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

SECOND SECTION

CASE OF VRENČEV v. SERBIA

(Application no. 2361/05)

JUDGMENT

STRASBOURG

23 September 2008

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 Vrenčev v. Serbia,

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

Françoise Tulkens, *President,*
Antonella Mularoni,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria, *judges,*

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 2 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 2361/05) against the State Union of Serbia and Montenegro lodged with the Court, under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by, at that time, a national of the State Union of Serbia and Montenegro, Mr Ljubiša Vrenčev ("the applicant"), on 28 December 2004.

2. As of 3 June 2006, following the Montenegrin declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.

3. The applicant, who had been granted legal aid, was represented by Mr I. Janković, Mr D. Bogdanović, Mr D. Stojković, Ms K. Radović and Mr V. Đerić, all lawyers practising in Belgrade. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

4. The applicant alleged that he had suffered violations of Article 5 §§ 1 (c) and 3-5 of the Convention.

5. On 13 December 2005 the Court decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1968 and lives in Pančevo, Serbia.

7. The facts of the case, as submitted by the parties, may be summarised as follows.

8. On 16 November 2003, the applicant was stopped and searched by a police officer at the main bus station in Belgrade and a packet containing 4.13 grams of cannabis was found on his person.

9. He was then taken to a police station but was released after a short period of time. Whilst in custody, an on-duty police officer issued a receipt confirming seizure of the cannabis in question (*potvrda o privremeno oduzetim predmetima*). This receipt was signed by the applicant and the officer and contained the applicant's registered home address – M.K. Street no. 32, Pančevo.

10. In a subsequent incident report of the same date, however, the officer appears to have made a mistake by stating that the applicant's address was M.K. Street no. 30 rather than no. 32. This report was neither seen nor signed by the applicant.

11. Having found his number in a telephone directory, on 6 July 2004 the police contacted the applicant's father by telephone. He in turn informed the applicant that the police were looking for him. The applicant subsequently called the police and was told that he needed to come to the station in order to pick up the court summons. Upon arrival at the station, he was arrested and placed in detention.

12. It subsequently became clear that a detention order had been issued by the District Court (*Okružni sud*) in Belgrade on 29 June 2004, as part of the criminal proceedings brought against the applicant regarding the cannabis seizure of 16 November 2003. In its reasoning, the court first explained that the applicant had not appeared at the hearing scheduled for 17 March 2004 and noted that the return receipt attached to its summons had stated that he "was unknown at M.K. Street no. 30". Secondly, the applicant had failed to appear at the following hearing scheduled for 20 May 2004 and the police, who had been ordered to serve the summons, had reported on 20 April 2004 that a neighbour had confirmed that the applicant had not been living at the address in question since 1999. Thirdly, on 20 April 2004 the police had also run a search in their database and had made additional inquiries, confirming that, as of 1986, the applicant's registered residence was indeed M.K. Street no. 30, but could not discover any information concerning his current whereabouts. Finally, the court concluded that there was a sufficient factual basis to indicate that the applicant was hiding and/or in flight and had therefore ordered his

detention. (It must, however, be noted that the neighbour's statement and the original police report of 20 April 2004 were cited erroneously by the District Court and that in fact both had referred to M.K. Street no. 32 only, as the applicant's registered residence, there being no mention of M.K. Street no. 30.)

13. On 29 June 2004 the District Court had also adopted a separate decision requesting the police to issue a wanted notice (*poternica*) and arrest the applicant. Therein the applicant's address had again been stated as M.K. Street no. 30.

14. Various other documents successively referred to both addresses. Thus the District Court's letter sent to the police on 20 May 2004 referred to M.K. Street no. 32 while all court summonses, the criminal complaint of 11 December 2003 (*krivična prijava*) and the indictment (*optužni predlog*) of 26 December 2003 consistently stated the applicant's address as M.K. Street no. 30.

15. Throughout this time the applicant's identity card, issued by the police on 30 August 2000, and his residence registration remained unchanged, stating his address as M.K. Street no. 32, Pančevo.

16. On 7 July 2004 the applicant's lawyer filed an appeal by telegram against the District Court's detention order of 29 June 2004. Therein he stated that the applicant had never lived at M.K. Street no. 30 and pointed out that his registered residence was in fact M.K. Street no. 32. The applicant consequently had no knowledge of the criminal proceedings against him; nor could he have deliberately avoided receiving the court summons.

