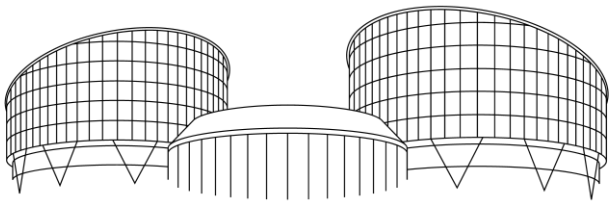

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF POGHOSYAN v. ARMENIA

(Application no. 44068/07)

JUDGMENT

STRASBOURG

20 December 2011

FINAL

20/03/2012

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

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

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 29 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 44068/07) 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 Gaspar Poghosyan ("the applicant"), on 28 September 2007.

2. The applicant was represented by Mr L. Simonyan, a lawyer 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. On 8 September 2009 the President of the Third Section decided to give notice of the application 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 1981 and lives in Yerevan.

5. On an unspecified date criminal proceedings were instituted in respect of the applicant on account of fraud and burglary under Article 177 § 2 (3) and (4) and Article 178 § 1 of the Criminal Code.

6. On 15 February 2007 formal charges were brought against the applicant. It appears that the applicant was considered to be in hiding and a search was initiated.

7. On the same date the Ararat Regional Court examined and granted the investigator's motion seeking to have the applicant placed in pre-trial detention. This decision was based on the nature and degree of dangerousness of the incriminated acts and on the fact that the applicant was in hiding and was capable of hindering the investigation by exerting unlawful pressure on the parties to the proceedings. Detention was imposed for a period of two months to be calculated from the moment of the applicant's arrest.

8. On 13 April 2007 the applicant was arrested and taken to the Ararat Police Department where he was informed about the decision of 15 February 2007. The applicant was then taken to Nubarashen detention facility.

9. On 31 May 2007 the applicant filed a motion with the Ararat Regional Court seeking to be released on bail. The applicant submitted at the outset that the Regional Court, despite the requirement of Article 137 § 4 of the Code of Criminal Procedure (CCP) (see paragraph 29 below), had failed to address the question of his release on bail in its decision of 15 February 2007. He further argued that the fact that he was not eligible under the law for release on bail because of the gravity of the charges was in contradiction with the requirements of Article 5 § 3 of the Convention. He requested the court to apply the requirements of the Convention and to release him, arguing that he had never been in hiding. The applicant alleged that prior to his arrest he had been out of town for business and that he had never been informed of the criminal proceedings against him. He finally argued that he had not been brought before a judge following his arrest, as required by Article 5 § 3 of the Convention.

10. On 5 June 2007 the investigation was completed.

11. On 8 June 2007 the Ararat Regional Court examined the motion of 31 May 2007. The Regional Court noted at the outset, with reference to Article 5 § 3 of the Convention, that the norms of international law prevailed over domestic law and therefore the question of the applicant's release on bail was to be considered. The Regional Court, however, decided to refuse the applicant's request for release, finding that there was a risk of the applicant absconding and thereby evading liability and punishment in view of the fact that he had earlier been in hiding. This decision was subject to appeal within fifteen days.

12. On the same date the bill of indictment was finalised.

13. On 12 June 2007 the criminal case was transmitted to the Ararat Regional Court for examination.

14. On 13 June 2007 the applicant's detention period authorised by the decision of 15 February 2007 expired.

15. On 15 June 2007 the applicant lodged an appeal against the decision of 8 June 2007. He also applied to the chief of Nubarashen detention facility and requested that he be released, since the authorised detention period had expired on 13 June 2007.

16. On the same date Judge Y. of the Ararat Regional Court decided to take over the applicant's criminal case.

17. By a letter of 18 June 2007 the chief of Nubarashen detention facility refused the applicant's request to be released, on the ground that the case had been transmitted to the Regional Court.

18. On 29 June 2007 the applicant lodged an appeal against this refusal with the Erebuni and Nubarashen District Court of Yerevan, arguing that his continued detention was unlawful.

19. On 2 July 2007 Judge Y. decided to set the applicant's criminal case down for trial, scheduling a hearing for 12 July 2007. This decision stated that it was not necessary to modify or cancel the applicant's detention.

