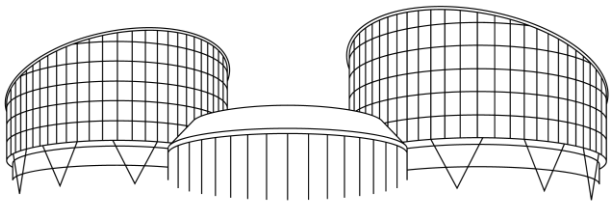

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF X.Y. v. HUNGARY

(Application no. 43888/08)

JUDGMENT

STRASBOURG

19 March 2013

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

In the case of X.Y. v. Hungary,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 19 February 2013,

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

PROCEDURE

1. The case originated in an application (no. 43888/08) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr X.Y. ("the applicant"), on 2 September 2008. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr A. Kádár, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant complained in particular under Article 5 § 1 of the Convention that between 18 February and 11 March 2008 his detention had been unlawful. Moreover, in his view, his detention altogether had lasted an unreasonably long time, in breach of Article 5 § 3. Furthermore, relying on Article 5 § 4 of the Convention, he complained that the principle of "equality of arms" had not been respected when he had been challenging his detention, since he had not had access to the relevant material of the investigation.

4. On 10 October 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Budapest.

6. On 15 November 2007 the applicant was arrested on charges of a series of car thefts. In the prosecution's ensuing motion to have him detained on remand, the dangers of absconding, collusion and repetition of crime were referred to.

7. The defence argued that there was no reasonable suspicion that the applicant had indeed committed an offence. Moreover, since he had a settled life in Hungary, the applicant – who was the father of a minor child and had regular income out of which he was supporting his parents and was paying a mortgage – was unlikely to abscond. In another criminal case conducted against him, he had attended all the hearings and had never attempted to frustrate the procedure. In the instant case, all evidence having already been seized, it was not plausible that he would interfere with the witnesses or repeat any crime. Against this background, his pre-trial detention was not justified and should be substituted, if necessary at all, by a less coercive measure.

8. On 17 November 2007 the Pest Central District Court ordered the applicant's detention on remand, reiterating in essence the reasons in the prosecution's motion.

9. On 29 November 2007 the Budapest Regional Court rejected the applicant's appeal. This court was satisfied that there was reasonable suspicion against the applicant. It pointed out that no actual assessment of that evidence could be done in the remand proceedings because that would amount to usurping the powers of the trial court. The Regional Court moreover held that the fact that the applicant had made preparations to buy property abroad was sufficient to substantiate the danger of absconding. Moreover, since there was another prosecution under way, the court held that the applicant might have a criminal lifestyle, a predisposition to repetition of crime. The court went on to state that "in the present phase of the proceedings, the controversies referred to by the defence are not capable of fully eliminating the reasonable suspicion" of the applicant's having committed a crime.

10. The applicant's pre-trial detention was repeatedly prolonged at the statutory intervals. In these proceedings, the arguments of the defence remained largely the same, and so did the findings of the courts. The applicant's requests for release, if necessary on bail, were to no avail.

On 18 December 2007, 8 and 28 February and 28 March 2008 the applicant complained to the authorities that he had not been granted access to the evidence underlying his detention. These complaints were all rejected,

although the courts did not specify that such an access had actually been granted.

Meanwhile, on 8 February 2008 the applicant submitted to the authorities a psychiatric opinion, according to which he suffered from a personality disorder, including fear of crowds and of being locked up, which was susceptible to deterioration due to detention.

A further expert opinion issued on 16 March 2008 specified that the applicant had suffered a sexual assault from fellow inmates while in detention, which had aggravated his psychological imbalance.

11. Meanwhile, a further prolongation order, valid until 17 February 2008, was issued on 14 February 2008. However, the applicant was not released on 17 February 2008, because the holding facility had received a mistyped notification ordering his detention until 17 May – rather than 17 February – 2008. On 18 February 2008 the first-instance court corrected its order of 14 February. On appeal, on 11 March 2008 the Regional Court reversed the latter decision, holding that, although there had obviously been a typing mistake, the first-instance court could not correct the operative part of its order and that this matter was subject to a reversal within the jurisdiction of the Regional Court. It further reiterated the consideration that no assessment of the evidence giving rise to the reasonable suspicion against the applicant could be done in the remand proceedings.

