

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

FIRST SECTION

# CASE OF TRIFKOVIĆ v. CROATIA

*(Application no. 36653/09)*

JUDGMENT

STRASBOURG

6 November 2012

**FINAL**

18/03/2013

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



**In the case of Trifković v. Croatia,**

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

Anatoly Kovler, *President,*
Nina Vajić,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 16 October 2012,

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

# PROCEDURE

1. The case originated in an application (no. 36653/09) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Milan Trifković ("the applicant"), on 12 June 2009.

2. The applicant was represented by Mr T. Vukičević, a lawyer practising in Split. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 10 November 2010 complaints concerning the lawfulness and length of the applicant's detention and alleged flaws in the procedure of challenging his pre-trial detention were communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1976 and lives in Split.

### A. Criminal proceedings against the applicant

5. An investigation was opened against the applicant and twenty other individuals on 24 November 2006 by an investigating judge of the Split County Court (*Županijski sud u Splitu*) in connection with a suspicion that

between 2003 and November 2006 they had organised distribution of heroin in Dubrovnik and on the island of Korčula.

6. During the investigation, the investigating judge heard evidence from a number of witnesses, ordered searches, seizures and freezing of assets, and commissioned psychiatric, telecommunications and financial expert reports.

7. Following an order by the investigating judge, on 24 November 2006 the police carried out a search of the applicant's flat and on 5 February 2007 the psychiatrist submitted his report in respect of the applicant. He found that the applicant had used drugs for a relatively short period of time and had not developed an addiction.

8. On 15 May, 15 June, 8 August and 5 October 2007 the investigating judge established that all the necessary evidence had not been obtained and asked the president of the Split County Court to extend the investigation. The president of the Split County Court granted the requests and the investigation was extended on each of those occasions.

9. The State Attorney's Office for the Suppression of Corruption and Organised Crime (*Državno odvjetništvo, Ured za suzbijanje korupcije i organiziranog kriminaliteta*; hereinafter: "the State Attorney's Office") indicted the applicant and sixteen others on 15 November 2007 in the Split County Court on charges of conspiracy to supply heroin in Dubrovnik and on the island of Korčula between 2003 and November 2006.

10. The applicant lodged an objection against the indictment on 7 December 2007, arguing that it had numerous substantive and procedural flaws. On 7 February 2008 the Split County Court sent the indictment back to the State Attorney's Office on the ground that it needed further clarification.

11. The State Attorney's Office submitted an amended indictment against the applicant and sixteen others before the Split County Court on 22 February 2008, reiterating the same charges of conspiracy to supply heroin. On 5 March 2008 the applicant lodged an objection against the above amended indictment, arguing that it had numerous substantive and procedural flaws. A three-judge panel of the Split County Court dismissed the applicant's objection on 14 March 2008 as ill-founded.

12. At a hearing on 13 November 2008 the applicant pleaded not guilty to the charges against him.

13. At hearings held on 17 and 18 December 2008 the trial court heard evidence from two witnesses. Further hearings scheduled for 11 and 12 February 2009 were adjourned indefinitely as one of the defendants had broken his leg and could not attend.

14. A hearing scheduled for 29 June 2009 was also adjourned because the first accused had asked for members to be removed from the trial panel.

15. Further hearings were held on 28 August, 8, 15, 16 and 28 September, 20, 21 and 22 October, 2, 3, 4, 17 and 18 November and

21 December 2009, 27 and 29 January, 15, 17, 18 and 19 February, and 15, 29 and 30 March 2010.

16. At a hearing on 13 May 2010 the applicant gave oral evidence denying all the charges. At hearings held on 14, 17, 21 and 24 May 2010 the other accused gave oral evidence and the parties made their closing statements.

17. On 24 May 2010 the Split County Court found the applicant guilty as charged and sentenced him to three years and six months' imprisonment.

18. The applicant lodged an appeal with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against the first-instance judgment on 31 January 2011.

19. The appeal proceedings are still pending.

### B. Decisions on the applicant's detention

20. On 22 November 2006 the applicant was arrested on suspicion of supplying heroin.

21. The investigating judge of the Split County Court heard the applicant on 23 November 2006 and remanded him in custody for a further forty-eight hours under Article 98 § 2 of the Code of Criminal Procedure. The applicant appealed against this decision, arguing, *inter alia*, that he was permanently employed by company K.-V. and had not been engaging in any criminal activity. To support his arguments he submitted his employment contract with company K.-V. On 24 November 2006 a three-judge panel of the Split County Court dismissed his appeal.

22. On 24 November 2006 the investigating judge remanded the applicant in custody under Article 102 § 1(3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges). The relevant part of the decision reads:

> "The pre-trial detention was ordered in respect of the defendants listed under [heading] II of this decision under Article 102 § 1(4) of the Code of Criminal Procedure, because it is possible to order pre-trial detention on this ground for the offence at issue and because [the charges] concern a large quantity of heroin, which the defendants supplied to a larger number of people and for a longer period of time, therefore probably damaging the health of a significant number of people, which all contributes to the particularly grave circumstances of the offence...
>
> The pre-trial detention was ordered under Article 102 § 1(3) of the Code of Criminal Procedure in respect of defendants ... Milan Trifković, ... and ... since they have already been convicted of similar or other offences they now have no permanent income, so there is justified fear that they will reoffend."

23. The applicant lodged an appeal on 6 December 2006, arguing that the charges against him suggested that he had had only a minor role in the alleged organisation of supply of heroin. As to the risk of reoffending, he argued that it was not true that he had no permanent income, as he was employed by company K.-V. In this connection he indicated his

employment contract and submitted further documents as evidence of his income. The applicant also asked that the detention be replaced by another preventive measure that the court deemed appropriate.

24. The appeal was dismissed on 8 December 2006 by a three-judge panel of the Split County Court. The relevant part of the decision reads:

> "In view of the offence [the accused] are charged with, this panel finds that there are particularly grave circumstances justifying their detention under Article 102 § 1(4) of the Code of Criminal Procedure given that ..., Milan Trifković and ... have already been convicted of similar or other offences, so that for them the detention under Article 102 § 1(3) of the Code of Criminal Procedure is also justified."

25. The investigating judge extended the applicant's detention on 20 December 2006, under Article 102 § 1(3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges), reiterating the arguments in his decision of 24 November 2006.

