SECOND SECTION

# CASE OF LUKOVIĆ v. SERBIA

*(Application no. 43808/07)*

JUDGMENT

STRASBOURG

26 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 Luković v. Serbia,**

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 Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 5 March 2013,

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

# PROCEDURE

1. The case originated in an application (no. 43808/07) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Velibor Luković ("the applicant"), on 11 September 2007.

2. The applicant was represented by Ms B. Kajganić, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant complained, in particular, that his pre-trial detention had been unlawful and excessively long.

4. On 9 November 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Kraljevo. He was employed in the Customs Department's Anti-Smuggling Team.

6. On 28 November 2006 he was arrested and detained on suspicion of organising a criminal group and corruption.

7. On 1 December 2006 an investigating judge of the Belgrade District Court ("the District Court") reviewed and extended the applicant's detention

and that of eighteen other co-accused. The reasons given for detention were as follows:

> "After having examined the prosecutor's request [for the extension of detention], the investigating judge finds the request well-founded and orders the extension of the accused Velibor Luković's detention ...in accordance with Article 142 § 2 (1) of the Code of Criminal Procedure. The accused Velibor Luković ... [is] employed by the Customs Department [and] has through his work undoubtedly made contact with other customs officers and has also made numerous international contacts which could enable [the group] to cross the State border without the necessary documents. That and the fact that they have gained significant profit through illegal activities which they could use in order to avoid criminal prosecution, justifies the fear that if released they would abscond.
>
> ...
>
> As regards the accused Velibor Luković ... his detention is also ordered in accordance with Article 142 § 2 (2) of the Code of Criminal Procedure. Given that the accused Velibor Luković ... is a team leader in the Customs Department's Anti-Smuggling Team, he is the superior of other customs officers who are to be heard as witnesses ... [this] indicates that, if released, he would obstruct the course of justice by influencing the witnesses...
>
> Taking into account that the accused Velibor Luković ... committed several criminal acts within a short period of time ... the investigating judge considers that these facts represent special circumstances which justify the fear that, if released, he would reoffend, so his detention is also ordered under Article 142 § 2 (3) of the Code of Criminal Procedure.
>
> Taking into account that the accused Velibor Luković ... has been charged with serious criminal offences which are punishable by imprisonment for more than ten years, and in view of the manner in which the offences were committed, in particular, that he is employed in the Customs Department's Anti-Smuggling Team, which was established precisely with a view to preventing the very same offences which he enabled [others] to commit ... his detention is also ordered under Article 142 § 2 (5) of the Code of Criminal Procedure [on the basis of the nature of the offences alleged and the severity of the penalty that could be imposed].
>
> ...".

8. On 13 December 2006 the applicant was suspended from work with effect from 28 November 2006, the date on which he was arrested.

9. On 27 December 2006 and 23 February 2007 the applicant's detention was further extended on the same grounds as given in the above order by a chamber of three judges of the District Court and by the Supreme Court of Serbia ("the Supreme Court"), respectively.

10. On 28 May 2007 the public prosecutor issued an indictment – which was 247 pages long – against the applicant and twenty-seven other individuals and delivered it to the District Court on the same day. The applicant was charged with organising a criminal group and eight counts of large-scale corruption. The District Court extended his detention on the same date for the same reasons as before. In particular, as regards influencing the witnesses, the court concluded that it was still justified to

extend the applicant's detention on that ground because, in view of the complexity of the case and the number of the accused, there were eighty-one witnesses to be examined. The applicant was served with a copy of that order on 31 May 2007 and subsequently appealed against it.

11. In parallel to the appeal, on 31 May 2007 the applicant's representative submitted an application for his release to the District Court, on the grounds that he had not been served with the indictment within the twenty-four-hour time-limit prescribed by Article 270 § 1 of the Code of Criminal Procedure (see paragraph 28 below) and that therefore the six-month time-limit set by Article 144 of that Code had not been respected (see paragraph 27 below). On 11 June 2007 the District Court rejected the application. That decision was not subject to an appeal.