17. On 8 July 2004 the applicant's lawyer supplemented this appeal with additional written arguments requesting that the impugned detention order be revoked and his client released. In particular, he noted that the applicant had gone to the police station "of his own free will" as soon as he had found out that they were looking for him. Upon arrival at the police station, he had been arrested and it was then that he had first found out about the criminal charges against him.

18. On 12 July 2004 the Supreme Court (*Vrhovni sud Srbije*) rejected the appeal. It did so without an oral hearing. In its ruling the Supreme Court affirmed the reasons for detention given by the District Court and further held that there was no evidence in the case file that the applicant's correct address was indeed M.K. Street no. 32. On the contrary, police reports suggested that "the applicant's residence throughout the proceedings had remained unknown".

19. On 14 July 2004 this decision was received by the applicant's lawyer.

20. On 16 July 2004 he filed a motion with the District Court, seeking the applicant's release on bail or, alternatively, that his detention be replaced with a prohibition on leaving his place of residence until the

conclusion of the criminal proceedings. The lawyer further noted that the applicant's detention had been ordered due to the court's error in the establishment of his true home address and concluded by requesting that a hearing in the case be scheduled urgently.

21. The District Court appears not to have considered this motion.

22. Following a hearing on 26 July 2004, the District Court found the applicant guilty of illicit possession of narcotics and fined him in the amount of 10,000 Serbian dinars (at the time approximately 128 euros).

23. In a separate decision of the same date the District Court released the applicant from detention. It held, *inter alia*, that "the current phase of the criminal proceedings had been completed" and that "the defendant had provided correct information about his present address".

24. On 24 September 2004 the applicant filed a complaint with the Court of Serbia and Montenegro (*Sud Srbije i Crne Gore*).

25. Following the communication of the present application to the respondent State, the Government produced two signed witness statements, taken by the police on 23 January 2006, wherein the applicant's neighbours, both residing at M.K. Street no. 32, confirmed that the applicant had indeed not been living there for years. One of them further specified that he had already told the police as much in April 2004, while the other recalled that the applicant had not been living at the address in question since 1999.

II. RELEVANT DOMESTIC LAW AND JURISPRUDENCE

A. Constitutional Charter of the State Union of Serbia and Montenegro (*Ustavna povelja državne zajednice Srbija i Crna Gora*; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 1/03)

26. Articles 10 and 16, taken together, stated that the "provisions of international treaties on human and minority rights applicable in ... [the State Union of] ... Serbia and Montenegro shall be directly enforceable" and, further, that "the ratified international treaties" shall "have precedence" over domestic legislation.

B. Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora; published in OG SCG no. 6/03)

27. Article 7 provided that "international treaties in force in the State Union [of Serbia and Montenegro] shall be guaranteed by this Charter and be directly applicable".

28. Article 14 § 8 provided that a person "who has been deprived of his liberty unlawfully [*nezakonito lišen slobode*] shall have the right to compensation".

C. Constitution of the Republic of Serbia (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia - OG RS - no. 1/90)

29. Article 23 § 4 provided, *inter alia*, that a person who has been deprived of his liberty, "without any basis [*bez osnova*] ... shall have the right to ... compensation ...".

D. Criminal Procedure Code (Zakonik o krivičnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 70/01, 68/02 and 58/04)

30. The relevant provisions of this Code provide as follows:

Article 17

"The courts, as well as State bodies taking part in the criminal proceedings, shall establish truthfully and comprehensively all facts which are of importance for the adoption of a lawful decision.

The courts and State bodies shall examine and establish with equal care facts which incriminate the defendant, as well as those in his favour."

Article 24 § 6

"First instance courts sit in a panel of three judges ["Judicial Panel"] when deciding on appeals against rulings of the investigating judge and other rulings when it is so prescribed by this Code ... "

Article 133 §§ 1-3

"The ... [defendant's participation in the criminal proceedings may be secured by means of sending] ... summonses, his forcible production in court, the issuance of a prohibition of his leaving his place of residence, [as well as] through the imposition of bail or detention.

The competent court shall ... [attempt not to apply] ... a more severe measure ... [in order to secure the defendant presence] ... if a less severe measure may achieve the same purpose.

These measures shall be vacated *ex officio* when the reasons for their application have ceased to exist, or shall be replaced with other less severe measures once the conditions are met."