26. The applicant appealed on 29 December 2006, pointing out that according to the charges held against him he had had only a minor role in the alleged organisation of heroin supplying. He also argued that nothing suggested that he might reoffend, since he was not a drug addict and his previous conviction for the possession of a small quantity of drugs could not in any respect be associated with the charges against him in the present case. He again asked that the detention be replaced by another preventive measure that the court deemed appropriate.

27. That appeal was dismissed on 17 January 2007 by a three-judge panel of the Split County Court. They reiterated their previous arguments. As to the risk of reoffending they added:

> "...and since [the defendants] are users of illegal drugs and do not have a permanent income, the investigating judge properly extended their detention under Article 102 § 1(3) of the Code of Criminal Procedure."

28. On 19 January 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, reiterating the arguments in his previous decisions.

29. The applicant appealed on 23 January 2007, again stating that he had had only a minor role in the organisation of the supply of heroin and argued that the finding that he had no permanent income was not true, because he was employed. The applicant again asked for his detention to be replaced with another preventive measure.

30. The appeal was dismissed on 8 February 2007 by a three-judge panel of the Split County Court which reiterated its previous arguments.

31. On 20 February and 20 March 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as before.

32. The applicant lodged an appeal on 21 March 2007 where he argued, relying on the Court's case-law, that the investigating judge had failed to

provide sufficient reasons for extending his detention and that he had failed to consider the possibility of applying another preventive measure.

33. The appeal was dismissed on 4 April 2007 by a three-judge panel of the Split County Court which reiterated that the gravity of the charges and the fact that the applicant had already been convicted of similar offences and that he was a drug user, justified his detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure.

34. On 20 April 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as in his previous decisions.

35. The applicant appealed on 23 April 2007, arguing, *inter alia*, that the investigating judge had insisted that he had no permanent income, which was not true, because he was employed, and in that respect he had provided sufficient evidence. He also asked that the detention be replaced with another preventive measure. The appeal was dismissed on 4 May 2007 by a three-judge panel of the Split County Court, which endorsed the reasoning of the investigating judge.

36. On 18 May 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as in his previous decisions.

37. The applicant appealed on 21 May 2007, reiterating his arguments that there were no grounds for his continued detention. He again asked for the detention to be replaced with another preventive measure. On 30 May 2007 a three-judge panel of the Split County Court dismissed the applicant's appeal, reiterating its previous arguments.

38. The investigating judge extended the applicant's detention on 20 June 2007 again under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using identical phrases as in his previous decisions.

39. The applicant lodged an appeal on 21 June 2007 against the above decision, reiterating his previous arguments and asking for his detention to be replaced with another preventive measure: on 27 June 2007 a three-judge panel of the Split County Court dismissed his appeal, on the same grounds as before.

40. On 19 July 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as in his previous decisions.

41. The applicant lodged an appeal on 25 July 2007, reiterating his previous arguments and asking for his detention to be replaced with another preventive measure, but on 31 July 2007 a three-judge panel of the Split County Court dismissed the applicant's appeal, using identical phrases to those in its previous decision.

42. On 20 August 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, again using identical reasoning.

43. The applicant lodged an appeal on 21 August 2007 and on 28 August 2007 a three-judge panel of the Split County Court dismissed it, using the same formulation as in its previous decisions.

44. The investigating judge extended the applicant's detention on 20 September 2007 under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, using identical phrases as in his previous decisions.

45. The applicant lodged an appeal on 25 September 2007. He again pointed out that the same effect of extending his detention could be achieved by ordering another preventive measure. On 3 October 2007 a three-judge panel of the Split County Court dismissed the appeal, using the same formulation as in its previous decisions.

46. On 19 October 2007 the investigating judge extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, reiterating his previous reasoning.

47. The applicant lodged an appeal on 23 October 2007, reiterating his previous arguments, but it was dismissed by a three-judge panel of the Split County Court on 26 October 2007.

48. On 16 November 2007, after the applicant had been indicted in the Split County Court, a three-judge panel of that court extended the applicant's detention, again under Article 102 § 1(3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges). The relevant part of the decision reads:

> "The criminal record ... shows that the accused ... Milan Trifković ... [has] already been convicted of a criminal offence of the same type as the one concerned in these proceedings ...
>
> Furthermore, the report drawn up by a neuropsychiatrist ... shows that the defendant... Milan Trifković ... [is a] drug user ...
>
> Therefore since the accused ... Milan Trifković ... [are] drug users ... there is a risk that they might reoffend.
>
> Also, since the accused are charged [with having] organised a group with the aim of trafficking in illegal drugs on the island of Korčula, and were engaged [in that activity for] a long period of time, together with J.C., who was the leader of the group and of all [the criminal] activities, and particularly having in mind the gravity [ of the offences at issue] and the danger to society, as well the prevalence of such offences, this panel considers that in the case at issue there are particularly grave circumstances which significantly differ from the usual manner in which the offence at issue is committed."

49. Against that decision the applicant lodged an appeal with the Supreme Court on 28 November 2007. As to his previous conviction, he argued that he had been convicted only of possession of illegal drugs for his personal use, which could not in any respect be associated with the charges against him in the present case. Moreover, the psychiatric report showed that he had no addiction to drugs and that there was no risk that he would

reoffend. He also pointed out that he was permanently employed and that he had a regular source of income. As to the gravity of the charges, the applicant argued that the charges against him suggested that he had had only a minor role in the alleged organisation of the supply of heroin. The applicant also asked for the detention to be replaced with any preventive measure that the court deemed appropriate.

50. On 7 December 2007 the Supreme Court dismissed the applicant's appeal, endorsing the reasoning of the Split County Court. It made no reference to the applicant's request that his detention be replaced with another preventive measure.

51. The applicant's detention was further extended on 7 February 2008 by a three-judge panel of the Split County Court under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, reiterating its previous arguments.

