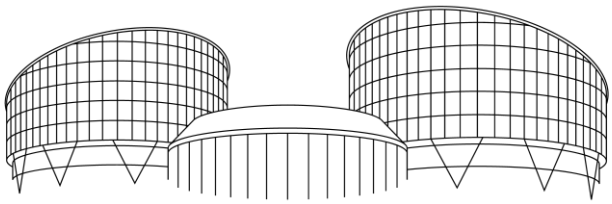

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GRIGORYAN v. ARMENIA

(Application no. 3627/06)

JUDGMENT

STRASBOURG

10 July 2012

FINAL

17/12/2012

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

In the case of Grigoryan v. Armenia**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 12 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 3627/06) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Vahe Grigoryan ("the applicant"), on 9 January 2006.

2. The applicant was represented by Mr A. Grigoryan, Mr A. Zakaryan, Mr T. Atanesyan and Mr M. Shushanyan, lawyers practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been unlawfully deprived of his liberty between 9.50 p.m. on 10 October 2005 and 5.05 a.m. on 11 October 2005, that the domestic courts had failed to provide relevant and sufficient reasons for his continued detention, that he had no enforceable right to compensation of a non-pecuniary nature and that the criminal proceedings against him were lengthy.

4. On 14 January 2010 the application was 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

5. The applicant was born in 1975 and lives in Yerevan.

A. Institution of criminal proceedings and the applicant's arrest

6. The applicant is a lawyer by profession.

7. On 10 June 2005 the investigator decided to institute criminal proceedings. The relevant decision stated:

> "...having studied the materials received from the [National Security Service of Armenia] concerning the preparation and use by ... [the applicant] of obviously false documents in June and July 2003 and misappropriation [by him] of a third person's property entrusted to him ..., and considering that the materials contain features of offences envisaged by Article 179 § 3 (1) and Article 325 § 1 of the Criminal Code [CC] ... I have decided to institute criminal proceedings..."

8. On 4, 15 and 28 July 2005 the applicant was summoned to the General Prosecutor's Office and questioned as a witness in the context of the above criminal proceedings.

9. On 7 October 2005 the applicant was again summoned to the General Prosecutor's Office where, from 7.50 to 9.50 p.m., he participated in a confrontation with another witness, A.H.

10. On the same date at 9.50 p.m. the investigator drew up an arrest record, in which it was stated that the applicant was arrested at that hour on suspicion of having misappropriated a large sum of money in collusion with A.H. by using forged documents. It appears that another person, T.A., was also suspected of involvement in those offences.

B. The proceedings ordering the applicant's detention

11. On 10 October 2005 the applicant was formally charged under Article 178 § 3 (1) and Article 325 § 2 of the CC.

12. On the same date the investigator filed a motion with the Kentron and Nork-Marash District Court of Yerevan, seeking to have the applicant detained for a period of two months. The investigator substantiated his motion with the fact that the applicant had committed a grave crime, that if he stayed at large he might obstruct the examination of the case during the pre-trial and court proceedings by falsifying documents, making public the data collected in the investigation and other means, that he had refused to testify and to answer questions when interviewed as a witness and that he had misappropriated a particularly large amount of money. It appears that

two volumes of materials relating to the criminal case were submitted to the court in support of this motion.

13. On the same date at 8.20 p.m. the District Court, presided by one judge, started the examination of the investigator's motion in the presence of the applicant and his ten lawyers. It appears that the hearing was held in the judge's office.

14. At the beginning of the court hearing the applicant's lawyers requested that a copy of the investigator's motion be provided to them. The investigator argued that there was no such requirement under the law and it was sufficient to read out the motion. The court nevertheless ordered that a copy of the motion be provided to the applicant's lawyers and announced a ten-minute recess in order for them to acquaint themselves with it.

15. Following the recess, one of the applicant's lawyers asked the court whether he had a right to submit written objections against the motion and, if so, whether he was entitled to be provided with sufficient time to do so. The presiding judge replied that only oral objections could be submitted and that time could be requested after the presentation of the motion by the investigator. The lawyer further asked the court whether he had a right to acquaint himself with the materials on which the investigator's motion was based. The investigator objected to this request, stating that the applicant and his lawyers did not enjoy such a right under Articles 65 and 73 of the Code of Criminal Procedure (CCP). The judge stated that the lawyers had no right to acquaint themselves with the materials, pursuant to Article 285 of the CCP. The applicant's lawyers challenged the judge, claiming that this was in violation of the principle of adversarial proceedings and equality of arms. The presiding judge examined and decided to dismiss this challenge.

16. At some point after 10 p.m. the applicant's lawyers filed a motion, requesting the presiding judge to acknowledge the fact that the applicant's 72-hour long arrest authorised under the domestic law had expired at 9.50 p.m. and that there were no restrictions on his liberty. The investigator objected, arguing that the motion had no connection with the issues examined by the court, namely the applicant's placement in detention. The presiding judge examined the motion and announced his decision, finding that the motion was to be examined at a later stage.

17. The applicant's lawyers insisted that the applicant was entitled to be released since his 72-hour long arrest had expired and challenged the judge for refusing to take a decision on this question. The applicant joined this challenge and stated that, during the judge's examination of the last motion, he had gone out of the judge's office into the reception room but was prevented from leaving the reception room by four police officers. The investigator objected to this motion, arguing that the applicant was not allowed to leave the hearing room without the presiding judge's permission before a recess was announced, pursuant to Article 65 § 4 (6) of the CCP. Since no recess was announced, the applicant was not allowed to leave the

hearing room. The presiding judge examined and decided to dismiss this challenge.

18. The presiding judge then proceeded to the examination of the investigator's motion. The applicant's lawyers requested the court to adjourn the hearing for several hours and asked to have access to the materials of the case in order to prepare their objections. The investigator objected, stating that his motion was to be examined promptly. The presiding judge examined and dismissed this request.

19. The applicant and his lawyers then submitted, *inter alia*, that the fear of his absconding was unjustified. The criminal proceedings had been pending for four months and he had never made any attempt to flee the country. Furthermore, he had permanent residence and elderly and sick parents who were dependent solely on him. Lastly, he had always appeared upon the investigator's summons and had no intention of obstructing the investigation.

20. On 11 October 2005 at 5.05 a.m. the judge closed the hearing by announcing his decision. The judge found the investigator's motion to be substantiated and ordered the applicant's detention until 7 December 2005, taking into account the dangers posed to society by the imputed offence and the fact that the maximum sentence for the offences in question exceeded one year's imprisonment, and having sufficient grounds to believe that the applicant might abscond and might obstruct the investigation by exerting unlawful influence on persons involved in the criminal proceedings, by concealing or falsifying materials significant for the case and by failing to appear upon the summons of the authority dealing with the case without valid reasons. The judge, in his decision, further found that there were no restrictions on the applicant's liberty after 9.50 p.m. on 10 October 2005 and referred to the requirements of Article 65 § 4 (6) of the CCP.