Article 134 § 4

"The defendant is obliged to immediately inform the court of any change of address, as well as of his intent to change his abode. The defendant shall be informed of this obligation at his first hearing ... [or] ... upon receipt of the indictment ... and warned about the consequences ... [of any non-compliance] ... provided for under the Code."

Article 135 § 1

" ... [The court shall order the forcible production of the defendant before it if the defendant] ... could not be properly summoned and it is obvious from the facts that he has been avoiding receipt [of court summonses]."

Article 136 §§ 1, 6 and 8

"If there are circumstances indicating that the defendant might abscond, hide, go to an unknown place or abroad, the court may, by a reasoned decision, prohibit him from leaving his place of residence.

...

In the course of the [judicial] investigation the [measure] referred to in [paragraph 1] ... of this Article shall be ordered and vacated by the investigating judge, and when the indictment is preferred by the President of the Chamber.

...

Parties may appeal the ruling ordering, extending or vacating ... [the said measure] ... and the Public Prosecutor may also appeal the ruling rejecting his motion for [its] application. The Judicial Panel ... shall decide on the appeal ... [within a period of three days] ... The appeal does not stay the execution of the ruling.

... "

Article 137

"The defendant who is to be or has already been detained based only on circumstances indicating that he will abscond ... may remain at large or may be released providing that he personally, or another person on his behalf, gives bail guaranteeing that he shall not abscond until the conclusion of the criminal proceedings and the defendant himself promises that he shall not hide or change his place of residence without permission."

Article 140 § 1

"The decision on bail before and in the course of a [judicial] investigation shall be rendered by the investigating judge. After the indictment is preferred the decision on bail shall be rendered by the President of the Chamber and [subsequently] at the main hearing by the Chamber itself."

Article 141

"Detention may be ordered only in accordance with the conditions provided by this Code and only if the same purpose cannot be achieved by another measure.

The authorities taking part in the criminal proceedings ... are bound to proceed with particular urgency if the defendant is in detention.

In the course of the ... proceedings, detention shall be vacated as soon as the grounds therefor have ceased to exist."

Article 143 §§ 1, 3-4 and 6

"Detention shall be ordered by a decision of the competent court.

...

A decision on detention shall be served on the person to whom it relates at the moment of his deprivation of liberty, but no later than within 24 hours ... [as of this moment] ...

A detained person may file an appeal against the decision on detention with the Judicial Panel within 24 hours as of the moment of its receipt. The appeal, the decision on detention and other files shall immediately be forwarded to the Judicial Panel. The appeal shall not stay the execution of the [impugned] decision.

...

In the situation referred to ... [above,] ... the Judicial Panel shall rule on the appeal within 48 hours."

398 §§ 1 and 4

"Against decisions [*rešenja*] ... adopted by courts acting at first instance, the parties and persons whose rights have been breached may file an appeal, unless this Code expressly provides that an appeal shall not be permitted.

...

There shall be no appeal against a decision [*rešenje*] of the Supreme Court of Serbia, unless provided otherwise by this Code."

Article 401 § 1

"An appeal against a decision [*rešenje*] adopted by a court at first instance shall be decided at a session held before the court of second instance, unless provided otherwise by this Code."

Article 436 § 1 (1)

"For the purposes of unhindered conduct of the criminal proceedings [in respect of crimes punishable by a fine or imprisonment of up to three years,] detention may be ordered against a person who is under reasonable suspicion of having committed a criminal offence if:

(1) he is in hiding or his identity cannot be established or if there are other circumstances clearly indicating a danger of flight..."

Article 560 § 1 (1 and 3)

"[The following persons shall be] ... entitled to recover ... [any] ... damages ... [suffered] ...

(1) [a person] who was detained but against whom no criminal proceedings were instituted, where these proceedings were discontinued by a final ruling, where ... [the person in question] ... was [ultimately] acquitted by a final judgment or where the charge against him was rejected;

...

(3) [a person] who due to an error committed or an unlawful action undertaken by a [State] body has been deprived of his liberty in the absence of any legal basis [*neosnovano lišeno slobode*] ... "

E. Relevant commentary as regards Articles 137 and 401 § 1 of the Criminal Procedure Code

31. The person requesting bail, under Article 137, "does not have to ... specify the amount of bail" to be posted (see *Komentar Zakonika o krivičnom postupku*, Prof. dr Tihomir Vasiljević and Prof. dr Momčilo Grubač, IDP Justinijan, Belgrade, 2005, p. 247).

