it must be distinguished from Article 5 § 4, which gives a detained person the right to apply for release (see *McKay*, cited above, § 33; *Varga v. Romania*, no. 73957/01, § 52, 1 April 2008; and *Aquilina*, cited above, § 49). Thus, it cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, but might even defeat the purpose of that safeguard, which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (see *Kurt v. Turkey*, 25 May 1998, § 123, *Reports of Judgments and Decisions* 1998- III).

31. Finally, by virtue of Article 5 § 3 of the Convention, the judicial officer must himself or herself hear the detained person before taking the appropriate decision (see *Aquilina*, cited above, § 50). The judicial officer must offer the requisite guarantees of independence from the executive and the parties and he or she must have the power to order release after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 146, *Reports* 1998-VIII). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early case of *Schiesser v. Switzerland* (4 December 1979, § 31, Series A no. 34):

> "... [U]nder Article 5 [§ 3], there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, mutatis mutandis, ... *Winterwerp* [*v. the Netherlands*, 24 October 1979, § 60, Series A no. 33]); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons ([see] Ireland v. the United Kingdom [, 18 January 1978, § 199, Series A no. 25])."

(ii) Application of these principles to the present case

32. The foregoing considerations are sufficient to enable the Court to conclude that the applicant cannot be seen as having failed to exhaust the domestic remedies on the basis that he did not request a hearing, since the review under Article 5 § 3 of the Convention must be automatic and cannot depend on an application from the detained person. Accordingly, the Government's objection regarding exhaustion of domestic remedies cannot be accepted.

33. The Court observes that, as pointed out by the Government, the detention of the applicant in the present case was ordered by a court and he was brought before a judge on 18 October 2016 (see paragraph 4 above).

However, the Court is called upon to determine whether the Court of Appeal's decision of 21 November 2016 to remand him in custody met the requirements of Article 5 § 3 of the Convention.

34. The Court finds that the judicial decision of 20 October 2016 as to the necessity of the applicant's detention, which had been taken on unrelated and withdrawn facts and evidence, could not have been considered sufficient at the time when the Court of Appeal was considering the issue. The factual and legal grounds on which the applicant's detention was sought and, therefore, the circumstances militating for or against the applicant's detention, had changed completely on 7 November 2016 (see paragraph 6 above), and the reasons to justify his detention required a fresh examination in his presence in order to meet the procedural and substantive requirements of Article 5 § 3 (see *Bergmann v. Estonia*, no. 38241/04, § 44, 29 May 2008, and paragraph 31 above).

35. The Court considers that the fact that the applicant was not released after the withdrawal of the criminal complaints by B. and therefore not subsequently arrested again based on the new facts and grounds, but rather, as the Federal Supreme Court determined in its judgment of 19 December 2016, had been unlawfully detained in the interim, did not alter the requirement for an immediate hearing to have taken place after 7 November 2016. The primary purpose of the relevant guarantee of Article 5 § 3 of the Convention, namely to prevent arbitrary or unjustified deprivation of liberty, would be thwarted if individuals could be unlawfully detained and, in a situation where the initial charges were dropped, their detention essentially ordered afresh on new and unrelated grounds without bringing the accused person before a judge. Therefore, in such cases the hearing must be held promptly after the public prosecutor's office presents new facts and grounds, which, if the detained person had been lawfully released, could have justified their re-detention (see *De Jong, Baljet and Van den Brink*, cited above, § 51).

36. While the Court takes note of the fact that the relevant domestic law has evolved (see § 12 above) and that the situation complained of normally would not occur under the amended domestic law, it must give a ruling on the facts of the case. In the present case the applicant was not heard in person in connection with the new facts and grounds on which the Court of Appeal based its decision to order his pre-trial detention on 21 November 2016.

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

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

38. The applicant complained that the lack of a possibility to have the Court of Appeal's decision reviewed by a court with full jurisdiction over the

matter violated his rights guaranteed under Article 5 § 4 of the Convention, which states as follows:

> "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."

39. The Government contested that argument.

Admissibility

1. The parties' arguments

40. The Government submitted that the complaint was inadmissible in so far as every person in pre-trial detention was free, at any time, to submit an application to the public prosecutor's office for release from detention pursuant to Article 228 § 1 of the Swiss Code of Criminal Procedure, which in turn entails a personal hearing before the Compulsory Measures Court having full jurisdiction (paragraph 11 above).

41. The applicant did not reply to the Government's observations.

2. The Court's assessment

42. The Court notes that Article 228 of the Swiss Code of Criminal Procedure gave the applicant a right to submit an application to the public prosecutor's office for release from detention, which would have led to a full judicial review of the lawfulness of his detention by the Compulsory Measures Court, if the application was not granted by the public prosecutor's office.

43. The applicant therefore had a remedy within the meaning of Article 5 § 4 of the Convention affording him an effective review of the lawfulness of his detention.

44. It follows that the complaint under Article 5 § 4 is inadmissible under Article 35 § 3 as being manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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."

46. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's preliminary objection concerning the exhaustion of domestic remedies and *dismisses* it;

2. *Declares* the complaint under Article 5 § 3 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 19 February 2026, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Kateřina Šimáčková President