21. According to the applicant, each time the presiding judge examined a challenge or a motion, all the participants in the hearing were asked to leave the judge's office. On each such occasions he was ordered to wait in the judge's reception room and was prevented from leaving by four police officers, while other participants in the hearing could freely walk about or leave the court building.

22. On 17 October 2005 the applicant's lawyers lodged an appeal. In their appeal they argued, *inter alia*, that they had not had access to the materials of the case consisting of two volumes which had been submitted to the court in support of the investigator's motion and that they had had only ten minutes to study the investigator's motion and to prepare their objections. They further argued that the District Court had justified the applicant's detention on grounds which had not been invoked by the investigator, namely the risk of absconding, of his exerting unlawful influence on persons involved in the criminal proceedings and of his not appearing upon the investigating authority's summons. They lastly argued

that, in any event, the justification of the applicant's detention lacked any reasoning as the District Court had failed to explain on what grounds the risks in question were believed to exist in the applicant's case.

23. On 27 October 2005 the Criminal and Military Court of Appeal examined the applicant's appeal in the presence of the applicant's seven lawyers. It appears that during these proceedings the applicant's lawyers were allowed to familiarise themselves with the materials submitted by the investigator in support of his motion. These materials consisted of 69 pages and included, *inter alia*, the arrest record, the charges and the transcript of the applicant's questioning. The lawyers alleged, however, that two volumes of materials had been presented to the District Court and requested the Court of Appeal to order the investigating authority to disclose these materials. This request was refused, as a result of which the applicant's lawyers unsuccessfully challenged the impartiality of the court. Thereafter, the lawyers filed a motion, seeking that an audio recording of the hearing be made. The Court of Appeal examined and dismissed this motion. The parties then made submissions concerning the substance of the investigator's motion and the applicant's appeal.

24. The Court of Appeal decided to dismiss the applicant's appeal, finding that the materials of the case indicated that there was a reasonable suspicion of his having committed an offence which was punishable by a prison term exceeding one year, and that the nature and dangerousness of the imputed offences and the particular circumstances of the case provided sufficient grounds to believe that the applicant might obstruct the investigation. The Court of Appeal further found that the proceedings before the District Court had been conducted in an adversarial manner and with respect for the equality of arms as required by the Convention and the CCP. Furthermore, the District Court had upheld the requirements of Article 201 of the CCP and had not based its decision on circumstances which were not known to the applicant. The reasons for the applicant's detention were based on the facts of the case and the District Court had not gone beyond the scope of the investigator's motion.

25. On 8 November 2005 the applicant's lawyers lodged an appeal on points of law with the Court of Cassation.

26. On 27 November 2005 constitutional amendments were introduced in Armenia with effect from 6 December 2005. As a result of these amendments the Court of Cassation was entrusted with a new role, namely to ensure the uniform application of the law.

27. By a letter of 9 December 2005 the Chairman of the Criminal Chamber of the Court of Cassation returned the appeal unexamined in accordance with the decision of the Council of Court Chairmen of 8 December 2005 taken in connection with the entry into force of the above-mentioned constitutional amendments.

C. The proceedings extending the applicant's detention

28. On 28 November 2005 the investigator filed a motion, seeking to have the applicant's detention extended for another two months, namely until 7 February 2006. The investigator substantiated the necessity of extension on the same grounds as in his previous motion of 10 October 2005.

29. The applicant's lawyers filed objections against this motion, arguing that it had been filed out of time and was based on the same groundless and standard allegations which had been invoked in the previous motion.

30. On 1 December 2005 at 11 a.m. the Kentron and Nork-Marash District Court of Yerevan started the examination of the investigator's motion in the presence of the investigator and the applicant's five lawyers. The applicant's lawyers filed a motion seeking to receive a copy of the investigator's motion and accompanying documents, which was apparently granted. Thereafter, they filed another motion seeking to adjourn the hearing for one day in order to prepare the defence. This motion was granted partially and the hearing was adjourned until 4 p.m. After the resumption of the hearing, the applicant's lawyers filed another motion, seeking to ensure the applicant's presence at the trial. This motion was granted and the trial was adjourned until 12 noon the next day.

31. On 2 December 2005 the General Prosecutor approved the investigator's motion seeking to have the investigation period, which was to expire on 10 December 2005, extended until 10 February 2006.

32. On the same date at 12 noon the District Court continued the examination of the investigator's motion of 28 November 2005. The applicant's lawyers submitted their written observations in reply to this motion and a number of substantiating documents. Thereafter the applicant made oral submissions, contesting the grounds for his continued detention. The judge proceeded to the examination of the written materials submitted by the investigator and then departed to the deliberation room.

33. The District Court found the investigator's motion to be substantiated and decided to grant it, taking into account that the grounds for the applicant's detention still persisted.

34. On 8 December 2005 the Armenian Bar Association decided to apply to the General Prosecutor's Office with a request to have the applicant's detention replaced with the Bar Association's guarantee.

35. On 12 December 2005 the applicant's lawyers lodged an appeal against the decision of the District Court of 2 December 2005. In their appeal they argued, *inter alia*, that the investigator's motion had been filed out of time and should not therefore have been examined. Furthermore, no materials whatsoever were submitted to the court in support of this motion. The District Court had therefore failed to examine the materials of the criminal case. Nor did it analyse the arguments raised in the investigator's

motion. Its decision was therefore groundless and contained standard reasoning.

36. By a letter of 16 December 2005 the General Prosecutor's Office informed the head of the Bar Association that the grounds for the applicant's detention still persisted and there were therefore no reasons to replace it.

37. On 22 and 23 December 2005 the Criminal and Military Court of Appeal held hearings, examining the applicant's appeal. It appears that in the proceedings before the Court of Appeal, one of the applicant's lawyers requested that the applicant's detention be replaced with a non-custodial preventive measure. It further appears that the investigator submitted certain documents in support of his motion, which had not been submitted to the District Court. The applicant's lawyers were allowed to familiarise themselves with these documents. They objected, however, to these documents being taken into account, alleging that the Court of Appeal had no jurisdiction to examine documents which had not been examined by the District Court.

38. On 26 December 2006 the Court of Appeal continued the examination of the applicant's appeal and decided to dismiss it on the same grounds as before, adding that the complexity of the case, the amount of investigative measures to be taken, the applicant's behaviour (even if the accused is not obliged to cooperate, nevertheless, he had refused to testify and to provide handwriting and signature samples) and the fact that the two co-accused were currently in hiding provided sufficient grounds to believe that the applicant might obstruct the investigation. As regards the submission of new materials by the investigator, the Court of Appeal found that the law did not prevent the investigator from doing so.

D. The applicant's release and suspension of the criminal proceedings

39. On 27 January 2006 the investigator filed a motion, seeking to have the applicant's detention extended for another two months, namely until 7 April 2006. The investigator substantiated the necessity of extension on the same grounds as in his previous motions.

