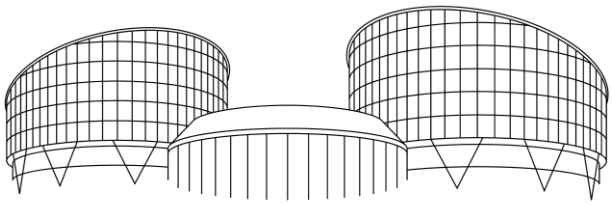

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAKARENKO v. RUSSIA

(Application no. 5962/03)

JUDGMENT

STRASBOURG

22 December 2009

FINAL

28/06/2010

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

In the case of Makarenko v. Russia**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 5962/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Anatoliy Mikhaylovich Makarenko ("the applicant"), on 4 December 2002.

2. The applicant was represented by Mr E. Liptser, a lawyer with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev and Mrs V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his arrest had been unlawful, that the length of his pre-trial detention had been excessive, that the domestic courts had either failed to examine or had delayed the examination of his requests for release or appeals against the detention orders, that he had been denied a "fair hearing" in the proceedings on the charge of criminal libel and that his freedom of expression had been violated.

4. On 22 June 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lived until his arrest in the town of Smolensk. He is a former deputy governor of the Smolensk Region.

A. Criminal proceedings on the charges of fraud, money laundering, unlawful possession of ammunition and forgery of documents

1. Applicant's arrest and authorisation of his detention on remand

6. On 24 October 2002 criminal proceedings were instituted against several officials of the Smolensk Regional Council on suspicion of money laundering and fraud.

7. On 2 December 2002 the applicant was arrested in the Smolensk Regional Prosecutor's office where he had been invited for questioning. He was transferred to the Smolensk Regional Department of the Federal Security Service (hereinafter – the FSB). A record of his arrest, drawn up at 2 p.m. on the same day and produced by the Government, indicated that certain documents were found and seized from the applicant's office. Those documents and other evidence, including witness statements, linked the applicant to or placed him in charge of private and State-owned enterprises implicated in money laundering and fraudulent activities and served as the basis for suspecting the applicant of having participated in an aggravated fraud. The relevant part of the record read as follows:

> "[The applicant], who is suspected of having committed a serious criminal offence, was arrested according to subparagraphs 1, 2 and 3 of paragraph 1 of Article 91 of the Russian Code of Criminal Procedure, and because the pre-trial investigating authorities have sufficient grounds to believe that, if released, he may abscond..., threaten witnesses, destroy evidence or in any other way obstruct the investigation in the present case."

The applicant signed the record, making a handwritten objection to his arrest and the accusations against him.

8. On the following day a senior investigator of the Smolensk Regional FSB Investigative Division, with the consent of the acting Smolensk Regional Prosecutor, lodged an application with the Leninskiy District Court of Smolensk, seeking authorisation for the applicant's detention on remand. The application contained a lengthy description of the fraudulent activities of a number of private and State-owned enterprises in which the applicant had allegedly taken part. The senior investigator also drew the District Court's attention to other circumstances warranting the applicant's detention, namely the likelihood that he would abscond and pervert the course of justice.

9. On 3 December 2002 the Leninskiy District Court authorised the applicant's detention, finding that he was accused of having committed a serious crime and that, if released, he might threaten witnesses, destroy evidence and obstruct justice.

10. The applicant's lawyer appealed against the decisions authorising the arrest and detention. In particular, she complained that there was no evidence which could serve as grounds for the applicant's arrest and that if such evidence did exist, it had not been listed in the record of the applicant's arrest. According to the lawyer, the authorities did not put forward any evidence justifying the conclusion that the applicant was liable to abscond or obstruct justice.

11. On 11 December 2002 the Smolensk Regional Court upheld the decision of 3 December 2002, holding as follows:

> "Taking into account the circumstances of the case, the information concerning the personality of the accused, [the court finds that] the investigator's application is substantiated because [the applicant] may threaten witnesses, destroy evidence in the case and obstruct adjudication of the case."

12. Two weeks later, on 26 December 2002, the Leninskiy District Court rejected the lawyer's complaint concerning the applicant's arrest, finding that the arrest had been effected in compliance with Article 91 § 1 of the Russian Code of Criminal Procedure.

13. On 6 February 2003 the Smolensk Regional Court, endorsing the reasons given by the District Court, upheld the decision of 26 December 2002.

2. Extension of the applicant's pre-trial detention

(a) Detention order of 31 January 2003

14. On 31 January 2003 the Leninskiy District Court extended the applicant's detention until 24 April 2003, holding that there were no grounds warranting his release.

15. The applicant's lawyer appealed. In particular, she complained that the District Court had not put forward any reason necessitating the extension of the applicant's detention.

16. On an unspecified date the Smolensk Regional Court upheld the decision of 31 January 2003.

(b) Detention order of 22 April 2003

17. On 22 April 2003 the Leninskiy District Court extended the applicant's detention until 1 June 2003, reasoning that additional time was required to perform certain investigative actions. The District Court further held as follows:

> "[The applicant] is accused of having committed a serious criminal offence; the court remanded him in custody because he was charged with a serious criminal

offence, thus, there are no grounds for a change or annulment of [the preventive measure].

The court takes into account that the detention is extended only for one month and eight days.

The court takes into account that [the applicant] has minor children, however, in determining the issue of the extension of detention, the court has regard to the fact that [the applicant] is charged with an offence under Article 159 § 3 (b) of the Russian Criminal Code, that is with having committed a serious crime for which the most lenient penalty is five years' imprisonment."

18. The decision of 22 April 2003 was upheld on appeal.

(c) Detention order of 30 May 2003

19. On 30 May 2003 the Leninskiy District Court extended the applicant's detention until 1 September 2003, citing the same reasons as in the decision of 22 April 2003.

20. On 9 June 2003 the Smolensk Regional Court upheld the decision of 30 May 2003, accepting the District Court's reasoning that the applicant was charged with serious criminal offences and that the investigating authorities needed additional time.

(d) Request for the applicant's release

21. On 2 July 2003 the applicant's lawyer applied for the applicant's release under his own recognisance not to leave the town. The lawyer argued that the need to hold the applicant in custody had long ceased to exist as the pre-trial investigation had been closed. The lawyer further pointed to circumstances making the applicant's absconding improbable: the applicant had three minor children and permanent places of residence and work, and before his arrest the investigating authorities had summoned him on several occasions and he had never defaulted.

22. On 11 July 2003 the Leninskiy District Court dismissed the request for release. It held that the applicant had been charged with aggravated fraud, money laundering, unlawful possession of ammunition and forgery of documents. A month later the Smolensk Regional Court upheld the decision, endorsing the District Court's findings.

(e) Decision of 25 September 2003

23. On 25 September 2003 the Leninskiy District Court held a preliminary trial hearing, at which the applicant's lawyers petitioned for the applicant's release and discontinuation of the criminal proceedings against him. The District Court dismissed the request for release because the applicant was charged with serious criminal offences, and if released, could abscond or obstruct establishment of the truth. The District Court listed the first trial hearing for 8 October 2003.

24. The applicant's lawyers, Ms Liptser, Ms Karlova and Mr Kravchuk, appealed.

25. On 13 October 2003 the Leninskiy District Court returned the statement of appeal to Ms Liptser, stating that the applicant had refused her services.