12. On 13 June 2007 the applicant was served with a copy of the indictment.

13. On 22 June 2007 the Supreme Court upheld the order extending the applicant's detention of 28 May 2007 (see paragraph 10 above). It held that, pursuant to the Code of Criminal Procedure, the date on which an indictment is delivered to the court – and not the date on which it is served on the accused – is the date to be taken in determining whether an indictment has been issued within the six-month maximum pre-trial detention period.

14. On the same date the president of the District Court informed the applicant's representative that the indictment had not been served on the applicant in time due to the complexity of the case and the heavy workload of the judge sitting in the case.

15. On 16 August 2007 the public prosecutor decided not to lodge an application for judicial review on behalf of the applicant in connection with the orders of 28 May 2007 and 22 June 2007 (paragraphs 10 and 13 above).

16. The applicant's detention was regularly examined and extended every two months by the District Court and the Supreme Court, and, following a reform of the domestic judicial system, by the Belgrade High Court ("the High Court") and the Belgrade Court of Appeal ("the Court of Appeal").

17. The applicant repeatedly challenged his detention. He argued, in particular, that there was no reason to extend his detention on the basis of a risk of him influencing the witnesses, because the court had failed to specify the witnesses who remained to be examined and in which circumstances, and that, therefore, it was not possible to establish which witnesses he could potentially influence. Furthemore, as regards the risk of him absconding, he claimed that he had not been working as the team leader in the Anti-Smuggling Team at the time of the alleged criminal activity, but rather that he had been occupying a different post in the Customs Department. The applicant also argued that there was no risk of him reoffending, because he had been suspended from his position at the Customs Department. Finally,

he argued that there was no legal basis for the extension of his detention based on the severity of the sentence that could be imposed and the special aggravating circumstances of the criminal offences imputed to him.

18. Until 19 November 2007 his detention was based on the same grounds as before. In particular, as regards the risk of him influencing the witnesses, the courts reiterated their previous argument that eighty-one witnesses were yet to be examined at trial, because it had not been possible to examine them during the investigation due to the complexity of the case.

19. On 19 November 2007, although it rejected the applicant's appeal, the Supreme Court accepted the argument concerning the fourth ground for detention (severity of the sentence that could be imposed, the manner in which the criminal offence had been committed or other aggravating circumstances) and decided that it did not exist. The court held in particular:

> "... for this legal ground [for detention to be satisfied] the cumulative existence of two conditions is necessary: that the criminal offence in question is punishable by a sentence of more than ten years' imprisonment and [that there are] particularly aggravating circumstances. In the present case, only one condition has been fulfilled, because there is a reasonable suspicion that the accused committed criminal offences for which a sentence of more than ten years' imprisonment can be imposed, but the reasons given in the contested order do not justify the existence of the second condition... [Neither] the fact that the accused were employed at the Customs Department, [nor] the specific characteristics of their positions, nor the fact that they gained a large illegal profit could be considered as particularly aggravating circumstances, because these facts are contained in the factual description of the criminal acts in question and represent the [constituent] elements of those criminal acts.
>
> Therefore, the Supreme Court holds that the reasons given in the contested order do not justify the extension of detention under Article 142 § 2 (5) of the Code of Criminal Procedure ..."

Further reasoning for the applicant's detention based on the risk of him reoffending was also provided:

> "... there is a reasonable suspicion that the accused, Velibor Luković ... as [a member of] an organised criminal group committed a series of criminal offences over a long period of time ... [the group's] criminal activity had been planned for an indefinite period of time and with a view to gaining a vast illegal profit ... [T]hese circumstances justify the fear that, if released, he would reoffend ..."

20. In issuing subsequent orders extending the applicant's detention, the courts held, in particular, as regards the risk of the applicant influencing the witnesses, that he could influence two other accused, F.P. and M.M., who were at large; and that there was a risk that he would influence witness N.Š., who was expected to testify about the customs clearance of a motor vehicle which the applicant had received as a gift from F.P.