20. On 6 July 2007 the Criminal Court of Appeal, referring to Chapter 39 of the CCP which prescribes the rules of judicial control over pre-trial proceedings, decided to leave the applicant's appeal of 15 June 2007 unexamined on the ground that the pre-trial proceedings had already been completed.

21. On 12 July 2007 the Erebuni and Nubarashen District Court of Yerevan dismissed the applicant's appeal of 29 June 2007, finding that the refusal to release him had been lawful and in compliance with Article 138 of the CCP.

22. On 27 July 2007 the applicant lodged an appeal against this decision.

23. On 2 August 2007 the applicant filed a motion with the Ararat Regional Court seeking to be released.

24. On the same date the Ararat Regional Court examined and dismissed this motion. The Regional Court found that the applicant's detention after 13 June 2007 was justified under Article 138 § 3 of the CCP (see paragraph 31 below), while his detention after 2 July 2007 was authorised by the court's decision of the same date.

25. On 22 August 2007 the Criminal Court of Appeal dismissed the applicant's appeal of 27 July 2007 on the same grounds as the District Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

26. According to Article 65, the accused is entitled, *inter alia*, to file motions.

27. According to Article 134 §§ 1 and 4, preventive measures are measures of compulsion imposed on the suspect or the accused. They include, *inter alia*, detention and bail. Bail is considered an alternative preventive measure to detention and is imposed only if a court decision has been issued to detain the accused.

28. According to Article 136 § 2, detention and bail are applied only by a court decision upon the investigator's or the prosecutor's motion or of the court's own motion during the court proceedings. The court can replace detention with bail also upon the motion of the defence.

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

30. According to Article 137 § 5, a court decision imposing detention may be contested before the appeal court.

31. According to 138 § 1, entitled "Detention period", the detention period of an arrested person shall be calculated from the moment of his actual taking into custody or, if he has not been arrested, from the moment of execution of the court decision whereby detention was imposed.

32. According to Article 138 § 3, during the pre-trial proceedings of a criminal case the detention period may not exceed two months, except for cases prescribed by this Code. During the pre-trial proceedings of the criminal case the running of the detention period shall be suspended on the date when the prosecutor transmits the criminal case to the court or when detention is cancelled as a preventive measure.

33. According to Article 138 §§ 5 and 6, during the pre-trial proceedings of a criminal case the accused's detention period cannot exceed one year. No maximum detention period is prescribed during the court proceedings.

34. According to Article 139 §§ 1 and 3, if it is necessary to prolong 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. When deciding on the prolongation of the accused's detention period, the court shall prolong the detention period within the limits prescribed by this Code, on each occasion for a period not exceeding two months.

35. According to Article 141 (10), the administration of a detention facility is obliged, *inter alia*, immediately to release a person kept in detention without a relevant court decision or if the detention period fixed by a court decision has expired.

36. According to Article 285 § 2, a motion seeking to have detention imposed on an accused for whom a search has been declared shall be examined by the court in the presence of the person who has filed the motion and the accused's lawyer, if any.

37. According to Article 288 § 1, the court of appeal shall carry out the judicial review of the lawfulness and validity of decisions imposing or

refusing to impose detention, as well as prolonging or refusing to prolong the detention period.

38. According to Article 291, a criminal case received at the court shall be taken over by judges in a procedure prescribed by law. A relevant decision must be adopted.

39. According to Article 292, the judge who has taken over a case shall examine the materials of the case and within fifteen days from the date of taking over the case shall adopt, *inter alia*, a decision setting the case down for trial.

40. According to Article 293 § 2, the decision setting the case down for trial shall contain, *inter alia*, a decision cancelling, modifying or imposing a preventive measure.

41. According to Article 381 § 1, an appeal must contain (a) the name of the court to which it is addressed; (b) information about the appellant; (c) the contested judgment or decision and the name of the court which issued it; (d) an indication as to whether the whole or part of the judgment or decision are being contested; (e) the appellant's arguments and complaints; (f) substantiating evidence, if any; (g) a list of attached materials; and (h) the appellant's signature. According to Article 381 § 2, the court of appeal shall leave an appeal unexamined if it does not comply with the requirements set out in this Article, was lodged by a person who was not entitled to do so, or was lodged out of time.