52. On 12 February 2008 the applicant lodged an appeal against the above decision, reiterating his previous arguments and asking for his detention to be replaced with another preventive measure. The Supreme Court dismissed the applicant's appeal on 29 February 2008 in the following terms:

> "According to the indictment, the activities with which the accused are charged took place between the beginning of 2003 and mid-2006, and the accused J.C., in the broader area of Dubrovnik and Korčula, organised a criminal group in which he recruited ... Milan Trifković ... all in order to supply heroin.
>
> Since all the accused were engaged in a criminal activity for a longer period of time, between the beginning of 2003 and mid-2006, in the broader area of Dubrovnik and Korčula, and since they showed a high degree of criminal resolve by organising continuous [criminal] activity, which shows a particular degree of persistence and criminal resolve, and taking this together with the fact that the accused ... Milan Trifković ... were on more occasions convicted of, [*inter alia*], the same or similar offences, and ... since the accused ... Milan Trifković are users of illegal drugs, there is a fear that they might reoffend...
>
> Also, since the subject of the alleged [criminal] activity was distribution of the illegal drug heroin in large quantities, and since it could have been used for a large number of small packages for individual use, which, if sold on the illegal drug market, could endanger a large number of mostly young people, suggests... that there are particularly grave circumstances surrounding the offence ...
>
> The preventive measures under Article 90 of the CCP in respect of the accused Milan Trifković would not have the same effect as detention on the basis of Article 102 § 1(3) and (4) of the Code of Criminal Procedure."

53. A three-judge panel of the Split County Court on 29 April 2008 extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, on the same grounds as before.

54. The applicant lodged an appeal on 6 May 2008, reiterating his previous arguments, but on 30 May 2008 the Supreme Court dismissed it.

55. On 24 July 2008 a three-judge panel of the Split County Court extended the applicant's detention under Article 102 § 1(3) and (4) of the Code of Criminal Procedure, reiterating the same reasons as in its previous decisions.

56. The applicant lodged an appeal against the above decision on 29 July 2008. He argued that the evidence from the case file showed that he had not been a member of the alleged criminal organisation. As to the risk of reoffending, he pointed out that his previous conviction had concerned small amounts of drugs, for his personal use only, and that he was not a drug addict. He also argued that he was employed and had a regular source of income. On 10 September 2008 the Supreme Court dismissed the appeal, reiterating the same arguments as in its previous decisions.

57. On 10 November 2008 a three-judge panel of the Split County Court extended the applicant's detention, again under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure. The relevant part of the decision reads:

> "The criminal record ... shows that the defendant ... Milan Trifković ... [has] already been convicted of a criminal offence of the same type as the one concerned in these proceedings ...
>
> Furthermore, the report drawn up by a neuropsychiatrist ... shows that the defendant... Milan Trifković ... [is a] drug user ...
>
> Also, the defendants are charged with organising a group with the aim of trafficking in illegal drugs on the island of Korčula, that they had been engaging [in that activity for] a long period of time, together with J.C., who was the leader of the group and of all [the criminal] activities.
>
> The above-mentioned circumstances, together with the fact that the defendants were allegedly members of a group which was continually [and for a long] period of time engaged in trafficking in illegal drugs, namely heroin, one of the hardest drugs, and that they thus put at risk the health of a large number of people, justify the extension of detention in respect of the defendants ... [including] Milan Trifković ... under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure. These circumstances justify the fear of reoffending and also amount to particularly grave circumstances [in which] the offence [is alleged to have taken place]."

58. The applicant lodged an appeal on 13 November 2008, in which he argued that the evidence thus far obtained had not implicated him in the offences in question, save for a statement given by a witness, Ž.T. However, he claimed that her statement was unreliable because it was both contradictory and hearsay evidence, and also contradicted the evidence given by other witnesses. The transcripts of telephone conversations of his which had been taped did not show that he had discussed details of drug trafficking with anyone. Furthermore, no material evidence which could connect him with trafficking in illegal drugs had been found on him. As regards the risk of reoffending, the applicant argued that, even if he had been a drug addict before being detained, during the period of his detention

he would surely stop being one because he would not be able to take any drugs during his detention. As regards the argument that he had already been convicted of the same type of offence, he argued that his previous conviction concerned the possession of a small amount of drugs for his personal use, and that he was permanently employed. Against that background, he argued that there was no need for him to remain in detention and asked that his detention be replaced by another preventive measure.

59. A three-judge panel of the Split County Court on 13 January 2009 again extended the applicant's detention, under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, and with the same reasoning as it had previously given. On 19 January 2009 the applicant lodged an appeal against this decision, reiterating his previous arguments.

60. On 13 February 2009 the Supreme Court dismissed the applicant's appeal against the decision of 10 November 2008. The relevant part of the decision reads:

> "The circumstances which show that there is a risk of reoffending ... are that the defendants are charged [with having been] ... members of a criminal organisation organised by the defendant J.C. in the period between the beginning of 2003 and November 2006, [operating in] the broader area of Dubrovnik and Korčula, and in which sixteen individuals were involved and mutually connected, among whom [were] the defendants Milan Trifković and ..., all [having the] aim of purchasing, storing, transferring and selling the drug heroin in order to obtain significant material gain. They delivered heroin previously bought by the defendant J.C. in Serbia, Bosnia and Herzegovina, and Montenegro for the needs of drug addicts on the island of Korčula, in daily amounts of at least 32 grams.
>
> Furthermore, the defendants Milan Trifković and ... have already been convicted several times of criminal offences of the same type – abuse of illegal drugs ... This shows that their previous life was not in conformity with the law and that their previous conviction has not taught them about the peril of committing criminal offences. Also, the documents in the file show that the defendants Milan Trifković and ... are users of illegal drugs ...
>
> Therefore, the long period of engaging in such criminal activity, which shows their determination, high level of organisation and criminal resolve ..., together with the fact that they are users of illegal drugs, ... and previous conviction, amount in the view of the Supreme Court ... to specific circumstances which justify the fear that the defendants Milan Trifković and..., if at large, would continue to commit new criminal offences of the same type ...
>
> The decision to extend the defendants' detention on the basis of Article 102 paragraph 1(4) of the Code of Criminal Procedure is justified and lawful in view of the fact that the... charges concern a significant amount of the illegal drug heroin. The fact that there was such a large amount of this drug, which could be divided into a large number of individual doses and thus put at risk the health of a large number of people, especially youngsters, [together with] the international elements of the offence, surpasses by far the usual gravity of such offences.
>
> The defendants' arguments pointing to the lack of evidence that they had committed the criminal offences at issue ... have no bearing on the decision [on their detention].