26. Ten days later the president of Lawyer's office no. 10 of the Moscow City Bar Association informed the District Court that Ms Liptser and the applicant had signed an agreement according to which Ms Liptser had been entrusted with the authority to appeal against the decision of 25 September 2003. Ms Liptser's statement of appeal against the decision of 25 September 2003 was enclosed.

27. On 30 October 2003 the Leninskiy District Court accepted Ms Liptser's statement of appeal and sent it to the Smolensk Regional Court. Five days later the Regional Court, having heard the arguments by Ms Karlova and Mr Kravchuk, upheld the decision of 25 September 2003. The appeal statement lodged by Ms Liptser was examined by the Regional Court on 30 December 2003 and dismissed as unsubstantiated.

(f) Request for the applicant's release and decision of 8 October 2003

28. At the trial hearing on 8 October 2003 the Leninskiy District Court dismissed the applicant's lawyer's application for the applicant's release.

29. A week later the lawyer lodged an appeal against the District Court's decision.

30. On 18 November 2003 the Smolensk Regional Court, relying on Article 355 § 5 (2) of the Russian Code of Criminal Procedure, discontinued the appeal proceedings, finding that the release application had been examined and dismissed at the trial hearing and that such a decision was not amenable to appeal.

(g) Decision of 13 November 2003

31. On 13 November 2003 the Leninskiy District Court held a trial hearing. At that hearing the applicant's lawyer asked for the applicant's release under his own recognisance. The District Court dismissed the request, noting that there were no grounds for the release.

32. The applicant's lawyer, invoking Article 5 § 3 of the Convention, appealed against the decision of 13 November 2003.

33. On 30 December 2003 the Smolensk Regional Court upheld the decision of 13 November 2003. The Regional Court held that the grounds warranting the applicant's detention had not changed and, thus, the request for release had been dismissed lawfully.

(h) Detention order of 19 November 2003

34. On 19 November 2003 the Leninskiy District Court dismissed another application for the applicant's release. It held that no new grounds

authorising the applicant's release had been established. That decision was upheld on appeal on 30 December 2003 by the Smolensk Regional Court, which endorsed the District Court's reasoning.

(i) Requests for release of 24 November 2003 and decisions of 29 December 2003 and 30 January 2004

35. On 24 November 2003 the applicant's lawyer requested the applicant's release on a written undertaking not to leave the town. The Leninskiy District Court refused to examine the request, finding that it was a mere restatement of the lawyer's previous release applications.

36. At the trial hearing on 29 December 2003 the applicant unsuccessfully asked the District Court to release him. On 6 April 2004 the Smolensk Regional Court examined the lawyers' appeal against the decision of 29 December 2003, upholding that decision as lawful. The Regional Court confirmed the District Court's opinion that there were no grounds authorising the applicant's release.

37. On 30 January 2004 the District Court adjourned the proceedings because the applicant's co-defendant was ill. The lawyers unsuccessfully petitioned for the applicant's release. On 16 March 2004 the Regional Court upheld the decision of 30 January 2004 because there were no new grounds justifying the release.

(j) Detention order of 26 February 2004

38. On 26 February 2004 the Leninskiy District Court extended the applicant's detention until 26 May 2004. The relevant part of the decision read as follows:

> "[The applicant] is accused of having committed intentional mercenary and serious crimes. The circumstances which served as the basis for remanding [the applicant] in custody have not changed. New circumstances justifying [the applicant's] release ... have not appeared.
>
> The trial investigation has not been finished, [the court] continues to examine the evidence. If released, the accused may obstruct establishment of the truth in the case, abscond or commit new crimes."

39. On 30 March 2004 the Smolensk Regional Court endorsed the reasons given by the District Court on 26 February 2004 and upheld that decision.

(k) Detention order of 26 May 2004

40. On 26 May 2004 the Leninskiy District Court extended the applicant's detention until 26 August 2004 for the same reasons as in the decision of 26 February 2004. That decision became final on 6 July 2004, when the Regional Court upheld it on appeal, finding that the District Court had taken into account all relevant factors, including the applicant's personality, and that it had lawfully extended the detention.

3. Trial and appeal proceedings

41. On 28 June 2004 the Leninskiy District Court found the applicant guilty of aggravated fraud, unlawful possession of ammunition and forgery of documents and sentenced him to five years' imprisonment.

42. On 12 October 2004 the Smolensk Regional Court amended the judgment of 28 June 2004, discontinued the criminal proceedings on the forgery charge due to the expiration of the statutory limitation period and reduced the sentence by two months.

B. Criminal proceedings on the charge of libel

43. On the morning of 16 May 2002 the applicant's car was shot at several times. The applicant, his five-year old daughter, his bodyguard and his driver were in the car. The applicant was wounded, his bodyguard received serious injuries and the driver was killed.

44. On the same day the applicant gave a press conference, at which he accused Mr M., an FSB general and candidate in the upcoming election of the Smolensk Regional Governor, of having tried to kill him.

45. A complaint lodged by Mr M. with the Smolensk Regional Prosecutor led to the institution of criminal proceedings against the applicant on a charge of criminal libel on 18 May 2002.

46. On 19 August 2002 the applicant, in the presence of his lawyer, Ms Karlova, was served with the final text of the bill of indictment and was questioned as the accused. On the same day Ms Karlova began studying the case file, in compliance with the requirements of Article 53 of the Russian Code of Criminal Procedure. Two days later the applicant and Ms Karlova finished reading the file and made handwritten notes to that effect in a case file record.

47. On 29 August 2002 the applicant was committed to stand trial before the Justice of the Peace of the 7th Court Circuit of Smolensk, which, at the applicant's and Ms Karlova's request, fixed a preliminary hearing for 19 November 2002.

48. At the first trial hearing, held on 19 December 2002, the applicant successfully asked the Justice of the Peace to adjourn the proceedings to allow his lawyer to study the case file. On 22 January 2003 the Justice of the Peace granted another request by the applicant and allowed two other lawyers retained by the applicant to enter the proceedings.

49. A number of trial hearings were held between 22 January and 12 February 2003, at which the applicant was mostly represented by Ms Karlova.

50. At the trial hearing on 6 February 2003 the applicant notified the Justice of the Peace that he no longer intended to participate in the trial and that he had terminated his contracts with all his lawyers. On the same day

the Justice of the Peace decided to proceed with the examination of the case in the applicant's absence, dismissed two of the applicant's lawyers from the proceedings and ordered that Ms Karlova, the applicant's third counsel, should continue representing him. The Justice adjourned the hearing until the afternoon of the same day. After the lunch break, the hearing resumed. Ms Karlova read out the applicant's repeated refusal of her services and left the courtroom, without waiting for the Justice's response to it.

51. On 7 February 2003 the Justice of the Peace held that Ms Karlova had committed contempt of court because she had left the courtroom without permission. The Justice also sent a notification to the President of the Smolensk Regional Bar Association concerning Ms Karlova's actions and asking him to ensure that she attended the following hearing.

52. Ms Karlova attended the following hearing. She informed the Justice that she refused to assist the applicant, referring to his refusal of her services.

53. At the following hearing, on 12 February 2003, Ms Karlova defaulted. The Justice of the Peace issued an interim order and again notified the Smolensk Regional Bar Association of Ms Karlova's actions.

