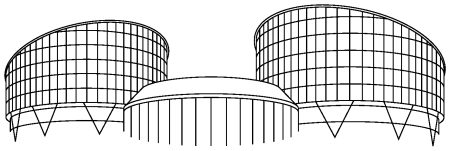

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF LISOVSKIJ v. LITHUANIA

(Application no. 36249/14)

JUDGMENT

STRASBOURG

2 May 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Lisovskij v. Lithuania,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 21 June 2016, 31 January 2017 and 21 March 2017,

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

PROCEDURE

1. The case originated in an application (no. 36249/14) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Genrik Lisovskij ("the applicant"), on 24 April 2014.

2. The applicant was represented by Ms G. Cimbolienė, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicant alleged, in particular, that the length of his detention on remand had been excessive, contrary to Article 5 § 3 of the Convention.

4. On 16 June 2015 the complaint concerning the length of detention on remand was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. On 30 August 2016 the parties were asked to submit additional observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1987 and lives in Vilnius.

A. The applicant's detention during the pre-trial investigation (from 15 December 2009 to 3 December 2010)

6. On 11 May 2009 the State criminal police bureau started a pre-trial investigation into allegations that an armed criminal organisation was active in Vilnius Region. It was suspected that the said organisation possessed and distributed large amounts of narcotic and psychotropic substances, and that it was also engaged in other criminal activities, such as violent assaults, unlawful deprivation of liberty and extortion.

7. In the context of that investigation, on 15 December 2009 the applicant was arrested near his parents' apartment in Vilnius. He was questioned and officially notified that he was suspected of participating in a criminal organisation armed with firearms (Article 249 § 2 of the Criminal Code) and possession of a large amount of narcotic and psychotropic substances with the intention to distribute them (Article 260 §§ 1 and 2 of the Criminal Code).

8. On 16 December 2009 the Vilnius City First District Court authorised the applicant's detention on remand for three months. The court considered that the available evidence (testimonies of witnesses and other suspects and other data collected by the authorities) was sufficient to hold that the applicant may have committed the crimes of which he was suspected. It held that the applicant might try to abscond because he was suspected of serious and very serious crimes which could lead to life imprisonment, he was unemployed, not enrolled in an educational institution, not married and had no strong social ties. The court also found that the applicant might interfere with the criminal investigation or commit further crimes because the crimes of which he was suspected had been well-organised and not spontaneous. Lastly the court noted that the pre-trial investigation was ongoing (see paragraph 40 below) and the remaining investigative actions had to be carried out urgently, so the applicant's detention was necessary to ensure the unimpeded course of the investigation.

9. The applicant appealed against that decision and asked the court to impose a different restrictive measure. He argued that the allegations against him were unfounded. He also submitted that there was no risk of him absconding because in another criminal case, in which he was accused, he had been prohibited from leaving his home for more than seven days in a row and he was complying with that restriction. The applicant further submitted that in the past he had always complied with similar restrictions of movement which had been imposed on him in other pre-trial investigations. He stated that he had a permanent place of residence with his parents and that he had been taking care of his sick grandmother, so detaining him would negatively affect his family. The applicant also contended that he was young, that he used to work until the deterioration of the economic situation in Lithuania, and that he had no prior convictions, so

there were no grounds to find that he might commit further crimes. Lastly the applicant submitted that all the witnesses in the investigation had already been questioned, so there was no possibility for him to interfere with the ongoing investigation.

10. However, on 12 January 2010 the Vilnius Regional Court dismissed the applicant's appeal. It firstly noted that when ordering detention on remand, a court was not establishing the applicant's guilt, and thus the standard of evidence required for detaining him was lower. The Vilnius Regional Court then found that the first-instance court had correctly assessed all the relevant circumstances, and upheld its findings in their entirety.

11. On 16 March 2010 the Vilnius City First District Court extended the applicant's detention for a further three months. It relied on the same grounds as in its previous decision (see paragraph 8 above). In addition, the court noted that the case against the applicant was complex and of a large scale, and that the investigative actions were being carried out without undue delays (see paragraph 40 below).

12. The applicant appealed against that decision, submitting essentially the same reasons as in his previous appeal (see paragraph 9 above). However, on 14 April 2010 the Vilnius Regional Court dismissed the appeal and upheld the lower court's findings that the applicant might flee, attempt to interfere with the investigation or commit further crimes, that the criminal case was complex, and that the pre-trial investigation was being carried out with due diligence (see paragraph 40 below).

13. On 11 June 2010 the Vilnius Regional Court, acting as a court of first instance, extended the applicant's detention for a further three months. In addition to reiterating the findings of the previous court decisions (see paragraphs 8 and 11 above), it noted that the applicant had a prior conviction and that he was suspected of leading a criminal organisation, so there were grounds to believe that he might commit further crimes. The court also found that the pre-trial investigation concerned more than fifty suspects and that it was being carried out diligently and without undue delays (see paragraph 40 below).

14. On 30 June 2010 the Court of Appeal dismissed the applicant's appeal. It reiterated that there had been sufficient evidence (such as testimonies of witnesses and other suspects, results of eyewitness identification, and other data collected by the authorities) to believe that the applicant might have committed the crimes of which he had been suspected. The Court of Appeal quashed the lower court's conclusion that the applicant might interfere with the investigation, holding that it was unsubstantiated. However, it accepted that the applicant might abscond because he was suspected of serious and very serious deliberate crimes which could lead to life imprisonment, and because he had no legal source of income or strong social ties. The Court of Appeal also held that the applicant might commit

further crimes because he was suspected of having committed multiple crimes while participating in a criminal organisation which, allegedly, had been his main source of income.

The Court of Appeal observed that, in accordance with the domestic law, detention on remand could last longer than six months only when the case was especially complex or of a large scale. It found that those two conditions had been met in the applicant's case: the investigation concerned multiple criminal offences committed in a criminal organisation, there was a large number of suspects, and it was necessary to carry out numerous investigative actions, so the case could be considered especially complex and of a large scale. The Court of Appeal also noted that the pre-trial investigation had been conducted with due diligence: after the last decision to extend the applicant's detention, the police had questioned additional witnesses and the applicant himself, conducted eyewitness identification, ordered forensic examinations of various objects, and carried out other investigative actions in respect of the other suspects (see paragraph 40 below).

Lastly the court held that the applicant's personal circumstances, such as his age, family situation, or restrictive measures imposed on him in other cases, could not be considered as "having a special priority" (*išimtinai prioritetiniai*) which could "outweigh the public interest" and justify releasing him from detention.

15. On 14 September 2010 the Vilnius Regional Court extended the applicant's detention for a further three months. It relied on essentially the same grounds (see paragraph 14 above), additionally finding that the applicant had connections to foreign countries which could facilitate his absconding. The court also held that the number and nature of the allegations against the applicant indicated that he was dangerous. Lastly it noted that over fifty suspects had been arrested in the case and that numerous investigative actions were still being carried out (see paragraph 40 below). As a result, the Vilnius Regional Court concluded that the applicant's continuing detention was necessary in order to ensure his participation in the criminal proceedings and the unhindered course of the investigation, as well as to prevent the commission of further crimes.

It appears that the applicant did not appeal against that decision.

16. On 20 September 2010 the applicant was officially notified that he was suspected of leading a criminal organisation armed with firearms (Article 249 § 3 of the Criminal Code) and possession of a very large amount of narcotic and psychotropic substances with the intention to distribute them (Article 260 § 3 of the Criminal Code).

17. On 3 December 2010 the prosecutor charged the applicant with the aforementioned crimes (see paragraph 16 above), and the case was referred to the Vilnius Regional Court for examination on the merits.

B. The applicant's detention during the examination of the case by the first-instance court until his conviction in separate criminal proceedings (from 3 December 2010 to 22 May 2014)

18. On 13 December 2010 the Vilnius Regional Court extended the applicant's detention for a further three months, reiterating the findings of the previous decisions (see paragraphs 14 and 15 above). It also noted that the criminal organisation in question had been operating for a long time, it had been armed with firearms and had committed numerous well-organised crimes which had allegedly been a source of income for its members. Since the applicant was suspected of leading that organisation and participating in multiple crimes, and since he was unemployed, not enrolled in an educational institution and not married, the court considered that he was "not prone to following socially accepted rules of behaviour" (*nelinkęs laikytis visuomenėje priimtų elgesio normų ir taisyklių*).

19. On 10 January 2011 the Court of Appeal dismissed the applicant's appeal, relying on essentially the same grounds as before (see paragraphs 14, 15 and 18 above). It also underlined that after the case had been referred to the first-instance court for examination on the merits, the law had no longer established the maximum length of detention; however, it had to be compatible with the grounds and procedures provided for by law (see paragraphs 46-51 below). The Court of Appeal held that, in the light of the charges against the applicant, the protection of the public interest in his case outweighed his right to liberty.

20. In separate criminal proceedings, on 25 February 2011 the Vilnius City Second District Court convicted the applicant of engaging in public violence when using firearms under Article 283 § 2 of the Criminal Code. He was given a suspended prison sentence of two years and one month. On 5 April 2012 the Vilnius Regional Court upheld the conviction.

21. On 10 March 2011 the Vilnius Regional Court extended the applicant's detention for a further three months on essentially the same grounds as before (see paragraphs 14, 15 and 18 above). It appears that the applicant did not appeal against that decision.

22. On 2 June 2011 the prosecutor, on the basis of the information collected during the pre-trial investigation, started a separate pre-trial investigation against the applicant. The second investigation concerned allegations of production of a counterfeit electronic means of payment; fraudulently acquiring another person's property; unauthorised possession of firearms, ammunition or explosives; destruction of or damage to other person's property; murder for personal gain; unlawful deprivation of liberty using violence; and violation of public order (Articles 214 § 1, 182 § 1, 253 § 1, 187 § 1, 129 § 2 (9), 146 § 2 and 284 § 1 of the Criminal Code, respectively). On 29 July 2011 the prosecutor issued an indictment against

the applicant in respect of those charges and the case was referred to the Vilnius Regional Court for examination on the merits.

23. The Vilnius Regional Court extended the applicant's detention for a further three months on 13 June 2011 and 14 September 2011, relying on essentially the same grounds as before (see paragraphs 14, 15 and 18 above).

24. On 14 October 2011 the Court of Appeal dismissed the applicant's appeal. It reiterated that there was sufficient evidence to believe that he had committed the crimes with which he had been charged, and upheld the lower court's findings that the applicant might flee. The Court of Appeal emphasised that the applicant had a prior conviction, that he was accused of participating in a criminal organisation and of having a leading role in the commission of multiple crimes, and that there was no information that he had ever had a legal source of income. Accordingly, the Court of Appeal considered that there were sufficient grounds to believe that the applicant might commit further crimes, so his continued detention was necessary.

25. The Vilnius Regional Court extended the applicant's detention for a further three months on 12 December 2011 and 5 March 2012 on essentially the same grounds as before (see paragraphs 14, 15, 18 and 24 above).

26. On 28 March 2012 the Court of Appeal dismissed the applicant's appeal and upheld the lower court's findings that the applicant might flee or commit new crimes. It also noted that the criminal case was very complex and of a large scale: there were twenty-seven defendants, and the case file at that time consisted of seventy-six volumes. Thus, the Court of Appeal concluded that although the applicant had been detained for a very long time (two years and three months), the complexity and scope of the case made his detention essential for ensuring the unimpeded course of the criminal proceedings.

27. From June to December 2012 the Vilnius Regional Court extended the applicant's detention every three months and the Court of Appeal dismissed his subsequent appeals, relying on essentially the same grounds as in previous court decisions (see paragraphs 14, 15, 18, 24 and 26 above).