21. From 13 April 2009 onwards the applicant's detention was extended only on the grounds that he might abscond and reoffend. The courts held that the third ground, the risk of him influencing the witnesses, had ceased

to exist, as there was no reasonable suspicion to believe that at that stage of the proceedings the applicant could contact or influence M.M., who had been at large for a long period of time.

22. From 4 December 2009 onwards the applicant's detention was based only on the risk of him absconding. The court held that the risk of him reoffending had ceased to exist in view of: the time that had passed since the alleged criminal activity; the fact that the applicant had been suspended from his post; the fact that he had no previous criminal record; the time he had spent in detention; and the fact that the criminal group had been disbanded. The court further held that the reasons which had previously justified his detention on this ground could not exist throughout the proceedings, and therefore their existence automatically had to be assessed by the court upon each review.

23. Throughout his detention, the applicant made applications for release on bail. Until December 2009 they were rejected as inadmissible (see paragraph 31 below). From December 2009 onwards, when the applicant's detention was based solely on the risk of him absconding, four applications for bail were rejected because the value of the proposed bail (a mortgage over the applicant's family's immovable property) was considered insufficient to guarantee his appearance at trial. The courts also noted that no evidence concerning the financial situation of the applicant and his family had been submitted in support of the application, and that an exact value of the immovable property had not been obtained.

24. On 9 July 2010 the High Court accepted bail in the value of 388,416.50 euros (EUR). On 20 July 2010 the Court of Appeal quashed that decision and ordered that the application for bail be reconsidered. The court noted that the applicant's assets had been the subject of a financial investigation and that it was necessary to establish whether those assets were included in the bail that had been offered.

25. On 16 August 2010 the High Court again accepted bail in the value of EUR 388,416.50. On 23 August 2010 the Court of Appeal upheld that decision.

26. The applicant was released on 27 August 2010.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Article 144 of the Code of Criminal Procedure 2001[1], in so far as relevant, provides that a defendant should be released from detention if an indictment has not been issued within six months of his or her arrest. In accordance with domestic jurisprudence, an indictment is considered to be

[1] *Zakon o krivičnom postupku*, Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02; and Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 46/06, 49/07, 122/08, 20/09, 72/09 and 76/10.

issued when the indictment is delivered to the competent court (see decision of the Constitutional Court of Serbia no. Už-1503/2009 of 3 December 2009 confirming the long-standing jurisprudence).

28. Article 270 § 1 provides that an indictment should be delivered to a defendant who is in detention within twenty-four hours of the delivery of the indictment to the court.

29. Article 269 § 2 provides that the court should decide whether to extend the individual's detention within three days of the delivery of the indictment.

30. Reasons for detention are outlined in Article 142. Detention will be ordered if there is a reasonable suspicion that the accused has committed the criminal offence in question and if, *inter alia*, there is a possibility that the accused would abscond (Article 142 § 2 (1)), obstruct the course of justice (destroy the evidence or influence the witnesses or obstruct the course of justice in some other way) (Article 142 § 2 (2)), reoffend (Article 142 § 2 (3)), or if the criminal offence in question is punishable by a sentence of more than ten years' imprisonment and the manner in which the offence was committed, or other special aggravating circumstances, justify the accused's detention (Article 142 § 2 (5)).

31. Bail can be accepted only in respect of an accused who is detained on the grounds of the risk of him or her absconding (Article 137 § 1). The monetary amount set is always determined with regard to the gravity of the offence(s), the personal and family circumstances of the accused and the financial situation of the person offering to post bail (Article 138 § 1).

# THE LAW

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

32. The applicant complained that his pre-trial detention in the period from 28 May to 13 June 2007 had been unlawful because he had not been served with the indictment within the twenty-four-hour time-limit set by Article 270 § 1 of the Criminal Procedure Act 2001. He relied on Article 5 § 1 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (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;

...”

33. The Government contested this argument.

34. The Court notes that this complaint is based on a misreading of domestic law. Under the Criminal Procedure Act 2001 and domestic jurisprudence, the date on which the indictment is delivered to the competent court – and not the date on which it is served on the accused – is the date to be taken in determining whether an indictment has been issued within the six-month maximum pre-trial detention period (paragraph 27 above). The court should then serve the indictment on the accused within twenty-four hours of its receipt and should decide within three days whether to extend the pre-trial detention of the accused (paragraphs 28 and 29 above).