54. On the same day the Justice of the Peace found the applicant guilty of aggravated libel and sentenced him to one year's probation. The Justice of the Peace based its judgment on testimonies by the victim and four witnesses who had attended the press conference given by the applicant, a written record and audio and video recordings of the press conference, a letter from the Smolensk Regional Police Department indicating that it had no information concerning participation by Mr M. in any illegal activities and a record of the applicant's questioning. The Justice of the Peace held, in particular:

> "...the court characterises the actions of [the applicant]... as dissemination of false information defaming the honour and dignity of another person and damaging his reputation, connected to accusation of that person of having committed an especially serious criminal offence, because he, by oral statements [addressed] to a number of persons, disseminated false information concerning the organisation by Mr M. of the attempted murder of [the applicant]. He disseminated that information in an affirmative rather than a presumptive manner. Furthermore, [the applicant] knew that Mr M. was a top ranking governmental official who, at the time the statement was made, was running for election as Governor of the Smolensk Region, thus any discreditable information could damage his reputation in some way. The statements made by [the applicant] were false... unfounded and unsubstantiated: at the time the statements [were made] no criminal proceedings were instituted against Mr M. and no other investigative measures were taken by law enforcement agencies; the statement did not contain references to any reliable evidence or documents proving the truthfulness of the statement, or any reference to sources of information on the basis of which [the applicant] had concluded that Mr M. had participated in the criminal offence committed against him. Undisputedly, [the applicant] understood that, but he publicly and intentionally made the above-mentioned statement in the presence of representatives of the mass media, accusing Mr M. of having committed an especially serious crime, thereby defaming the victim, his honour and his dignity, and [the

applicant], in his official position as the deputy Governor of the Smolensk Region, must have been aware of that.

At the meeting of the administration of the Smolensk Region of 16 May 2002, [the applicant] only put forward one piece of evidence to substantiate his statement about Mr M.'s involvement in the attempted murder: two days before the [attempted murder] General M. had threatened him ([the applicant]) in the presence of a deputy president of the Smolensk Regional Court, Mr A., and a deputy prosecutor of the Smolensk Region, Ms P. This submission ... was examined in the course of the trial but was not proven, because Mr A. and Ms P., questioned as witnesses in open court, did not confirm it. The court does not see any reason not to trust those witnesses. No other evidence proving the truthfulness of [the applicant's statement] was presented.

The court also notes that [there is evidence confirming] the defendant's intention to disseminate the false statements publicly (whatever his reasons) and thus to negatively influence people's opinion of the victim, in order to damage his reputation before the election: firstly, the affirmative, rather than presumptive character of the statement; the content of the [the applicant's] speech before and after the libellous statement; the dissemination of the false information at the meeting of the administration of the Smolensk Region, that is, to individuals who had no right to institute criminal proceedings and verify the statement; the fact that the statement was made on several occasions... after the attempted murder... and in the course of the pre-trial investigation... Moreover, the false character of the statement made by [the applicant] was confirmed by his confession made at a press conference on 28 May 2002, during which he had confirmed that as far as he knew Mr M. had not participated in the attempted murder, and [the applicant] had apologised."

55. The applicant and his three lawyers appealed against the judgment of 12 February 2003. In particular, they complained that the Justice of the Peace had proceeded with the trial after the applicant refused to participate, and that it had forced Ms Karlova to represent the applicant despite the fact that he had refused the assistance of his three lawyers, including Ms Karlova. Ms Karlova also filed a separate appeal against the interim orders of 7 and 12 February 2003.

56. On 21 November 2003 the Leninskiy District Court of Smolensk, in the presence of the applicant and his three lawyers, upheld the judgment of 12 February 2003. As regards the applicant's complaint concerning his defence rights, the District Court held that under Russian law a lawyer could not refuse to represent a defendant if he had already undertaken such a responsibility. However, the defendant could refuse legal assistance. Such a refusal would not be binding on the court, if the defendant, at the same time, asked for the case to be determined in his absence. Thus, the Justice of the Peace had lawfully ordered that Ms Karlova should continue representing the applicant because the latter had not wished to participate in the trial, had refused the assistance of his lawyers and had not asked the trial court to appoint another lawyer.

57. On the same day the Leninskiy District Court upheld the interim orders of 7 and 12 February 2003.

58. On 27 January 2004 the Smolensk Regional Court, in the final instance, upheld the judgments of 12 February and 21 November 2003 and

the interim orders of 7 and 12 February 2003. The applicant and two of his lawyers attended the hearing.

II. RELEVANT DOMESTIC LAW

59. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federalist Socialist Republic (Law of 27 October 1960, "the old CCrP"). From 1 July 2002 the old CCrP was replaced by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001, "the new CCrP").

A. Detention matters

1. Preventive measures

60. "Preventive measures" include an undertaking not to leave a town or region, a personal guarantee, bail and remand in custody (Article 89 of the old CCrP, Article 98 of the new CCrP).

2. Authorities ordering detention

61. The Russian Constitution of 12 December 1993 provides that a judicial decision is required before a defendant can be detained or his or her detention extended (Article 22).

Under the old CCrP, a decision ordering detention could be taken by a prosecutor or a court (Articles 11, 89 and 96).

The new CCrP requires a judicial decision by a district or town court on a reasoned request by a prosecutor, supported by appropriate evidence (Article 108 §§ 1, 3-6).

3. Grounds for remand in custody

62. When deciding whether to remand an accused in custody, the competent authority is required to consider whether there are "sufficient grounds to believe" that he or she would abscond during the investigation or trial, obstruct the establishment of the truth or reoffend (Article 89 of the old CCrP). It must also take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 91 of the old CCrP, Article 99 of the new CCrP).

63. Before 14 March 2001, remand in custody was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). On 14 March 2001 the old CCrP was amended to permit defendants to be remanded in custody if the charge carried a sentence of at least two years' imprisonment, if they had previously defaulted, had no

permanent residence in Russia or their identity could not be ascertained. The amendments of 14 March 2001 also repealed the provision that permitted defendants to be remanded in custody on the sole ground of the dangerous nature of the criminal offence they had allegedly committed. The new CCrP reproduced the amended provisions (Articles 97 § 1 and 108 § 1) and added that a defendant should not be remanded in custody if a less severe preventive measure was available.

4. Time-limits for detention

(a) Two types of remand in custody

64. The Codes make a distinction between two types of remand in custody, the first being "during investigation", that is, while a competent agency – the police or a prosecutor's office – is investigating the case, and the second being "before the court" (or "during judicial proceedings"), at the judicial stage. Although there is no difference in practice between them (the detainee is held in the same detention facility), the calculation of the time-limits is different.

(b) Time-limits for detention "during investigation"

65. After arrest the suspect is placed in custody "during investigation". The maximum permitted period of detention "during investigation" is two months but this can be extended for up to eighteen months in "exceptional circumstances". Under the old CCrP, extensions were authorised by prosecutors of ascending hierarchical levels, but they must now be authorised by judicial decisions, taken by courts of ascending levels (under the new CCrP). No extension of detention "during investigation" beyond eighteen months is possible (Article 97 of the old CCrP, Article 109 § 4 of the new CCrP).

66. The period of detention "during investigation" is calculated up to the date on which the prosecutor sends the case to the trial court (Article 97 of the old CCrP, Article 109 § 9 of the new CCrP).