32. Parties to the proceedings "shall not be informed about ... [the session referred to in Article 401 § 1 of the Criminal Procedure Code] .., including the State Prosecutor ... [who shall] .., prior to the session, be provided with the case file and shall submit his proposal ... [to the court] ... in writing" (see *Komentar Zakonika o krivičnom postupku*, cited above, pp. 705-706).

F. Domicile and Temporary Residence Act (Zakon o prebivalištu i boravištu građana; published in the Official Gazette of the Socialist Republic of Serbia - OG SRS - nos. 42/77, 24/85 and 6/89, as well as OG RS nos. 25/89, 53/93, 67/93 and 48/94)

33. Articles 6 § 1, 8 § 1, 14 and 20 provide, *inter alia*, that citizens must inform the police about any change in their address, within eight days as of

their moving, which information shall then be entered into an official register.

G. Obligations Act (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and OG FRY no. 31/93)

34. Articles 199 and 200 of the Obligations Act provide, *inter alia*, that anyone who has suffered fear, physical pain or, indeed, mental anguish as a consequence of a breach of his "personal rights" (*prava ličnosti*) is entitled, depending on their duration and intensity, to sue for financial compensation in the civil courts, as well as to request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction.

H. The Court of Serbia and Montenegro

35. The relevant provisions concerning the Court of Serbia and Montenegro are set out in the *Matijašević v. Serbia* judgment (no. 23037/04, §§ 12, 13 and 16, ECHR 2006-...).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 (c), 3 AND 4 OF THE CONVENTION

36. The applicant complained under Article 5 § 1 (c) of the Convention that his detention was unlawful, that is in violation of Article 17 of the Criminal Procedure Code (hereinafter "the CPC"), because the domestic courts had failed to note his correct address, already contained in the case file.

37. The applicant further complained under Article 5 § 3 of the Convention that:

(i) he had been detained for a period of twenty days prior to being brought in person before the judge who released him; and

(ii) his continued detention had been a disproportionate measure, given the minor nature of the crime with which he was charged and the sanction ultimately imposed, as well as the fact that and the domestic courts had refused to even consider the possibility of releasing him on bail or replacing his detention with an order of confinement to his residence.

38. Lastly, the applicant complained under Article 5 § 4 of the Convention that:

(i) the proceedings before the Supreme Court had taken place in the absence of an oral hearing; and

(ii) they were insufficiently "speedy", within the meaning of this provision. Concerning the latter point, the applicant explained that a period of more than four days had elapsed from the moment when his appeal was filed until the moment when the decision of the Supreme Court had been adopted. Further, his lawyer had received the said decision another two days later, in all more than six days following the submission of his appeal, which had clearly been in breach of the forty-eight-hour deadline laid down in Article 143 § 6 the CPC.

39. Article 5 of the Convention, in its relevant part, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his [or her] 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 ... fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

A. Admissibility

1. The parties' arguments

40. The Government submitted that the applicant had not exhausted all effective domestic remedies. In particular, he had failed to bring a separate civil lawsuit under Articles 199 and 200 of the Obligations Act, and the Court of Serbia and Montenegro had itself yet to consider his complaint filed on 24 September 2004 (see paragraphs 24, 34 and 35 above).

41. The applicant maintained that these remedies were neither available nor effective as understood by Article 35 § 1 of the Convention.

2. Relevant principles

42. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of this provision is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33).

43. The Court further notes that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003).

3. The Court's assessment

44. Concerning the Government's submission that the applicant should have filed a civil claim based on Article 200 of the Obligations Act, the Court notes that the rights guaranteed under Article 5 §§ 1 (c), 3 and 4, are to be distinguished from the right to receive compensation for a violation thereof, which is why a civil action for damages cannot be deemed effective as regards the applicant's complaints (see, among many other authorities, *Włoch v. Poland*, no. 27785/95, § 90, ECHR 2000-XI; *Pavletic v. Slovakia* (dec.), no. 39359/98, ECHR 13 May 2005; *Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, § 24).

45. It is further noted that the Government have failed to provide any domestic case-law indicating that, in a case such as the applicant's, it was indeed possible to obtain any other detention-related redress under Article 199 of the Obligations Act.