28. On 14 January 2013 the Court of Appeal, when dismissing an appeal by the applicant, emphasised that the case had been referred to the first-instance court for examination on the merits and at that stage of the proceedings the maximum length of detention was not established either in domestic law or in the Convention or the Court's case-law. It reiterated that the case against the applicant was complex and of a large scope – the case file at that time consisted of seventy-nine volumes. The Court of Appeal also considered that there had not been any undue delays in the examination of the case before the first-instance court. It dismissed as unsubstantiated the applicant's argument that after a lengthy period of detention he no longer had any motivation to flee or commit further crimes.

29. In unrelated criminal proceedings, on 6 February 2013 the Šiauliai Regional Court convicted the applicant of unlawful deprivation of liberty by using violence under Article 146 § 2 of the Criminal Code and sentenced him to seventy-five days of detention.

30. The Vilnius Regional Court extended the applicant's detention for a further three months on 8 March 2013 and 13 June 2013, relying on essentially the same grounds as before (see paragraphs 14, 15, 18, 24 and 26 above) and additionally noting that the applicant was accused of serious crimes in another criminal case as well. On 3 July 2013 the Court of Appeal dismissed the applicant's appeal, reiterating, *inter alia*, the scope and complexity of the criminal case and noting that the case file at that time consisted of eighty-one volume.

31. On 11 September 2013 the Vilnius Regional Court refused to extend the applicant's detention. It noted that the applicant had been detained for more than three years, so the initial grounds – such as the possibility that he might flee or commit further crimes – could no longer justify his continued detention. The court also observed that all the witnesses and most of the co-accused in the case had already been questioned, so it was no longer necessary to keep the applicant in detention.

32. The Vilnius Regional Court released the applicant immediately and placed him under house arrest (see paragraph 52 below). The applicant's passport and driver's licence were taken and he was prohibited from leaving his home between 10 p.m. and 8 a.m., from visiting public places, except for medical institutions and shops, and from contacting the other defendants in the criminal case. According to the applicant, he complied with all those conditions and soon after his release he found a job as a security guard.

33. On 24 September 2013 the Court of Appeal, following an appeal by the prosecution, quashed the lower court's decision to release the applicant from detention, finding that the latter had erred in concluding that the detention was no longer justified. The Court of Appeal held that there were sufficient grounds to believe that the applicant might flee because he was facing a very severe punishment and had no strong social ties. It also held that the applicant might commit further crimes because he had allegedly been the leader of a criminal organisation, had been suspected of committing crimes for personal gain, and had had several prior convictions, all of which contributed to a "negative description of his personality" (*neigiamai charakterizuoja kaltinamojo asmenybę*). Although the court acknowledged that the applicant had been detained for a very long time (more than three years and six months), it reiterated that the public interest outweighed individual liberty, so the nature and seriousness of the charges against the applicant justified keeping him in detention. Lastly the Court of Appeal noted that the maximum length of detention during the examination of the case before the first-instance court was not established either in domestic law or in the Convention, so the necessity of extending detention

had to be assessed on a case-by-case basis. In the applicant's case, the court considered that the scope of the case (twenty-seven defendants and, at that time, eighty-two volumes of case-file material) and the complexity of the investigation justified the applicant's continued detention. Accordingly, the Court of Appeal extended the detention for three months.

34. On 17 October 2013 the Vilnius Regional Court found that the applicant had been detained on remand in another criminal case (see paragraph 38 below). It held that it was unnecessary to order detention in two separate cases and thus quashed the applicant's detention. However, on 5 November 2013 the Court of Appeal quashed that decision, finding that the grounds for detention established in its decision of 24 September 2013 (see paragraph 33 above) remained valid.

35. On 20 December 2013 the Vilnius Regional Court again found that the applicant had been detained on remand in another criminal case and thus revoked his detention. However, on 7 January 2014 the Court of Appeal quashed that decision. It held that the applicant could be released only when the grounds for his detention had ceased to pertain, but the Vilnius Regional Court had not examined that. The Court of Appeal underlined that there was sufficient evidence (such as the testimonies of other defendants, eyewitness identification, surveillance data, expert reports, and other material in the case file) that the applicant might have committed the crimes with which he was charged. Then the court re-examined its previous findings concerning the need to keep the applicant in detention (see paragraph 33 above) and concluded that they were still valid. As a result, the Court of Appeal extended the applicant's detention for a further three months.

36. On 28 March 2014 the Vilnius Regional Court extended the applicant's detention for a further three months. It relied on essentially the same grounds as the Court of Appeal in its previous decisions (see paragraphs 33 and 35 above), also noting that the applicant had connections abroad, which might facilitate his absconding. The Vilnius Regional Court also considered that the nature and seriousness of the charges against the applicant, as well as his personal character, indicated that he was especially dangerous to society and thus the commission of further crimes could not be prevented by less restrictive measures.

37. On 15 April 2014 the Court of Appeal dismissed the applicant's appeal and upheld the findings of the lower court. It reiterated that neither domestic law nor the Convention established the maximum duration of detention during the examination of a case before a first-instance court. The court considered that the circumstances of the applicant's case – such as the number, nature and seriousness of the charges against him, as well as the fact that proceeds of crime had allegedly been his main source of income - required prioritising the protection of the public interest over the applicant's individual liberty. Therefore, the Court of Appeal held that even

the lengthy total period of the applicant's detention was in compliance with domestic law and the Convention.

38. In separate criminal proceedings, on 22 May 2014 the Vilnius Regional Court convicted the applicant of unauthorised possession of firearms, ammunition or explosives, destruction of or damage to other persons' property, murder for personal gain, unlawful deprivation of liberty using violence, and violation of public order (Articles 253 § 1, 187 § 1, 129 § 2 (9), 146 § 2 and 284 § 1 of the Criminal Code, respectively). The applicant was sentenced to ten years and six months' imprisonment, after deducting the time spent in pre-trial detention from 1 October 2013 to 1 April 2014 which had been ordered in that case.

The applicant appealed against his conviction. According to the latest information submitted to the Court, at the time of the present judgment his appeal was still pending because the appellate court had decided to re-examine the evidence in the light of new material.

39. On 30 June 2014 the Vilnius Regional Court revoked the applicant's detention order on the grounds that on 22 May 2014 he had been convicted in another criminal case (see paragraph 38 above).

C. Conduct of the criminal proceedings during the applicant's detention

40. From the applicant's arrest on 15 December 2009 (see paragraph 7 above) to the completion of the pre-trial investigation on 3 December 2010 (see paragraph 17 above), the authorities conducted five interviews with the applicant, searched his home twice, seized and examined his car, computer and other belongings, ordered two forensic examinations of various seized items, sent four requests for information to telecommunications providers, carried out secret-surveillance activities, conducted an eyewitness identification of the applicant, and interviewed around fifty witnesses and other suspects.

41. From the transfer of the case to the Vilnius Regional Court for examination on the merits on 3 December 2010 (see paragraph 17 above) to the applicant's conviction in separate criminal proceedings on 22 May 2014 (see paragraph 38 above), a total of fifty-seven hearings were scheduled on a monthly or nearly monthly basis, and twenty-six of those hearings were adjourned:

(a) From 3 December 2010 to 31 March 2011 two hearings were scheduled but both were adjourned;

(b) From 1 April 2011 to 22 June 2011 six hearings were held;

(c) From 23 June 2011 to 7 December 2011 five hearings were scheduled but all were adjourned;

(d) From 8 December 2011 to 14 June 2012 twelve hearings were scheduled and nine of them were held;

(e) From 15 June 2012 to 3 October 2012 one hearing was scheduled but it was adjourned;

(f) From 4 October 2012 to 29 November 2012 five hearings were scheduled and four of them were held;

(g) From 30 November 2012 to 3 March 2013 two hearings were scheduled but both were adjourned;

(h) On 4 and 25 of March 2013 two hearings were scheduled and both were held;

(i) From 26 March 2013 to 6 October 2013 six hearings were scheduled but all were adjourned;

(j) From 7 October 2013 to 25 November 2013 six hearings were scheduled and five of them were held;

(k) From 26 November 2013 to 16 February 2014 four hearings were scheduled but all were adjourned;

(l) From 17 February 2014 to 22 May 2014 six hearings were scheduled and five of them were held.

42. The main reasons for adjournment were the failure of the co-accused or witnesses to appear, and in some of those instances the court ordered a search for them or imposed additional restrictive measures. During the thirty-one hearings which were held, the court heard over fifty testimonies of the co-accused and witnesses, read out the case material, played audio and video recordings, and examined applications lodged by the prosecutor and some of the co-accused.

D. Subsequent court decisions

43. On 12 June 2015 the Vilnius Regional Court convicted the applicant of leading a criminal organisation armed with firearms and possession of a very large amount of narcotic and psychotropic substances with the intention to distribute them (Articles 249 § 3 and 260 § 3 of the Criminal Code, respectively). The applicant was sentenced to thirteen years' imprisonment, after deducting the time spent in pre-trial detention from 15 December 2009 to 11 September 2013 and from 24 September 2013 to 30 June 2014.

The applicant appealed against his conviction. According to the latest information submitted to the Court, at the time of the present judgment his appeal was still pending.

44. On 23 September 2016 the Court of Appeal released the applicant on bail. The court observed that the applicant's conviction by the first-instance court (see paragraph 38 above) had not yet become final because the appellate proceedings were pending, and those proceedings would likely last a long time. The court also noted that the applicant had already been detained for more than six years, which amounted to nearly two thirds of his sentence (see paragraph 38 above). The Court of Appeal set bail at

5,000 euros (EUR), prohibited the applicant from leaving his home, visiting certain public places, contacting the other co-accused, and leaving Lithuania, and ordered him to report to a local police station twice a week.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention on remand and house arrest

45. Article 20 of the Constitution of the Republic of Lithuania reads as follows:

Article 20

"Human liberty shall be inviolable.

No one may be arbitrarily apprehended or detained. No one may be deprived of his liberty otherwise than on the grounds and according to the procedures established by law.

A person apprehended *in flagrante delicto* must, within forty-eight hours, be brought before a court for the purpose of deciding, in the presence of this person, on the validity of the apprehension. If the court does not adopt a decision to detain the person, the apprehended person shall be released immediately."

46. Article 119 of the Code of Criminal Procedure (hereinafter – "the CCP") provides that restrictive measures can be applied in order to ensure that the suspect, the accused or the convicted person participates in the proceedings, to prevent interference with the pre-trial investigation or with the examination of the case before the court, or with the execution of the sentence, and to prevent the commission of further criminal acts.

47. Article 122 § 1 of the CCP permits detention on remand when there is a well-founded belief that the suspect may flee, interfere with the investigation, or commit further criminal acts.

48. Article 122 § 2 of the CCP provides that where there is a reasonable suspicion that a suspect might flee, detention may be ordered after taking into account his or her marital status, permanent place of residence, employment status, state of health, prior convictions, connections abroad, and other relevant circumstances.

49. Article 122 § 7 of the CCP states that detention on remand may be ordered only when more lenient remand measures would be insufficient to achieve the objectives listed in Article 119 of the CCP.

50. Article 127 § 2 of the CCP provides that the maximum length of detention on remand during the pre-trial investigation is nine months, and in particularly complex or large-scale cases, or cases concerning organised criminal groups, eighteen months. The CCP does not prescribe the maximum length of detention after the pre-trial investigation has been

completed and the case had been transferred to the first-instance court for examination on the merits.