40. On 1 February 2006 the Kentron and Nork-Marash District Court of Yerevan examined this motion. In the proceedings before the District Court one of the applicant's lawyers made a reference to the Bar Association's request of 8 December 2005 as an additional circumstance justifying the applicant's release. The District Court found the investigator's motion to be substantiated and decided to grant it, taking into account that the grounds for the applicant's detention still persisted. As regards the Bar Association's request, the District Court found that this request was addressed to the

General Prosecutor's Office and that, in any event, the only alternative preventive measure to detention was bail.

41. On an unspecified date the applicant's lawyers lodged an appeal.

42. On 15 February 2006 the Criminal and Military Court of Appeal quashed the District Court's decision and decided to order the applicant's release. The Court of Appeal found that the persistence of a reasonable suspicion was no longer sufficient to justify the applicant's continued detention and that the risk of his obstructing the investigation was already small at that stage of the proceedings.

43. On 10 August 2006 the investigator decided to suspend the criminal proceedings on the grounds envisaged by Article 31 § 1 (2) and (5) of the Code of Criminal Procedure. The relevant decision in its part concerning the applicant stated:

> "At the current stage of the proceedings it is not possible to disjoin the materials of the criminal case against [the applicant] and to submit a bill of indictment to the court, because the flight and the undisclosed whereabouts of his accomplices [A.H. and T.A.] make it impossible to guarantee [the applicant's] rights under Article 6 § 3 (d) of [the European Convention of Human Rights]... At the same time, in view of the evidence obtained during the investigation, it is not possible to terminate the criminal proceedings against [the applicant] on any ground.
>
> On the basis of the above, taking into consideration the fact that [the] statements made by [the accused A.H. and T.A.] concerning the circumstances disclosed and confirmed by the investigation after [their] flight and other investigative measures to be carried out with their participation may be of significant importance for the determination of the charge against the other accused in the criminal case, [the applicant], and for the qualification and evaluation of the acts committed by him from the criminal law perspective[.H]owever, [A.H. and T.A.] are wanted and their whereabouts are unknown, namely there is a *force majeure* which temporarily precludes further examination of the criminal case..."

44. On 17 December 2007 the investigation of the criminal case was taken over from the General Prosecutor's Office by the National Security Service.

45. It appears that there were no further developments in the case. The proceedings against the applicant were still pending on 10 September 2010, that is the date when the last observation in the present case was filed by the Government.

II. RELEVANT DOMESTIC LAW

A. The Constitution of 1995 (following the amendments adopted on 27 November 2005 with effect from 6 December 2005)

46. Article 92 provides that the highest judicial instance in Armenia, except matters falling within the constitutional jurisdiction, is the Court of Cassation which is called upon to ensure the uniform application of the law.

B. The Criminal Code (in force from 1 August 2003)

47. According to Article 19, offences by their nature and degree of danger posed to society are divided into offences of minor gravity, medium gravity, grave offences and particularly grave offences. Premeditated acts which are punishable by a maximum of five years' imprisonment fall into the category of offences of medium gravity, while those punishable by a maximum of ten years' imprisonment are considered grave offences.

48. Article 178 § 3 (1) provides that fraud, that is the embezzlement or acquisition of rights in respect of a particularly large amount of somebody else's property through deception or abuse of trust shall be punishable by imprisonment for a period between four and eight years with or without confiscation of property.

49. Article 325 § 2 provides that falsification of a certificate or other official document conferring an entitlement or absolving from liability to be used or to be sold by the falsifier himself or another person, or the sale of such a document, or the preparation or sale of false seals, stamps, forms or licence plates of vehicles for the same purposes, as well as the use of an obviously false document, if committed by a group of persons by conspiracy, shall be punishable by a fine of between two hundred and four hundred times the minimum wage, or by correctional labour for a period not exceeding one year, or by imprisonment for a period not exceeding two years.

C. The Code of Criminal Procedure (in force from 12 January 1999)

1. Arrest and detention

50. According to Articles 65 § 2(16) and 73 § 1(12), the accused and his defence counsel are entitled to familiarise themselves with all the materials of the case, to make copies of and to take notes on any information contained in the case and in any volume, after the completion of the investigation.

51. Article 65 § 4(6) provides that the accused is obliged not to leave the courtroom without the presiding judge's permission before a recess is announced. Article 73 § 5(3) imposes the same obligation on the defence counsel.

52. Article 65 § 2(6-8) provides that the accused has the right to refuse to testify, to give explanations or to take part in investigative measures unless otherwise provided by this Code. According to Article 65 § 3, if an accused avails himself of his rights, this should not be interpreted to his detriment or cause unfavourable consequences for him. According to Article 65 § 4, the accused is obliged to undergo a medical examination, fingerprinting, have his photograph taken, as well as samples of his blood and other bodily fluids taken upon the request of the investigating authority.

53. According to Article 128, arrest is the act of taking a person and keeping him in short-term custody.

54. According to Articles 129 and 130, a person may be arrested (1) on immediate suspicion of having committed an offence; or (2) on the basis of a decision adopted by the prosecuting authority. In both cases an arrest must not exceed 72 hours from the moment of taking a person into custody.

55. According to Article 132 § 1(3), an arrestee must be released if the maximum period of arrest prescribed by this Code has expired and the court has not adopted a decision to detain the accused.

56. According to Article 134, preventive measures are measures of compulsion imposed on an arrestee or the accused in order to prevent their inappropriate behaviour in the course of the criminal proceedings and to ensure the enforcement of the judgment. Preventive measures include, *inter alia*, detention, bail and an organisation's guarantee.

57. According to Article 135, the court can impose a preventive measure only when the materials obtained in the criminal case provide sufficient grounds to believe that the suspect or the accused may: (1) abscond from the authority dealing with the case; (2) obstruct the examination of the case during the pre-trial or court proceedings by exerting unlawful influence on persons involved in the criminal proceedings, by concealing or falsifying materials significant for the case, by failing to appear upon the summons of the authority dealing with the case without valid reasons or by other means; (3) commit an act prohibited by criminal law; (4) avoid criminal liability and serving the imposed sentence; and (5) hinder the execution of the judgment. Detention and its alternative preventive measure can be imposed on the accused only if the highest punishment prescribed for the imputed crime is imprisonment for a term exceeding one year or if there are sufficient grounds to believe that the suspect or the accused can commit any of the actions referred to above. When deciding on the necessity of imposing a preventive measure or choosing the type of preventive measure to be imposed on the suspect or the accused, the following should be taken into account: (1) the nature and degree of danger of the imputed offence;

(2) the personality of the suspect or the accused; (3) age and state of health; (4) sex; (5) occupation; (6) family status and dependants, if any; (7) property situation; (8) if he has a permanent residence; and (9) other important circumstances.

58. According to Article 136 § 2, detention and bail can be imposed only by a court decision upon the investigator's or the prosecutor's motion or of the court's own motion during the court examination of the criminal case. The court can replace the detention with bail also upon the motion of the defence.

59. According to Article 137 § 4, when deciding on detention, the court also decides on the possibility of releasing the accused on bail and, if such release is possible, sets the amount of bail.

60. According to Article 138 § 5, the court's decision to choose detention as a preventive measure may be contested before a higher court.