46. Lastly, as regards the applicant's complaint filed with the Court of Serbia and Montenegro, the Court recalls that it has already held that this particular remedy was unavailable until 15 July 2005 and, further, that it remained ineffective until the break up of the State Union of Serbia and Montenegro (see *Matijašević v. Serbia*, cited above, §§ 34-37). The Court sees no reason to depart from this finding in the present case.

47. In view of the above, the Court concludes that the applicant's complaints cannot be declared inadmissible for non-exhaustion of domestic

remedies under Article 35 § 1 of the Convention. Accordingly, the Government's objection in this respect must be dismissed. The Court also considers that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare them inadmissible. They must therefore be declared admissible.

B. Merits

1. As regards the applicant's complaint under Article 5 § 1 (c) of the Convention that his detention had been ordered unlawfully (see paragraph 36 above)

(a) The parties' arguments

48. The Government recalled the contents of the police report of 20 April 2004 and noted that the District Court's erroneous referral to the applicant's address as M.K. Street no. 30 could not obscure the fact that the police had actually searched for the applicant at M.K. Street no. 32 but could not find him there (see paragraphs 12 and 25 above).

49. The Government maintained that the applicant had neither lived at M.K Street no. 30 nor no. 32, which is why the District Court had acted fully in accordance with Article 436 § 1 (1) of the CPC when it had ordered his detention (see paragraph 30 above).

50. The Government submitted that the applicant must have been aware of the fact that the criminal proceedings had been brought against him, given that he had signed the receipt confirming the seizure of the cannabis in question, and emphasised the importance of the witness statements taken in January 2006 (see paragraphs 9 and 25 above).

51. The Government pointed out that the domestic authorities had no reason to attempt to contact the applicant by telephone whilst they were still in the process of establishing his address. Indeed, the applicant himself should have informed the competent domestic authorities of his correct address or of any intention to change his residence (see Article 134 § 4 of the CPC at paragraph 30, as well as paragraph 33 above).

52. In view of the above, the Government concluded that the domestic authorities had done everything in their power to establish the applicant's whereabouts. Thus there had been no violation of Article 5 § 1 (c) of the Convention.

53. The applicant reaffirmed his complaint and explained that the District Court had misapplied Article 436 § 1 (1) of the CPC given that there was no evidence of him absconding.

54. The applicant further observed that his detention was unlawful because the District Court had failed to consider other less severe measures

in order to secure his attendance, as envisaged by Articles 133 and 135 of the CPC (see paragraph 30 above).

55. Finally, the applicant noted that he could not have been expected to periodically review court registers merely in order to establish whether any criminal proceedings had been brought against him, and he commented that the witness statements taken in January 2006, as well as the provisions of the Domicile and Temporary Residence Act, were irrelevant.

(b) Relevant principles

56. The Court recalls that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a "democratic society" within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, § 65, and *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37). Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-...).

57. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 22, § 40), save in accordance with the conditions specified in paragraph 1 of Article 5.

58. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to the substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 753, § 41; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II). A period of detention is, in principle, "lawful" if it is based on a court order and even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see, *Benham*, cited above, pp. 753-54, §§ 42-47; *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX).

59. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above § 37; *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67,

ECHR 2008-...). In particular, it does not suffice that the deprivation of liberty is executed in conformity with national law, it must also be necessary in the specific circumstances of each case. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest (see, in the context of Article 5 § 1 (b), (d) and (e), *Saadi v. the United Kingdom*, cited above, §§ 67-72; *Witold Litwa*, cited above, § 78; *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004; *Enhorn v. Sweden*, no. 56529/00, § 44, ECHR 2005-I).

(c) The Court's assessment

60. As regards the present case, the Court notes that:

(i) although the applicant could not have been expected to repeatedly seek information from the authorities as to whether any proceedings had been brought against him, he was obliged, when first challenged by the police, to provide his *de facto* residence;

(ii) notwithstanding the obvious confusion in the official documents, the police had gone to the address given by the applicant (M.K. Street no. 32) on at least one occasion, but were told by a neighbour that he had not been living there since 1999 (see paragraphs 12 and 25 above);

(iii) the applicant has failed to effectively refute this statement even though his registered domicile (M.K. Street no. 32) would appear to have remained unchanged (see paragraph 15 above);

(iv) the fact that the applicant had come to the police station following the telephone call made to his father is irrelevant because this occurred after the District Court had already decided to order his detention and the authorities, in any event, had no obligation under law, regardless of the stage of the proceedings, to resort to this particular measure; and

(v) since the domestic authorities were unable to reach the applicant, it was reasonable for the District Court to conclude that he was indeed absconding and order his detention in accordance with Article 436 § 1 (1) of the CPC, rather than his forcible production pursuant to Articles 133 and 135, given that the latter measure, by its very nature, would not have been capable of securing his presence until the conclusion of the proceedings in question (see paragraph 30 above).