67. Access to the materials in the file is to be granted no later than one month before the expiry of the authorised detention period (Article 97 of the old CCrP, Article 109 § 5 of the new CCrP). If the defendant needs more time to study the case file, a judge, at the request of a prosecutor, may grant an extension of the detention until such time as the file has been read in full and the case sent for trial (Article 97 of the old CCrP, Article 109 § 8 (1) of the new CCrP). Under the old CCrP, such an extension could not be granted for longer than six months.

68. Under the old CCrP, the trial court was entitled to refer the case back for "additional investigation" if it found procedural defects that could not be remedied at the trial. In such cases the defendant's detention was again classified as "during investigation" and the relevant time-limit continued to

apply. If, however, the case was remitted for additional investigation but the investigators had already used up all the time authorised for detention "during investigation", a supervising prosecutor could nevertheless extend the detention period for one additional month, starting from the date on which he or she received the case. Subsequent extensions could only be granted if the detention "during investigation" had not exceeded eighteen months (Article 97).

(c) Time-limits for detention "before the court"/"during judicial proceedings"

69. From the date the prosecutor refers the case to the trial court, the defendant's detention is classified as "before the court" (or "during judicial proceedings").

70. Before 15 June 2001 the old CCrP set no time-limit for detention "during judicial proceedings". On 15 June 2001 a new Article, 239-1, entered into force which established that the period of detention "during judicial proceedings" could not generally exceed six months from the date the court received the file. However, if there was evidence to show that the defendant's release might impede a thorough, complete and objective examination of the case, a court could – of its own motion or at the request of a prosecutor – extend the detention by no longer than three months. These provisions did not apply to defendants charged with particularly serious criminal offences.

71. The new CCrP provides that the term of detention "during judicial proceedings" is calculated from the date the court received the file up to the date on which judgment is given. The period of detention "during judicial proceedings" may not normally exceed six months, but if the case concerns serious or particularly serious criminal offences, the trial court may approve one or more extensions of no longer than three months each (Article 255 §§ 2 and 3).

5. Proceedings to examine the lawfulness of detention

(a) Detention "during investigation"

72. Under the old CCrP, the detainee or his or her counsel or representative could challenge the detention order issued by a prosecutor, and any subsequent extension order, before a court. The judge was required to review the lawfulness of and justification for a detention or extension order no later than three days after receipt of the relevant papers. The review was to be conducted in camera in the presence of a prosecutor and the detainee's counsel or representative. The detainee was to be summoned and a review in his absence was only permissible in exceptional circumstances, if the detainee waived his right to be present of his own free will. The judge could either dismiss the challenge or revoke the pre-trial detention and order the detainee's release (Article 220-1). An appeal to a higher court lay against

the judge's decision. It had to be examined within the same time-limit as appeals against a judgment on the merits (Article 331 *in fine*).

73. Under the new CCrP, an appeal may be lodged with a higher court within three days against a judicial decision ordering or extending detention. The appeal court must rule on the appeal within three days of its receipt (Article 108 § 10).

(b) During judicial proceedings

74. Upon receipt of the case file, the judge must determine, in particular, whether the defendant should be held in custody or released pending the trial hearings (Article 222 § 5 and Article 230 of the old CCrP, Article 228 (3) and Article 231 § 2 (6) of the new CCrP) and rule on any application by the defendant for release (Article 223 of the old CCrP).

75. At any time during the judicial proceedings the court may order, vary or revoke any preventive measure, including remand in custody (Article 260 of the old CCrP, Article 255 § 1 of the new CCrP). Any such decision must be given in the deliberation room and signed by all the judges on the bench (Article 261 of the old CCrP, Article 256 of the new CCrP).

76. An appeal against such a decision lies to a higher court. It must be lodged within ten days and examined within the same time-limit as an appeal against the judgment on the merits (Article 331 of the old CCrP, Article 255 § 4 of the new CCrP).

6. Time-limits for trial proceedings

77. Under the old CCrP, within fourteen days after receipt of the case file (if the defendant was in custody), the judge was required to do one of the following: (1) to fix the trial date; (2) to refer the case back for further investigation; (3) to stay or discontinue the proceedings; or (4) to refer the case to a court having jurisdiction to hear it (Article 221). The new CCrP empowers the judge, within the same time-limit, (1) to refer the case to a competent court; (2) to fix a date for a preliminary hearing; or (3) to fix a trial date (Article 227). In this last case, the trial proceedings must begin no later than fourteen days after the judge has fixed the trial date (Article 239 of the old CCrP, Article 233 § 1 of the new CCrP). There are no restrictions on fixing the date of a preliminary hearing.

78. The duration of the entire trial proceedings is not limited in time.

79. Under the old CCrP, the appeal court was required to examine an appeal against the first-instance judgment within ten days after it was lodged. In exceptional circumstances or in complex cases or in proceedings before the Supreme Court this period could be extended by up to two months (Article 333). No further extensions were possible.

The new CCrP requires the appeal court to start examining an appeal no later than one month after it is lodged (Article 374).

B. Access to a lawyer

80. Article 51 of the new CCrP, in so far as relevant, reads as follows:

> "1. Participation of legal counsel in the criminal proceedings is mandatory if:
>
> 1) the suspect or the accused has not waived legal representation in accordance with Article 52 of this Code;
>
> 2) the suspect or the accused is a minor;
>
> 3) the suspect or the accused cannot exercise his right of defence by himself owing to a physical or mental handicap;
>
> 3.1) the court proceedings are to be conducted [in the absence of the accused] in accordance with Article 247 § 5 of this Code;
>
> 4) the suspect or the accused does not speak the language in which the proceedings are conducted;
>
> 5) the suspect or the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty;
>
> 6) the criminal case falls to be examined by a jury trial;
>
> 7) the accused has filed a request for the proceedings to be conducted [without a hearing] under Chapter 40 of this Code;
>
> 2. ...
>
> 3. In the circumstances provided for by paragraph 1 above, unless counsel is retained by the suspect or the accused, or his lawful representative, or other persons at the request, or with the consent, of the suspect or the accused, it is incumbent on the investigator, prosecutor or the court to ensure participation of legal counsel in the proceedings."

81. Article 52 of the Code provides that a suspect or an accused may refuse legal assistance at any stage of criminal proceedings. Such a waiver may be accepted only if made on the initiative of the suspect or the accused. The waiver must be filed in writing and must be recorded in the official minutes of the relevant procedural act. The refusal of legal assistance may not strip the suspect or accused of the right to ask to be assisted by counsel during further procedural actions in the criminal case. The admission of a lawyer may not lead to the repetition of procedural actions which have already been performed by that time.

C. Participation of a defendant

82. The presence of a defendant at the trial is mandatory unless, in a case which does not concern a grave criminal offence, the defendant petitions the court for the case to be examined in his absence (Article 247 §§ 1 and 4 of the new CCrP).

D. Examination of appeals against judgments issued by a Justice of the Peace

83. Chapters 43-45 of the new CCrP regulate procedure for lodging and examining appeals against judgments taken by justices of the peace. In particular, Article 365 of the Code establishes that a district court, when examining an appeal against a judgment taken by a justice of the peace, should conduct a judicial investigation which includes examination of the parties' submissions and evidence, including the hearing of witnesses, experts, and so on. The district court may, at the parties' request, hear new witnesses, authorise an expert examination, and collect material evidence and documents, even if the justice of the peace previously refused to perform those procedural actions. The district court may not dismiss a party's request pertaining to examination of new evidence on the ground that such a request was also dismissed by the justice of the peace.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION

84. The applicant complained under Article 5 § 1 (c) of the Convention that his arrest had been unlawful, in that the authorities had not had any reasons to suspect him of having committed any criminal offence. The relevant parts of Article 5 provide:

> "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..."