B. The Criminal Code

42. According to Article 177 § 2 (3) and (4), burglary with breaking into a flat, storage or construction committed anew is punishable by two to six years' imprisonment.

43. According to Article 178 § 1, fraud is punishable by a maximum of two years' imprisonment.

C. The relevant decisions of the Court of Cassation

44. On 28 November 2008 the Court of Cassation issued a decision in another criminal case whose relevant parts read as follows:

> "...[T]he Court of Cassation finds unacceptable the limitation of the right to appeal against decisions imposing detention or prolonging a detention period on the ground whether the appeal was lodged within the scope of judicial control over pre-trial proceedings or during the court proceedings of the case. ...
>
> In the present case, the Criminal Court of Appeal based its decision to leave the appeal unexamined on the fact that the investigation had been over and the case had been submitted to court, which was not envisaged by Article 381 § 2 of [the CCP]. Hence, the Court of Cassation finds that in the present case an appeal was lodged

against a judicial act subject to appeal, which was not supposed to be left unexamined. ...

On the violation of ... Article 5 § 4 ... of the Convention by the Court of Appeal. ...The domestic criminal procedure law does not envisage any limitation on lodging an appeal against the general jurisdiction court's decision imposing detention or prolonging a detention period, based on the particular stage of the proceedings."

45. On 26 December 2008 the Court of Cassation issued a decision in another criminal case whose relevant parts read as follows:

"The Court of Cassation finds that[, *inter alia*, Article 285 § 2 of the CCP], as regards imposition of a preventive measure on an accused in whose respect a search has been initiated, is incompatible with the requirement of Article 5 § 3 of the Convention that [an arrested person] be promptly brought before a judge. [The mentioned Article of the CCP] allows imposition of a preventive measure depriving a person of liberty in the absence of that person, without providing a possibility for the person discovered as a result of the search to appear before the court and for the question of his detention to be discussed in his presence.

The Court of Cassation finds that such rules of the criminal procedure law will breach Article 5 § 3 of the Convention and will constitute a grave violation of a person's right to liberty if a person discovered as a result of the search is not brought promptly before a court. ...

...[T]he Court of Cassation finds that a necessary domestic safeguard for the protection of the right to liberty must be an additional examination by [the relevant] court of the question of [detention] in the presence of [the affected] person following his discovery as a result of the search."

46. On 10 April 2009 the Court of Cassation issued a decision in another criminal case whose relevant parts read as follows:

"Taking into account the findings reached in the judgment of the European Court of Human Rights in the case of *Ječius v. Lithuania*, the Court of Cassation finds that the suspension of the detention period on the ground that the case has been transmitted by the prosecutor to a court constitutes an unlawful limitation of a person's right to liberty. Hence, the rules prescribed by Article 138 § 3 of [the CCP] contradict Article 5 § 1 of [the Convention] and Articles 11 § 2 and 136 § 2 of [the CCP].

The Court of Cassation finds that in cases in which there are less than fifteen days left before the expiry of the two-month detention period, that is less than the time-limit within which a judge who has taken over the case is to adopt one of the decisions envisaged by Article 292 of [the CCP], the investigating authority, when transmitting the case to the court, must also resolve the question of a person's detention, namely release him if the grounds justifying his detention have ceased to exist or file a motion with the court seeking a prolongation of the detention period if there are [relevant grounds]."

THE LAW

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

47. The applicant complained that his detention between 13 June and 2 July 2007 was unlawful. 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

48. 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

49. The applicant submitted that the domestic law, namely Article 136 of the CCP, allowed detention only upon a court decision. His detention period authorised by a court expired on 13 June 2007 and there was no court decision authorising his detention from that date until 2 July 2007. During that period he was kept in detention by virtue of Article 138 § 3 of the CCP. The applicant argued that the relevant provisions of the CCP were ambiguous and did not meet the Convention requirement of lawfulness. Furthermore, his detention on the sole ground that his criminal case had been transmitted to court could not be regarded as lawful within the meaning of Article 5 § 1. There was therefore no lawful basis for keeping him in detention between 13 June and 2 July 2007.