61. In view of the above, the Court finds that the applicant's detention, notwithstanding the regrettable confusion concerning his address reflected in the official documents, was neither unlawful nor arbitrary. The Court further notes that there was no dispute between the parties as to the existence of a reasonable suspicion that the applicant had committed the

offence in question, or that his detention had been ordered for the purpose of bringing him before the competent legal authority. There has, accordingly, been no violation of Article 5 § 1 (c) of the Convention.

2. As regards the applicant's complaint under Article 5 § 3 of the Convention that he had not been brought before a judge promptly (see paragraph 37(i) above)

(a) The parties' arguments

62. The Government maintained that there had been no violation of Article 5 § 3 of the Convention.

63. The applicant reaffirmed his complaint.

(b) The Court's assessment

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

65. Turning to the initial stage under the first limb, the Court's case-law establishes that an individual arrested or detained on suspicion of having committed a criminal offence must be protected by a certain judicial control. That control serves to provide effective safeguards against the risk of ill-treatment, as well as safeguards against an abuse of power by law enforcement officers or other authorities for what should be narrowly restricted purposes, to be exercised strictly in accordance with prescribed procedures.

66. The said judicial control must, *inter alia*, satisfy the requirement of promptness (see, *McKay v. the United Kingdom*, cited above, § 32), thereby allowing the detection of any ill-treatment and keeping to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation as there would otherwise be a serious risk of impairing the very essence of the right protected (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, § 62, where periods of more than four days in detention without an appearance before a judge, were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

67. Detention ordered by a domestic court does not preclude the subsequent application of the "promptness" requirement contained in

Article 5 § 3 if, *inter alia*, the defendant was not heard when his detention was first being considered. For example, an interval of fifteen days between the applicant's placement in custody, based on a court order, and his hearing in person before a judge was deemed inconsistent with Article 5 § 3 in the case of *McGoff v. Sweden* (judgment of 26 October 1984, § 27, Series A no. 83).

68. In view of the above, the Court notes that in the present case no hearings were held either when the applicant's initial detention was ordered or when the Supreme Court considered the related appeal. Thus it took twenty days for the applicant to be brought before a judge in person and, even then, this was not part of a pre-trial detention review procedure but occurred at the applicant's actual trial. There has accordingly been a breach of the applicant's right to be brought promptly before a judge as guaranteed under Article 5 § 3 of the Convention.

3. As regards the applicant's complaint under Article 5 § 3 of the Convention concerning the disproportionate nature of his continued detention as well as the respondent State's failure to consider any alternatives thereto (see paragraph 37(ii) above)

(a) The parties' arguments

69. The Government maintained that there had been no violation of Article 5 § 3 of the Convention. In particular, they stated that the applicant had absconded, and noted that he had failed to specify the "form and amount" of bail proposed. In any event, the applicant had been released quickly, only ten days after the submission of his request to be released on bail.

70. The applicant reaffirmed his complaints and noted that, according to Article 133 § 3 of the CPC, he had not been obliged to specify the bail proposed. Indeed, it was up to the District Court to do so *ex officio* (see paragraph 30 above).

(b) The Court's assessment

71. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p. 37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he or she must be presumed innocent, and the purpose of the provision under consideration is essentially to require the individual's provisional release once continued detention ceases to be reasonable.

72. This form of detention can only be justified in a given case 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 laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 *et seq*, ECHR 2000-XI).

73. The responsibility falls in the first place to the national judicial authorities to ensure that 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 an important public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release (see, for example, *Weinsztal v. Poland,* no. 43748/98, judgment of 30 May 2006, § 50).

74. 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 with the lapse of time this no longer suffices and the Court must then 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 be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings at issue (see, amongst other authorities, *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 35; *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 50).