On 3 April 2008 the applicant filed a request for release. This was rejected by the District Court. In his appeal, he stressed that his tolerance of detention had diminished on account of the psychological problems he had. On 14 May 2008 the Regional Court rejected the appeal, being satisfied that the applicant's condition could be properly treated within the penitentiary health system. In his further complaints, the applicant's lawyer emphasised that the applicant needed to be heavily medicated, because of which he could not be validly interrogated, and the resultant situation ran counter to both the applicant's rights and the interests of the investigation.

12. The applicant's pre-trial detention continued until 29 May 2008. The defence repeatedly made references to the absence of concrete elements underlying a reasonable suspicion against the applicant and to his personal circumstances not in the least warranting his continued detention. The applicant stated that the courts had rejected these arguments in rather stereotyped decisions.

13. On 29 May 2008 the Regional Court replaced the applicant's detention with house arrest. It held that the danger of absconding had lessened to an extent that house arrest was then sufficient, especially in view of the indecent assault the applicant had suffered from fellow inmates. It also took into account the time that had elapsed, the applicant's settled family and personal circumstances, and the fact that his health had seriously deteriorated.

14. On 26 June 2008 the applicant's house arrest was lifted and replaced with a restriction on leaving Budapest (as of 21 January 2009, on leaving Pest County). On 15 November 2009 all restrictions on the applicant's personal liberty were lifted.

15. The applicant submitted that an alleged accomplice, Mr Á., although he had previously absconded, had no legal income or employment and had no minor children, had been released on bail in October 2007 – in the applicant's view simply due to the fact that, unlike him, Mr Á. had confessed to the crime with which he was charged.

16. A bill of indictment against the applicant and ten co-defendants was filed with the Buda Central District Court on 11 December 2009.

The trial of the case is pending.

II. RELEVANT DOMESTIC LAW

17. Act no. XIX of 1998 on the Code of Criminal Procedure provides as follows:

Section 211

"(3) At the session the party [that is, the prosecution] having submitted the motion [on ordering or prolonging pre-trial detention] shall present the evidence substantiating the motion in writing or orally. Those present shall be granted the opportunity to examine – within the limits set forth in section 186 – the evidence of the party having submitted the motion. If the notified party does not attend the session but had submitted his observations in writing, this document shall be presented by the investigating judge."

Section 186

"(1) Any person having the right to be present at an investigatory action may forthwith inspect the minutes taken.

(2) The suspect, the counsel for the defence and the victim may inspect the expert opinion during the investigation as well, but they may only inspect other documents if this does not injure the interests of the investigation.

(3) The suspect and the counsel for the defence shall be entitled to receive a copy of the documents they may inspect.

(4) The copy of the documents produced, obtained, filed or attached in the course of the investigation and containing the testimony or personal data of the victim or the witness shall not indicate the personal data of either the victim or the witness. No copy may be issued of the draft decisions of the prosecutor or the investigating authority. No copy may be issued of the documents created in the course of communications between the prosecutor and the investigating authority pursuant to sections 165 and 165/A, except for the documents that contain the legal standpoint of the prosecutor and the investigating authority in relation to the case – including particularly the document containing the prosecutor's instruction concerning the conduct of the investigation, provided that the specific investigation was conducted – provided that this does not interfere with the interests of the investigation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION IN RESPECT OF THE PERIOD BETWEEN 18 FEBRUARY AND 11 MARCH 2008

18. The applicant complained that his detention between the above dates had been unlawful, in breach of Article 5 § 1 of the Convention, which reads as relevant:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

A. Admissibility

19. The Government argued that the applicant should have filed an official liability action under section 349 of the Civil Code against the authorities which had ordered his detention with a formal mistake in respect of the impugned period. This could have been done at any time after the occurrence of the unlawful conduct and within the period of prescription, and the civil court could have established the fact that the applicant had been unlawfully detained; the termination of the criminal case would have been the precondition only of a pecuniary award. Having failed to do so, the applicant had not exhausted domestic remedies.

20. As an alternative argument, they submitted that since the criminal proceedings were still pending, it could not be determined with certainty whether or not the applicant could be regarded as a victim, for the purposes of Article 34 of the Convention, or whether he had suffered any significant disadvantage, within the meaning of Article 35 § 3 (b). In particular, if he was eventually convicted and sentenced to a prison term, the impugned period would be credited against his sentence, redress thus being provided for the grievance. Otherwise, he was likely to receive pecuniary compensation in the official liability action referred to above. In the latter context, the Government submitted extracts of domestic judgments in which persons having been subjected to unlawful detention of various, unspecified lengths had been awarded pecuniary compensation in amounts ranging between 700 and 1,400 euros.