A. Submissions by the parties

85. The Government, relying on a copy of the record of the applicant's arrest issued on 2 December 2002, stated that the arrest had been carried out in compliance with the requirements of the Russian Code of Criminal Procedure, based on reasonable suspicion that the applicant had committed a number of serious criminal offences. The Government stressed that the suspicion had been based on extensive evidence, including witness

statements and documents, implicating the applicant in large-scale fraud and money laundering.

86. The applicant averred that his arrest had been unlawful as the domestic authorities had not cited any grounds warranting the conclusion that he had committed a crime. He further argued that the authorities had not relied on the exhaustive list of grounds under Article 91 of the Russian Code of Criminal Procedure in the record of his arrest.

B. The Court's assessment

1. Admissibility

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

2. Merits

88. The Court firstly reiterates that the "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention laid down in Article 5 § 1 (c) of the Convention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, p. 16, § 32).

89. In the present case the Court notes that the applicant was arrested by the prosecution authorities on suspicion of having committed an aggravated fraud. A record, drawn up immediately after the arrest and signed by the applicant, contained a description of the charges against him and listed evidence on which the suspicion was based. The investigating authorities, relying on Article 91 of the Russian Code of Criminal Procedure, further cited the applicant's liability to abscond and pervert the course of justice as additional circumstances warranting his arrest (see paragraph 7 above). The lawfulness of the arrest was challenged by the applicant in domestic proceedings, where the courts at two instances, having examined the applicant's claims that his arrest was not justified by a suspicion based on reasonable grounds, rejected them as unfounded (see paragraphs 12 and 13 above). In those proceedings evidence was given by the investigating authorities concerning the circumstances leading to the arrest, and the applicant was given the opportunity to raise his objections.

90. As regards the basis for the applicant's arrest, the Court observes that the domestic authorities relied on documentary evidence seized from the

applicant's office during the search, and on witness statements linking the applicant to the large-scale fraudulent activities in which a number of private and State-owned enterprises were implicated. The Court is mindful of the fact that the applicant did not dispute the reliability or consistency of the documentary evidence and witness statements (see, by contrast, *Contrada v. Italy*, no. 27143/95, Commission decision of 14 January 1997, Decisions and Reports (DR) 88-A). Furthermore, he did not deny his connections to the enterprises involved in the alleged criminal activities. The applicant's objection was rather technical in nature. He merely argued that the authorities should have laid down a detailed account of the evidence supporting each of the grounds listed in Article 91 of the Russian Code of Criminal Procedure.

91. In this connection, the Court reiterates that the reasonable suspicion referred to in Article 5 § 1 (c) of the Convention does not mean that the suspected person's guilt must at that stage be established and proven, and it cannot be required in order to justify arrest and detention on remand that the commission of the offence with which the person concerned is charged has been established. It is precisely the purpose of the official investigation and detention that the legality and nature of the offences laid against the accused should be definitely proved (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, and *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A).

92. In the circumstances of the present case the Court considers that the suspicion against the applicant reached the required level as it was based on specific information that he was involved in large-scale fraud. The Court also attributes particular weight to the fact that the applicant's objections to the "reasonableness" of the suspicion against him were examined by the domestic courts at two levels of jurisdiction, and their rejection of the applicant's claims was based on their knowledge and experience of domestic economic activities (see, for similar reasoning, *X. v. Germany*, no. 8098/77, Commission decision of 13 December 1978, Decisions and Reports (DR) 16, and, more recently, *O'Hara v. the United Kingdom*, no. 37555/97, §§ 37-38, ECHR 2001-X).

93. The applicant can accordingly be said to have been arrested and detained on "reasonable suspicion" of a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1. It follows that there has been no violation of that Convention provision.

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

94. The applicant complained that the length of his pre-trial detention was unreasonable, in breach of Article 5 § 3 of the Convention, which reads as follows:

"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."

A. Submissions by the parties

95. The Government claimed that the length of the applicant's detention on remand had not been excessive. The extensions of the detention had been necessary in the circumstances of the case, in particular taking into account the gravity of the charges against the applicant and the risk of his obstructing the examination of the case and absconding, if released. The Government stressed that the investigating and judicial authorities had exhibited particular diligence in conducting the criminal proceedings against the applicant.

96. The applicant replied that the domestic courts had not provided any evidence to show that he had been genuinely liable to re-offend, abscond or pervert the course of justice. The only reason for his continued detention was the gravity of the charges against him. The applicant further pointed out that his behaviour prior to his arrest, in particular his compliance with the prosecution's orders, was additional proof of the domestic courts' baseless finding that he was likely to abscond.

B. The Court's assessment

1. Admissibility

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

2. Merits

(a) General principles

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

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or

against the existence of a genuine requirement of public interest that might justify, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

99. The arguments for and against release must not be "general and abstract" (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the concrete facts outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84 *in fine*, 26 July 2001).

100. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (*Labita*, cited above, § 153).

(b) Application of the general principles to the present case

101. The Court finds that the period to be examined commenced on 2 December 2002, when the applicant was arrested, and ended on 28 June 2004, the day of his conviction by the Leninskiy District Court on the charges of fraud, unlawful possession of ammunition and forgery of documents. The Court has already found that the applicant's detention was initially warranted by a reasonable suspicion that he was involved in large-scale fraud (see paragraph 93 above). The domestic authorities cited the gravity of the charges and the need to prevent the applicant from absconding and obstructing as the grounds for his placement in custody. At that stage of the proceedings those reasons justified keeping the applicant in custody (see *Khudoyorov v. Russia*, no. 6847/02, § 176, ECHR 2005-X (extracts)). However, with the passage of time those grounds inevitably became less and less relevant. Accordingly, the authorities were under an obligation to analyse the applicant's personal situation in greater detail and to give specific reasons for holding him in custody.

102. The Court notes that the authorities extended the applicant's detention on a number of occasions. In their decisions they consistently

relied on the gravity of the charges as the main factor and on the applicant's potential to abscond or pervert the course of justice.

103. As regards the authorities' reliance on the gravity of the charges as the decisive element, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention (see *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003; and *Ilijkov*, cited above, § 81). This is particularly true in the Russian legal system, where the characterisation in law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence obtained supports a reasonable suspicion that the applicant has committed the alleged offence (see *Khudoyorov*, cited above, § 180).

104. The other grounds for the applicant's continued detention were the authorities' findings that the applicant might abscond and pervert the course of justice. The Court reiterates that it is incumbent on the domestic authorities to establish the existence of concrete facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005). It remains to be ascertained whether the domestic authorities established and convincingly demonstrated the existence of concrete facts in support of their conclusions.

105. The Court notes that the domestic authorities gauged the applicant's potential to abscond by reference to the fact that he had been charged with serious criminal offences, and thus faced a severe sentence. In this connection the Court reiterates that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view. It must be examined with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding and reoffending or make it appear so slight that it cannot justify detention pending trial (see *Letellier v. France*, 26 June 1991, § 43, Series A no. 207, and *Panchenko*, cited above, § 106).