51. In its ruling of 30 December 2004, the Senate of the Supreme Court of Lithuania held as follows:

> "8. When detention on remand is imposed or extended in line with Article 122 § 1 of the CCP, all the circumstances listed in Article 122 § 2 of the CCP must be considered. The seriousness of the crime and the possibility of life imprisonment fall under the notion of "other relevant circumstances" referred to in the latter provision. If such circumstances permit the conclusion that the person may flee ... then they warrant the imposition or extension of detention on remand on the grounds provided in [Article 122 § 1 of the CCP].
>
> ...
>
> 10. ... Grounds to believe that the person can commit further crimes ... may be established on the basis of that person's criminal record, his or her role in committing the crimes [of which he or she is suspected], the fact that he or she is suspected of having committed several crimes or earning a living from criminal activity, as well as on the basis of witness testimonies and other data ...
>
> ...
>
> 15. Article 127 §§ 1 and 2 of the CCP stipulate the maximum duration of detention at the stage of pre-trial investigation. That duration does not include the time during which the case is being examined by the court ...
>
> ...
>
> 22. ... When detention is extended for more than six months, [the court] must indicate the circumstances which confirm the particular complexity or large scale of the case ...
>
> ...
>
> 24. The terms "particular complexity of the case" and "large scale", used in Article 127 § 2 of the CCP are relative (*vertinamosios*) and usually interrelated. The particular complexity or large scale of the case can arise from a large number of criminal acts, suspects or victims and witnesses ... or the need to conduct time-consuming and complex examinations, or the multitude of procedural actions or case documents, and so forth ..."

52. Article 132 § 1 of the CCP provides that house arrest consists of prohibiting the suspect from leaving his or her place of residence during certain hours, visiting public places and contacting certain persons.

B. Conduct of criminal proceedings

53. Articles 243 and 244 § 1 of the CCP provide that the examination of a case could be adjourned in order to rest, to re-summon the parties or participants who have failed to appear, to request new evidence, or for other important reasons.

54. On 13 March 2014 the CCP was amended. A new Article 242^1 § 1 establishes a court's duty to examine a case within the shortest possible time

and with as few adjournments as possible. Amended Articles 243 § 2 and 244 § 1 provide that a case can be adjourned for no longer than one month and that that term can be extended once.

C. Sentencing

55. Article 66 §§ 1 and 2 of the Criminal Code provide that when sentencing a person who has been detained on remand, a court must deduct the time spent in detention from the final sentence. One day spent in detention is equivalent to one day of imprisonment.

THE LAW

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

56. The applicant complained about the excessive length of his detention on remand. He relied on Article 5 § 3 of the Convention, which, in its relevant parts, reads:

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

A. Admissibility

57. The Government argued that the applicant had failed to exhaust effective domestic remedies. They submitted that he had had the possibility to lodge a civil claim for damages in line with Article 6.272 of the Civil Code. The Government referred to the well-established case-law of the domestic courts in assessing the lawfulness and reasonable length of detention on remand, and noted that in many cases the parties had successfully sought compensation for damage caused by unreasonably long detention. Therefore, relying on the Court's judgment in *Varnas v. Lithuania* (no. 42615/06, §§ 85-89, 9 July 2013), the Government requested that the application be declared inadmissible due to non-exhaustion of domestic remedies as required by Article 35 § 1 of the Convention.

58. The applicant contested the Government's argument, stating that he had not initiated civil proceedings because "the issue of damage was not the main one in this case".

59. The Court reiterates its findings in *Varnas* (cited above, §§ 85-89), that an action for damages can be considered an effective remedy only in those cases where the impugned detention has come to an end. Meanwhile

where the person concerned is still in custody, the only remedy which may be considered sufficient and adequate is one which is capable of leading to a binding decision for his or her release (ibid., § 86, and the cases cited therein). The Court also reiterates that the requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)).

60. In the present case, at the time of the lodging of this application (24 April 2014), the applicant was still in detention (see paragraphs 37-38 above). Therefore, a claim for damages under Article 6.272 of the Civil Code was not a sufficient and adequate remedy which the applicant was obliged to exhaust. The Government's preliminary objection is thus dismissed.

61. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

62. The applicant submitted that his continued detention had been excessively long and unjustified. He stated that he had had a permanent place of residence with his parents and that he had complied with all the conditions of the house arrest, so the domestic courts had not had any reasonable grounds to find that he may have fled or committed further crimes. The applicant further submitted that the domestic courts had extended his detention quasi-automatically, repeating almost identical grounds in all their decisions.

63. The Government submitted that in cases concerning organised crime the Court had found no violation of Article 5 when detention on remand had lasted over three years (see *Wrona v. Poland*, no. 23119/05, 5 January 2010; *Luković v. Serbia*, no. 43808/07, 26 March 2013; and *Mierzejewski v. Poland*, no. 15612/13, 24 February 2015). The Government argued that the present case, which concerned a criminal organisation armed with firearms and engaged in large-scale distribution of illegal drugs, had been exceptionally complex and therefore justified the lengthy detention of the applicant, who had been suspected of leading the said organisation and of committing multiple crimes under its umbrella. They also noted the large scope of the case: it had involved twenty-seven accused individuals and two hundred criminal episodes, in fifty of which the applicant had been involved. During the investigation at least fifty witnesses had been questioned, some of them multiple times, and a large number of other

investigative actions had been carried out. The Government submitted that the authorities had acted with due diligence and there had not been any periods of inactivity on their part. The Government provided a timeline of all the investigative actions taken in respect of the applicant during the pre-trial investigation, as well as a timeline of the seventy-five court hearings scheduled in the criminal proceedings (fifty-seven of them were scheduled before the applicant's conviction in separate criminal proceedings - see paragraphs 41-42 above), indicating the actions carried out by the court during each hearing or the reasons for adjournment.

64. Lastly the Government submitted that the domestic courts in all their decisions had provided relevant and sufficient grounds to detain the applicant and that they had relied on the specific circumstances of the applicant's case, as required by the Convention, and not on "general and abstract" considerations.

2. The Court's assessment

(a) General principles

65. The applicable general principles have been recently summarised in *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 84-91, ECHR 2016 (extracts).

66. The Court reiterates in particular that the question of whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features. Accordingly, there is no fixed time-frame applicable to each case (see *McKay v. the United Kingdom* [GC], no. 543/03, § 45, ECHR 2006-X). The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a public interest which justifies a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Idalov v. Russia* [GC], no. 5826/03, § 141, 22 May 2012).

67. The Court also reiterates that cases which concern organised crime inevitably present more difficulties for the investigative authorities and courts in determining the facts and the degree of responsibility of each member of the criminal organisation (see *Pastukhov and Yelagin v. Russia*, no. 55299/07, § 44, 19 December 2013, and the cases cited therein). In cases of this kind, continuous control and limitation of the defendants' ability to contact each other and other individuals may be essential to avoid their

absconding, tampering with evidence and influencing or threatening witnesses. Accordingly, longer periods of detention than in other cases may be reasonable (see *Bąk v. Poland*, no. 7870/04, §§ 56-57, 16 January 2007; *Tomecki v. Poland*, no. 47944/06, § 29, 20 May 2008; and *Luković*, cited above, § 46).

68. Lastly, the Court reiterates that Article 5 § 3 of the Convention requires the competent national authorities to display "special diligence" in the conduct of the criminal proceedings against the accused in detention (see *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV). In assessing whether the "special diligence" requirement has been met, the Court will have regard to, *inter alia*, the overall complexity of the proceedings, any periods of unjustified delay and the steps taken by the authorities to speed up proceedings to ensure that the overall length of detention remains "reasonable" (see *Suslov v. Russia*, no. 2366/07, § 93, 29 May 2012, and the cases cited therein). While very long periods of detention do not automatically violate Article 5 § 3, the Court notes that exceptional circumstances are usually required to justify them (see *Bulatović v. Montenegro*, no. 67320/10, § 143, 22 July 2014, and the cases cited therein).

(b) The application of the above principles in the present case

(i) Period to be taken into consideration

69. In the present case the applicant's detention on remand started on 15 December 2009 when he was arrested (see paragraph 7 above). He was detained for the purposes of Article 5 § 3 of the Convention until his conviction by the Vilnius Regional Court on 22 May 2014 (see paragraph 38 above). Although to date that conviction has not become final, the Court reiterates that the period to be taken into consideration for the purposes of Article 5 § 3 ends on the day when the criminal charge is determined, even if only by a court of first instance (see *Buzadji*, cited above, § 85, and the cases cited therein). From 22 May 2014 the applicant was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (see *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI; *Piotr Baranowski v. Poland*, no. 39742/05, § 45, 2 October 2007; and *Dragin v. Croatia*, no. 75068/12, § 111, 24 July 2014).

70. During the period from 11 to 24 September 2013 the applicant's detention was replaced by house arrest (see paragraphs 32-33 above). In this connection the Court reiterates that where detention on remand is broken into several non-consecutive periods and where applicants are free to lodge complaints about detention while they are at liberty, those non-consecutive periods should be assessed separately (see *Idalov*, cited above, § 129, and *Chuprikov v. Russia*, no. 17504/07, § 61, 12 June 2014).

71. On many previous occasions the Court has held that house arrest, in view of its degree and intensity, amounted to deprivation of liberty within the meaning of Article 5 of the Convention (see *Buzadji*, cited above, §§ 104-05), and thus a period of house arrest between periods of detention on remand was not considered as breaking the detention into several non-consecutive periods (see, among others, *Nikolova v. Bulgaria (no. 2)*, no. 40896/98, § 60, 30 September 2004, and *Süveges v. Hungary*, no. 50255/12, § 77, 5 January 2016). In this connection the Court observes however that conditions of house arrest under Lithuanian law (see paragraph 52 above) differ rather significantly from those which it has previously assessed. Whereas the applicants in the other cases cited above were prohibited from leaving their place of residence save for specific exceptions indicated by authorities (see *Nikolova*, § 53; *Süveges*, § 53; and *Buzadji*, § 42, all cited above), by contrast, the applicant in the present case was allowed to leave his home for most of the day (except from 10 p.m. to 8 a.m.), he was allowed to work, and there were only limited restrictions to his public and social life (see paragraph 32 above).

72. However, despite the relatively low "degree and intensity" of the house arrest in the present case, the Court is of the view that there are other circumstances which warrant assessing the applicant's detention on remand from 15 December 2009 to 22 May 2014 as a single period. Firstly, the duration of the applicant's house arrest was very short – thirteen days. In this respect the Court has previously acknowledged that if a period of liberty in between repeated remands in custody was negligible, it might not break the detention into separate periods (see *Velichko v. Russia*, no. 19664/07, § 80, 15 January 2013). Secondly, the applicant's release was terminated not by a new detention order but by an extension of an already existing detention order (see paragraph 33 above). The decision to release the applicant from detention never became final because it was revoked by a higher court on the grounds that the reasons for keeping him in detention persisted (contrast with *Idalov*, cited above, in which the applicant's release on bail was discontinued due to his failure to comply with bail conditions, and *Süveges*, also cited above, in which the applicant's house arrest was replaced by detention on remand ordered in connection with different criminal proceedings). Thus, at the domestic procedural level the applicant's detention was not broken into separate periods. Accordingly, the Court considers that, on the basis of the above elements, in must assess the applicant's detention as a single period.

73. Accordingly, the period of the applicant's detention on remand, to be considered in the present case, was four years, five months and seven days (from 15 December 2009 to 22 May 2014).

(ii) Reasonableness of the length of detention

74. At the outset the Court observes that the inordinate length of the applicant's detention on remand – more than four years – is a matter of grave concern and requires the domestic authorities to put forward very weighty reasons in order for it to be justified (see *Tsarenko v. Russia*, no. 5235/09, § 68, 3 March 2011; *Trifković v. Croatia*, no. 36653/09, § 121, 6 November 2012; and *Dragin*, cited above, § 112).