> When deciding upon an appeal against a decision on detention, the appeal court has no competence to assess the factual background of the case or the defendants' criminal responsibility. For detention to be ordered it suffices that the indictment and the documents in the case file indicate that there is reasonable suspicion. Neither has the principle of proportionality been infringed, because the defendant Milan Trifković has so far spent less than two years and three months in pre-trial detention ... When applying that principle, the relevant factors to be taken into account are not only the time already spent in detention but also the gravity of the criminal charges brought against the defendants and the severity of the sentence faced, as well as the need to order and extend detention.
>
> The statement of the defendant Milan Trifković that he is not a drug addict ... is also irrelevant, because drug addiction and drug use are not the decisive motives for committing such criminal offences, and they cannot put into question the importance of all the other above-mentioned points which show at the risk of reoffending ... "

61. On the same day, the Supreme Court dismissed the applicant's appeal against the Split County Court's decision extending his detention of 13 January 2009, using the same arguments.

62. On 5 March 2009 the applicant lodged two constitutional complaints with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the decision of the Supreme Court of 13 February 2009 dismissing his appeal against the Split County Court's decision of 10 November 2008 and the decision of the Supreme Court of 13 February 2009 dismissing his appeal against the Split County Court's decision of 13 January 2009.

63. The applicant's detention was again extended on 9 April 2009 by a three-judge panel of the Split County Court under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, using the same reasons as in its previous decisions.

64. The applicant lodged an appeal against the above decision on 16 April 2009. He argued that for several years his detention had been repeatedly extended, always using the same reasoning as to the gravity of the charges, without any assessment of his individual position in the alleged criminal organisation. He also pointed out that his previous conviction was minor and that he was employed, with a regular source of income. He further argued that the trial had been adjourned indefinitely and that there was a real risk that his detention was becoming a penalty. Finally, he pointed out, relying on the Court's case-law, that the reasons justifying his detention were no longer relevant and sufficient, and that the domestic courts had never examined the possibility of applying another preventive measure.

65. On 29 April 2009 the Constitutional Court declared the applicant's constitutional complaint against the decision of the Supreme Court dismissing his appeal against the Split County Court's decision of 10 November 2008 inadmissible on the ground that the impugned decisions were no longer in effect, because in the meantime the Split County Court had adopted a fresh decision on his detention on 13 January 2009.

66. On 6 May 2009 the Supreme Court dismissed the applicant's appeal against the decision extending his detention of 9 April 2009, reiterating its previous arguments. It also found that the purpose of the detention could not be achieved with any other preventive measure.

67. On 27 May 2009 the Constitutional Court declared the applicant's constitutional complaint against the decision of the Supreme Court dismissing his appeal against the Split County Court's decision of 13 January 2009 inadmissible on the ground that that the impugned decisions were no longer in effect, because in the meantime the Split County Court had adopted a fresh decision on his detention, on 9 April 2009.

68. A three-judge panel of the Split County Court on 6 July 2009 again extended the applicant's detention under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as in its previous decisions.

69. The applicant lodged an appeal against the above decision on 9 July 2009, pointing out that he had no addiction to drugs and that he was employed and therefore had a regular source of income. He also asked that the detention be replaced by another preventive measure. On 4 August 2009 the Supreme Court dismissed the appeal, reiterating its previous arguments. It added that the fact that the applicant had been detained and therefore had not had any opportunity to obtain drugs was not of a decisive influence on the conclusion that he might reoffend. As to his arguments that he was employed and had a regular source of income, the Supreme Court held that it also had no decisive effect, since the proceeds of the offence at issue were significantly higher than his personal income.

70. On 1 October 2009 a three-judge panel of the Split County Court again extended the applicant's detention under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, using the same formulation as in its previous decision.

71. The applicant lodged an appeal on 5 October 2009 in which he argued that the principle of proportionality had been infringed with his continuous detention but on 14 October 2009 the Supreme Court dismissed it, reiterating its previous arguments. As to the proportionality of the detention, the Supreme Court held that this principle had not been infringed, since the charges concerned the most serious offences, for which there was also a possibility of extending the detention for an additional six months under section 28 paragraph 3 of the Act on the Office for the Suppression of Corruption and Organised Crime (hereinafter "the AOSCOC").

72. On 20 November 2009 a three-judge panel of the Split County Court extended the applicant's detention for a further six months. The relevant part of the decision reads:

> " ... since the maximum limits for detention under Article 109 of the Code of Criminal Procedure were about to expire, [this panel] has examined whether there are grounds for extending the accused's detention or for his release.

> In the situation at issue, in view of the sentence that the offence at issue carries, the maximum statutory limit under Article 109 § 1(5) of the Code of Criminal Procedure is three years, and therefore this period would expire in respect of ... the accused Milan Trifković ... on 22 November 2009.
>
> However, under section 28 § 2 of the [AOSCOC] the maximum time-limit of detention during an investigation, if the investigation has been extended, can be twelve months, while paragraph 3 of the same section provides that the maximum period of detention under Article 109 of the Code of Criminal Procedure shall be extended for a further six months if the detention during the investigation has been extended under paragraph 2 of [Section 28 of the AOSCOC].
>
> Since in this particular case the investigation was extended so that it lasted more than the maximum six months, the conditions for extending the maximum period of the pre-trial detention for a further six months under section 28 paragraph 3 of the [AOSCOC] have been met.
>
> Therefore, since all the circumstances on which the detention was extended under Article 102 paragraph 1 (1), (3) and (4) of the CCP have not changed, the detention in respect of the accused ... Milan Trifković and ... had to be extended for a further six months ...“

73. The applicant lodged an appeal with the Supreme Court against the above decision on 24 November 2009. He argued that the evidence adduced during the trial did not support the suspicion that he was an important member of the criminal group and that no drugs, objects usually used to sell drugs, or any proceeds of crime had ever been found on or seized from him. The applicant further argued that the Split County Court had been using the same stereotyped formula when extending his detention for three years, and that there were no grounds for extending his detention. He also argued that the proceedings had been unreasonably long and that during that period he had been detained in inhuman and degrading conditions. Finally, he pointed out, relying on the Court’s case-law, that the possibility of replacing his detention with another preventive measure had never been examined. On 27 November 2009 he also submitted to the Supreme Court a statement from company K.-V. confirming that he was permanently employed by that company; he asked again to be released.