21. The applicant submitted that any tort liability emanating from the authorities' allegedly wrongful action would be statute-barred after five

years, to be counted from the occurrence, that is, from 11 March 2008 at the latest. However, according to the domestic jurisprudence, such a claim could not be successfully pursued before the completion of the criminal case. Should the criminal case exceed the five-year prescription period (very likely in the circumstances), any tort action would become obsolete. Therefore, this avenue could not be regarded as an effective remedy to be exhausted in the circumstances. As regards the Government's argument about the absence of victim status, the applicant argued that the fact that the proceedings were still pending had no impact on his having suffered an unlawful deprivation of liberty.

22. The Court recalls that the purpose of the rule of exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). It reiterates that the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I).

23. In the present case, the Court notes the Government's suggestion about the possibility of filing an official liability action.

However, it observes that the parties' agree (see paragraphs 20 and 21 above) that such an action could be submitted with a reasonable prospect of success only after the termination of the criminal proceedings conducted against the applicant – which, for their part, are still pending before the trial court.

Moreover, it is not convinced that such an action would be capable of determining the formal unlawfulness of the applicant's detention in the impugned period – which has not been done, either, by the courts examining the procedure leading to the applicant's continued detention.

Lastly, the Court also notes the Government's submission according to which such an action could, depending on the outcome of the criminal proceedings, result either in the irregular period being credited against the applicant's potential prison term (which, in the Court's view, in no way reflects the fact that this period was unlawful, such a crediting being

normally a corollary of any period of pre-trial detention, rather than that of unlawful deprivation of liberty) or in pecuniary compensation being awarded for the authorities' unlawful conduct.

In the latter respect the Court recalls that the fact that the pursuit of a domestic claim results in awards of amounts that are lower than those fixed by the Court in similar cases does not render that remedy in itself ineffective (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 80, ECHR 2006-V).

However, in the present case, the Court is not in a position to assess the compatibility with its relevant case-law on Article 41 (see in particular *Ferencné Kovács v. Hungary*, no. 19325/09, § 24, 20 December 2011; *Somogyi v. Hungary*, no. 5770/05, § 37, 11 January 2011; and *Gajcsi v. Hungary*, no. 34503/03, § 30, 3 October 2006) of the award obtainable in the procedure referred to by the Government, the exact periods – to which the various amounts of compensation awarded in the sample cases adduced by the Government corresponded – not being ascertainable from the information provided.

24. For the Court, the combined effect of the above considerations is that the remedy proposed by the Government cannot be regarded as "available and sufficient", especially in view of the fact that it is dependent on the outcome of the criminal proceedings, pending before the trial court since 2009, which in the Court's eyes causes this legal avenue to represent no more than a remote possibility whose assessment can only be speculative.

It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies.

25. Moreover, as regards the Government's alternative pleading about the complaint being premature, the Court considers that, once the official liability action has been found not to constitute a remedy to be exhausted in the circumstances, the fact that the criminal proceedings conducted against the applicant are still pending becomes immaterial, since this circumstance would have played a role only in assessing the prospects of success of such an action. It follows that the complaint cannot be rejected on this ground for the absence of victim status or the absence of "significant disadvantage" suffered by the applicant.

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

B. Merits

26. The applicant complained that his detention between 18 February and 11 March 2008 had been formally unlawful. The Government did not contest this view.

27. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (see *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III). Moreover, any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports* 1996-V).

28. In the present case, the Court notes that on 11 March 2008 the Regional Court pointed out (see paragraph 11 above) that the District Court had acted exceeding its competence when prolonging the applicant's detention on 18 February 2008. Therefore, it cannot but conclude that the applicant's detention between these dates was devoid of a legal basis in the national law.

29. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 1 of the Convention.

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

30. The applicant complained that his pre-trial detention had been of unjustified duration, in breach of Article 5 § 3, which provides as follows:

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

The Government contested this view.

A. Admissibility

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

B. Merits

32. The applicant argued that the "reasonable suspicion" of his having committed a crime, a general condition for pre-trial detention, had been regarded as controversial by the second-instance court ordering his detention (see paragraph 9 above). Therefore, his detention was as such unjustified.

33. The Government argued that the Regional Court had not found that the evidence against the applicant had been controversial. In any case, no certainty in this regard was possible or required at this early stage of the investigation.

34. Moreover, the applicant maintained that the decisions prolonging his detention had not been individualised or taken into account his personal circumstances, had not substantiated the risk of his absconding, collusion and re-offending or involved an assessment of the possibility of applying less stringent measures. The arguments of the defence (see paragraph 7 above) had largely remained unanswered.