35. In the present case, the applicant was arrested on 28 November 2006. On 28 May 2007, within the six-month time-limit, the public prosecutor delivered the indictment to the Belgrade District Court and on 31 May 2007, within the three-day time-limit, the District Court delivered a copy of the order extending his detention to the applicant. While it is true that the indictment was only served on the applicant on 13 June 2007, after the expiry of the twenty-four-hour time-limit, this did not affect the lawfulness of his detention. What is of importance under Article 5 § 1 is that the detention order was served on the applicant within the statutory time-limit. Therefore, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

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

36. The applicant further complained about the length of his pre-trial detention. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, reads 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.”

### A. Admissibility

#### *1. Non-exhaustion of domestic remedies*

37. The Government argued that the applicant had failed to lodge a constitutional appeal concerning this complaint.

38. The applicant disagreed that this had been required.

39. The Court notes that the application was introduced before 7 August 2008 and thus the applicant was not obliged to lodge a constitutional appeal before bringing his case to this Court (see *Vinčić and Others v. Serbia*, nos.

44698/06 *et al*., § 51, 1 December 2009). The Government's objection must therefore be rejected.

*2. Conclusion*

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

## B. Merits

*1. The parties' submissions*

**(a) The applicant**

41. The applicant submitted that the length of his detention pending trial could not be regarded as justified for the purposes of Article 5 § 3 of the Convention. He argued that the reasons given for his detention had been arbitrary and unsupported by the facts. The applicant further argued that the proceedings had not been conducted diligently. In this respect, he claimed that only sixteen witnesses had been examined by the investigative judge in a six-month period.

**(b) The Government**

42. The Government submitted that the length of the applicant's pre-trial detention had been reasonable in view of the complexity and sensitivity of the case. The investigation had been conducted by the Office of the Special Public Prosecutor for Organised Crime and had concerned twenty-eight individuals, out of whom seven, including the applicant, had been employed at the Customs Department. The applicant had been charged with organising an international criminal group and corruption, which had been identified as one of the main problems facing the respondent State. The case had also sparked a large amount of media interest.

43. As regards the reasons for the applicant's detention, the Government submitted that they had been relevant and sufficient. The existence of specific grounds for the applicant's detention had been assessed regularly by the domestic courts. Furthermore, his applications for release on bail had always been properly assessed and an application had been accepted once the legal requirements had been met.

*2. The Court's assessment*

**(a) General principles**

44. The Court recalls that the general principles regarding the right "to trial within a reasonable time or to release pending trial", as guaranteed by Article 5 § 3 of the Convention, were stated in a number of its previous judgments (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 *et seq*, ECHR 2000-XI, and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-X, with further references).

**(b) Application of the above principles to the present case**

45. The Court notes that the period to be taken into consideration began on 28 November 2006, when the applicant was arrested and detained, and ended on 27 August 2010, when he was released on bail. It thus lasted for three years and nine months.

46. The Court observes that the present case concerned serious crimes, namely leadership of a criminal group and corruption. Thus it was a classic example of organised crime, by definition presenting more difficulties for the investigative authorities and, later, for the courts in determining the facts and the degree of responsibility of each member of the group. It is obvious that in cases of this kind, continuous control and limitation of the defendants' ability to contact each other and other individuals may be essential to avoid their absconding, tampering with evidence and, most importantly of all, influencing, or even threatening, witnesses. Accordingly, longer periods of detention than in other cases may be reasonable (see, for example, *Tomecki v. Poland*, no. 47944/06, § 29, 20 May 2008).

47. In the Court's view, the fact that the case concerned a member of such a criminal group should be taken into account in assessing compliance with Article 5 § 3 (see *Bąk v. Poland*, no. 7870/04, § 57, 16 January 2007).