75. Unlike the first limb of Article 5 § 3, there is no express requirement of "promptness" in its second limb. However, the required scrutiny, whether on application by the applicant or by the judge of his or her own motion, must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum (see *McKay v. the United Kingdom*, cited above, § 46).

76. Whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, it being incumbent on the national authorities to always duly consider such alternatives (see, *mutatis mutandis*, *G.K. v. Poland*, no. 38816/97, § 85, 20 January 2004), notwithstanding the fact that it cannot be required of them that the examination of bail takes place with any more speed than is demanded of the first automatic review of the applicant's detention, which the Court has already identified as being a maximum of four days (see *McKay v. the United Kingdom*, cited above, §47). Where a lighter sentence can be anticipated, the reduced incentive for the accused to abscond should also be taken into account (see, *mutatis mutandis*, *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, Series A, No. 96, § 69).

77. In view of the above, the Court notes that:

(i) on 16 July 2004 the applicant had filed a motion with the District Court, seeking his release on bail or, alternatively, confinement to his residence until the conclusion of the criminal proceedings against him;

(ii) notwithstanding the Government's submissions to the contrary, the applicant had clearly had no obligation under Articles 133 § 3 and 137 of the CPC to specify the type and amount of bail to be posted (see paragraphs 30 and 31 above);

(iii) on 26 July 2004 the applicant was convicted and fined in the amount of 128 euros, which was a lenient sentence and, given the circumstances, certainly one which could have been anticipated; and

(iv) on 26 July 2004 the applicant was released, apparently without his motion of 16 July 2004 having ever been considered.

There has accordingly been a separate violation of the applicant's right "to be released pending trial", which release could have been "conditioned by [his] guarantees to appear" in court, as provided under Article 5 § 3 of the Convention.

4. As regards the applicant's complaint under Article 5 § 4 of the Convention concerning the "speed" of the proceedings before the Supreme Court as well as the absence of an oral hearing (see paragraph 38 above)

(a) The parties' arguments

78. The Government acknowledged that, in breach of Article 143 § 6 of the CPC, more than forty-eight hours elapsed before the Supreme Court determined the applicant's appeal. They argued, however, that this cannot amount to an "automatic" violation of Article 5 § 4, particularly in view of the fact that the Supreme Court had ultimately taken only six days to rule in respect of the said appeal, that in so doing it had upheld the District Court's detention order, and that on 26 July 2004 the applicant had been found guilty and released.

79. As regards the absence of the oral hearing before the Supreme Court, the Government pointed out that neither the applicant nor the State Prosecutor had had the right to attend the session in question. Therefore there had been no violation of Article 5 § 4.

80. The applicant reaffirmed his complaints and noted that the Government's arguments were irrelevant. In particular, whilst the involvement of the State Prosecutor might be of interest in assessing the applicant's rights under Article 6, it clearly had no bearing on the Article 5 question.

(b) The Court's assessment

81. An adversarial oral hearing under Article 5 § 4 is always required in cases where the initial arrest was effected pursuant to Article 5 § 1 (c) (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, § 162, *Reports* 1998-VIII).

82. Moreover, the fact that the impugned detention was ordered by a court does not deprive the detained person of the right to subsequently bring review proceedings in accordance with Article 5 § 4, if fundamental procedural guarantees, such as an oral hearing, were not complied with initially (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, cited above, § 76).

83. Lastly, concerning the speed of the said review, it "must comply with both the substantive and procedural rules of the national legislation" (see *Koendjbiharie v. the Netherlands*, judgment of 25 October 1990, § 27, Series A no. 185-B).

84. The Court observes, as regards the present case, that the proceedings before the Supreme Court had not included an oral hearing. Moreover, a period of four days had elapsed from the moment when the applicant's appeal had been completed until the decision had been adopted, a delay which in itself was a breach of the forty-eight hour time-limit laid down in Article 143 § 6 the CPC (see paragraph 30 above). In addition, the applicant's lawyer had only received the Supreme Court's decision two days after its adoption and, in all, more than six days after the appeal had been finalised (see paragraphs 16-19 above). The Court therefore finds that there has been a violation of Article 5 § 4 in two respects: the lack of speed in the proceedings before the Supreme Court and the absence of an oral hearing before it (notwithstanding the fact that it is seldom the case in other European jurisdictions that a Supreme Court would be obliged to routinely deal with appeals lodged in the detention context).