74. The Supreme Court dismissed the applicant’s appeal on 11 December 2009. It limited its assessment only to the question of whether further extension would exceed the maximum statutory limit. As to the other arguments put forward by the applicant, the Supreme Court noted:

> “As to the arguments put forward by all three accused in which they complain about the conditions of their detention and challenge the grounds and purpose of their detention on account of its length, it is to be noted that it does not put in any doubt the impugned decision. Namely, the [Split County Court’s] decision did not address the grounds for their detention, since it only concerned examination of statutory conditions for extending the maximum detention under Article 109 of the Code of Criminal Procedure, in respect of which the arguments in the appeal are irrelevant.”

75. On an unspecified date in 2010 the applicant lodged a constitutional complaint against the above decision of the Supreme Court, reiterating the same arguments from his appeal.

76. A three-judge panel of the Split County Court on 12 February 2010 extended the applicant's detention under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, reiterating arguments from its previous decisions as to the risk of reoffending and the gravity of the charges.

77. The applicant lodged an appeal against the above decision on 18 February 2010, reiterating his previous arguments and asking that the detention be replaced by another preventive measure, if one was necessary.

78. On 25 February 2010 the Constitutional Court dismissed the applicant's constitutional complaint against the decision of the Supreme Court of 11 December 2009. The relevant part of the Constitutional Court's decision reads:

> "It appears from the constitutional complaint, which is identical to the appeal lodged with the Supreme Court, that [the applicant] is complaining about the grounds for his detention, which was not the subject of the impugned decisions. The statutory grounds for his detention are under Article 107 paragraph 2 of the CCP, within the competence of the panel from Article 18 paragraph 3 and Article 20 paragraph 2 of [the CCP], which is obliged to examine the grounds for detention every two months ...
>
> However, in the case at issue, the impugned decisions do not examine the grounds for [the applicant's] detention, but only whether the conditions for extending the detention under Article 109 of the Code of Criminal Procedure have been met. ... "

79. On 17 March 2010 the Supreme Court dismissed the applicant's appeal against the Split County Court's decision of 12 February 2010 on the ground that the same reasons warranting the applicant's detention under Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure still existed. It also found that the principle of proportionality had not been infringed and that there were no grounds to replace the detention with another preventive measure.

80. On an unspecified date in 2010 the applicant lodged a constitutional complaint with the Constitutional Court against the above decision of the Supreme Court, again complaining about the extension of his detention and about the conditions in detention.

81. The applicant's detention was again extended by a three-judge panel of the Split County Court on 17 May 2010 on the basis of Article 102 paragraph 1(3) and (4) of the Code of Criminal Procedure, reiterating its previous arguments.

82. On 22 May 2010 the maximum statutory time-limit of the applicant's extended detention expired and the applicant was released.

## II. RELEVANT DOMESTIC LAW

83. The relevant part of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, 27/1998, 129/2000, 51/2001, 105/2004, 84/2005) provides:

**Abuse of Narcotic Drugs**

**Article 173**

" ...(2) Whoever, without authorisation, manufactures, processes, sells or offers for sale or buys for the purpose of reselling, keeps, distributes or brokers the sale and purchase of, or, in some other way and without authorisation, puts into circulation, substances or preparations which are by regulation proclaimed to be narcotic drugs, shall be punished by imprisonment for one to twelve years.

(3) If the criminal offence referred to in paragraph 2 of this Article is committed while the perpetrator is part of a group or a criminal organisation, or if he has set up a network for selling drugs, he shall be punished by imprisonment for not less than three years or by long-term imprisonment."

84. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003) provide as follows:

**Preventive Measures**

**Article 90**

"(1) Where the conditions for ordering detention under Article 102 of this Code have been fulfilled, and where the same purpose may be achieved by other preventive measures under this Article, the court shall order that one or more preventive measures are to be applied ...

(2) Preventive measures are:

1) prohibition on leaving one's place of residence;

2) prohibition on being in a certain place or area;

3) obligation on the defendant to report periodically to a certain person or a State body;

4) prohibition on contact with a certain person or on establishing or maintaining contact with a certain person;

5) prohibition on undertaking a certain business activity;

6) temporary seizure of a passport or other document necessary for crossing the State border;

7) temporary seizure of a driving licence...”

8. General Provisions on Detention

**Section 101**

“(1) Detention may be imposed only if the same purpose cannot be achieved by another [preventive] measure.

(2) Detention shall be lifted and the detainee released as soon as the grounds for detention cease to exist.

(3) When deciding on detention, in particular its duration, a court shall take into consideration the proportionality between the gravity of the offence, the sentence which... may be expected to be imposed, and the need to order and determine the duration of detention.

(4) Judicial authorities conducting criminal proceedings shall proceed with particular urgency when the defendant is in detention and shall review of their own motion whether the grounds and legal conditions for detention have ceased to exist, in which case detention shall immediately be lifted.”

**9. Grounds for Ordering Detention**

**Section 102**

“(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in detention:

1. where there are circumstances which show that there is a risk that [the defendant] will abscond [is in hiding or his or her identity cannot be established, and so on);

2. if there is a risk that he or she might destroy, hide, alter or forge evidence or traces relevant for the criminal proceedings or might suborn witnesses, or where there is a risk of collusion;

3. special circumstances justify the suspicion that the person concerned might reoffend;

4. where the charges relate to murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion or any other offence carrying a sentence of at least twelve years’ imprisonment, or where detention is justified by the *modus operandi* or other especially grave circumstances of the offence.”

**Article 109**

“(1) Until the adoption of a first-instance judgment, pre-trial detention may last for a maximum of:

1. six months for offences carrying a statutory maximum sentence of three years’ imprisonment;

2. one year for offences carrying a statutory maximum sentence of five years' imprisonment;

3. eighteen months for offences carrying a statutory maximum sentence of eight years' imprisonment;

4. two years for offences carrying a sentence of more than eight years' imprisonment;

5. three years for offences carrying a sentence of long-term imprisonment...”

Appeal against a decision ordering, lifting or extending a custodial measure

**Article 110**

“(1) A defendant, defence counsel or the State Attorney may lodge an appeal against a decision ordering, extending or lifting a custodial measure, within two days thereof..”.

**Article 204**

“(1) If the investigation cannot be completed within six months, the investigating judge shall inform the president of the court why the investigation is not finished.

(2) The president of the court shall, if necessary, take appropriate measures to enable the investigation to be completed.”