48. The Court observes that in their orders to remand the applicant in custody the judicial authorities initially relied on the following grounds: (1) the risk of absconding; (2) the risk of obstructing the course of justice by exerting pressure on witnesses and co-accused; (3) the risk of reoffending; and (4) the serious nature of the offences with which he had been charged and the severity of the penalty which could be imposed on him if found guilty (see paragraph 7 above). In addition, the Government stated that the particular complexity of the case, as it concerned organised crime, also justified the applicant's detention.

49. The Court notes that in their orders, the domestic courts referred to the specific facts of the case and the applicant's personal circumstances and did not use "general and abstract" arguments for his continued detention (contrast, for example, *Boicenco v. Moldova*, no. 41088/05, § 143, 11 July 2006, and *Khudoyorov v. Russia*, no. 6847/02, §§ 185-186, ECHR 2005-X).

They examined each specific ground for detention every two months and gave detailed reasons why the detention should be further extended. Furthermore, the applicant's numerous appeals were examined in detail and the courts provided reasoned decisions for rejecting those appeals.

50. The Court also notes that with the passing of time the courts' reasoning evolved to reflect the developing situation and to verify whether these grounds remained valid at the later stages of the proceedings.

51. In particular, on 19 November 2007 the Supreme Court held that the fourth ground (the serious nature of the offences with which he had been charged and the severity of the penalty which could be imposed) had not been satisfied in the applicant's case because the cumulative conditions for that ground to be used did not exist (paragraph 19 above).

52. Furthermore, on 13 April 2009 the domestic courts held that the second ground, the risk of obstructing the course of justice by exerting pressure on witnesses and co-accused, had ceased to exist (paragraph 21 above).

Finally, on 4 December 2009 the courts held that the third ground for detention, the risk of reoffending, had ceased to exist in view of the applicant's suspension from work, the passage of time and the fact that the criminal group had been disbanded (paragraph 22 above). The Court is aware that the applicant was suspended from work on 12 December 2006, with effect from 28 November 2006, and that that fact could not have remained unknown to the judicial authorities. However, it is prepared to accept that there were other justifications for detention on this ground, notwithstanding the applicant's suspension from work. In support of this is the aforementioned decision of 4 December 2009, which took into account a number of other relevant circumstances for the existence of this ground.

53. After 4 December 2009 the applicant's detention was based only on the risk of him absconding. While it is true that the domestic courts used the same reasoning concerning this ground throughout the applicant's detention and that with the passage of time this ground inevitably became less relevant, the Court cannot conclude on this basis alone that the authorities did not have reasonable grounds to keep him in custody in order to prevent his absconding (compare *Panchenko v. Russia*, no. 45100/98, § 106, 8 February 2005). Having in mind the nature of the case (namely, a serious corruption case), it was reasonable to believe that the risk of the applicant's absconding persisted throughout his pre-trial detention. The domestic courts' reasoning that the contacts with other customs officers, which the applicant had through his work made in Serbia and abroad, might have enabled him to abscond does not appear arbitrary. Furthermore, the existence of this ground was also regularly examined every two months.

The foregoing considerations are sufficient for the Court to conclude that the grounds given for the applicant's pre-trial detention were "relevant" and

"sufficient" to justify holding him in custody for the entire period under review.

54. In addition, the Court reiterates that when the only remaining reason for continued detention is the risk that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by posting bail (see, for example, *Wemhoff v. Germany*, 27 June 1968, § 15, Series A no. 7).

In the present case, the applicant submitted several applications for release on bail. They were initially rejected in accordance with Article 137 § 1 of the Criminal Procedure Code, which provides that bail can only be accepted in respect of an accused detained because of the risk of absconding (paragraph 31 above). After the only remaining ground for detention was the risk of the applicant absconding, the courts rejected four applications for release on bail because the value of the proposed bail was considered insufficient to guarantee his appearance at trial (paragraph 23 above).

Eventually, on 16 August 2010 the bail was accepted and the applicant was released on 27 August 2010.