61. Article 139 § 1 prescribes that, if it is necessary to extend the accused's detention period, the investigator or the prosecutor must submit a well-grounded motion to the court not later than ten days before the expiry of the detention period. The court, agreeing with the necessity of extending the detention period, adopts an appropriate decision not later than five days before the expiry of the detention period.

62. Article 143 § 1 prescribes that bail is the money, shares or other values deposited with the court by one or more persons in order to secure the release of a person accused of a crime of minor or medium gravity.

63. According to Article 201 § 1, information related to the investigation may be made public only with the permission of the authority dealing with the case.

64. According to Article 288 § 1, the judicial control of lawfulness and reasons for imposing or not imposing detention as a preventive measure, as well as for extending or refusing to extend a detention period, shall be performed by the appeal court.

65. According to Article 285 § 1, the prosecutor's or the investigator's motion seeking to have detention imposed or extended must indicate the reasons and grounds necessitating the suspect's detention. Materials substantiating the motion shall be attached to it.

2. Suspension of criminal proceedings

66. According to Article 31 § 1(2) and (5), criminal proceedings may be suspended in whole or in their relevant part by the prosecutor's, the investigator's or the court's decision, if the accused has evaded the proceedings or the trial and if there is a *force majeure* which temporarily prevents the conduct of further proceedings.

67. According to Article 31 § 5, criminal proceedings shall be suspended until the circumstances which provided the basis for suspension cease to

exist. After they cease to exist, the proceedings shall be resumed on a decision of the investigator, the prosecutor or the court.

3. Compensation

68. According to Article 66 § 3, an acquitted person is entitled to claim full compensation of pecuniary damage caused as a result of his unlawful arrest, detention, indictment and conviction, taking into account possible lost profits.

D. The Civil Code (in force from 1 January 1999)

69. Article 17 provides that the person whose rights have been violated may claim full compensation for the damage suffered, unless the law or a contract envisage a lower amount of compensation. Damages are the expenses borne or to be borne by the person whose rights have been violated, in connection with restoring the violated rights, loss of his property or damage to it (material damage), including lost earnings which the person would have gained in normal conditions of civil circulation, had his rights not been violated (lost income).

70. Article 1064 provides that damage caused as a result of unlawful conviction, unlawful criminal prosecution, unlawful imposition of a preventive measure in the form of detention or a written undertaking not to leave the place of residence, and unlawful imposition of an administrative penalty shall be compensated in full, in a procedure prescribed by law, by the Republic of Armenia, regardless of the fault of the officials of the body of inquiry, the investigating authority, the prosecutor's office or the courts.

E. Decision no. 20 of the Council of Court Chairmen of 12 February 2000

71. Paragraph 4 of this decision stated that Article 137 § 5 of the CCP prescribed that the court's decision to choose detention as a preventive measure might be contested before a higher court. However, the CCP did not provide for a procedure of contesting the lawfulness and reasons of the appeal court's decisions imposing and extending detention. Hence, in such cases the appeal court's decisions might be contested before the Court of Cassation.

F. Decision no. 83 of the Council of Court Chairmen of 8 December 2005

72. This decision states that Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000 must be repealed, taking

into account that under Article 92 of the Constitution the Court of Cassation, as the highest general jurisdiction court, is called upon to ensure the uniform application of the law.

G. Decision no. 96 of the Council of Court Chairmen of 5 April 2006

73. This decision sets out the new text of Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000, which provides that under Article 92 of the Constitution the highest judicial instance is the Court of Cassation which is called upon to ensure the uniform application of the law. In such circumstances an appeal to the highest judicial instance against decisions taken in pre-trial proceedings, including any decision on detention, does not follow from its constitutional status. Such appeals must be left unexamined. In exceptional cases they may be examined by the Court of Cassation if they raise issues of importance for judicial practice. At the same time, appeals may be brought against decisions of the appeal court whereby it imposes detention at first instance.

THE LAW

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

74. The applicant complained that his right to liberty was violated during the first detention hearing and that the extension of his detention on 2 December 2006 was not carried out in compliance with the time-limits prescribed by law. He invoked 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..."

A. Admissibility

1. Compliance with domestic time-limits when extending detention

(a) The parties' submissions

75. The Government submitted that the investigator had observed the ten-day time-limit prescribed by Article 139 § 1 of the CCP when requesting an extension of the applicant's detention on 28 November 2005.

Pursuant to Article 173 § 3 of the CCP, a time-limit was to begin at 12 noon on the first day and expire at 12 midnight on the last day of the time-limit. Furthermore, pursuant to the same Article, if a time-limit was to expire on a non-working day, then the first following working day was to be considered as the last day of the time-limit. The applicant's detention was to expire on 7 December 2005. The investigator should have filed his motion on 27 November 2005, but since this was a Sunday he filed it on 28 November 2005. There was therefore no violation of Article 5 § 1.

76. The applicant argued that the Government had incorrectly interpreted Article 173 § 3 of the CCP and that the investigator's motion should have been filed on 26 November 2005 as opposed to 28 November 2005 in order to comply with the time-limit prescribed by Article 139 § 1 of the CCP. Moreover, the District Court's decision of 2 December 2005 was also taken with a one-day delay. Thus, both the investigator and the court failed to comply with Article 139 § 1 of the CCP when requesting and ordering an extension of his detention, resulting in a violation of Article 5 § 1.

(b) The Court's assessment

77. 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 comply with its substantive and procedural rules. 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 this law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports of Judgments and Decisions* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II). A period of detention is, in principle, "lawful" if it is based on a court order. Even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see *Benham*, cited above, §§ 42-47, and *Jėčius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX).

78. In the present case, the applicant's two-months detention period authorised by a court was to expire on 7 December 2005. Article 139 § 1 of the CCP required the investigator, if he deemed necessary to seek extension of detention, to submit a motion for extension not later than ten days, and the court to adopt its decision not later than five days, before the expiry of the detention period. The investigator in the applicant's case submitted a motion for extension on 28 November 2005, while the District Court adopted its decision granting that motion and extending the applicant's detention by two months on 2 December 2005. The Court does not find it necessary to determine whether, by doing so, the investigator and the

District Court complied with the time-limits prescribed by Article 139 § 1 of the CCP for the following reasons.

79. The Court notes that at the time when the District Court decided on 2 December 2005 to extend the applicant's detention, his on-going detention was still valid as authorised by the District Court's previous decision of 11 October 2005. Furthermore, even assuming that the decision of 2 December 2005 was taken with a one-day delay, it was nevertheless taken several days before the expiry of the authorised detention period. It was adopted by a competent court upon the investigator's motion as required by the domestic law. The Court considers that in the circumstances of the case the alleged procedural shortcomings, namely the alleged short delays in the filing and examination of the investigator's motion, assuming that they took place, were of such a formal and minor nature that they did not in any way affect the lawfulness of the detention period authorised by that decision.