35. The Government submitted in reply that the applicant's personal circumstances had duly been considered, in an individualised way, and this in an ever-increasing manner as time had been passing; indeed, it had been these considerations that had led to the applicant's eventual release (see paragraph 13 above). Likewise, the possibility of applying less stringent measures had not been overlooked by the courts, although it is true that release on bail had not been possible for fear of the applicant interfering with the investigation.

36. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the

continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, among many authorities, *Szepesi v. Hungary*, no. 7983/06, §§ 23 to 25, 21 December 2010).

37. Turning to the circumstances of the present case, the Court notes the parties' diverging positions as to the existence of a "reasonable suspicion". For its part, the Court finds nothing in the case file demonstrating that the domestic authorities acted arbitrarily when they established that there was a reasonable suspicion that the applicant had been implicated in a series of car thefts. In this connection, the Court shares the Government's view according to which in this early stage of the proceedings the notion of "reasonable suspicion" cannot be equated with that of certainty, subsequently required for a conviction.

38. The Court further observes that there has been a dispute between the parties as to whether the grounds given by the judicial authorities for the applicant's continued detention were "relevant" and "sufficient", especially in the face of the requisite individualised assessment of the particular circumstances of the detainee and of the case (see, in the context of Article 5 § 1, *Darvas v. Hungary*, no. 19547/07, §§ 27 to 29, 11 January 2011).

39. The Court considers that, even assuming that those reasons were as such "relevant", they cannot be regarded as "sufficient" for the following reasons.

40. The Court would point out that Article 5 § 3 cannot be read as obliging the national authorities to release a detainee on account of his state of health. The question of whether or not the condition of the person in custody is compatible with his continued detention should primarily be determined by the national courts and, as the Court has held in the context of Article 3 of the Convention, those courts are in general not obliged to release him on health grounds or to place him in a civil hospital to enable him to receive a particular kind of medical treatment.

On the other hand, the Court observes that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that Article lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial". That provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent, and the purpose of Article 5 § 3 is essentially to require his provisional release

once his continuing detention ceases to be reasonable (see *Jablonski v. Poland*, no. 33492/96, §§ 82-83, 21 December 2000).

41. In the present case, the Court notes that over the period of six months and eleven days which the applicant spent in pre-trial detention, no genuine consideration appears to have been given to the possibility of imposing on him other, less stringent measures, such as bail or house arrest. The Court finds this particularly troubling in view of the fact that the authorities became aware of the applicant's psychological problems at the latest on 8 February 2008 when an expert opinion to that effect was submitted to them. However, the applicant's detention continued for almost another four months, irrespective of the circumstance that he had meanwhile been the victim of a sexual assault which had aggravated his mental condition (see paragraphs 10 to 13 above).

For the Court, it is regrettable that the domestic authorities paid no heed to the fact that with the passage of time and given the applicant's deteriorating health, it became more and more acutely obvious that keeping him in detention no longer served the purpose of bringing him to "trial within a reasonable time" (see *Jablonski*, cited above, § 84). In the circumstances, the Court is of the opinion that the applicant's prolonged detention could not be considered "necessary" from the point of view of ensuring the due course of the proceedings.

42. The Court accordingly concludes that the reasons relied on by the courts in their decisions were not sufficient to justify the applicant's being held in custody for the period in question.

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

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

43. The applicant complained that the principle of "equality of arms" had been infringed when he had been challenging his detention, since he had had no access to the relevant material of the investigation. He relied on Article 5 § 4 of the Convention which provides as follows:

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

44. The Government contested that argument.

A. Admissibility

45. The Government submitted that the applicant should have filed an action in compensation with the civil courts claiming that the judicial authorities denying his right to have access to the documents submitted by

the prosecution had caused him damages. Having failed to do so, he had not exhausted domestic remedies.

46. The applicant submitted that at the material time – that is, prior to Constitutional Court decision no. 166/2011. (XII.20.) which endorsed the principles enounced by the Court in the case of *Nikolova v. Bulgaria* [GC] (no. 31195/96, ECHR 1999-II) – it was ambiguous under the domestic law whether or not a suspect in pre-trial detention had a right of access to the documents serving as the basis for his detention. Therefore, any tort action based on the alleged breach of this right had little prospect of success. In any event, no tort liability could be established on the judicial authorities' side unless an intentional breach of procedure could be proven. Given the cumbersome nature of bringing such an action, it could not be regarded as an effective remedy in the circumstances.