55. The Court lastly observes that the proceedings were of considerable complexity, regard being had to the number of defendants, the extensive evidentiary proceedings and the implementation of special measures required in cases concerning organised crime. The Court therefore concludes that the national authorities displayed special diligence in the conduct of the proceedings. The length of the investigation and of the trial was justified by the exceptional complexity of the case. The applicant has not substantiated any considerable periods of inactivity which could lead the Court to conclude otherwise.

56. Having regard to the foregoing, the Court considers that there has been no violation of Article 5 § 3 of the Convention.

## FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the length of the applicant's pre-trial detention admissible and declares, by a majority, the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 26 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Françoise Elens-Passos | Guido Raimondi |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Sajó is annexed to this judgment.

G.R.A.
F.E.P.

# DISSENTING OPINION OF JUDGE SAJÓ

The question here is whether the Government was justified in holding the applicant in prison with no bail and no trial for 45 straight months. Based on analogous cases this Court has decided, I would find that such an extended detention was excessive.

Article 5 § 3 of the Convention guarantees the right to trial within a reasonable time or to release pending trial; release may be conditioned by guarantees to appear for trial. Absent a relevant and sufficient reason, a person charged with an offence must always be released pending trial (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 58, ECHR 2003-IX (extracts); *Becciev v. Moldova*, no. 9190/03, § 53, 4 October 2005; and *Khodorkovskiy v. Russia*, no. 5829/04, § 182, 31 May 2011). Where such relevant and sufficient grounds exist, the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings, since the initial grounds for pre-trial detention become less and less relevant over time (see *Labita v. Italy* [GC], no. 772/95, § 153, ECHR 2000-IV). The State must consider alternative preventive measures, such as bail, to ensure appearance before the court (see *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000). It is of particular importance that people not be exposed to dubious police and prosecutorial practices even if charged with a serious crime. Sheer lack of proper promptness in the handling of criminal affairs, irrespective of the reason, cannot normalise long pre-trial detention. The requirement that the length of detention pending trial be limited is closely related to the presumption of innocence. There is a clear danger that this detention will be misused; its continuation cannot be used to anticipate a custodial sentence.[2] Even if an accused makes use of his right not to "cooperate with the authorities," although this may indeed delay the "progress of the investigation" it is not acceptable that he should be made to "bear the consequences" by having his detention prolonged (see dissenting opinion of Judge De Meyer, *W. v Switzerland*, 26 January 1993, Series A no. 254-A). In determining whether the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty (*Neumeister v. Austria*, 27 June 1968, [Law Part] § 4, Series A no. 8). In the evaluation of continuing detention it is crucial to recall at all times that the public interest considerations of continued detention should be understood as a "departure from the rule of respect for individual liberty" (*Yagci and Sargin v. Turkey*, no. 16419/90, § 50, 8 June 1995). Bearing in mind the force of inquisitorial habits in many legal systems, these considerations must animate the above rules and should guide the Court in the application of Article 5 § 3 in all cases.

Considering the presumption in favour of release, national authorities must ensure that pre-trial detention of an accused person does not exceed a reasonable time (see *McKay v. the United Kingdom* [GC], no. 543/03, § 43, ECHR 2006-X). They must examine all the facts that support or oppose the existence of the public interest which justifies a departure from the rule in Article 5, and must explicitly set out these reasons in their decisions on applications for release. Insufficient facts or deficiencies in the process will lead this Court to find a violation of Article 5 § 3 (ibid.).

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[2]. S. Trechsel, Human Rights in Criminal Proceedings. OUP. 2007. 516.

The Court does recognise the risk that the accused would fail to appear for trial as a reason to detain a person suspected of a crime before judgment (see *Stögmüller v. Austria*, 10 November 1969, § 15, Series A no. 9). But domestic authorities cannot make this assessment in the abstract; they must assess a number of case-specific factors, among them the person's character, morals, home, occupation, assets, family ties and links with the country in which he is prosecuted. The mere possibility of a heavy sentence and the weight of the evidence are not in themselves sufficient to offset these factors (see *Neumeister,* cited above, § 10, and *Piruzyan v. Armenia*, no. 33376/07, § 94-95, ECHR 2012 (extracts)). Furthermore, when the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance (see *Wemhoff v. Germany*, 27 June 1968, § 15, Series A no. 7). And most relevant here, the risk of absconding does not excuse unreasonable delays in bringing the suspect to trial (see, for example, *Szepesi v. Hungary*, no. 7983/06, § 28, 21 December 2010, holding that despite the risk of the suspect absconding, a ten-month period of inactivity in the judicial process was irreconcilable with the requisite special diligence in such cases).