50. The Government submitted that the applicant's detention between 13 June and 2 July 2007 was compatible with the provisions of the CCP, namely its Article 138 § 3. His detention authorised by a court was to expire on 13 June 2007. In view of this fact, on 8 June 2007 the bill of indictment was finalised and on 12 June 2007 the criminal case was submitted to the Ararat Regional Court for examination on the merits. On 2 July 2007 the Regional Court decided to set the applicant's case down for trial and to leave the detention imposed on the applicant unchanged.

51. The Government added that this procedure was in the process of being amended in order to be brought into compliance with the Court's case-law and the practice of other member States of the Council of Europe. The Government asked the Court to take this into account when deciding on the present case.

2. The Court's assessment

52. 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).

53. 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 (see, among other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 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 *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX).

54. However, the "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among other authorities, *Winterwerp*, cited above, § 45, and *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI).

55. On this last point, the Court stresses that 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).

56. Turning to the circumstances of the present case, the Court notes that the applicant's detention period – as authorised by the decision of the Ararat Regional Court of 15 February 2007 – expired on 13 June 2007 (see paragraphs 7 and 14 above). In the meantime, the investigation was over and on 12 June 2007 the criminal case was transmitted to the Regional Court for examination on the merits. The next occasion on which a court took a decision concerning the applicant's detention was only on 2 July 2007 when the Regional Court decided to set the case down for trial (see paragraph 19 above). Thus, between 13 June and 2 July 2007 the applicant remained in detention by virtue of Article 138 § 3 of the CCP, according to which during the pre-trial proceedings the running of the detention period was to be suspended on the date when the prosecutor transmitted the criminal case to the court.

57. The Court notes that similar but not identical situations have been previously examined in a number of other cases (see *Baranowski v. Poland*, no. 28358/95, §§ 53-58, ECHR 2000-III; *Ječius*, cited above, §§ 57-64; and *Khudoyorov v. Russia*, no. 6847/02, §§ 146-151, ECHR 2005-... (extracts)). In particular, in the cases of *Baranowski* and *Khudoyorov* the applicants continued to remain in detention due to the fact that a bill of indictment had been lodged with the court competent to try their cases. Unlike the present case, however, in those cases that practice was not based on any domestic legal provision. On the other hand, in the case of *Ječius* the legal provision which permitted the applicant's continued detention on the ground that he had access to the case file was found by the Court to be lacking legal certainty.

58. The Court notes that Article 138 of the CCP sets out the rules concerning the detention period, notably its calculation and time-limits. Pursuant to that Article, during pre-trial proceedings the detention period may not exceed two months unless prolonged by a court decision, on each occasion for a period not exceeding two months (Article 139 § 3 of the CCP). However, paragraph 3 of Article 138 provides that during the pre-trial proceedings the running of the detention period is suspended on the date when the prosecutor transmits the criminal case to the court. The rule contained in that paragraph was relied on to justify the continued detention of a person once the criminal case was transmitted to the court for examination on the merits even if the pre-trial detention period authorised by a court had already expired, as happened in the applicant's case.

59. The Court observes that the rule contained in Article 138 § 3 was in direct conflict with the requirement contained in Article 136 § 2 of the CCP which stipulated that detention could be applied only by a court decision. It further contradicted Article 141 (10) of the CCP which required the administration of a detention facility immediately to release a person kept in detention without a relevant court decision or if the detention period fixed by a court decision had expired. The Court does not find the wording of

Article 138 § 3 to be sufficiently precise to provide for a clear, foreseeable and unequivocal exception to these rules. It therefore considers that Article 138 § 3 of the CCP failed to satisfy the principle of legal certainty.

60. The Court further notes that in the case of *Baranowski* the Court stressed that, for the purposes of Article 5 § 1, detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person "authorised ... to exercise judicial power" cannot be considered "lawful" in the sense of that provision. While this requirement is not explicitly stipulated in Article 5 § 1, it can be inferred from Article 5 read as a whole, in particular the wording in paragraph 1 (c) and paragraph 3 (see *Baranowski*, cited above, § 57). In the present case, the applicant stayed in detention without a court decision for nineteen days, which is shorter than the period in the case of *Baranowski* (almost four months) but, in the Court's opinion, sufficiently long to raise an issue of lawfulness under Article 5 § 1.