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

85. Finally, the applicant complained under Article 5 § 5 of the Convention that he did not have an enforceable right to compensation concerning the breach of his other rights guaranteed by this provision.

86. Article 5 § 5 of the Convention provides as follows:

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

A. Admissibility

87. The Court notes that it has already found violations in respect of the applicant's rights under Article 5 §§ 3 and 4 of the Convention. It follows that Article 5 § 5 of the Convention is applicable.

88. The Court further notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and considers that it cannot be declared inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

89. The Government submitted that the applicant had failed to demonstrate that he had suffered any damage as a result of the events in question. They further maintained that, even assuming that he had had suffered some harm, he had had an enforceable right to compensation in accordance with Article 5 § 5 of the Convention. In particular, he could have filed a separate civil suit for damages in accordance with Article 14 § 8 of the Charter on Human and Minority Rights and Civic Freedoms, Article 23 § 4 of the Serbian Constitution, Article 200 of the Obligations Act, Article 560 § 1 (3) of the CPC, as well as directly on the basis of the Convention in accordance with Articles 10 and 16 of the Constitutional Charter (see paragraphs 26, 28-30 and 34 above).

90. The Government provided the Court with a criminal judgment adopted by the District Court in Valjevo wherein Article 6 of the Convention was applied directly as regards the length of the proceedings in question, as well as the defendant's right to examine the witnesses against him.

91. Lastly, the Government furnished the Court with a civil judgment adopted by the First Municipal Court (*Prvi opštinski sud*) in Belgrade, whereby the plaintiff had been awarded compensation on the basis of Article 560 § 1 (1) of the CPC, and an additional judgment issued by the Municipal Court in Novi Sad, granting the plaintiff compensation under Article 200 of the Obligations Act, as well as Articles 5, 8 and 13 of the Convention, in a matter involving illegal surveillance and unlawful detention by the State Security Agency (*Bezbednosno-informativna agencija*).

92. The applicant pointed out that the Supreme Court had already found that his detention was lawful and maintained that he could not, therefore, have obtained compensation in a subsequent civil suit based on the domestic provisions referred to by the Government. As regards the direct application of the Convention, the applicant observed that Serbian law did not recognise "an enforceable right of action" under Article 5.

2. The Court's assessment

93. In *Belchev v. Bulgaria* (no. 39270/98, §§ 84-94, 8 April 2004), the Court held, *inter alia*, that there had been a violation of Article 5 § 5 because the domestic criminal "courts [had deemed the applicant's detention to be] ... in full compliance with the requirements of domestic law" and there had been no available domestic jurisprudence to suggest that compensation for detention in breach of the Convention could have been obtained in a subsequent civil lawsuit. Since the Government in the present

case have likewise failed to provide any relevant Serbian case-law in response to the applicant's pertinent submissions described at paragraph 92 above, and given that the domestic case-law which they have provided is clearly distinguishable from the applicant's situation, his detention having been deemed lawful by the Supreme Court, the Court finds that the applicant indeed had no "enforceable right to compensation" in violation of Article 5 § 5 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicant claimed 5,000 euros (EUR) for the non-pecuniary damage suffered.

96. The Government contested that claim.

97. The Court considers that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by its mere finding of several violations of the Convention. Having regard to the number and character of the violations found in the present case and making its assessment on an equitable basis, the Court therefore awards the applicant EUR 2,000 under this head.

B. Costs and expenses

98. The applicant also claimed EUR 887 for the costs and expenses incurred before the domestic courts and EUR 1,566 for those incurred in connection with his Strasbourg case.

99. The Government contested those claims.

100. 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 were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

101. In the present case, regard being had to the information in its possession and the above criteria, as well as the fact that the applicant has already been granted EUR 850 under the Council of Europe's legal aid scheme, the Court considers it reasonable to award him the additional sum

of EUR 716 for the proceedings before it, as well as the EUR 887 sought for the costs and expenses incurred domestically.

C. Default interest

102. The Court considers it appropriate that the default interest 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 application admissible;

2. *Holds* that there has been no violation of Article 5 § 1 (c) of the Convention;

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

6. *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 sums, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of the non-pecuniary damage suffered, plus any tax that may be chargeable,

(ii) EUR 1,603 (one thousand six hundred and three euros) for costs and expenses, plus any tax that may be chargeable to the applicant;

(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;

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

Done in English, and notified in writing on 23 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé	Françoise Tulkens
Registrar	President