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

2. The first detention hearing of 10-11 October 2005

81. The Court notes that this complaint 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' submissions

(a) The Government

82. The Government submitted that the applicant had been brought before the Kentron and Nork-Marash District Court of Yerevan at 8.20 p.m. on 10 October 2005, that is before the expiry of his 72-hour long arrest. The hearing before the District Court lasted so long due to the involvement of ten qualified lawyers, each of whom filed a significant number of motions. From the moment when the applicant's 72-hour long arrest expired at 9.50 p.m. on 10 October 2005 until the moment when the District Court took its decision at 5.05 a.m. on 11 October 2005 the applicant could not be considered as a person deprived of liberty. He was not allowed to leave the courtroom because as an accused he was obliged under Article 65 § 4(6) of the CCP to participate in the hearing and not to leave the courtroom without the judge's permission until recess was announced. No recess was

announced during the hearing and those moments when the judge departed to the deliberation room could not be considered as such.

(b) The applicant

83. The applicant submitted that the so-called "deliberation room" was actually the judge's office. The judge never left the room and it was the participants in the hearing who were asked to leave the office when the judge was deliberating on this or that issue. On each such occasion he was surrounded by four police officers in the small room which served as the judge's reception area, while the others were free to go out. Article 129 § 2 of the CCP did not allow the initial 72-hour long arrest to be exceeded. He was formally arrested at 9.50 p.m. on 7 October 2005 and his authorised arrest expired at 9.50 p.m. on 10 October 2005. In spite of this, the judge continued to treat him as a detainee. He was obliged under Article 65 § 4(6) of the CCP to stay in the "courtroom" during the deliberations, but his lawyers were allowed to go out during the same breaks when Article 73 § 5(3) of the CCP imposed the same obligation on them. Therefore, the Government's assertion, which moreover was not based on any domestic provision, that recess must be announced to be considered as such, was misleading. Furthermore, the judge deliberately avoided, throughout the entire hearing, ruling on the question of his liberty thereby depriving him of the possibility to be set free from the police officers during the breaks. This also showed a total disregard on the judge's part of his personal liberty. In conclusion, he was deprived of his liberty during the court hearing in violation of Article 5 § 1 of the Convention.

2. The Court's assessment

84. The Court reiterates once again that any detention must be lawful. Furthermore, any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, and *Lukanov v. Bulgaria*, 20 March 1997, § 41, *Reports of Judgments and Decisions* 1997-II).

85. Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which 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 of Judgments and Decisions* 1998-VII).

86. Turning to the circumstances of the present case, the Court observes that the applicant was formally arrested at 9.50 p.m. on 7 October 2005. According to the domestic law, this initial arrest could not last longer than 72 hours and an arrestee was to be released if that maximum period had expired and the court had not adopted a decision to detain him (Article 129 § 2 and Article 132 § 1(3) of the CCP). The Court notes, however, that on 10 October 2005 at about 8.20 p.m., that is one and a half hours prior to the expiry of his short-term arrest, the applicant was brought before a judge who was called upon to decide whether to detain him. Thus, the authorities complied with their obligation and brought the applicant before a judge within the 72 hours permitted by law. It is true that the hearing extended beyond 9.50 p.m. on that evening, that is beyond those 72 hours, and lasted until 5.05 a.m. on the next morning – the moment that the judge closed the hearing by announcing the decision to detain him (see paragraph 20 above) –, during which there were no recesses announced and the applicant was obliged to stay in the courtroom. The Court, however, considers that, since the applicant was brought before the judge within the 72 hours permitted by law, the requirement that he be present at that hearing until the question of his detention was finally decided by the judge cannot be said to have violated the guarantees of Article 5 § 1 of the Convention. Last but not least, the Court cannot overlook the fact that the applicant was represented by ten lawyers who filed numerous motions and objections, which caused significant delays in the proceedings. Thus, the fact that the hearing went beyond 9.50 p.m. on 10 October 2005 cannot be attributable to the judge, who appears to have dealt with the case diligently.

87. There has accordingly been no violation of Article 5 § 1 of the Convention.

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

88. The applicant complained that procedural requirements had not been observed at the first detention hearing of 10-11 October 2005, that the courts had failed to provide relevant and sufficient reasons for his continued detention and that he had been precluded by law from being released on bail due to the gravity of the offence. He invoked Article 5 § 3 of the Convention, which reads as follows:

> "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."

A. Procedural aspects of the first detention hearing of 10-11 October 2005

1. The parties' submissions

89. The Government submitted that the first detention hearing had been conducted in compliance with the procedural requirements of Article 5 § 3. This Article could not be interpreted as guaranteeing a right to adversarial proceedings and equality of arms. The main purpose of that Article was to afford individuals deprived of their liberty a procedure of a judicial nature designed to ensure that no one was deprived of his liberty arbitrarily and that any such deprivation of liberty was kept to the minimum. An accused was entitled to have access to all the materials of the case file only after the completion of the investigation. Thus, the fact that the applicant and his lawyers were not allowed to familiarise themselves with the materials submitted by the investigator in support of his motion of 10 October 2005 did not violate either the domestic law or Article 5 § 3.

90. The applicant submitted that Article 5 § 3 provided the same guarantees as Article 5 § 4. Furthermore, the Court of Appeal in its decision of 27 October 2005 found that the first instance court had not violated the requirements of equality of arms and adversarial proceedings under the Convention, thereby admitting that such guarantees were applicable to the first detention hearing. Thus, that hearing was conducted in violation of the guarantees of Article 5 § 3, namely the equality of arms and to have sufficient time and facilities to prepare his case. In particular, he and his lawyers were not allowed by the presiding judge to familiarise themselves with two volumes of the case file presented to the judge by the investigator; he and his lawyers were allowed only ten minutes to familiarise themselves with the investigator's motion of 10 October 2005 and to coordinate their position; and he and his lawyers were not allowed to hold a meeting in private to discuss the case.

2. The Court's assessment

91. The Court reiterates that Article 5 § 3 is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999, and *McKay v. the United Kingdom* [GC], no. 543/03, § 31, ECHR 2006-X).

92. Taking the initial stage under the first limb, the Court's case-law establishes that there must be protection of an individual arrested or

detained on suspicion of having committed a criminal offence through judicial control, which must satisfy the following requirements.

93. First, the judicial control 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 (see *Jėčius v. Lithuania*, no. 34578/97, § 84, ECHR 2000-IX, and *McKay*, cited above, § 33). Second, the judicial control of the detention must be automatic (see *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III, and *McKay*, cited above, § 34). Lastly, the judicial officer must offer the requisite guarantees of independence from the executive and the parties (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 146, *Reports* 1998-VIII). He must hear himself the person brought before him (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34) and must review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see *Aquilina*, cited above, § 47).

94. In the present case, the applicant did not allege a violation of any of the guarantees of Article 5 § 3 listed above. He claimed, however, that this Article had been violated because he and his lawyers had not been allowed to familiarise themselves with two volumes of case file materials presented to the judge by the investigator and they had little time to acquaint themselves with the investigator's motion and to coordinate their position. The Government admitted that this was indeed the case. The Court considers that this situation did not put the defence at a significant disadvantage vis-à-vis the prosecution, because the defence was at least able to present their arguments orally. The nature of the first detention hearing is such that the time to examine the case file and prepare the arguments may be reduced to the very minimum, in order to allow the court to take the decision "promptly", as Article 5 requires (see *Khodorkovskiy v. Russia*, no. 5829/04, § 221, 31 May 2011).