61. The Court also notes that Article 138 § 3 of the CCP did not prescribe any time-limits, thereby failing to provide any safeguards against a person's indefinite stay in detention. It is true that Article 292 of the CCP requires the judge, who has taken over a case, to adopt a decision on detention within fifteen days (see paragraph 39 above). However, firstly, this time-limit starts to run from the date on which the judge decides to take over the case and not from the date on which the case is received at the court. No time-limit, however, is prescribed for a judge to decide on taking over the case after receiving it at the court (see paragraph 38 above). Secondly, there are no safeguards against the failure by a judge, like in the present case, to comply with the fifteen-day time-limit (see paragraphs 16 and 19 above). The Court notes that no explanation was provided for this, even if only short, delay. Thus, it cannot be ruled out that under Article 138 § 3 of the CCP an individual may be kept in detention without a court decision for a significantly longer period than the fifteen-day time-limit prescribed by Article 292 of the CCP or even the nineteen days of the present case.

62. Lastly, the Court cannot overlook the fact that Article 138 § 3 of the CCP permitted detention by reference to matters wholly extraneous to Article 5 § 1 (see *Ječius*, cited above, § 59). It also notes that similar findings were reached by the Court of Cassation in its decision of 10 April 2009 (see paragraph 46 above).

63. In view of the above, the Court considers that the applicant's detention between 13 June and 2 July 2007 was unlawful within the meaning of Article 5 § 1.

64. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

65. The applicant complained that he had not been brought before a judge after being arrested. 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. Admissibility

66. 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

67. The applicant submitted that the decision of 15 February 2007 imposing detention was taken in his absence. On 13 April 2007 he was arrested by the police and taken to a detention facility but he was never brought before a judge, in breach of the requirements of Article 5 § 3. The legislative changes which occurred following the circumstances of the present case could not eliminate the violation of the Convention which had taken place in respect of the applicant.

68. The Government submitted that considerable measures had been taken in order to resolve the issue of bringing a person, who had been discovered as a result of a search, before a judge. The domestic law did not require the presence of a person for whom a search had been declared at the hearing on his detention and was silent on the measures to be taken when the person sought was discovered. This question had been addressed by the Court of Cassation in its decision of 26 December 2008 (see paragraph 45 above).

2. The Court's assessment

69. The Court reiterates that Article 5 § 3 requires that an arrested individual be brought promptly before a judge or a judicial officer (see *Kandzhov v. Bulgaria*, no. 68294/01, § 65, 6 November 2008). This Article places the judge or the judicial officer under the obligation of hearing

himself the individual brought before him (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34). Furthermore, it does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention. To conclude otherwise would run counter to the plain meaning of this provision (see *Ladent v. Poland*, no. 11036/03, § 75, 18 March 2008).

70. In the present case, the applicant was suspected of having committed a crime. A detention order was issued on 15 February 2007 by the Ararat Regional Court in the applicant's absence, since he was deemed to have gone into hiding. The Court observes in this respect that the mere possibility of a court issuing an arrest warrant *in absentia* in a situation where a person flees from justice does not conflict with the provisions of the Convention (see *Garabayev v. Russia*, no. 38411/02, § 101, 7 June 2007). However, after the applicant was arrested by the police on 13 April 2007 and subsequently detained on the basis of the above-mentioned order, he was never brought before a judge or a judicial officer for the purposes of Article 5 § 3. The Court also notes that the practice of not bringing a person in hiding before a judge following his arrest was found to be in violation of the guarantees of Article 5 § 3 of the Convention by the Court of Cassation in its decision of 26 December 2008 (see paragraph 45 above).

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

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

72. The applicant complained that his appeal of 15 June 2007 had not been examined by the Court of Appeal. He invoked Articles 5 § 4 and 13 of the Convention. The Court considers that this complaint falls to be examined solely under 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. Admissibility

73. 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

74. The applicant submitted that the decision of the Court of Appeal of 6 July 2007 to leave his appeal against detention unexamined on the ground that the pre-trial proceedings had terminated was incompatible with Article 5 § 4 of the Convention. Moreover, there was no domestic provision prescribing non-examination of an appeal on such grounds.