47. The Court considers that it is not necessary to embark on a closer scrutiny of the parties arguments' about the effectiveness of a civil action in the circumstances, since the Government have not produced any evidence to show that such an action has proved effective in similar cases and would consequently constitute a remedy to be exhausted in the circumstances. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. Moreover, the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

48. The Government submitted that under the domestic law access to the case-file in the investigation phase was not absolute in so far as it was limited to access to those elements of evidence which were relevant to the ordering or maintaining of pre-trial detention. The selection of these pieces of evidence was in the public prosecutor's discretion. It was important to emphasise in this connection that the judge deciding on detention received exactly the same and based his decision on the same elements. In reaction to a proposed amendment to the Code of Criminal Procedure, the Constitutional Court held (in decision no. 166/2011. (XII.20.)), in line with the Court's judgment in the above-mentioned *Nikolova* case, that the existing rules satisfied the requirements of the principle of "equality of arms". Since the applicant had never brought the civil action referred to above (see paragraph 45 above), the Government were unable to take position as to whether the access actually granted in the instant case had satisfied those requirements.

49. The applicant submitted that in his particular case no sufficient access to the evidence underlying his detention had been secured. Had such an access been granted, this would have been recorded in the case file.

However, the Government had not demonstrated that this was the case. Moreover, had he been able to exercise the right of access, it would have been superfluous on his part to complain about this. However, he had repeatedly made such complaints, but in vain (see paragraph 10 above).

50. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to the investigation file in so far as it is essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among many other authorities, *Nikolova*, cited above, § 58). The disclosure of evidence must take place in good time, giving access to the relevant elements of the file prior to the applicant's first appearance before the judicial authorities (see *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151).

51. In the present case, the Court notes the Government's submission according to which – in the absence of a subsequent civil action, in which the disputed issues could be clarified – they were not in a position to form a view on the adequacy of the information provided to the applicant concerning his continued detention. In this connection, the Court would refer to its above finding (see paragraph 47 above) that the non-introduction of the civil action suggested by the Government must be seen as immaterial in the circumstances.

Furthermore, the Court observes that the applicant has been consistently asserting, both before the domestic authorities and the Court, that he had been granted no access to the relevant elements of the file and that the domestic courts rejected his related complaints without refuting the allegation about the denial of access (see paragraph 10 above). It also notes (see paragraph 17 above) that such an access is guaranteed by the Code of Criminal Procedure, unless it interferes with the interests of the investigation.

However, there is no element in the case file or the parties' submissions indicating that the applicant could indeed exercise this right (cf. *Lamy v. Belgium*, loc. cit.; *Lietzow v. Germany*, no. 24479/94, § 47,

ECHR 2001-I; *Svipsta v. Latvia*, no. 66820/01, § 138, ECHR 2006-III (extracts)).

52. In these circumstances, the Court cannot but conclude that the Government have failed to provide evidence that the requisite access was indeed made available to the applicant, the burden of proof being incumbent on the Government in this connection.

It follows that the principle of "equality of arms" cannot be considered to have been respected in the instant case.

Consequently, there has been a violation of Article 5 § 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. The applicant also complained that, quite apart from the issue concerning the period between 18 February and 11 March 2008, his entire detention on remand had been unjustified.

The Court observes that the applicant has been prosecuted for several counts of car theft and that his pre-trial detention was ordered on the reasonable suspicion emerging in this respect. It follows that the measure can be seen as justified for the purposes of Article 5 § 1 (c).

Lastly, the applicant complained that the fact that his alleged accomplice, although with a more serious background, had been released on bail unlike him showed that he had been discriminated against, in breach of Article 14 read in conjunction with Article 5, on account of the fact that he had not confessed to the crime with which he was charged.

The Court considers that this complaint is unsubstantiated.

It follows that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 10,344 euros (EUR) in respect of pecuniary damage. This amount corresponds to income lost during his detention. Moreover, he claims EUR 20,000 in respect of non-pecuniary damage.

56. The Government contested these claims.

57. The Court considers it appropriate to award, on an equitable basis, EUR 18,000 to the applicant under all heads.

B. Costs and expenses

58. The applicant also claimed EUR 5,800 for the costs and expenses incurred before the Court. This sum corresponds to 43 hours of legal work billable by his lawyer at an hourly rate of EUR 131, plus EUR 167 of clerical costs.

59. The Government contested this claim.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,500 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 5 § 1 (in regard to the period of 18 February to 11 March 2008), Article 5 § 3 and Article 5 § 4 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in regard to the period of 18 February to 11 March 2008;

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

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 18,000 (eighteen thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
(ii) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President