75. The Court sees no reason to doubt the findings of the domestic courts that during the entire period under consideration there was a reasonable suspicion that the applicant had committed the offences with which he had been charged (see paragraph 35 above). Although in the domestic proceedings the applicant argued to the contrary, the Court reiterates that "reasonable suspicion" requires the presence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Gusinskiy v. Russia*, no. 70276/01, § 53, ECHR 2004-IV, and the cases cited therein) and the facts which raise a suspicion justifying arrest under Article 5 of the Convention do not need to be of the same level as those necessary to bring charges or secure a conviction (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A). The Court considers that that level was reached in the applicant's case.

76. The domestic courts re-examined the grounds for the applicant's detention every three months and gave reasons why the detention should be further extended. They relied on the following grounds (see paragraphs 33-37 above):

(1) the risk of absconding, based on the severity of punishment that the applicant was facing, his lack of strong social ties, and his connections abroad (see also *Sopin v. Russia*, no. 57319/10, §§ 41-42, 18 December 2012);

(2) the risk of reoffending, based on the seriousness, nature and number of the charges against the applicant, his alleged leading role in the criminal organisation, his prior convictions, and the allegation that criminal activity had been his main source of income (see also *Merčep v. Croatia*, no. 12301/12, § 96, 26 April 2016; compare with *Šoš v. Croatia*, no. 26211/13, § 95, 1 December 2015);

(3) the particular complexity and large, constantly increasing volume of the case, resulting from a high number of charges, defendants and witnesses (contrast *Kalashnikov v. Russia*, no. 47095/99, § 119, ECHR 2002-VI).

77. The Court considers that the Lithuanian courts thoroughly evaluated all the relevant factors and that they based their decisions on the particular circumstances of the applicant's case, his personal and financial situation, his criminal history and his connections abroad, among others. The reasons relied upon by the domestic courts cannot be said to have been stated *in abstracto*, nor can it be said that they ordered or extended the applicant's

detention on identical or stereotypical grounds, using some pre-existing template or formalistic and abstract language (compare and contrast *Khudoyorov v. Russia*, no. 6847/02, §§ 185-86, ECHR 2005-X; *Boicenco v. Moldova*, no. 41088/05, § 143, 11 July 2006; and *Qing v. Portugal*, no. 69861/11, § 67, 5 November 2015). Accordingly, the Court is satisfied that the domestic courts did not use "general and abstract" arguments for the applicant's continued detention and that their reasons were relevant and sufficient.

78. It remains to be ascertained whether the domestic authorities displayed "special diligence" in the conduct of the criminal proceedings against the applicant. The Court firstly observes that during the pre-trial investigation, which lasted for almost a year after the applicant's arrest (from 15 December 2009 to 3 December 2010 – see paragraphs 7 and 17 above), the authorities interviewed over fifty witnesses and other suspects, and carried out multiple other investigative measures which appear to have been necessary and were carried out with sufficient frequency (see paragraph 40 above; compare and contrast *Kalashnikov*, cited above, § 119). Having regard to the fact that the pre-trial investigation concerned multiple crimes allegedly committed by a criminal organisation and was thus of considerable complexity, the Court is of the view that the actions of the domestic authorities during that period could be considered as falling within the standard of special diligence under Article 5 § 3 of the Convention.

79. However, after the case was transferred to the first-instance court for examination on the merits, the applicant remained in detention on remand for another three years, five months and nineteen days (from 3 December 2010 to 22 May 2014 – see paragraphs 17 and 38 above), during which period fifty-seven hearings were scheduled on a monthly or nearly monthly basis (see paragraph 41 above). Bearing in mind that at the start of the court proceedings the applicant had already been detained for a year, the Court is not convinced that scheduling on average one hearing per month displayed sufficient diligence on the part of the authorities (see, *mutatis mutandis*, *Čevizović v. Germany*, no. 49746/99, § 51, 29 July 2004, and *El Khoury v. Germany*, nos. 8824/09 and 42836/12, § 69, 9 July 2015; compare and contrast *Chraidi v. Germany*, no. 65655/01, § 44, ECHR 2006-XII, and *Rażniak v. Poland*, no. 6767/03, §§ 10 and 33, 7 October 2008). The Court further notes that twenty-six of those hearings were adjourned, mainly because of the authorities' failure to ensure the presence of other co-accused or witnesses (see paragraphs 41-42 above; see also *Malkov v. Estonia*, no. 31407/07, § 51, 4 February 2010, and *Kobernik v. Ukraine*, no. 45947/06, § 62, 25 July 2013; compare and contrast *Shikuta v. Russia*, no. 45373/05, § 49, 11 April 2013). None of the adjournments or any other delays were imputable to the applicant (see *Kuibishev v. Bulgaria*, no. 39271/98, § 69, 30 September 2004, and *Grujović v. Serbia*, no. 25381/12, § 53, 21 July 2015). As a result of the repeated adjournments,

there were several long periods when no hearings were held – from 3 December 2010 to 31 March 2011, from 23 June 2011 to 7 December 2011, from 15 June 2012 to 3 October 2012, from 30 November 2012 to 3 March 2013, from 26 March 2013 to 6 October 2013, and from 26 November 2013 to 16 February 2014 - amounting to a total period of more than two years without a single hearing (see paragraph 41 above; see, *mutatis mutandis*, *Dervishi v. Croatia*, no. 67341/10, § 144, 25 September 2012, and *Süveges*, cited above, § 101; compare and contrast *Sigarev v. Russia*, no. 53812/10, § 56, 30 October 2014, and *Topekhin v. Russia*, no. 78774/13, § 109, 10 May 2016).

80. While the Court accepts the Government's submission that the criminal proceedings against the applicant were complex and of a large scale, it nonetheless considers that neither their complexity nor the fact that they concerned organised crime can justify detention of such length as in the present case (see, *mutatis mutandis*, *Veliyev v. Russia*, no. 24202/05, § 157, 24 June 2010, and *Chyła v. Poland*, no. 8384/08, §§ 122-23, 3 November 2015). The authorities have not advanced any exceptional circumstances able to demonstrate otherwise, such as, for example, the need to collect evidence abroad or to request international legal assistance (compare and contrast *Łaszkiewicz v. Poland*, no. 28481/03, § 61, 15 January 2008; *Ereren v. Germany*, no. 67522/09, § 62, 6 November 2014; and *Merčep*, cited above, § 110). Furthermore, although the domestic courts acknowledged on several occasions that the period of the applicant's detention had been very long (see paragraphs 26, 33 and 37 above), it does not appear that any measures were taken to speed up the proceedings. The Court observes that hearings were adjourned mainly because of the absence of witnesses or co-accused (see paragraph 79 above), and acknowledges that in certain situations that could be justified; however, in the present case the Court does not discern any attempts on the part of the domestic authorities to fix a tighter and more efficient hearing schedule in order to avoid the repeated adjournments (see, *mutatis mutandis*, *Dzelili v. Germany*, no. 65745/01, § 80, 10 November 2005, and *Baksza v. Hungary*, no. 59196/08, § 38, 23 April 2013). In such circumstances, the Court considers that the domestic authorities did not display special diligence in the conduct of the criminal proceedings against the applicant during the lengthy period of his detention on remand.

81. Accordingly, there has been a violation of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. The Government considered that amount to be excessive and unsubstantiated.

84. The Court considers that the applicant must have suffered distress as a result of the violation found in the present case. It notes that the judgment of the Vilnius Regional Court of 12 June 2015, by which the applicant was convicted and sentenced to thirteen years' imprisonment, has not yet become final as the applicant's appeal is still pending (see paragraph 43 above), so it cannot be said that the length of the applicant's detention on remand was deducted from his sentence (see *Český v. the Czech Republic*, no. 33644/96, § 91, 6 June 2000). In such circumstances, the Court considers it necessary to make an award in respect of non-pecuniary damage. Making its assessment on an equitable basis, it awards the applicant EUR 4,700 under this head.

B. Costs and expenses

85. The applicant did not submit any claim in respect of costs and expenses. The Court therefore makes no award under this head.

C. Default interest

86. 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*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, EUR 4,700 (four thousand seven hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(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;

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

Done in English, and notified in writing on 2 May 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

András Sajó
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Wojtyczek;
(b) dissenting opinion of Judge Kūris.

A.S.
M.T.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I agree with the majority that Article 5 § 3 has been violated in the instant case. However, I am not satisfied with the way in which the Court reasons its judgment.

2. I share the view that scheduling on average one hearing per month is not satisfactory (see paragraph 79 of the judgment). The majority rightly stress that, in the instant case, it was necessary to fix a tighter schedule (see paragraph 80).

The essential problem in the instant case concerns the organisation of the trial. In my view States should ensure, to the extent that it is possible, that trials for serious offences follow a very tight schedule. This applies in particular to trials for offences committed by organised crime. It is true that the measure under consideration entails a complete change of paradigm for the organisation of criminal trials in many States. However, such a change is necessary not only in order to implement the rights of the accused but also to ensure a just and timely criminal-law response to serious crime and to protect public order as well as the rights of citizens in general. Although the Court determined the case from the viewpoint of Article 5, the instant judgment enhances the requirement to impose stricter trial schedules for serious criminal offences as one of the standards of a fair trial under Article 6 of the Convention.

3. On the other hand, the majority criticise the Lithuanian authorities for the fact that many court hearings were adjourned although none of the adjournments was attributable to the applicant (see paragraphs 79 and 80 of the judgment). In my view, such an assessment called for a very thorough and detailed analysis of the circumstances of each specific adjournment. Unfortunately, no such analysis has been carried out and the persuasive force of the reasoning has been weakened as result. In this respect, I fully share the concerns expressed by Judge Kūris in his dissenting opinion.

However, even if the State could not be blamed for the adjournments of the hearings, the courts should have scheduled the hearings much more frequently. Even if a tighter schedule does not prevent hearing adjournments, it increases the prospects of reaching a final judicial decision within a much shorter period.

DISSENTING OPINION OF JUDGE KŪRIS

1. Legal history has taught us what today is common knowledge: that one of the mainstream trends in the development of Western law in general, and European law in particular, was its passage from the formal assessment of evidence (the facts of the case under consideration) to the individualised examination of those facts by the organs applying the law, first and foremost the courts.

According to the first of these two approaches, the presence in the factual situation at hand of a certain set of facts, as "foreseen" by (or even listed in) the positive law (be it a piece of legislation, a treaty or other agreement, or the courts' case-law), entails a mandatory and indiscriminate finding of a breach of the law, with little (if any) regard being given to the "unforeseen" particularities of that specific situation. Under this methodology, what is sufficient in itself for the finding of a breach of the law is the very presence of the said set of facts or – in extreme cases – even one single determining fact. This approach also mandates a no less indiscriminate application of the sanction prescribed for the said breach of that positive law, though that sanction can be mitigated on certain compassionate or otherwise extenuating grounds, provided that these grounds, in their turn, can also be discerned in the relevant provisions of the positive law. But this approach, which gives prominence to the formal assessment of the facts of the case, does not approve of a court (or other organ applying the law) dispensing with the finding of a breach of the law in such cases, where certain formal elements are present.

The second approach is less dogmatic and thus less obstinate. It requires that none of the factual circumstances of the case should be removed from the equation and that due heed be given to all of them. This may result in a situation where what may, on the surface, look like a breach of the law is viewed by the court as something unavoidable in the actual circumstances and, consequently, excusable in the eyes of the law applied. Consequently, where the formalistic approach would automatically find a breach of the law, the individualised approach would not necessarily do so.