106. In the present case, apart from a bald reference to the applicant's being likely to threaten witnesses and destroy evidence, the domestic authorities did not cite any concrete facts warranting the applicant's detention on that ground. They did not indicate any circumstance to suggest that, if released, the applicant would abscond, re-offend or otherwise upset the course of the trial. The domestic courts merely repeated the same conclusion concerning possible collusion, without citing any reason why, notwithstanding the arguments put forward by the applicant in support of

his requests for release, they considered the risk of interference with witnesses and evidence to exist and be decisive. Furthermore, the Court has not lost sight of the fact that the applicant was not in custody for a certain period after the criminal proceedings had been instituted on the fraud charge. The domestic courts did not make any reference to inappropriate or unlawful behaviour by the applicant during that period. Nor did the Government dispute the applicant's assertion that he had complied with the prosecution's orders and had participated in the investigation process, whenever summoned. The Court is therefore not convinced that the domestic authorities' findings that the applicant was likely to pervert the course of justice or abscond had a sufficient basis in fact.

107. The Court further emphasises that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures to ensure his or her appearance at the trial (see *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). During the entire period under consideration the authorities did not consider the possibility of ensuring the applicant's attendance by the use of other "preventive measures" – such as a written undertaking or bail – which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings, or, at the very minimum, seek to explain in their decisions why such alternatives would not have ensured that the trial would follow its proper course.

108. In sum, the Court finds that the domestic authorities' decisions were not based on an analysis of all the pertinent facts. They paid no regard to the arguments in favour of the applicant's release pending trial, such as his family situation and his behaviour prior to the arrest. It is also of particular concern to the Court that the Russian authorities persistently used a stereotyped summary formula to justify extending his detention.

109. Having regard to the above, the Court considers that by failing to address concrete relevant facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which cannot be regarded as "sufficient". They thus failed to justify the applicant's continued detention for more than a year and a half. It is hence not necessary to examine whether the proceedings against the applicant were conducted with due diligence during that period as such a lengthy period cannot in the circumstances be regarded as "reasonable" within the meaning of Article 5 § 3 of the Convention (see *Mishketkul and Others v. Russia*, no. 36911/02, § 59, 24 May 2007, with further references).

110. The Court accordingly finds a violation of Article 5 § 3 of the Convention.

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

111. The applicant, relying on Article 5 § 4 of the Convention, complained that his appeal against the decision of 8 October 2003 and his request for release lodged on 24 November 2003 had not been examined. In his additional application form lodged on 26 July 2004 he further complained that the domestic courts had not promptly examined his requests for release and his appeals against the detention decisions issued between November 2003 and June 2004. In his observations lodged with the Court on 29 December 2006 the applicant complained in addition of the domestic courts' failure speedily to examine his complaint about the unlawfulness of his placement in custody in December 2002. The Court considers that the present complaints fall to be examined under Article 5 § 4 of the Convention, which reads as follows:

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

A. Submissions by the parties

112. The Government, addressing the applicant's claims of the domestic courts' failure to examine his appeal against the decision of 8 October 2003 and the request for release lodged on 24 November 2003, submitted that, by virtue of the decision issued on 2 July 1998 by the Russian Constitutional Court, any judicial decision pertaining to examination of parties' requests for a change of a preventive measure was amenable to appeal and the merits of such an appeal should have been examined by an appeal court. The Government stressed that the applicant's appeals against the detention decisions, save for the one issued on 8 October 2003, had, in fact, been examined by the appeal court. The Government, relying on Article 120 of the Russian Code of Criminal Procedure, further noted that the Leninksiy District Court should have examined the merits of the applicant's request for release lodged on 24 November 2003, even if the new request had been a mere restatement of the application for release which had already been dismissed by the District Court.

113. As regards the speediness of the review of the detention matters, the Government noted that the District and Regional courts had examined the applicant's requests for release and his appeals within the time-limits established by the Russian Code of Criminal Procedure.

114. The applicant drew the Court's attention to the fact that the Government, in substance, accepted that his right under Article 5 § 4 of the Convention had been violated by the domestic courts' refusal to examine his appeal against the decision of 8 October 2003 and his application for release

lodged on 24 November 2003. He maintained his complaints concerning delays in the examination of his requests for release and appeals against the detention decisions.

B. The Court's assessment

1. Admissibility

115. The Court firstly notes that the complaint related to the domestic courts' alleged failure to examine speedily the applicant's appeal against the arrest and placement in custody in December 2002 was raised by the applicant for the first time in his observations on 29 December 2006. This complaint was introduced out of time, as the final decision on the matter was taken by the Smolensk Regional Court on 6 February 2003 (see paragraph 13 above), that is more than six months before the applicant raised the issue with the Court, and it must thus be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

116. The Court further observes that in the application form lodged on 26 July 2004 the applicant complained about delays in the examination of the detention matters after November 2003. In this regard, the Court observes that the complaints relating to the detention decisions which were taken in the final instance before 26 January 2004 were also introduced outside the six-month time-limit and must be dismissed pursuant to Article 35 §§ 1 and 4 of the Convention.

117. The Court notes that the applicant's remaining complaints raised under Article 5 § 4 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds and that they must therefore be declared admissible.

2. Merits

(a) Speediness of review

(i) General principles

118. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. Although it does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B, and *Toth v. Austria*,

12 December 1991, § 84, Series A no. 224). The requirement that a decision be given "speedily" is undeniably one such guarantee and Article 5 § 4, concerning issues of liberty, requires particular expedition (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79, ECHR 2003-IV). In that context, the Court also observes that there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending, because the defendant should benefit fully from the principle of the presumption of innocence (see *Iłowiecki v. Poland*, no. 27504/95, § 76, 4 October 2001).

(ii) Application of the general principles to the present case

119. The Court notes that it took the domestic courts approximately ninety-eight, forty-five, thirty-three and forty days to examine the applicant's various requests for release or his appeals against the detention orders (see paragraphs 36, 37, 38-39 and 40 above). Nothing suggests that the applicant caused delays in the examination of his request for release or appeals against the detention orders. The Court considers that these four periods cannot be considered compatible with the "speediness" requirement of Article 5 § 4, especially taking into account that their entire duration was attributable to the authorities (see, for example, *Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006; *Khudoyorov*, cited above, §§ 198 and 203; and *Rehbock v. Slovenia*, no. 29462/95, §§ 85-86, ECHR 2000-XII, where review proceedings which lasted twenty-three days were not "speedy").

120. There has therefore been a violation of Article 5 § 4 of the Convention.

(b) Appeal against the decision of 8 October 2003 and request for release lodged on 24 November 2003

(i) General principles

121. The Court observes that Article 5 § 4 of the Convention entitles arrested or detained persons to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Grauslys v. Lithuania*, no. 36743/97, § 53, 10 October 2000). In order to satisfy the requirements of Article 5 § 4 of the Convention, a "review of the lawfulness of the applicant's detention" must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5, namely to protect the individual against arbitrariness (see *Keus v. the Netherlands*, 25 October 1990, § 24, Series A no. 185-C).

(ii) Application of the general principles to the present case

122. The Court reiterates that on 18 November 2003 the Smolensk Regional Court disallowed the applicant's appeal against the District Court's decision of 8 October 2003 by which his application for release had been dismissed. The Regional Court reasoned that the decision was not amenable to appeal as it had been taken in the course of a trial hearing (see paragraph 30 above). On 24 November 2003 the Leninskiy District Court refused to examine the applicant's request for release on the ground that it did not contain any new information warranting his release (see paragraph 35 above).