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

B. Impossibility of release on bail

1. The parties' submissions

96. The Government submitted that the domestic courts had refused to release him on bail not because of the restrictions imposed by Article 143 § 1 of the CCP but because there were sufficient grounds to believe that the applicant might abscond and obstruct the investigation.

Consequently, Article 143 § 1 of the CCP was not applied in the applicant's case.

97. The applicant submitted that none of the decisions taken by the domestic courts included any reference to his request to be released on bail. They also failed to consider this question of their own motion as required by Article 137 § 4. Thus, there could be no doubt that the courts did so by automatically applying Article 143 § 1 of the CCP to his case, because one of the offences of which he was accused fell into the category of grave crimes under the provisions of Article 19 of the CC. Such automatic refusal of bail amounted to a violation of Article 5 § 3.

2. The Court's assessment

98. The Court notes that it has previously found a violation of Article 5 § 3 in a number of cases in which an application for bail was refused automatically by virtue of the law (see *Caballero v. the United Kingdom* [GC], no. 32819/96, § 21, ECHR 2000-II, and *S.B.C. v. the United Kingdom*, no. 39360/98, §§ 23-24, 19 June 2001).

99. In the present case, the applicant made a similar allegation, namely that the question of his release on bail was not addressed by virtue of application of Article 143 § 1 of the CCP which precluded release on bail of persons accused of grave or particularly grave crimes. The Court will address the applicant's specific allegation.

100. Having regard to the circumstances of the case, the Court notes at the outset that there is no material in the case file suggesting that the applicant had ever filed a request to be released on bail. It is true that the domestic courts appear to have failed to address that question of their own motion as they were supposed to do under Article 137 § 4 of the CCP. However, it is not for the Court to speculate on the possible reasons for this omission and whether this was due to the restrictions prescribed by Article 143 § 1 of the CCP. Thus, it cannot be said with sufficient certainty that that Article had been applied in the applicant's case. In such circumstances, the Court considers that the applicant cannot claim to be a victim of an alleged violation of Article 5 § 3 on that specific ground.

101. It follows that this part of the application is incompatible *ratione personae* and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. The alleged lack of reasons for the applicant's continued detention

1. The parties' submissions

102. The Government argued that the domestic authorities provided relevant and sufficient reasons for the applicant's continued detention. The investigator had submitted a well-grounded motion supported by numerous materials. The courts granted that motion, finding that the applicant might abscond or obstruct the investigation. Thus, the courts had complied with the obligation to provide relevant and sufficient reasons for detention.

103. The applicant submitted that the domestic courts had failed to provide reasons for his continued detention and their reasoning basically amounted to citation of the relevant legal provisions without making any assessment of his personal situation or supporting it with any factual basis. All his arguments in favour of release were ignored by the courts.

2. The Court's assessment

104. A person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 58, ECHR 2003-IX (extracts); *Becciev v. Moldova*, no. 9190/03, § 53, 4 October 2005; and *Khodorkovskiy v. Russia*, no. 5829/04, § 182, 31 May 2011).

105. The domestic courts must examine all the facts arguing 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 set them out in their decisions on the applications for release (see *Letellier v. France*, 26 June 1991, § 35, Series A no. 207). Arguments for and against release must not be general and abstract (see *Clooth v. Belgium*, 12 December 1991, § 44, Series A no. 225).

106. The Court reiterates that 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 *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV)

107. In the present case, the Court notes at the outset that the applicant's pre-trial detention lasted a little more than four months, from 7 October 2005 until 15 February 2006 when his release was ordered by the Court of

Appeal. Thus, his complaint under Article 5 § 3 of the Convention concerns a relatively short period of pre-trial detention. The Court further notes that nothing suggests that the applicant's detention was not based on a reasonable suspicion. Furthermore, it cannot be said that the domestic courts manifestly failed to provide any other grounds justifying his detention (see, in particular, paragraph 38 above). In view of all the above factors, the Court concludes that there is no appearance of a violation of Article 5 § 3 of the Convention.

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

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

109. The applicant complained about the refusal of the Court of Cassation to examine his appeal on points of law of 8 November 2005. He invoked Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

110. The Government submitted that the applicant did not enjoy a right to bring an appeal on points of law against pre-trial decisions concerning his detention. The right to appeal against such decisions was prescribed by Articles 137 § 5 and 288 § 1 of the CCP, which provided that an appeal could be lodged with the Court of Appeal. The applicant successfully exercised this right. The amendments introduced in the Constitution on 6 December 2005 brought about changes in the status of the Court of Cassation, whose role, pursuant to Article 92, was to be limited to ensuring the uniform application of the law. Consequently, on 8 December 2005 the Council of Court Chairmen, a body vested with the authority of providing advisory and non-binding interpretation of domestic law, adopted Decision no. 83 in order to align the judicial practice with the new provisions of the Constitution.

111. The applicant submitted that at the material time his appeal on points of law of 8 November 2005 should have been examined within 3 days from the moment of receiving the materials of the case. The materials were received by the Court of Cassation on 10 November 2005, so his appeal should been examined by 14 November 2005 at the latest. However, the Court of Cassation deliberately delayed its examination until the

decision of the Council of Court Chairmen of 8 December 2005 in order to return his appeal. At the material time, in accordance with well-established practice, the Court of Cassation was obliged to examine his appeal and its failure to do so violated Article 5 § 4.

B. The Court's assessment

112. The Court reiterates that Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which institutes such a system must in principle accord detainees the same guarantees on appeal as at first instance (see *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224). Furthermore, although Article 5 § 4 of the Convention does not guarantee a right to appeal against decisions on the lawfulness of detention, it follows from the aim and purpose of this provision that its requirements must be respected by appeal courts if an appeal lies against a decision on the lawfulness of detention (see *Rutten v. the Netherlands*, no. 32605/96, § 53, 24 July 2001).

113. The Court notes that the first question to be answered in the present case is whether the applicant enjoyed a right under the domestic law to bring an appeal on points of law against the first instance court's decision to extend his detention during the investigation. Having regard to the relevant domestic provisions, it indeed appears that both Articles 137 § 5 and 288 § 1 of the CCP, which regulated this issue, prescribed explicitly only a right to appeal to the Court of Appeal and said nothing about the Court of Cassation (see paragraphs 60 and 64 above). The same follows from Decision no. 20 of the Council of Court Chairmen of 12 February 2000 which stated that an appeal procedure before the Court of Cassation was not regulated by the CCP and advised that such appeals should, nevertheless, be examined (see paragraph 71 above). Thus, it cannot be said that the applicant explicitly enjoyed in law a right of appeal to the Court of Cassation against pre-trial decisions on detention at the material time.