2. The drawbacks to the predominantly formal assessment of facts and its incompatibility with the aspirations of substantive justice have been long ago perceived and acknowledged in perhaps all fields of law, both national and supranational, and with respect not only to individuals but also to institutionalised entities, not excluding States. The case-law of the Court also allows the latter not to resort to the rather blinkered formalistic methodology.

On the other hand the Court's case-law, abundant and diverse as it is, provides for an array of positivistically worded, but nevertheless doctrinal criteria (because they are developed by the Court and not formulated explicitly in the Convention), which are meant to serve as tools for

juxtaposing the facts of the case under consideration with the legal imperatives stemming from the Convention. One such criterion is capable of covering, *like an umbrella*, all sorts of factual situations, which may nevertheless involve important differences and which an individualised approach would require to be distinguished one from the other before concluding as to the congruity (or otherwise) of the facts with the law. A situation in which the facts of the case do not correspond to such a criterion, as formulated and applied in previous cases, can be perceived as not leaving the Court any option other than to apply the relevant imperatives in "umbrella fashion" and to find a violation of the relevant provision of the Convention. But the seemingly flawless plausibility of such a legal assessment of the factual situation may, in fact, prove to be illusory and ephemeral. This ostensible plausibility may prove to be plausibility at first sight, which (like love at first sight) can evaporate if and when one casts a second glance at the object of one's initial fascination. Indeed, the Court's case-law, which contains a multitude of diverse schemes and patterns for decision-making which can (or even have to) be followed to a greater or lesser extent in subsequent cases, is not unyielding to what would be, in essence, a purely formalistic application of the law of the Convention. However, that formalistic application would be disguised in the robes of strict observance of the Court's precedents, even if resorting to indiscriminate use of an "umbrella" criterion would amount at times to moving away from the direction of substantive justice. There is always a risk of slipping onto this dubious path.

Still (this has to be underlined once more), the Court's case-law allows also for non-formalistic and non-dogmatic application of the criteria which it has itself developed. It is my firm belief that the Court's case-law, especially as interpreted in the light of the principle of subsidiarity (which itself is a product of the Court's interpretive activity), not only allows for a rather wide margin of flexibility, but authoritatively calls for and mandates a non-formalist approach.

3. Which direction the Court chooses to take in a specific case depends to a large extent on its more general attitude, namely on whether the Court regards the alleged transgressor's, that is to say the respondent State's, version of events with a predisposed mistrust or is inclined to give that version due credit and to look into the Government's arguments more understandingly. States (at least most of them) should not be treated by the Court, or by anyone else, with greater suspicion than they actually deserve. And, for sure, they do not deserve to be treated with bias or prejudice, based on the belief that everything that the State in question is doing or has done with regard to an applicant who accuses it of a violation of his or her rights under the Convention is very likely to be tainted with disregard and lack of respect for those rights. In these sorts of disputes States may be proved to have wronged, but they may also be proved to have been *right*, and not so

seldom in cases in which the other party's conduct, which was at the root of his or her troubles with that State, was the opposite of law-abiding. *Presumption of the State's preconceived sin* in each and every case, irrespective of what predicaments or difficulties the authorities might have encountered while sincerely attempting to comply with the imperatives of the Convention, is, to say the least, a very unreliable guide. Such a presumption is even more treacherous – and unjust to the State – if it is couched in terms of a seemingly objectivist legal criterion which the conduct of the authorities allegedly fails to satisfy. Each alleged violation of the Convention, however serious, must be determined on its own merits and without prejudice. And the criteria applied must themselves be *beyond doubt*. This applies especially to "umbrella" criteria.

4. I now turn to the assessment of the facts of the instant case. For the majority, one (the first) period of the applicant's detention did not appear to be questionable in any way for the purposes of Article 5 § 3 of the Convention (see paragraph 78 of the judgment). This period expired when the applicant's case was transferred to the first-instance court for examination on the merits. The applicant was thus "brought promptly before a judge" and, at that stage, was granted the possibility of what Article 5 § 3 explicitly requires: "trial within a reasonable time or release pending trial". The conjunction "or" in the second quote is of no small importance: the applicant had either to be released pending trial, or the length of his trial had not to exceed the standards of what, in the eyes of an objective observer, is "reasonable". According to the Court's standard of "reasonableness", that period had to be not "too lengthy" *in the specific circumstances of the case*. As to the hypothetical possibility of the applicant's release during that period, the majority did not doubt at all the findings of the domestic courts that "during the entire period under consideration there was a reasonable suspicion that the applicant had committed the offences with which he had been charged" (see paragraph 75 of the judgment). Furthermore, the majority fully approved of the domestic courts' periodic evaluation, every three months, of the grounds for the applicant's continued detention, which it found to have been based not on any stereotype or pre-existing template but on the particular circumstances of the applicant's situation, to have been stated not in formalistic language or *in abstracto*, and to have been thorough in all other respects (see paragraphs 76 and 77 of the judgment). Regarding the assessment of that period I can but concur with the majority.

5. What the majority found to be unsatisfactory for the purposes of Article 5 § 3 was the period *after* the applicant's case was transferred to the first-instance court. After that transfer, the court of first instance was under an obligation to adjudicate the applicant's case "within a reasonable time", as required under Article 5 § 3 and as interpreted in the Court's case-law.

6. The criterion by which to assess whether the time taken by the trial has been "reasonable", as this "reasonableness" is understood in the Court's

case-law and as employed by the majority in the instant case, is called "*special diligence*". If the period of the person's detention is lengthy, the authorities must display "special diligence" in the conduct of the criminal proceedings against that person, otherwise the inordinate length of that period will be *attributed* to the lack of "special diligence" (or even mere "diligence"). One or more factual circumstances which would substantiate such attribution would be not very difficult to find in almost any case.

7. The notion of "special diligence" comes from *Matznetter v. Austria* (no. 2178/64, § 12, 10 November 1969). In that judgment, "special diligence" was only an innocent paraphrase of its not much older predecessor notions, "particular diligence", employed in *Wemhoff v. Germany* (no. 2122/64, § 20, 27 June 1968), and the latter's completely unremarkable coeval "diligence" (see *Neumeister v. Austria*, no. 1936/63, 27 June 1968, §§ 2 and 25 of the "Arguments of the Commission and the Government", where the Court merely repeated the word once employed by the Commission).

8. Today it would be of little practical usefulness to try to reconstruct what precisely the Court meant, in the distant sixties, in adding the ornate epithet "special" to the very neutral noun "diligence" and thus coining the notion of "special diligence", and also why this notion was coined in two cases in which the Court found no breach of Article 5 § 3. Attempting to reconstruct the elevation of mere "diligence" or "particular diligence" to the level of "special diligence" in this way would make little practical sense because today the notion of "special diligence" is not only living a life of its own in the judgments of various Chambers of the Court, and has been for decades already, but – what is more important – has been consolidated, case by case, in a number of judgments adopted by the Grand Chamber (see *Kudła v. Poland* [GC], no. 30210/96, § 111, 26 October 2000; *Labita v. Italy* [GC], no. 26772/95, § 153, 6 April 2000; *McKay v. the United Kingdom* [GC], no. 543/03, § 45, 3 October, 2006; *Bykov v. Russia* [GC], no. 4378/02, § 64, 10 March 2009; *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012; and – most recently – *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 87, 5 July 2016).

9. Also, "special diligence" has long since become the notion employed by the parties litigating before the Court. It has been used even in cases in which the Court, in the ensuing judgment, has itself refrained from using this notion on its own behalf, and even before the notion was consolidated in the Court's case-law (see, for example, *Selmouni v. France* [GC], no. 25803/94, §§ 71 and 114, 28 July 1999, where this notion was invoked by the respondent Government, and *Humen v. Poland* [GC], no. 26614/95, § 67, 15 October 1999, where it was invoked by the applicant).

10. What is more, the imperative of displaying "special diligence" has not been limited, in the Court's case-law, to the conduct of criminal proceedings against the alleged perpetrator under Article 5 § 3. It has been

likewise derived from Article 6, and in particular from its first paragraph. In this context, and confining myself to the Grand Chamber's case-law, I would refer to *Laino v. Italy* ([GC], no. 33158/96, § 18, 18 February 1999), where "special diligence" was found to be required from the authorities in deciding marital separation disputes, and to *Frydlender v. France* ([GC], no. 30979/96, § 49, 27 June 2000), where it was considered to be required in examining and determining employment disputes.

11. But this is not all. The application of the notion of "special diligence" has the potential to expand much further. In fact, this expansion is already under way. Where (if anywhere) this expansion will stop is hard to foresee. To take the most recent example, five judges expressed the opinion that "promptness and special diligence" are required in (at least certain) situations falling under Article 2 of Protocol No. 4 (see the joint concurring opinion of Judges Raimondi, Villiger, Šikuta, Keller and Kjølbro in *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017). Indeed, why not? Most probably, many (not only judges) would agree with them.

12. Although the reconstruction of the original meaning of "special diligence" would make little practical sense, the meaning which this notion carries today is important. Given its increasing prominence, it is quite paradoxical that the notion of "special diligence" is nowhere defined in the Court's case-law. *Nowhere*. It is high time to do it, because without such a definition this notion is nothing more than an "umbrella" criterion, capable of covering all sorts of situations where the applicant's detention was "lengthy", *without due regard being paid to the factual circumstances which may justify that length*, especially if there is a predisposition to the view that the respondent State must do everything to make that detention as short as possible, no matter what. For finding a violation of Article 5 § 3, length suffices in itself.

As it stands, "special diligence" is a yardstick, an evaluative tool, which can be – and often is – effectively employed without its contents being revealed. But even more important are the considerations of fairness to the parties, especially the respondent States. While the meaning of the notion remains obscure, it is extremely difficult for any respondent Government to prove that the "diligence" displayed by the authorities in the conduct of criminal proceedings was indeed "special". "Special" in what sense? "Special" at what cost and to whose detriment? "Special" in relation to whom?

13. Of course, there also remains an alternative: to stop employing the undefined and imprecise term and, in future cases, base the assessment of the facts on the yardstick of "*due diligence*" (or, to use a synonym, "proper diligence") which, by the way, is still extensively used in the Court's case-law, and which has a much higher level of acceptance in the domestic law of the member States and in academia.

But now that the rhino has started running, it will probably not stop. It will run, and all those in its way should beware.

14. In order to draw a line, if only a blurred one, to mark where mere "diligence" ends and "special diligence" begins, one may want to consult the dictionaries. So let's go online. The *Longman Dictionary of Contemporary English* defines "special" as "not ordinary or usual, but different in some way and often better or more important". In the same vein, the *Macmillan Dictionary* defines "special" as "different from and usually better than what is normal or ordinary". For *Merriam-Webster*, "special" is "distinguished by some unusual quality" or "designed for a particular purpose or occasion". *Oxford Living Dictionaries* explain that "special" means "better, greater, or otherwise different from what is usual", but also "designed or organised for a particular person, purpose, or occasion". And *Collins* says that "[s]omeone or something that is special is better or more important than other people or things".

Here we are: someone is "*more important*" than other people. There must be grounds for this greater "importance". These grounds lie in the situation in which the person concerned finds himself or herself. In the applicant's case it is the deprivation of liberty, detention. The normal human condition is liberty, consequently, deprivation of liberty is an unusual, very particular, extraordinary situation, and therefore it merits being dealt with by the authorities with "particular", or "special", "diligence". The situation of a remand prisoner is "more important" than that of others because it would be not normal for the majority of people, and in this sense it is *exceptional*.