75. The Government submitted that this question had also been addressed by the Court of Cassation in its decision of 28 November 2008 (see paragraph 44 above). The decisions of the Court of Cassation had a binding force on all the courts and the investigating authorities. The Government further asked the Court, in deciding on the present application, to take into account that a number of significant measures had been taken in relation to the issues raised in it.

2. The Court's assessment

76. The Court reiterates that, according to its case-law, Article 5 § 4 enshrines, as does Article 6 § 1, the right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence (see *Shishkov v. Bulgaria*, no. 38822/97, § 82-90, ECHR 2003-I (extracts), and *Bochev v. Bulgaria*, no. 73481/01, § 70, 13 November 2008).

77. Furthermore, Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. 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; *Rutten v. the Netherlands*, no. 32605/96, § 53, 24 July 2001; *Lanz v. Austria*, no. 24430/94, § 42, 31 January 2002; and *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts)).

78. The Court notes that the Armenian law, namely Articles 137 § 5 and 288 § 1 of the CCP, prescribes a right to appeal against the first instance court's decision imposing or prolonging detention (see paragraphs 30 and 37 above). In the present case, the applicant filed a motion seeking to be released on bail, which was dismissed by the decision of the Ararat Regional Court of 8 June 2007. He then availed himself of his right to appeal by lodging an appeal on 15 June 2007. In the meantime, the investigation was over and the criminal case was transmitted to the Ararat Regional Court for examination on the merits. On 6 July 2007 the Court of Appeal decided to leave the applicant's appeal of 15 June 2007 unexamined on the ground that the pre-trial proceedings had been already completed.

79. The Court notes that the domestic law prescribed an exhaustive list of cases in which an appeal lodged against decisions of the first instance

courts could be left unexamined (see paragraph 41 above). This list did not include the ground relied upon by the Court of Appeal in refusing to examine the applicant's appeal. Thus, the applicant was denied access to the Court of Appeal on grounds not envisaged by the domestic law. In any event, the Court considers denial of judicial review of the applicant's detention on the sole ground that the criminal case was no longer considered to be in its pre-trial stage to be an unjustified restriction on his right to take proceedings under Article 5 § 4.

80. It is true that, prior to the Court of Appeal's refusal to examine the applicant's appeal, a decision had already been taken by the Regional Court to leave the applicant's detention unchanged (see paragraph 19 above). However, the Court has already found in a number of cases that the refusal to examine an appeal against detention simply because a fresh decision extending detention had been meanwhile adopted by a lower court was in breach of the requirements of Article 5 § 4 (see *Peša v. Croatia*, no. 40523/08, §§ 125-126, 8 April 2010; *Šebalj v. Croatia*, no. 4429/09, §§ 222-223, 28 June 2011; and *Hađi v. Croatia*, no. 42998/08, §§ 46-47, 1 July 2010). The Court lastly notes that this practice was found to be unacceptable and in violation of the guarantees of Article 5 § 4 of the Convention by the Court of Cassation in its decision of 28 November 2008 (see paragraph 44 above).

81. There has accordingly been a violation of Article 5 § 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

82. The applicant lastly raised a number of other complaints under Article 5 §§ 1 and 3 of the Convention.

83. 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 or its Protocols. 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed fourteen thousand euros (EUR 14,000) in respect of non-pecuniary damage.

86. The Government submitted that the amount claimed was excessive. Furthermore, the applicant had failed to specify the kind of non-pecuniary damage that he had allegedly suffered. The Government lastly asked the Court to take into account the general measures taken in relation to the issues raised in the present application.

87. The Court considers that the applicant has undoubtedly sustained non-pecuniary damage on account of the breaches of the Convention found in the present judgment. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

89. 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 UNANIMOUSLY

1. *Declares* the complaints concerning the alleged unlawfulness of the applicant's detention between 13 June and 2 July 2007, his non-appearance before a judge following his arrest and the refusal to examine his appeal of 15 June 2007 against detention admissible under Article 5 §§ 1, 3 and 4 of the Convention and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in that his detention between 13 June and 2 July 2007 lacked legal basis;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the applicant not appearing before a judge following his arrest;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the refusal to examine the applicant's appeal of 15 June 2007 against detention;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Armenian drams 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;

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

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President