123. The Court observes that, as it follows from the Government's submissions, on both occasions, on 18 and 24 November 2003, the Regional and District Courts, respectively, had taken the decisions in violation of the domestic legal norms. On both occasions the domestic courts should have examined the merits of the applicant's claims and should have ruled on the substance of his complaints (see paragraph 112 above).

124. In such circumstances, having regard to the domestic courts' express refusals to examine the issue of the applicant's continued detention and to take cognisance of any arguments concerning the lawfulness of his detention, and keeping in mind the Government's assertion, the Court considers that those decisions did not constitute an adequate judicial response for the purposes of Article 5 § 4 and that they infringed the applicant's right to take proceedings by which the lawfulness of his detention would be decided.

125. It follows that there has been a violation of Article 5 § 4 of the Convention on account of the failure to consider the substance of the applicant's appeal against the detention decision of 8 October 2003 and his request for release lodged on 24 November 2003.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION DURING THE CRIMINAL PROCEEDINGS ON THE LIBEL CHARGE

126. The applicant complained that his rights had been violated in the proceedings on the libel charge as he had not been present or represented at the trial. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

A. Submissions by the parties

127. The Government described in detail the circumstances surrounding the applicant's refusal to attend the trial and his decision forbidding his three lawyers to represent him. They further pointed out that the District Court had undertaken every necessary step to ensure the best possible defence of the applicant's interests, attempting to secure Ms Karlova's attendance. Ms Karlova had been familiar with the case, representing the applicant from the early stages of the criminal proceedings. However, the District Court's attempts had been unsuccessful due to Ms Karlova's repeated refusal to act as the applicant's lawyer. Thus, the District Court had interpreted the applicant's behaviour as a defence tactic and proceeded with the trial in his absence. In conclusion, the Government, citing Article 247 of the Russian Code of Criminal Procedure, noted that the District Court's decision to conduct trial *in absentia* had been lawful, as the case had not concerned a serious offence and the applicant had refused to participate.

128. The applicant submitted that his refusal of the services of three retained lawyers had been motivated by his fear for their lives. Without providing any further details, he insisted that despite his refusal to attend hearings and his dismissal of his lawyers, the trial court should have ensured the best representation of his interests.

B. The Court's submissions

1. Admissibility

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

2. Merits

130. The Court observes that the applicant's complaint that his rights were violated is twofold, raising issues of his being absent from and unrepresented at the trial. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaints under both provisions taken together (see, among other authorities, *Poitrimol v. France*, 23 November 1993, § 29, Series A no. 277-A). In deciding whether the

proceedings against the applicant were fair, it will also consider them as a whole, including the decisions of the appellate courts (see *Edwards v. the United Kingdom*, judgment of 16 December 1992, § 34, Series A no. 247-A).

131. The Court reiterates that in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A; *Poitrimol*, cited above, § 35; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), and the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005).

132. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89, and *Sejdovic v. Italy* [GC], no. 56581/00, § 81, ECHR 2006-II).

133. However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala*, cited above, § 33). For instance, in a number of cases the Court has already held that the fact that a defendant, in spite of having been properly summonsed, did not appear, could not – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 (c) of the Convention to be defended by counsel (see *Pelladoah v. the Netherlands*, 22 September 1994, § 40, Series A no. 297-B). It was for the courts to ensure that a trial was fair and, accordingly, that counsel who attended trial for the apparent purpose of defending the accused in his absence, was given the opportunity to do so (ibid., § 34 and § 41).

134. Turning to the facts of the present case the Court reiterates, and it was not disputed by the parties, that the applicant and his three lawyers were notified of and effectively participated in the trial until 6 February 2003. However, on 6 February 2003 the applicant informed the trial court of his decision to be absent from any subsequent trial hearings and to dismiss his three lawyers (see paragraph 50 above). The Court observes that in this respect the present case differs from a number of cases in which violations of "fair trial" guarantees were found, in that the applicant decided of his own accord not to appear and not to be represented by counsel (see *Goddi v. Italy*, 9 April 1984, § 26, Series A no. 76; *Colozza v. Italy*, 12 February

1985, § 28, Series A no. 89; *F.C.B. v. Italy*, 28 August 1991, §§ 30-33, Series A no. 208-B; *T. v. Italy*, 12 October 1992, § 27, Series A no. 245-C; *Lala*, cited above; and *Pelladoah*, cited above).

135. In this connection the Court notes that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II; *Kolu v. Turkey*, no. 35811/97, § 53, 2 August 2005; and *Colozza*, cited above, § 28). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and informed relinquishment of the right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

136. Having regard to the circumstances of the present case, the Court is convinced that the applicant, in a knowing, explicit and unequivocal manner, waived his right to defend himself in person or through legal assistance at the trial. At no point in the domestic proceedings or proceedings before the Court did the applicant dispute the voluntary and informed character of that waiver. The circumstances surrounding Ms Karlova's repeated refusal to represent the applicant, despite the trial court's attempts to discipline her, further support the conclusion of the deliberate character of the applicant's absence and dismissal of his counsel. The Court also considers that the applicant, being initially represented by three lawyers of his own choosing, could have been advised by his lawyers of the consequences of his refusal to attend the trial hearings and to terminate representation contracts and could have been expected to appreciate that his failure to attend and to retain counsel would result in his being tried and convicted in his absence and in the absence of legal representation (see, by contrast, *Pfeifer and Plankl v. Austria*, 25 February 1992, § 38, Series A no. 227, and *Jones*, cited above).

137. The Court does not lose sight, nevertheless, of the applicant's argument that, despite the waiver, the decision of the Justice of the Peace to continue the trial in the absence of the applicant and/or his legal representatives ran contrary to the guarantees of Article 6 of the Convention. In this regard the Court reiterates that proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law

and fact (see *Poitrimol*, cited above, § 31). It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself in person or through legal assistance (ibid). However, the Court does not have to determine this issue in the present case as it considers that it was, for reasons laid down below, in any event, open to the applicant to seek a fresh determination of his conviction.

138. The Court notes that the applicant appealed against his conviction to the Leninskiy District Court, and then to the Smolensk Regional Court. He was present at the hearings before both appellate courts and was represented by several lawyers.

139. Under Chapter 44 of the new CCrP it would have been open to the applicant to apply to have new evidence put before the District Court (see paragraph 83 above). He could have made use of this right if he had considered that there were matters relevant to his conviction which were not taken into account by the Justice of the Peace because of the circumstances of his trial. However, there is no indication in the case file that he requested the admission of new evidence or made any submission to suggest that the evidence of his committing libel was unreliable or that if he had been present and/or represented at the trial any innocent explanation could have been brought forward for his having made statements about Mr M. or casting doubt on the trial court's interpretation of his statements as false and defamatory.

140. The Court therefore considers that, given the District Court's power to hear fresh evidence, it would have been possible for the applicant to seek a fresh determination of his conviction if there had been any evidence at his disposal to challenge it (see *Jones*, cited above). Against this background, the Court finds that the proceedings taken as a whole were fair.

141. It follows that there has been no violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

142. The applicant complained that his conviction of libel constituted an unjustifiable and disproportionate restriction of his right to freedom of expression as provided in Article 10 of the Convention, which reads, insofar as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...”