In the Court's case-law, as it stands today (at least until such time as the Court has developed such notions as "exclusive diligence" or "extreme diligence", or "very exceptional diligence"), the exalted adjective "special" designates the highest degree of "diligence" which the conduct of criminal proceedings must attain in order to be in compliance with Article 5 § 3. It denotes *exceptional treatment*.

15. The exceptional nature of the applicant's situation lay in the fact that he was held in detention on remand while his case was examined by the court of first instance. It is this exceptional situation which prompted the majority to hold that not mere "diligence" but "special diligence" had to be displayed in the conduct of the criminal proceedings against him. This situation also prompted the Court to request further observations from the respondent Government following communication, asking for proof that the "diligence" displayed by the authorities in conducting the criminal proceedings against the applicant had indeed been "special" (this, in itself, was an extremely rare, if not unique, event in the Court's practice on recommunication). The Court's case-law does not suggest any other explanation: *this* case had to be treated as *more important* than others.

All others?

16. Exceptions remain exceptions as long as they are *rare*. If they are not rare, they are not exceptions. There cannot be anything "special" about something that is ordinary.

It is more likely than not that, at the material time, the applicant in the instant case was not the only accused who was being held in detention while his case was examined by the *same* court. If not mere "diligence" but "special diligence" had to be displayed by the authorities with respect to this applicant, then the *same* (highest) level of "diligence" – "special diligence " – had to be displayed in the conduct of the criminal proceedings *against these other persons*. We are thus faced with a whole *category of exceptions*, that is to say of persons requiring "special diligence".

Bear in mind too that, according to the Court's case-law, "special diligence" must be exercised with regard to litigants in marital separation cases and in employment cases, and who knows to how many other litigants in other categories of cases which the Court may one day designate as meriting the said preferential treatment. *More categories of exceptions.*

The question is: was it possible to display "special diligence" with regard to the applicant in the instant case *without this being detrimental to these other persons* (or even categories of persons)?

17. The majority did not fail to point out that, according to the Court's case-law, "cases which concern organised crime inevitably present more difficulties for the investigative authorities and courts in determining the facts and the degree of responsibility of each member of the criminal organisation" and that in cases of this kind "longer periods of detention than in other cases may be reasonable" (see paragraph 67 of the judgment). They also expressly accepted the Government's submission that the "criminal proceedings against the applicant were complex and of a large scale" (see paragraph 80 of the judgment). The popular song is wrong: words *do* come easy. The majority immediately *set aside* this acceptance by stating that "neither their complexity nor the fact that they concerned organised crime can justify detention of such length as in the present case" (see paragraph 80 of the judgment). Which means that the more complex and the more large-scale the case, the faster it must be dealt with. This recommendation would be, to put it mildly, a heresy in, say, technology or sports, or in the arts or literary translation – in fact, in any other field of human activity you care to name. But in adjudicating cases (I repeat): the more complex and the more large-scale the case, the faster it must be dealt with, and the tool for speeding up the handling of the case is "special diligence". If there are several complex and large-scale cases, all others (including those where the litigants happen not to be accused of organised crime but are law-abiding people with problems that cannot be settled out of court) can wait – because the State's resources are not unlimited. These people *should* wait and understand that there are *some whose cases require exceptional speed in dealing with them*. Of course, some of these underprivileged litigants may

later legitimately bring actions against the State, including in Strasbourg, for protracting the proceedings in their cases, but for the applicant's case this seems to be immaterial.

18. Now I come to the majority's assessment of the particular actions (or inaction) of the authorities in the conduct of the criminal proceedings against the applicant during his second period of detention, which were found in this judgment to have fallen short of the "umbrella" standard of "special diligence". The majority held that (i) the authorities had not "advanced any exceptional circumstances able to demonstrate [that the length of proceedings against the applicant was justified], such as ... the need to collect evidence abroad or to request international legal assistance" (see paragraph 80 of the judgment). They also asserted that (ii) "twenty-six ... hearings were adjourned, mainly because of the authorities' failure to ensure the presence of other co-accused or witnesses" (see paragraph 79). The majority also stated that (iii) "it does not appear that any measures were taken to speed up the proceedings" and that the Court was not able to "discern any attempts on the part of the domestic authorities to fix a tighter and more efficient hearing schedule in order to avoid the repeated adjournments" (see paragraph 80 of the judgment).

Let us examine these three criticisms one by one. They all represent – almost *par excellence* – an "umbrella" coverage and a formal assessment of the facts of the case.

19. The first of the three criticisms is sheer *carping at trifles*. True, in some earlier cases the Court found no violation of Article 5 § 3 on the basis that these cases had what is called an "international element". So what? Does this mean, as the majority assert, that only such "exceptional circumstances" as "the need to collect evidence abroad or to request international legal assistance" are capable of "demonstrating" that the length of proceedings against an applicant was justified? A very short list indeed.

20. But let us have a closer look at the situation examined in the cases to which the majority refer in formulating their first criticism of the domestic authorities. In the first of these three cases, *Łaszkiewicz v. Poland* (no. 28481/03, 15 January 2008), the applicant spent almost three years in pre-trial detention in Poland (in addition to over one year which she spent in prison in Sweden). The authorities claimed that the lengthy pre-trial detention of the applicant was justified by the reasonable suspicion against her, but also by the risk that she might tamper with the evidence since a number of suspects had remained at large, the fact that the investigation concerned a criminal gang involved in drug-trafficking on a significant scale, the severity of the penalty to which the applicant was liable, as well as the complexity of the investigation and the danger to society posed by drug-trafficking. The Court considered that "the need to obtain voluminous evidence from many sources, including from abroad, and to determine the facts and degree of alleged responsibility of each of the co-suspects,

constituted relevant and sufficient grounds for the applicant's detention during the period necessary to terminate the investigation" (§ 59).

Does anyone see, for the purposes of the justification or otherwise of the length of the suspect's detention on remand, any essential difference between that situation and the situation of the applicant in the instant case? I do not – save probably that, according to the Court, charges of supplying significant amounts of heroin to the market across borders may entail "obtain[ing] voluminous evidence from many sources" (as in *Łaszkiewicz*) and require more time for investigation, whereas charges of "leading a criminal organisation armed with firearms and possession of a very large amount of narcotic and psychotropic substances with the intention to distribute them" (as in the instant case) require less, even when coupled with charges of "production of a counterfeit electronic means of payment; fraudulently acquiring another person's property; unauthorised possession of firearms, ammunition or explosives; destruction of or damage to other person's property; murder for personal gain; unlawful deprivation of liberty using violence; and violation of public order" (which were the subject-matter of separate criminal proceedings against the same applicant). For the majority (which compared the instant case with *Łaszkiewicz*), the decisive element was that, in *Łaszkiewicz*, the drug-trafficking was a cross-border activity and thus required much more time to collect the evidence, whereas in the instant case it was "local", meaning presumably that all the evidence had to be lying somewhere within easy reach, waiting to be picked up by the investigators. I leave it to the investigators of crimes to judge the soundness of such an assumption. Bear in mind that, as a result, the applicant in *Łaszkiewicz* was sentenced to eighteen months' imprisonment and a fine, while the applicant in the instant case was sentenced to thirteen years' imprisonment.

Following reasoning such as that employed by the majority in this argument, it appears that the decisive element in cases involving organised crime and drug deals (drug-trafficking, possession of drugs, and so on), which determines whether the suspect can be held in pre-trial detention for a longer or shorter time, is not the gravity of the offences with which the person is charged or the scope of the activity of the organised criminal group to which that person belonged (to say nothing of leading it), but whether the transportation of drugs was a cross-border activity or not.

Moreover, in *Łaszkiewicz* the Court stated as follows:

"... in cases such as the present concerning organised criminal gangs, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-suspects, or otherwise obstruct the proceedings, is by the nature of things often particularly high" (§ 59).

Very reasonable. Very *very* reasonable. The "*nature of things*" is something that legal fiction often tends to ignore. However, this sound and

fair assessment appears not to be applicable to the instant case. One can only guess why.

In *Łaszkiewicz*, the Court also explicitly addressed the issue of "special diligence":

"It therefore remains to be ascertained whether the national authorities displayed 'special diligence' in the conduct of the proceedings. In this regard, the Court observes that the investigation was of considerable complexity, regard being had to the number of suspects, the extensive evidentiary proceedings and the implementation of special measures required in cases concerning organised crime. The Court does not discern any significant periods [of] inactivity in the investigation. Furthermore, as noted by the authorities, the investigation was additionally complicated by the need to obtain evidence from abroad since the criminal gang had operated in a number of countries. For these reasons, the Court considers that during the relevant period the domestic authorities handled the applicant's case with relative expedition" (§ 61).

"Relative expedition". Not "exceptional", not "extraordinary", not "unusual" – only "relative", which (if one consults the dictionaries) means "proportional". Very down to earth. Again, very reasonable. But, again, not applicable in the instant case.

21. The case of *Ereren v. Germany* (no. 67522/09, 6 November 2014) is another (and rather recent) case to which the majority refer as having an "international element" which justifies the lengthy period of pre-trial detention. The applicant in that case spent a much lengthier period in pre-trial detention than the applicant in the instant case. The court hearings at the domestic level were held with no greater frequency than in the instant case. Also, in no other respect did the domestic courts display any more activity than in the instant case. The Court, however, stated that it "cannot identify any periods of inactivity in the proceedings other than those occasioned by the need to gather evidence by way of letters rogatory" (§ 63). But it did not state that what saved the day for the respondent Government were only these letters rogatory and nothing else. On the contrary, they were just one element in a wider set. However, in the instant case that conclusion has been re-interpreted as if what really mattered in *Ereren* was not the content and/or the scope of the information which had to be obtained, but the manner in which it had to be obtained, namely by letters rogatory. As if information about organised crime is easy to obtain if no foreign authorities have to be addressed. This sets a higher standard for "local affairs".

22. In *Merčep v. Croatia* (no. 12301/12, 26 April 2016) the investigation also involved an "international element", as "the investigating judge ... requested international legal assistance from the Serbian authorities in obtaining evidence from the witnesses" (§ 11). Does that in itself prove anything for the purposes of Article 5 § 3? In my opinion, no less important

than the "international element" (in the words of the Court, "the questioning of a number of witnesses; some of which through the international legal assistance in criminal matters" (§ 110)) was the fact that "the criminal case at issue was very complex, requiring the collection and examination of voluminous documentation and physical evidence, as well as the need to seek expert advice on matters of DNA analyses" (ibid.). "International element" or no "international element", what was crucial for the justification of the length of detention of the applicant in that case was the *overall* complexity of the case, but – and this should not be overlooked – also the fact that the applicant spent less than seventeen months in pre-trial detention (although he had not yet been sentenced when the case was examined by the Court). "International" is not a substitute for "truly complex", and "truly complex" is not a synonym for "international". It would be very far-fetched to claim that only something which is "international" can be "truly complex", or that what is "truly complex" must necessarily be "international". Putting the emphasis, however artificially, on the "international element" obscures other important elements of that case. But the presence of that "international element" appears to be a very *convenient* way of substantiating the finding that the applicant's detention in the instant case was unjustifiable.