In this case, the applicant spent nearly four years of his life in prison, with no trial and no bail set. The domestic judicial system abandoned its reasons for continuing his detention one by one, eventually concluding that there was a monetary amount that would constitute sufficient bail and dissuade the suspect from fleeing. There is no justification in the record for not having come to that conclusion sooner – several years sooner.

In my view, the complexity of the present case, involving many potential witnesses and multiple defendants, is not so great as to excuse a 45-month delay. While the reasonable time cannot be assessed in the abstract (see*, mutatis mutandis*, the *Stögmüller* judgment cited above, p. 40, § 4), in a review of 69 Article 5 § 3 judgments provided by S. Trechsel, former President of the European Commission of Human Rights,[3] there is only one case where a 4-year detention was not found to have resulted in a finding of a violation (*W. v. Switzerland*, 26 January 1993, Series A no. 254-A).[4] Governments have often leaned on their own assessments of the complexity of the case, or made unfounded allegations about the risk of witness tampering, in order to excuse a lengthy delay – and the Court has often rejected those arguments (for one such list of violations, in a case where a violation of Article 5 § 3 was found because of lengthy detention despite complexity, see *Dirdizov v. Russia*, no. 41461/10, §§ 102-08, 27 November 2012). Indeed, this Court has found violations in complex cases when the

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[3]. Trechsel, op. cit. 530-531.

[4]. Note the differences between Mr. W. and Mr. Lukovic: As to Mr W., his residence was already transferred from Switzerland to Monte Carlo, he had frequently visited Germany, England, the United States and the island of Anguilla (where he was supposed to be the owner of a bank); he had thus established numerous close connections with foreign countries. Furthermore, he had stated on several occasions that he wished to go and live in the United States. There were certain indications that he still had considerable funds at his disposal outside his own country. Whatever one might think of *W. v. Switzerland* – see the dissent of Judge De Meyer: "The applicant was in fact deprived of his liberty for slightly over four years before being tried. This interference with 'the rule of respect for individual liberty' and the presumption of innocence was so serious that I cannot regard it as acceptable" – all the above *specific* considerations were established and duly considered by the domestic courts, which cannot be said in the present case, where the Court finds that "the domestic courts used the same reasoning."

applicant was detained for far less time. For instance, in *Toth v. Austria*, 12 December 1991, §§ 74-78, Series A no. 224, the Court found that a violation of Article 5 § 3 arose from 11 months of inactivity before trial, and the complexity of the case (voluminous evidence spanning several countries, as well as multiple charges and defendants) did not justify the unreasonably long detention.

The majority holds that the alleged participation of the accused in organised crime justifies his extended detention (§ 46, citing *Tomecki v. Poland*, no. 47944/06, § 29, 20 May 2008). In that case (which involved a period of detention shorter than in the present case), the applicant was a resident of another country, had absconded once already, and had tried to exert pressure on two other accused parties (ibid. §§ 8-10). The *Tomecki* Court qualified its reasoning by pointing out that "in the special circumstances of the case, the risk flowing from the nature of the applicant's criminal activities *actually existed* and justified holding him in custody for the relevant period" (§ 35, emphasis added). That case is a poor analogy; –in the present case the applicant was eventually granted bail, and arguments about the possibility of his absconding were largely speculative.

The judgment in the present case states the following (paragraph 53):

"While it is true that the domestic courts used the same reasoning concerning this ground throughout the applicant's detention and that with the passage of time this ground inevitably became less relevant, the Court cannot conclude on this basis alone that the authorities did not have reasonable grounds to keep him in custody in order to prevent his absconding (compare *Panchenko v. Russia*, no. 45100/98, § 106, 8 February 2005). Having in mind the nature of the case (namely, a serious corruption case), it was reasonable to believe that the risk of the applicant's absconding persisted throughout his pre-trial detention. The domestic courts' reasoning that the contacts with other customs officers, which the applicant had through his work made in Serbia and abroad, might have enabled him to abscond does not appear arbitrary."