114. It is true that prior to the constitutional amendments of 6 December 2005, such a right appears to have existed in practice if not in law. This practice, however, was abandoned following these amendments which, *inter alia*, re-defined the status of the Court of Cassation and restricted its role to ensuring the uniform application of the law (see paragraphs 72 and 73 above). The applicant lodged his appeal on points of law on 18 November 2005, that is while this practice was still in place, and it was still pending when a decision was taken on 8 December 2005 to abandon this practice. Nevertheless, the Court considers that the fact that the Court of Cassation applied the new approach to the applicant's pending appeal does not raise an issue under Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Brualla*

Gómez de la Torre v. Spain, 19 December 1997, §§ 32-39, *Reports of Judgments and Decisions* 1997-VIII).

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

IV. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

116. The applicant complained that he did not enjoy an enforceable right to compensation for non-pecuniary damage. He invoked Article 5 § 5 of the Convention, which reads as follows:

> "5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Admissibility

117. The Government claimed that the applicant had failed to exhaust domestic remedies because he had never raised the question of compensation, including for non-pecuniary damage, in respect of an alleged violation of Article 5 before any domestic authority.

118. The applicant submitted that the Government had failed to indicate any effective remedies. He claimed that there were no remedies to be exhausted against the absence of an enforceable right to compensation in domestic law.

119. The Court does not find it necessary to rule on this objection because this complaint is in any event inadmissible for the following reasons.

120. The Court reiterates that the right to compensation set forth in Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of that Article has been established, either by a domestic authority or by the Convention institutions (see, among other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X). In the present case, no such violation has been established either by the domestic courts or by this Court. In such circumstances, the applicant cannot claim to be a victim of an alleged violation of Article 5 § 5 of the Convention.

121. It follows that this part of the application is incompatible *ratione personae* and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

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

122. The applicant complained that the length of the criminal proceedings against him was in violation of the "reasonable time" requirement of Article 6 § 1 of the Convention, which, in so far as relevant, provides:

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

A. Admissibility

123. The Court notes that this complaint 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' submissions

124. The Government submitted that the Court's case-law did not set any particular time-limits and the reasonableness of the length of the proceedings depended on the particular circumstances of the case. In the applicant's case, due to the circumstances mentioned in the investigator's decision of 10 August 2006 it was impossible to terminate the criminal proceedings in the interests of proper investigation.

125. The applicant submitted that from 10 August 2006 onwards there was no activity whatsoever carried out by the investigating authority. Furthermore, there were significant delays in the investigation between the date on which the proceedings were instituted, namely 10 June 2005, and the date on which they were suspended, namely 10 August 2006. The criminal case against him had been pending for over five years and there was no certainty as to when it would be completed, if ever. The applicant alleged that the authorities did not wish to terminate the case against him but to use it as a means of pressure due to the sensitive nature of his activity as a human rights lawyer.

2. The Court's assessment

126. The Court reiterates that the period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is "charged" within the autonomous and substantive meaning to be given to that term (see, among other authorities, *Corigliano v. Italy*, 10 December 1982, § 34, Series A no. 57, and *Deweer v. Belgium*,

27 February 1980, §§ 42, 44 and 46, Series A no. 35), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see *Wemhoff v. Germany*, 27 June 1968, § 19, Series A no. 7; *Neumeister v. Austria*, 27 June 1968, § 18, Series A no. 8; and *Ringeisen v. Austria*, 16 July 1971, § 110, Series A no. 13). It ends with the day on which a charge is finally determined or the proceedings are discontinued (see *Kalashnikov v. Russia*, no. 47095/99, § 124, ECHR 2002-VI).

127. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities, and what was at stake for the applicant (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV)

128. In the present case, the criminal proceedings in respect of the applicant were instituted on 10 June 2005. Even if from that moment until his arrest on 7 October 2005 the applicant was formally involved only in his capacity as a witness, it is evident from the substance of that decision that the applicant was already a suspect in a criminal case. Therefore the period to be taken into consideration starts on 10 June 2005. The Court notes that the proceedings were suspended on 10 August 2006 and were still pending on 10 September 2010, that is the date on which the last observation was filed in this case by the Government. There is no material before the Court to suggest that the proceedings against the applicant were ever actually completed. Thus, the Court can say with certainty that the proceedings in question lasted at the very least five years and three months at the time and are possibly still pending over seven years later.

129. The Court considers that much was at stake for the applicant as he suffered feelings of uncertainty about his future for a protracted period of time, bearing in mind that he risked a criminal conviction. The Court reiterates, in this respect, that an accused in criminal proceedings should be entitled to have his case conducted with special diligence and that, in criminal matters, Article 6 is designed to avoid a person charged remaining too long in a state of uncertainty about the outcome of the proceedings (see *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006, and *Hajibeyli v. Azerbaijan*, no. 16528/05, § 51, 10 July 2008).

130. Furthermore, nothing before the Court suggests that the case was of particular complexity. The fact that it apparently involved three accused is in itself not sufficient to make such an assumption. Nor did the Government argue that the case was particularly difficult to determine. In any event, the Court takes the view that a period of at least five years and three months,

during which the case remained at the investigation stage, could not be explained solely by the complexity of the case.

131. The Court also notes that it is not clear if any investigative measures were carried out between 10 October 2005 and 10 August 2006, the date on which the proceedings were suspended. Furthermore, nothing in the case file suggests that any investigative measures were carried out following the suspension of the proceedings, that is for at least four years. No information has been provided by the Government as to whether the prosecution had taken any measures to find the missing persons and thus to eliminate the ground for the continued suspension of the proceedings.

132. The foregoing considerations are sufficient to enable the Court to conclude that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

133. There has accordingly been a violation of Article 6 § 1.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

134. The applicant also raised a number of other complaints under Article 5 §§ 1, 3 and 4 and Article 10 of the Convention.

135. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

136. Article 41 of the Convention provides:

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

A. Damage

137. The applicant claimed 128,400 euros (EUR) in respect of non-pecuniary damage.

138. The Government objected to this claim.

139. The Court considers that the applicant has undoubtedly sustained non-pecuniary damage on account of the breach of the Convention found in the present judgment. Ruling on an equitable basis, it awards the applicant EUR 2,500 in respect of non-pecuniary damage.

B. Costs and expenses

140. The applicant did not claim any costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* by a majority the complaints concerning the lawfulness of the applicant's alleged deprivation of liberty between 9.50 p.m. on 10 October 2005 and 5.05 a.m. on 11 October 2005 and the length of proceedings admissible under Article 5 § 1 and Article 6 § 1 of the Convention and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 10 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges J. Šikuta and N. Tsotsoria is annexed to this judgment.

J.C.M.
M.T.

JOINT DISSENTING OPINION OF JUDGES ŠIKUTA AND TSOTSORIA

We regret that we cannot agree with the majority in finding that there has been no violation of Article 5 § 1 of the Convention, for the following reasons.