23. The second criticism is no more well-founded that the first one. Probably less. This criticism is *not based on the facts* of the case under consideration – it is as simple as that. The majority were very "diligent" in counting how many years, months and days the applicant spent in detention on remand (paragraph 79). They should have also given at least some consideration to the five pages of the Government's observations containing a table in small font, in which *each and every procedural step* taken by the domestic court examining the applicant's case is thoroughly explained. And these explanations, if looked into with some attention, leave few stones intact in the edifice of the majority's assertion that "twenty-six ... hearings were adjourned, mainly because of the authorities' failure to ensure the presence of other co-accused or witnesses" (see paragraph 79 of the judgment). Instead, the majority have satisfied themselves with the imprecise acknowledgement that "in certain situations [the adjournments of the hearings owing to the absence of witnesses or other co-accused] could be justified" (ibid.). However, they failed to look into these "certain" situations at least in some detail, let alone to see that the number of such "certain" situations was overwhelming and that the corresponding adjournments not only "could be" but *indeed were* justified. In the majority's reasoning, abstract, euphemistic and confusing as it appears to be, "mainly", used together with "failure", in fact camouflages something which could better be referred to as "very few" or "maybe some". This whole "umbrella" statement is far-fetched. It is a sheer *misrepresentation* of the facts.

24. So let us look at the plain facts, as they were, and not as they are covered by the majority's "umbrella". In total, not "twenty-six" but as many as thirty-four hearings were adjourned, but the majority is right in stating that "twenty-six" hearings were adjourned during the "period of the applicant's detention on remand, to be considered in the present case", that is to say "from 15 December 2009 to 22 May 2014" (see paragraph 73 of the judgment). Still, it is difficult to say how the majority came up with the figure of "twenty-six" hearings adjourned "mainly because of the authorities' failure to ensure the presence of other co-accused or witnesses", because some hearings were adjourned for different reasons than the non-appearance of other co-accused or witnesses in court, and some were adjourned not for one but for several reasons, only one of which was the non-appearance of other co-accused or witnesses in court. In any event, the non-appearance of one or more of the co-accused or witnesses in court was *only one* reason or *one of* the reasons for the adjournment of twenty-three – and not "twenty-six" – hearings (excluding the hearings scheduled for 28 February 2011, 29 March 2012 and 12 December 2013, which were adjourned for other reasons). When there were also other reasons for adjournment of the hearing besides the non-appearance of some of the other co-accused or witnesses, these hearings had to be adjourned *anyway*. Only some of these non-appearances were due to reasons "unknown to the court"; on several occasions the court was informed that the persons concerned were sick, although later they appeared unable to substantiate these assertions with relevant medical documents (after being explicitly asked to do so by the court).

However, on a number of occasions when the hearings were adjourned, the co-accused in question were in fact sick. *Genuinely* sick, with supporting medical documents. Some scheduled hearings were adjourned because the lawyers were sick. And at least one hearing was adjourned because – God forbid! – the judge was sick. Are the authorities responsible for that adjournment too? If the majority find fault with the authorities by referring to the "twenty-six" hearings which were adjourned because of the non-appearance in court of some of the co-accused, it would had been fair for them to also mention that many other hearings were adjourned for other reasons – indeed, for *a very wide variety of reasons*.

For example, the hearing of 21 February 2014 was adjourned because as many as eleven of the applicant's co-accused – M.S., S.L., A.F., S.K., L.G., A.R., A.B., Ž.T., A.T., A.M., and V.B. – refused to be represented by the State-appointed defence lawyers. Would the majority attribute the ensuing break in the proceedings to the authorities?

25. But let us come back to the hearings which were adjourned because of the non-appearance of some of the other co-accused (as it is specifically this category of adjournments which the majority calculated with some precision.) My strong impression is that the majority attribute to the

authorities the "failure to ensure the presence of other co-accused", and the resulting protraction of examination of the case in each and every instance, where the element of non-appearance of one or more of the co-accused was present. This also includes hearings such as the one scheduled for 28 February 2011, which was adjourned when one of the co-accused, S.K., felt unwell before the hearing and was taken away by ambulance; the one scheduled for 20 September 2013, at which one of the co-accused, R.A., failed to appear owing to sickness; or the one scheduled for 8 September 2011, when two of the co-accused, J.S. and A.F., failed to appear in court owing to sickness and it was decided to make a break in the case. Did that break have to be ordered? If one follows the reasoning of the majority, then no. But I believe that the domestic court examining that particular criminal case *knew better*, especially in view of the fact that the questioning of some individual co-accused and witnesses took more than one day, as well as the fact that many of the other co-accused and witnesses were questioned not once, but at certain intervals, explaining at later hearings, among many other things, why their testimonies given during the pre-trial investigation and those given in court differed.

The majority seem to attribute to the authorities the "failure to ensure the presence of other co-accused" and the resulting protraction of examination of the case also in such instances as the hearing scheduled for 21 February 2013, where one of the co-accused, A.F. (mentioned above), was not brought to court owing to (in the respondent Government's own words) the "failure of Lukiškės remand prison". Regarding this failure (acknowledged by the Government themselves), I can but agree with the majority, because the management of Lukiškės remand prison is undoubtedly part of the authorities, with the result that its failure is the authorities' failure. The fact that the same hearing had to be adjourned anyway because of the illness of another of the co-accused, Ž.T., is probably immaterial according to the methodology employed in this case, as is the possibility (I am merely speculating, of course) that the prison may have failed to bring A.F. (who was held there after not appearing at the earlier hearing) to court because all the means of transportation the prison had were busy transporting some inmates to court who were "more important" than others, thus displaying the authorities' "special diligence" with respect to them.

26. Be that as it may, does the non-appearance of some of the co-accused automatically mean that it is the authorities who "fail[ed] to ensure [their] presence"? In other words, are there grounds to perform the hocus-pocus of what may be called "*double attribution*", first by attributing the non-appearance of some of the co-accused in court to the authorities, and second by attributing that non-appearance, already attributed to the authorities, to the failure of the latter? I do not think so. This is not fair, but not only that: it is factually incorrect. On numerous occasions when some of the co-accused did not appear at the hearing, the authorities *did not remain*

passive but ordered searches in respect of them and imposed remand measures on them. But, unsurprisingly, not in all cases. Was *that* the authorities' failure? Had *all* these persons to be deprived of their liberty? For how long? Would that have been *proportionate* under Article 5? Is this what the majority are suggesting? How many other applications containing complaints under Article 5 could have been lodged with this Court had the authorities succumbed to the dubious attractions of the simplicity of this method?

Still, on many occasions searches *were* ordered and/or remand measures *were* imposed on some of the co-accused. Unfortunately, not all of these measures guaranteed that the persons in question would appear at the later hearings.

27. Here are some incidental events by way of illustration.

16 March 2011: One of the co-accused, A.K., did not appear in court, having informed the registry that he was sick, although he did not provide any medical documents. Where was the authorities' failure? Was it in the fact that they did not arrest A.K. beforehand and transport him to the hearing themselves? Would that not be premature and disproportionate? What if he was really sick on that day? After the non-appearance of A.K. at the hearing, the decision was adopted to replace the remand measure imposed on him with detention. He gave his testimony two and a half months later, on 3 June 2011, and then additional testimony on 22 June 2011.

12 September 2011: Another co-accused, J.S., did not appear at the hearing. Earlier, on 8 September 2011, she had failed to appear in court owing to illness. When she did not appear for the second time, a search was ordered in respect of her and the issue regarding the imposition of a remand measure – detention on remand – was decided. Where was the authorities' failure?

13 October 2011: When one of the co-accused, M.D., did not appear at the court hearing for the third time (the first and second occasions were on 22 September 2011 and 3 October 2011) without a justifiable reason, a search was ordered in respect of him.

22 April 2013: Two of the co-accused, A.T. and J.K., did not appear at the court hearing. The latter was due to be questioned for the second time at the hearing, and he had not failed to appear for questioning at the hearing less than a month previously, on 25 March 2013. These two co-accused were obliged to provide medical documents substantiating their illness. On 13 May 2013 the remand measure in respect of J.K. was replaced with house arrest. Did the authorities fail by placing him under house arrest and not sending him to remand prison, from where they could transport him themselves (provided the cars were not all busy transporting other prisoners requiring "special diligence")? I ask this because he did not appear at the

hearing on 16 September 2013, although a search was then ordered in respect of him.

10 February 2014: The hearing was adjourned because the whereabouts of the co-accused A.K. were not clear. This co-accused has already been mentioned above in the context of 16 March 2011; it seems that he was in hiding, but was subsequently detained and appeared in court on 8 September 2014 (this date is later that that of the lodging of the applicant's application with the Court and, moreover, is not included in the "period of the applicant's detention on remand, to be considered in the present case", as determined by the Court). But there was also another reason for the adjournment of the hearing of 10 February 2014: A.T.'s son was undergoing surgery. Was that also the authorities' failure?

And so on.

28. It was not only some of the co-accused who did not appear, from time to time, at the court hearings. Witnesses also sometimes did not appear, and there was a variety of reasons for their non-appearance (including illness). Sometimes the reasons for the seemingly arbitrary non-appearance of a witness were understandable in their own right. For instance, on 10 May 2012 the witness D.J. failed to appear at a court hearing, and the court decided to question him remotely "due to the reasons of his personal security". This remote questioning was performed on 24 May 2012 and 14 June 2012, and then again on 4 October 2012.

29. I do not want to speculate as to why some of the co-accused decided not to appear at the hearings without providing the court with a legitimate reason. However, in view of the fact that some witnesses feared for their security, who could dismiss the possibility, especially at the material time (but perhaps also with hindsight), that some of the co-accused could also have had fears which were not completely unfounded? Also, criminals have their tactics for protracting the proceedings: someone does not show up, so you have a break; then another co-accused does not show up, so you have another break; and so on. To assert that this was so in the applicant's case (and that of his co-accused) would be further speculation, so I will not resort to it. But such things do take place in real life. Judicial reasoning must be judicious. It should not ignore the "nature of things".

One may also ask a rhetorical question, whether the refusal of eleven of the co-accused to be represented by the State-appointed defence lawyers did not contribute to some extent to the protraction of the proceedings. Step by step – but in the same direction.

In this context, the majority's statement that "[n]one of the adjournments or any other delays were imputable to the applicant" is nothing less than strange. Of course, they could not be "imputable to the applicant", because the latter was in remand prison and could not control his own or anyone else's non-appearance at the hearings. But his co-accused could – and did. The prefix "co-" employed in the word "co-accused" must mean something,

and this "something" was so eagerly overlooked by the majority. However, this "something" was not unimportant. This "something" was the fact that these persons were the *co*-accused *in relation to the applicant*, who was the *co*-accused *in relation to them*. They were *all* together *co-accused* in the *same* criminal case, which lasted longer than the authorities wished, notably because of the non-appearance of a number of them at the hearings.

30. As I have mentioned, the examples provided above are incidental. I do not claim that there were no instances where the authorities could have done better (which for the purposes of the "special diligence" "umbrella" means "faster"), but the criminal proceedings against the applicant and (let us not forget this) his more than fifty co-accused, taken in their *entirety*, were *not protracted*, and the overall conduct of the criminal proceedings was *diligent* as a whole. *Duly* diligent.

At least they were no less diligent and no more protracted than those which were examined by a Chamber of the very same Fourth Section of the Court in *Gábor Nagy v. Hungary (no. 2)* (no. 73999/14, 11 April 2017, not yet final). In that case, which, by the way, contained no "international element", the applicant was held in detention on remand for about a year and a half before the examination on the merits of the criminal case against him by the first-instance court, and for about a year and a half while that criminal case (which at this stage already involved three suspects) was examined by the court in twelve hearings. In *Gábor Nagy (no. 2)* the applicant was convicted of robbery and illegally entering a private property. Please compare the scope of that case with the magnitude of the instant case (the number and the gravity of the crimes, the number of co-accused, the number of witnesses, the number of court hearings, the intervals between those hearings, and so on). Yet in *Gábor Nagy (no. 2)* the Court found no violation of Article 5 § 3 – and with good reason.