85. The relevant provision of the Act on the Office for the Suppression of Corruption and Organised Crime (hereinafter the “AOSCOC” - *Zakon o Uredu za suzbijanje korupcije i organiziranog kriminaliteta* (ZUSKOK), Official Gazette nos. 88/2001, 12/2002, 33/2005, 48/2005, 76/2007) provides as follows:

**Section 28**

“(1) Custody under section 98 of the Criminal Procedure Act shall be extended to 48 hours.

(2) The total duration of the pre-trial detention in the above proceedings, if the investigation is lengthy (Article 204, paragraph 1 of the Code of Criminal Procedure) may be twelve months.

(3) If the pre-trial detention during the investigation has been extended under paragraph 2 above, the total duration of the pre-trial detention under Article 109 of the Code of Criminal Procedure shall be extended for six months.”

# THE LAW

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

86. The applicant complained that his pre-trial detention after 20 November 2009, when the maximum statutory period for his detention expired, had been unlawful. He relied on Article 5 § 1 of the Convention, which, 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..."

### A. The parties' arguments

87. The applicant submitted that his detention after 20 November 2009, when the maximum statutory limit for his detention provided in the Code of Criminal Procedure expired, had not been lawful within the meaning of Article 5 § 1 of the Convention. He argued that he had been legally represented and aware of the relevant domestic law which provided for the possibility that the maximum period of the detention be extended but that the domestic courts had never provided sufficient arguments why this law should be applied.

88. The Government argued that the applicant's detention after 20 November 2009 had been in compliance with the relevant domestic law, namely section 28 of the AOSCOC. When the applicant's detention had been extended the domestic courts provided relevant and sufficient reasons why this provision should be applied and also examined the grounds on which the applicant had been detained. Moreover, the applicant had had an opportunity to appeal before the Supreme Court which had duly examined the lawfulness of his continued detention and explained all the grounds on which his detention had been based.

### B. The Court's assessment

89. The Court reiterates that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a "democratic society" within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A

no. 33). Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X, and *Ladent v. Poland*, no. 11036/03, § 45, 18 March 2008).

90. Everyone is entitled to the protection of that right, that is to say the right not to be deprived or to continue to be deprived of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions set out in Article 5 § 1 is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III; *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV; and *Assanidze v. Georgia* [GC], no. 71503/01, § 170, ECHR 2004-II).

91. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether domestic law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III, and *Assanidze,* cited above, § 171).

92. This primarily requires any arrest or detention to have a legal basis in domestic law, but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 63, ECHR 2002-IV, and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur*, § 50, cited above; *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

93. 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 many other authorities, *Winterwerp*, cited above, § 37; *Amuur*, cited above, § 50; 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. The notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

94. The Court notes that Article 109 of the Code of Criminal Procedure prescribes the maximum duration of detention allowed before a conviction becomes final and enforceable. Paragraph 1 in particular prescribes the period of maximum detention before the adoption of a first-instance judgment, which in the case at issue is three years.

95. Under Article 204 paragraph 1 of the Code of Criminal Procedure the investigation has to be completed within six months. However, it is possible to extend that period in respect of crimes covered by the AOSCOC for a further six months.

96. In such cases, where the investigation is extended, section 28 of the AOSCOC allows the otherwise maximum statutory limit on pre-trial detention, under Article 109 of the Code of Criminal Procedure, to be extended for a further six months. In the case at issue this means that the maximum period of detention allowed before a conviction becomes final and enforceable was three years and six months.

97. The Court considers that the wording of section 28 of the AOSCOC was sufficiently clear and precise to allow the applicant to foresee situations in which his pre-trial detention could have been extended beyond the general statutory maximum limit for detention under Article 109, paragraph 1, of the Code of Criminal Procedure.

98. The Court notes that the applicant was arrested on 22 November 2006 and that the general maximum period of his detention, under Article 109 paragraph 1 of the Code of Criminal Procedure, would accordingly have expired on 22 November 2009.

99. However, in the applicant's case, which concerned crimes covered by the AOSCOC, the investigation was opened on 24 November 2006 and was therefore supposed to be completed by 24 May 2007. On 15 May 2007, and then on 15 June, 8 August and 5 October 2007 the investigating judge established that all the necessary evidence had not been obtained and asked the president of the Split County Court to extend the investigation which was granted and the investigation was extended on four occasions. The indictment was sent to the trial court on 15 November 2007. The Court notes that with the extension of the investigation the applicant's pre-trial detention was also extended and the applicant remained in detention throughout the investigation.

100. Therefore, when the investigation was extended under the AOSCOC, the general maximum period of the applicant's detention, under Article 109 paragraph 1 of the Code of Criminal Procedure, was also

extended for further six months under section 28 of the AOSCOC on 20 November 2009.

101. The Court considers that when extending the applicant's detention over the general maximum period, the Split County Court sufficiently explained the grounds for application of section 28 of the AOSCOC (see paragraph 72) and that such extension of the maximum period of the applicant's pre-trial detention for a further six months was in any respect in conformity with the relevant domestic law.

102. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

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

103. The applicant complained of the length of his pre-trial detention and in particular that the reasons put forward by the national courts when extending his pre-trial detention were not relevant and sufficient. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

### A. Admissibility

#### *1. The parties' arguments*

104. The Government submitted that the applicant had failed to lodge appeals against the decisions extending his detention on 20 February 2007 and 17 May 2010. As to the other domestic courts' decisions extending his detention, the Government argued that the applicant had failed to address the same issues raised before the Court in his constitutional complaints. Instead he had lodged his constitutional complaints as extraordinary remedies against the decisions of the Supreme Court, although the Constitutional Court had made it clear in its case-law that it was not a court of third instance.

105. The applicant contested that view, arguing that he had properly exhausted all available domestic remedies.

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

106. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged

against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-IV). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances.

107. As to the alleged violations of Article 5 § 3 of the Convention, the Court has already held that if a person alleging a violation of this provision on account of the length of his detention in circumstances such as those prevailing in the present case, he complains of a continuing situation, which should be considered as a whole and not divided into separate periods (see *Popov and Vorobyev v. Russia*, no. 1606/02, § 71, 23 April 2009). In this respect the Court considers that if the applicant made the domestic courts sufficiently aware of his situation and gave them an opportunity to assess whether his detention was compatible with his Convention right to a trial within a reasonable time or release pending trial, it cannot be held that the applicant failed to comply with his obligation to exhaust domestic remedies (see *Popov and Vorobyev*, cited above, § 71, and *Šuput v. Croatia*, no. 49905/07, § 86, 31 May 2011).