In the instant case the Court was called upon to answer two questions in order to conduct the necessary analysis under Article 5 § 1 of the Convention:

1. Was the applicant deprived of his liberty or not?

2. If so, was this deprivation lawful, that is, based on clearly defined and foreseeable legal provisions?

According to Articles 129 and 130 of the Code of Criminal Procedure (hereafter "the CCP"), a person may be arrested (1) on immediate suspicion of having committed an offence; or (2) on the basis of a decision adopted by the prosecuting authority. In both cases the arrest period must not exceed 72 hours from the time the person is taken into custody.

According to Article 132 § 1 (3) of the CCP, the arrestee must be released if the maximum period of arrest prescribed by the Code has expired and the court has not adopted a decision to detain the accused.

Article 65 § 4 (6) of the CCP provides that the accused may not leave the courtroom without the presiding judge's permission before a recess is announced. Article 73 § 5 (3) imposes the same obligation on the defence counsel.

It is important to reiterate that any detention must be lawful. The expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. Furthermore, any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, and *Lukanov v. Bulgaria*, 20 March 1997, § 41, *Reports of Judgments and Decisions* 1997-II).

Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which 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).

Turning to the circumstances of the present case, it has been noted that the applicant was formally arrested at 9.50 p.m. on 7 October 2005. According to domestic law, this initial arrest may not last longer than 72 hours and the arrestee has to be released if that maximum period has expired and the court has not adopted a decision to detain him or her (Article 129 § 2 and Article 132 § 1 (3) of the CCP). On 10 October 2005 at about 8.20 p.m., that is, one and a half hours before the expiry of the maximum period for short-term arrest, the applicant was brought before a judge who was called upon to decide whether to detain him. This hearing lasted until 5.05 a.m. the next morning, when the judge decided to grant the investigator's motion and detain the applicant.

The parties agreed that the applicant had not been allowed to move freely during the breaks in the court hearing, even after 9.50 p.m. on 10 October 2005, when he was technically considered to be at liberty. The Government sought to justify that situation with reference to Article 65 § 4 (6) of the CCP, which states that the accused is not allowed to leave the courtroom without the judge's permission unless there is a recess, and claimed that the applicant was not deprived of his liberty during that period.

We cannot, however, agree with the Government's arguments. They draw a distinction between an obligation for the accused to perform certain actions, in this case to be present at a court hearing, and physically restricting a person's liberty. The applicant in the present case was physically prevented by four police officers from leaving a certain restricted area, despite the fact that other participants in the hearing were allowed to move around freely during the breaks and the fact that under domestic law he was no longer considered an arrestee and was not yet a detainee. We therefore conclude that the applicant was deprived of his liberty in the course of the court hearing from 9.50 p.m. on 10 October 2005 until 5.05 a.m. on 11 October 2005. It remains to be determined whether this deprivation of liberty had a legal basis.

The Government relied on Article 65 § 4 (6) of the CCP. However, there is nothing in that Article which explicitly allows a person's liberty to be restricted. Furthermore, the Article speaks of the requirement not to leave the courtroom, whereas in the applicant's case he was no longer in the judge's office, which apparently served as a courtroom, when he was prevented from moving freely during the breaks in the hearing. Last but not least, the fact cannot be overlooked that Article 65 § 4 (6) allows the accused to leave the courtroom when there is a recess. This clearly suggests that the purpose of this provision is to ensure order in the courtroom and the smooth running of the judicial process rather than to deal with questions relating to deprivation of liberty. Article 73 § 5 (3) of the CCP imposes the same obligation on the defence counsel (see paragraph 51 of the judgment), a fact which also clearly indicates that this requirement has nothing to do with questions of deprivation of liberty.

It is up to the accused, in so far as he is at liberty, to comply with that obligation or face possible sanctions. Hence, we conclude that Article 65 § 4 (6) could not serve as a sufficiently clear and foreseeable legal basis for the applicant's deprivation of liberty during the above-mentioned period.

Lastly, it can be conceded that certain delays in the hearing were caused by the number of lawyers involved in the case and the numerous motions and objections which they filed. However, no explanation was provided by the Government as to why the applicant was brought before the judge only one and a half hours before expiry of the three-day arrest period. Nothing in the case file suggests that any investigative measures were carried out between 8 October 2010 and the time when the applicant was brought before the judge on 10 October 2010. It should be reiterated in this connection that it is for the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty (in the instant case, custody exceeding 72 hours) (see *Shukhardin v. Russia*, no. 65734/01, § 93, 28 June 2007; *Matyush v. Russia*, no. 14850/03, § 73, 9 December 2008; and *Asatryan v. Armenia*, no. 24173/06, § 45, 9 February 2010). Therefore, in our view, the applicant's deprivation of liberty between 9.50 p.m. on 10 October 2005 and 5.05 a.m. on 11 October 2005 lacked a proper legal basis.

We believe that the statutory initial 72-hour arrest period should not be extended under any circumstances (see *Salayev v. Azerbaijan*, no. 40900/05, §§ 44-48, 9 November 2010, and *Farhad Aliyev v. Azerbaijan*, no. 37138/06, §§ 166-169, 9 November 2010, where the Court found a violation of Article 5 § 1 of the Convention because the applicants' initial detention exceeded the maximum of 48 hours permitted by domestic law). The fact that the applicant was brought before the judge within the 72-hour time-limit and that the hearing extended beyond those 72 hours does not, in our opinion, alter the presumption that he was deprived of his liberty on the premises of the court while the latter was deciding on the imposition of a preventive measure, and that this deprivation of liberty was unlawful for the purposes of Article 5 of the Convention. Where the maximum period of detention is laid down by law and is absolute, the authorities responsible for the detention are under a duty to take all necessary precautions to ensure that the permitted duration is not exceeded (see, *K.-F. v. Germany*, 27 November 1997, § 72, *Reports* 1997-VII). Therefore, it was not relevant whether the delay was attributable to the judge (see paragraph 86 of the judgment), since the imperative of Articles 129 and 130 of the CCP is clear – an arrest must not exceed 72 hours from the time the person is taken into custody. Furthermore, under Article 132 § 1 (3) of the CCP, the arrestee must be released if the maximum period of arrest prescribed by that Code has expired (see paragraph 55).

Hence, Article 65 § 4 (6) of the CCP, in combination with the absence of any other provision regulating the maximum period within which a judge is obliged to take a decision on detention or release, provided no kind of clear legal basis for the applicant's deprivation of liberty and placed him in an uncertain legal situation. However, considering the clear and unambiguous language of Article 132 § 1 (3) of the CCP, the applicant, in the absence of a relevant court decision, had to be released on expiry of the 72-hour period.

The importance of the rights protected under Article 5 requires that the law should clearly specify a statutory time-limit for judges to determine the issue of pre-trial detention which lies within the maximum arrest period, in this case 72 hours, so to avoid a breach of Article 5 of the Convention.

On the basis of all the above-mentioned reasons, we cannot but come to the conclusion that there has been a violation of Article 5 § 1 of the Convention. This also leads us to believe that the complaint under Article 5 § 5 should have been declared admissible and a violation found.