31. The same situation – that of not being based on the facts of the case – goes for the third criticism, or, to call a spade a spade, accusation. Let it be repeated that this third criticism which the majority casts at the authorities is that no discernible "measures were taken to speed up the proceedings" and no discernible "attempts [were made by the domestic authorities] to fix a tighter and more efficient hearing schedule in order to avoid the repeated adjournments" (see paragraph 18 above). The majority seem to believe that some mystic "tighter" and "more efficient" schedule would have been a "cure-all" which would have, by itself, speeded up the proceedings. Apart from this "panacea", no other suggestions as to how the proceedings against the applicant could have been speeded up have been provided.

Firstly, the allegation that no measures to speed up the proceedings were taken by the domestic authorities *is not true*. Attempts which were not only aimed at speeding up the proceedings, but indeed speeded them up, at least to an important extent, were taken. Summoning the co-accused or witnesses to the court is one example of them. Another one is ordering searches in

respect of those in hiding and imposing remand measures on them. But there are limits to the possibilities of even the "tightest" schedule or other measures aimed at speeding up the proceedings. For instance, no "tighter" or "more efficient" schedule could counterbalance the effects of the refusal of eleven of the co-accused to be represented by the State-appointed defence lawyers (see paragraph 24 above), because the authorities would need some time to appoint new lawyers for these co-accused, and these newly appointed lawyers would need at least some time to study the case and discuss it with their clients, as well as to fit the hearings to be timetabled in the applicant's case into their schedules. This is as clear as day, unless, as the majority seem to be convinced, the whole judicial world must turn around this particular applicant, who for some reason is "more important" than anyone else, to such an extent that the schedule pertaining to the judicial examination of his criminal activities must take precedence over the array of all other possible schedules.

Secondly, if some of the co-accused or witnesses did not appear at the hearings, what would have been the use of a "tightened" hearing schedule? And *what is* a "tight" schedule *as such*? What would it be in reality, as distinct from on the paper on which the present judgment is printed, and especially in an eighty-two-volume case which involves over fifty suspects and countless witnesses, expert opinions and so forth? The majority would have been satisfied had the authorities brought, if necessary by coercion, all those involved in the applicant's case (and that of his co-accused) to one place for several months (because weeks would have not been enough) and had the first-instance court then examined this case day in, day out, non-stop. That "one place" would probably be some hotel, but a rather large one that could accommodate not only all those involved in the case, but also a platoon of doctors to see to it that no one fell ill for long. No, this utopia is not stated directly in the judgment itself, but there is no other way to read and implement the majority's schedule-tightening recommendation in a case of such magnitude. But could this display of "special diligence" have prevented the other co-accused, the witnesses, the lawyers or – again, God forbid! – the judge from falling ill? Or could it have averted the need to perform surgery on the son of one the co-accused? There is no need to think twice before answering these questions.

32. It is easy to point the finger, as the majority do, at the domestic authorities and to lecture them as to how to conduct proceedings in complex organised-crime cases. It would, however, be much more difficult to try to explain, at least in some detail, how these recommendations would have worked *in practice*, had they been known at the material time and taken on board. But the majority did not take the pains to explain anything of the sort, apart from making the uncharitable utterance, as if by the way, that the hearing schedule could have been "tighter". It *really* could have been "tighter", had that first-instance court had *nothing else to do* – both in cases,

which, according to the Court's case-law, required "special diligence", and in those in which mere "diligence" would suffice. The message sent by this lecturing judgment to the domestic authorities (and not only those in Lithuania) is as simple as this: "You could do better; you should have done better; you should have treated this case as a special one, regardless of anything."

33. Should the Strasbourg Court be involved in the "micromanaging" review of the process of examination of cases at the domestic level, especially of a case of such magnitude as the one involving the applicant and his co-accused? Even an attempt at such an exercise, in cases comparable in scope to this one, cannot be anything other than superficial. But this is exactly what the majority have done, while at the same time avoiding the appearance of superficiality by employing the "umbrella" approach, where the only relevant criterion (and the only relevant fact of the case) that is taken into account in finding a violation of Article 5 § 3 is that the criminal proceedings conducted against the applicant (as if there were no other co-accused or, rather, that they were, by some wave of the magician's wand, not connected to the applicant) were lengthy, and then mechanically *attributing* this length to a lack of "special diligence" on the part of the authorities.

The simplification of reality, both legal and factual, that is inherently complex is not a virtue. However, the reasoning of this judgment suggests that there is no need for a court to bother delving deep into the factual circumstances when the answer is so easily provided by a very simple methodology. In the instant case, this methodology has allowed the Court to declare itself satisfied on the basis of (i) a single fact of the case, namely, that the length of the applicant's detention was "inordinate" (see paragraph 74 of the judgment), and (ii) the attribution of this single fact to a superficially asserted failure to comply with the obscure notion of "special diligence". Why search for more? There is an entertaining story about a man who searched for his lost wallet not where he had lost it but under the street lamp, because it was brighter there. However, this eccentric method is not suitable for determining court cases, or at least many would have said so before reading this judgment. And if those cases involve organised crime, the employment of this method is even dangerous.

34. The irony of this case is that *the applicant himself did not complain of a lack of "special diligence"* on the part of the authorities. He did not complain about it either domestically or in his application to our Court. The Government (and the applicant) were not asked about this when the case was communicated to the parties. This notion was invoked *by the Chamber itself*, and an additional question was communicated to the parties. Even then the applicant had little to say on the matter. He did not invoke such issues as the frequency of the hearings, their adjournment, the number of witnesses, and so on. It was the Court which invoked all these elements.

In some of my academic writings (dating back to my "previous life" as a constitutional judge at the national level and a university scholar) I argued that perhaps all courts, unavoidably, are slightly activist. A healthy dose of activism helps to move the legal mind forward. But there is a great difference between being "slightly" activist and *overly activist*, or super-activist. This judgment is the product of *judicial super-activism*.

35. The majority commended the domestic courts for their reasoning, finding it to be non-stereotypical and not based on pre-existing-templates (see paragraph 4 above). But there is little that is commendable in precisely this regard in paragraph 84 of the judgment, where it is reasoned that "the applicant must have suffered distress as a result of the violation found in the present case", leading to an award in respect of non-pecuniary damage. Assuming that legal phraseology must correspond to at least some factual reality, one could ask how that "distress" manifested itself (if at all). And was that "distress" (if any) really a "result of the violation found in the present case"? A person who is *at all capable* of suffering "distress" may also have other reasons for suffering "distress" while in detention on remand, apart from the fact that he was held in detention for as long as it took to investigate the activities carried out by him during the twenty-two no doubt turbulent years of his life. And there was not a little to investigate (in several separate sets of criminal proceedings), as these activities allegedly included "leading a criminal organisation armed with firearms and possession of a very large amount of narcotic and psychotropic substances with the intention to distribute them", as well as "production of a counterfeit electronic means of payment; fraudulently acquiring another person's property; unauthorised possession of firearms, ammunition or explosives; destruction of or damage to other person's property; murder for personal gain; unlawful deprivation of liberty using violence; and violation of public order".

36. It is a well-known fact that the Court has its standards for calculating the amount of compensation awarded by way of just satisfaction to the victims of the violations found. Please forgive me this sarcasm, but why not then draw up a set of standards (preferably in the form of a clear table) for the length of pre-trial detention in criminal cases of various categories? This would be a truly Procrustean invention, but how simple it could make the examination of virtually all cases lodged under Article 5 § 3! If the period of detention is lengthier than the Court's yardstick (a certain maximum duration of detention on remand for suspects in criminal cases of different categories, which could be longer if an "international element" is involved), then a violation of Article 5 § 3 *must* be found, no matter what, because the detention was *lengthy*, and it could be lengthy for *no other reason* than the lack of "special diligence" on the part of the authorities (any other reason is excluded by this "umbrella" criterion). Cases that are alike would be treated alike, with the same outcome and with no exceptions.

However, what is "alike" from one perspective (fits under one "umbrella") is not necessarily "alike" from others. *Real* life is not so simple as it is when viewed through the lens of the formal assessment of the facts of the case.

37. "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" (Luke 6:41). The Court, overloaded by applications as it is, should know very well that some cases do not lend themselves to speedy examination. Even this very case was deliberated on by the Chamber three times: on 21 June 2016, 31 January 2017, and 21 March 2017. Of course, in the meantime while the case was *not* being deliberated on, the Court was not inactive but was examining other cases. Why then did the first-instance court which was examining the applicant's case have to set aside all other work and undertake the examination of this particular case according to some hypothetical and unrealistic "tightened" hearing schedule, the observance of which, in a case of this magnitude, was from the outset doomed to failure? Did it have to?

38. Being a loyal judge of the Court, I do not want to draw, in this opinion, on examples of cases which were determined many, many years after the applications had been lodged with the Court. There is no need to draw on such examples here, because any student of the Court's case-law could provide numerous examples of cases in which the delay in examination by the Court resulted in irreversible losses for the applicants – and not only those who were in the "unusual", "extraordinary" or "exceptional" situation of detention pending trial, but also those who had never committed any criminal act, but who had litigated against some member State in order to defend their rights under the Convention which appeared to have been *really* violated by that State. Still, those who employ the yardstick of "special diligence" should ask, where was the "special diligence" with regard to these cases? Or any "diligence"? Others can quote Luke.

39. But my answer to these questions is not aimed at criticising the Court. Some of the delays can be justified, many others can probably be explained (which, however, would be of little comfort to those applicants who experienced so directly at first hand the saying that justice delayed is justice denied). My answer is that criteria such as "special diligence" (and there are some others, no less obscure) are unreliable in the pursuit of justice, especially if they are perceived as some master-keys which allow a case to be examined and determined without looking a bit deeper into very important factual elements which do not fall under the chosen methodological "umbrella". But they are not only unreliable. When such a tool combines with what I have called (in paragraph 3 above) the presumption of the State's preconceived sin, the two produce their own kind of explosive mixture.

40. Some small pops here and there may not count. But one might wonder when and where that mixture will explode with greater force, prompting (among others) those who are burdened with *real* difficulties in investigating the most serious crimes and/or charged with *real* tasks in determining the most complex criminal cases (or even some High Contracting Parties) to question the very legitimacy of what have been coined as seemingly universal ("umbrella") doctrinal criteria to be applied in the Court's review of the compatibility of the length of domestic criminal proceedings with the requirements of Article 5 § 3. After all, in this case the domestic authorities were dealing not with a petty theft, not with driving under the influence, not with a brawl in a pub or a slap in the face, but with organised crime on a very large scale. The domestic authorities held the applicant in detention on remand for as long as "four years, five months and seven days" (as calculated by the majority in paragraph 37 of the judgment) until he was convicted in one of the greater number of (separate) criminal proceedings against him, after which his detention on remand in the instant case became unnecessary because it had been converted into nothing more than detention based on the prison sentence imposed on him by the court (in those separate proceedings). And it took this Court only three years to authoritatively establish that that period was unjustifiably long. Or, to put it more accurately, that period was too long according to the Court's formalistic "umbrella" doctrinal criterion called "special diligence", which is undefined, imprecise, obscure – and yet steadily expanding in its scope of application – and which in the instant case has been invoked by the Court on its own initiative. This, alas, was prompted by the presumption of the State's preconceived sin with regard to the applicant, who in his turn is considered by the majority to have been, at that stage of his professional career, "more important" than anyone else and who, in the majority's opinion, must have suffered "distress" as a result of not being treated by the domestic authorities as someone whose "importance" was so extraordinary.