108. The Court notes that in the present case the applicant's pre-trial detention was ordered under Article 102 § 1(3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges) and on the same grounds it was extended eleven times during the investigation and twelve times during the trial stage of the proceedings.

109. The Court further notes that during the period of his detention the applicant lodged twenty-three appeals before the domestic courts and in addition he lodged four constitutional complaints before the Constitutional Court complaining, *inter alia*, that his detention was unlawful, and pointing out in particular that there were no relevant and sufficient grounds for his continued detention and that it had lasted an excessively long time.

110. Against the above background, the Court considers that the applicant gave the domestic authorities an adequate opportunity to assess whether his detention had been lawful, based on relevant and sufficient grounds, and whether its length had been excessive. The Court therefore concludes that the applicant has complied with his obligation to exhaust domestic remedies and that the Government's objection must be rejected.

111. 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*

112. The applicant submitted that his detention had been extended throughout the proceedings without relevant and sufficient grounds. He argued that his detention on the ground of gravity of charges had been based only on an abstract examination of the charges against him. As to the risk of reoffending, he pointed out that the domestic courts had failed to give any consideration to the fact that he was in permanent employment and that he had not been a drug addict but had only used drugs in a shorter period of time. In his view, they had overestimated the fact that he had been previously convicted since his conviction had concerned only possession of drugs for personal use which had not been comparable with the charges in the present case. Finally, he argued that the domestic authorities had never examined the possibility to replace his detention with the preventive measures, but had only noted that there had been no ground for that.

113. The Government, reiterating the reasons put forward by the national courts, argued that the grounds for the applicant's detention had been relevant and sufficient throughout his detention. In the Government's view the charges against the applicant represented particularly grave circumstances which had justified the applicant's detention throughout the proceedings. They also pointed out that there was a reasonable risk of reoffending, since the applicant was unemployed and had previously been sentenced for an offence of drug abuse. Finally, the Government argued that the grounds for the applicant's detention had never been taken *in abstracto* but always with the clear, precise, adequate and valid reasoning of the domestic courts.

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

#### (a) General principles

114. The Court reiterates that under its constant case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case. Continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among other authorities, *W. v. Switzerland*, 26 January 1993, Series A no. 254-A, and *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI).

115. The presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a

reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (see *Vlasov v. Russia*, no. 78146/01, § 104, 12 June 2008, with further references).

116. It falls in the first place to the national judicial authorities to ensure that in a given case the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the evidence for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and the facts cited by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

117. The arguments for and against release must not be "general and abstract" (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the specific facts outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov*, cited above, § 84 *in fine*, 26 July 2001).

118. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Contrada v. Italy*, 24 August 1998, § 54, *Reports* 1998-V; *I.A. v. France*, 23 September 1998, § 102, *Reports* 1998-VII; *Toth v. Austria*, 12 December 1991, § 67, Series A no. 224; and *B. v. Austria*, 28 March 1990, § 42, Series A no. 175).

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

119. As to the period be taken into account in the present case, the Court reiterates that according to its well-established case-law, in determining the length of detention under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when he is released (see, for example, *Fešar v. the Czech Republic*, no. 76576/01, § 44, 13 November 2008).

120. It follows that the period of the applicant's detention to be taken into consideration began on 22 November 2006, the date of the arrest, and ended on 22 May 2010, when the applicant was released, which in total amounts to three years and six months.

121. The Court notes at the outset that the inordinate length of the applicant's pre-trial detention – more than three years – is a matter of great concern. The national authorities must put forward very weighty reasons for keeping the applicant in detention for such a long time (see *Tsarenko v. Russia*, no. 5235/09, § 68, 3 March 2011).

122. The Court notes that in the present case the applicant had been detained on two different grounds: (1) risk of reoffending and (2) gravity of charges.

123. As to the risk of reoffending, the domestic authorities relied on the fact that the applicant had previously been convicted of drug abuse, that he was a drug user and that he was charged with having participated in a criminal group organised to supply heroin. In addition, during the investigation the domestic courts relied on the fact that the applicant did not have a permanent source of income.

124. As regards the latter point, the Court notes, however, that as soon as he had been arrested and detained the applicant submitted to the domestic authorities a contract of permanent employment, and throughout the investigation argued that he was employed and had a permanent source of income. Moreover, at the trial stage of the proceedings the applicant submitted a statement from his employer confirming that he still had permanent employment.

125. Therefore, the Court must conclude that the domestic authorities failed, throughout almost one year of the applicant's detention during the investigating stage of the proceedings, to assess the relevant evidence concerning the applicant's employment. As a result they continued to extend his detention, arbitrarily relying on the assertion that he had no permanent source of income, using the same stereotyped phrases and in some cases even identical wording. In this respect the Court reiterates that it has found a violation of Article 5 § 3 of the Convention in many other cases in which the domestic authorities were using stereotyped formulae without addressing specific facts of the case (see *Tsarenko*, cited above, § 70, and cases cited therein).

126. As to the applicant's previous conviction for drug abuse as a reason for justifying the detention on the ground of the fear of reoffending, the Court considers that the domestic authorities were obliged to assess whether the previous facts and charges were comparable, either in nature or in the degree of seriousness, to the charges in the pending proceedings (see *Popkov v. Russia*, no. 32327/06, § 60, 15 May 2008, and *Romanova v. Russia*, no. 23215/02, § 130, 11 October 2011).

127. In this respect the Court notes that the domestic authorities found that the applicant had been convicted of drug abuse, but never went beyond these findings. They never assessed the facts of the previous charges and never compared the nature and the degree of seriousness of the previous conviction with the charges in the present case. Nor did they respond to the applicant's arguments that the previous conviction had concerned only possession of small quantities of drugs for personal use which was not comparable either in nature or in degree of seriousness with the charges of participation in organised supply of heroin (see, *mutatis mutandis*, *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, § 55, 29 September 2009).