The Court relies here on a kind of *a contrario* interpretation of *Panchenko.* The *Panchenko* Court found that the decisions extending the applicant's pre-trial detention were stereotypically worded and in summary form. In the present judgment it is found that the same reasoning is applied throughout the applicant's detention, but its relevance is not considered.

As to the severity of the crime (or the possibility of a serious punishment), which seems to be a prominent consideration in the above reasoning of the Court, this is not a sufficient ground in itself, at least in the light of our jurisprudence. Moreover, the Court itself relies on the contrary finding of the Supreme Court, which already on 19 November 2007 held that the grounds of the serious nature of the offences with which the applicant had been charged and the severity of the penalty which could be imposed had not been satisfied in the applicant's case (paragraph 51).

It is true that there are cases where the Court found that "the danger of the applicant's absconding was the other main ground referred to by the [domestic] courts" (*Van der Tang v. Spain*, 13 July 1995, § 64, Series A no. 321). But the risk of absconding is generally a more specific one: for example, in *Van der Tang*, the applicant (just like *Tomecki*, see above) was a non-resident foreigner, lacking links or

property in the country, and with a family and roots in another country. (Moreover, he did abscond later.) These are facts – unlike the mere speculation of the Serbian courts "that the applicant might have had" foreign contacts as a customs officer. More importantly, such assumption about the risk of absconding based on foreign links cannot in itself be considered to be a sufficient ground to justify the detention. It remains to be ascertained whether the national authorities displayed "special diligence" in the conduct of the proceedings (see *Van der Tang*, § 67). This matter is simply not discussed in the judgment. Instead the Court is satisfied with a reference to the domestic courts' reasoning, in the sense that in the light of the applicant's [assumed] contacts with other customs officers abroad that reasoning "does not appear arbitrary". But appearance of lack of arbitrariness (consisting in the "not unreasonable" nature of assumptions) is certainly not the same as "sufficient" when it comes to justifying 45 months of pre-trial detention, especially if one realises that the very institution of detention is a "departure from the rule of respect for individual liberty." Even if the evaluation of the applicant's flight risk was based on the assessment that he had contacts abroad, rather than on stereotyped generalities, this in itself should justify neither the excessive delay in determining bail, nor the failure to consider alternative preventive measures (see *Jablonski*, cited above, § 83).

To further bolster its organised-crime-related rationale, the majority cites *Bąk v. Poland*, no. 7870/04, § 57, 16 January 2007, which in turn relies on *Celejewski v. Poland*, no. 17584/04, § 37, 4 May 2006. Much of the *Celejewski* opinion could have been reproduced word for word here (§§ 38-40):

> "[E]ven if due to the particular circumstances of the case, detention on remand is extended beyond the period generally accepted under the Court's case-law, particularly strong reasons would be required to justify this. In the circumstances of the present case, the Court finds that with the passage of time, the severity of the anticipated penalty, alone or in conjunction with other grounds relied on by the authorities, cannot be accepted as sufficient justification for holding the applicant in detention for a very long period of nearly 4 years....The Court concludes, even taking into account the particular difficulty in dealing with a case concerning [an] organised criminal group, that the grounds given by the domestic authorities were not 'sufficient' and 'relevant' to justify the applicant's being kept in detention for 3 years, 9 months and 15 days."

Even in cases of organised crime where a delay in trial could be justified, the allowable delay cannot be open-ended. The length of the delay must be reasonably bounded by its necessity, a necessity which the Government's arguments about organised crime and foreign contacts do not demonstrate here. Nearly four years is simply too long in the absence of exceptional circumstances, and given the lack of relevant and sufficient grounds, or any showing of special diligence, I would have found that the State had violated the applicant's Article 5 § 3 rights.