128. The domestic courts also relied on the fact that the applicant was a drug user when justifying the detention on the ground of the risk of reoffending. The Court, however, notes that the psychiatric report commissioned during the investigation indicated that the applicant had used drugs for only a short period of time and that he had not developed an addiction. In such circumstances the Court does not consider the previous period of the applicant's use of drugs sufficient to justify the risk that the applicant would reoffend, particularly having in mind that he had been detained for a longer period of time (see *Shenoyev v. Russia*, no. 2563/06, § 51, 10 June 2010).

129. As regards the domestic courts' reliance on the gravity of the charges when extending the applicant's detention, the Court reiterates that it has repeatedly held that this reason cannot by itself serve to justify long periods of detention (see, among many other authorities, *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001; *Michta v. Poland*, no. 13425/02, § 49, 4 May 2006; and *Gultyayeva v. Russia*, no. 67413/01, § 186, 1 April 2010). The Court also notes that the total period of the applicant's pre-trial detention of three years and six months corresponds to the prison term imposed on him by the first-instance judgment, which suggests that the domestic authorities failed to assess the proportionality of the gravity of the specific charges against the applicant and the period of his pre-trial detention.

130. Against the above background the Court concludes, even taking into account the particular difficulty in dealing with a case concerning an organised criminal group, that the grounds given by the domestic authorities were not "sufficient" or "relevant" to justify the applicant's being kept in detention for three and a half years (see *Celejewski v. Poland*, no. 17584/04, § 40, 4 May 2006).

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

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

132. The applicant complained that the procedure by which he sought to challenge the lawfulness of his detention was not in conformity with Article 5 of the Convention. The Court considers that these complaints shall be examined under Article 5 § 4 of the Convention, which reads 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."

### A. Admissibility

133. 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*

134. The applicant complained that the Constitutional Court had refused to examine the merits of his complaints concerning the grounds and length of his pre-trial detention on the ground that a new decision extending his detention had been issued in the meantime. He also complained that the Supreme Court and the Constitutional Court had refused to examine his complaints concerning the existence of the concrete grounds for extending his pre-trial detention after 20 November 2009, when the maximum statutory time-limit for his detention had expired. In his view this practice of the domestic courts deprived him of an effective remedy in respect of his complaints about the lawfulness and grounds for his continued detention.

135. The Government argued that the domestic legal system had provided an effective procedure for the applicant to contest the grounds and duration of his detention. They pointed out that the applicant had been able to lodge his appeals against the decisions extending his detention and that all his arguments had been duly taken into consideration by the appeal court. In the Government's view, the State had complied with its obligation under Article 5 § 4 of the Convention by setting up the appellate procedure in which the competent courts had provided detailed reasons upon every appeal of the applicant. They also argued that, although the applicant had lodged the constitutional complaints in respect of the decisions extending his detention, there had been no right under the Convention to lodge further remedies against the decisions ordering and extending the detention by the

competent courts. This had been moreover so concerning the constitutional complaints, since the procedure before the Constitutional Court had represented a specific procedure, namely the procedure for the protection of human rights in the domestic legal system and not an extraordinary legal remedies procedure, as conceived by the applicant.

*2. The Court's assessment*

**(a) General principles**

136. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp*, cited above, § 76, and *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading where appropriate to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII).

137. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

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

138. The Court notes that the applicant's constitutional complaint against the decisions extending his detention was declared inadmissible by the Constitutional Court, on the ground that a fresh decision extending his detention had been adopted in the meantime.

139. The Court has already examined in other Croatian cases the practice of the Constitutional Court of declaring inadmissible each constitutional complaint where, before it has given its decision, a fresh decision extending detention has been adopted in the meantime. In this respect the Court has found a violation of Article 5 § 4 of the Convention in that the Constitutional Court's failure to decide on the applicant's constitutional complaints on the merits made it impossible to ensure the proper and meaningful functioning of the system for the review of his detention, as provided for by the national law. By declaring the applicant's constitutional complaints inadmissible simply because a fresh decision extending his detention had been adopted in the meantime, the Constitutional Court did not satisfy the requirement "that the circumstances

voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy" (see *Peša v. Croatia*, no. 40523/08, § 126, 8 April 2010; *Hađi v. Croatia*, no. 42998/08, § 47, 1 July 2010; *Bernobić v. Croatia*, no. 57180/09, § 93, 21 June 2011; and *Šebalj v. Croatia*, no. 4429/09, § 223, 28 June 2011).

140. Since the circumstances of the present case do not differ in any respect, the Court sees no reason to depart from its previous findings.

141. There has accordingly been a violation of Article 5 § 4 of the Convention as regards the failure of the Constitutional Court to decide the applicant's complaints on the merits.

142. In view of these conclusions and finding of a violation of Article 5 § 3 of the Convention (see paragraph 131), the Court considers that there is no need to examine separately under Article 5 § 4 of the Convention the applicant's complaint concerning the alleged lack of response of the domestic authorities to his complaints against the decisions extending the maximum statutory time-limit for his detention.

## IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

143. The applicant complained under Article 3 of the Convention about the conditions of his detention. He also complained under Article 6 § 2 of the Convention that his right to be presumed innocent had been violated in the decisions ordering and extending his detention. He further complained under Article 13 of the Convention that he had no effective remedy in respect of his Convention complaints. Finally he complained under Article 14 of the Convention that he had been discriminated against in comparison with other defendants.

144. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded, and must be rejected pursuant to Article 35 § 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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."

146. The Court notes that the applicant failed to submit any claim for just satisfaction and for cost and expenses as provided under Rule 60 of the

Rules of Court and as requested by the Court. Accordingly, the Court considers that there is no call to award him any sum on that account.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 5 § 3 of the Convention concerning the length of and reasons for the applicant's pre-trial detention and complaints under Article 5 § 4 of the Convention concerning the failure of the Constitutional Court to decide the applicant's complaints on the merits and the alleged lack of answer to the applicant's complaints concerning the grounds for extending his detention over the maximum statutory time-limit admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention concerning the lack of relevant and sufficient reasons and length of the applicant's pre-trial detention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention concerning the failure of the Constitutional Court to decide the applicant's complaints on the merits;

4. *Holds* that there is no separate issue to be examined under Article 5 § 4 of the Convention concerning the complaint about the alleged lack of answer to the applicant's complaints about the grounds for extending the maximum statutory time-limit for his detention;

5. *Holds* that there is no call to award the applicant just satisfaction.

Done in English, and notified in writing on 6 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President