A. Submissions by the parties

143. The Government submitted that the applicant had deliberately disseminated false information about Mr M., accusing him of attempted murder, a particularly serious offence. Furthermore, according to the Government, during a press conference on 28 May 2002 the applicant had confirmed that that information had been false. The applicant had been convicted of libel in compliance with Article 129 of the Russian Criminal Code, which prescribed a maximum penalty of three years' imprisonment.

144. The applicant submitted that he had made public statements about Mr M., accusing him of attempted murder, as he had had every reason to believe that Mr M. had taken part in the preparation of that criminal offence. Mr M. had run against the applicant in the elections for the Smolensk Regional Governor. Mr M. had threatened the applicant's life in response to the latter's public statements concerning Mr M.'s participation in an organised criminal group. Furthermore, the applicant submitted that he had expressed a personal opinion about Mr M.'s part in the attempted murder and therefore should not be expected to have verified whether his statement was true or false. In conclusion, the applicant, accepting that the interference with his freedom of expression pursued the “legitimate aim” of protecting the reputation and rights of Mr M., stressed that his statements had been a “value judgment” and it had been impossible to prove the truth of that opinion. He stressed that the application of a criminal-law sanction to him had been an unjustified and disproportionate measure.

B. The Court's assessment

1. Admissibility

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

2. Merits

146. The Court notes that on 12 February 2003 the Justice of the Peace convicted the applicant of aggravated libel and sentenced him to one year's probation. The judgment was upheld on appeal by the Leninskiy District Court and subsequently by the Smolensk Regional Court. The Court therefore considers that the conviction constituted an interference with the

applicant's right to freedom of expression. It remains to be examined whether such interference was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims (see *Lingens v. Austria*, 8 July 1986, §§ 34-37, Series A no. 103).

(a) "Prescribed by law"

147. Both parties agreed that the interference was based on the application of Article 129 of the Russian Criminal Code. The Court sees no reason to hold that the interference was not lawful and therefore concludes that the interference with the applicant's right to freedom of expression was "prescribed by law" within the meaning of Article 10 § 2.

(b) Legitimate aim

148. The parties agreed that the interference with the applicant's freedom of expression was aimed at protecting the rights and reputation of others, namely of Mr M. The Court also agrees that the interference had a legitimate aim.

(c) "Necessary in a democratic society"

(i) General principles

149. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 paragraph 2, which must, however, be construed strictly (see, *inter alia*, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions* 1998-VI; *Tammer v. Estonia*, no. 41205/98, § 59, ECHR 2001-I; and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005).

150. In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, §§ 39-40, ECHR 2002-I; and

Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, § 76, ECHR 2004-XI).

151. The notion of necessity implies a pressing social need. The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Convention organs must determine, in the light of the case as a whole, whether the interference at issue was "proportionate" to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see, for instance, *Hertel*, cited above, § 46; *Pedersen and Baadsgaard*, cited above, §§ 68-70; and *Steel and Morris*, cited above, § 87).

(ii) Application of the principles to the present case

152. Turning to the facts of the present case, the Court must weigh a number of factors when reviewing the proportionality of the measure complained of. Firstly, the Court is convinced that the statement that Mr M. had organised an attempt to murder the applicant was clearly an allegation of fact and as such susceptible to proof (see, among many other authorities, *McVicar v. the United Kingdom*, no. 46311/99, § 83, ECHR 2002-III; *Steel and Morris*, cited above, §§ 90 *in fine* and 94; and *Panev v. Bulgaria*, no. 35125/97, Commission decision of 3 December 1997, unreported). That statement, directed specifically and exclusively at Mr M., established a causal link between the attempt on the applicant's life and Mr M.'s actions. This was explicitly accepted by the domestic courts (see paragraph 54 above). Whether or not an act has a causal link with another is not a matter of speculation, but is a fact susceptible of proof (see *Pfeifer v. Austria*, no. 12556/03, § 47, ECHR 2007-XII). Having made the offending allegations, the applicant was liable for their truthfulness (see *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 62, 14 February 2008).

153. The Court further reiterates its finding (see paragraph 140 above) that in the ensuing proceedings the applicant was allowed to adduce evidence of the truth of his averment (see, by contrast, *Colombani and Others v. France*, no. 51279/99, § 66, ECHR 2002-V). In view of the nature of that averment, that task was not unreasonable or impossible (see, by contrast, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 65 *in fine*, Series A no. 239). However, no such proof was adduced. The only argument put forward by the applicant, pertaining to the alleged threats made by Mr M. two days prior to the attempted murder, was dismissed as false after the alleged witnesses to the threats had refuted the applicant's allegations in open court (see paragraph 54 above). The Court sees no reason to question that finding.

154. The Court is also mindful of the fact that shortly after the press conference at which the defamatory statements had been made, the applicant held another press conference to announce that the assertion about Mr M.'s participation in the attempt on his life was incorrect. The applicant also apologised (see paragraph 54 above). However, the admission and subsequent apology did not detract from the fact that the applicant's initial statements had been made known to a considerable number of individuals, including representatives of the mass media, their readers and employees of the Smolensk Regional Council (see, *mutatis mutandis*, *Radio France and Others v. France*, no. 53984/00, §§ 35 and 38 *in fine*, ECHR 2004-II). Furthermore, the apology, while indicative of the applicant's willingness to rectify the situation, did not fully wipe out the damage inflicted on Mr M.'s reputation. The potential consequences of the allegations made by the applicant during the press conference for an individual who at that time was running for election were grave (see, *mutatis mutandis*, *McVicar*, cited above, § 85). In any event, these developments, which took place only after the applicant had been made aware of the institution of the criminal proceedings against him in view of the defamatory nature of the allegations, do not show that the applicant was concerned with verifying their truth or reliability (see *Rumyana Ivanova*, cited above, § 65, with further references).

155. In assessing the necessity of the interference, it is also important to examine the way in which the domestic courts dealt with the case, and in particular whether they applied standards which were in conformity with the principles embodied in Article 10 of the Convention. A perusal of the judgments by the Justice of the Peace, the Leninskiy District Court and the Smolensk Regional Court (see paragraphs 54, 56 and 58 above) reveals that they fully recognised that the present case involved a conflict between the right to freedom of expression and protection of the reputation or rights of others, a conflict they resolved by weighing the relevant considerations.

156. Having regard to the foregoing, the Court is satisfied that the reasons adduced by the national courts for convicting the applicant were relevant and sufficient within the meaning of its case-law. In this connection, the Court is unable to follow the applicant's argument that the very use of criminal-law sanctions in defamation cases is in violation of Article 10. In view of the margin of appreciation left to Contracting States by that provision, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Radio France and Others*, cited above, § 40; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-...). Nor is it contrary to the Convention to require the defendant to prove, to a reasonable standard, that his allegations were substantially true (see paragraph 153 above). It should also be observed that the proceedings were

instituted on the initiative of Mr M., not by a State authority (see, by contrast, *Raichinov v. Bulgaria*, no. 47579/99, § 50 *in fine*, 20 April 2006).

157. Lastly, the Court must ensure itself that the penalty to which the applicant was subjected did not upset the balance between his freedom of expression and the need to protect Mr M.'s reputation (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI). It considers that the sanction imposed on the applicant – one year's probation – does not, in the specific circumstances of the case, appear excessive. The Court attaches particular weight to the fact that after convicting the applicant, the Justice of the Peace refrained from imposing the maximum sentence envisaged by Article 129 of the Russian Criminal Code (see paragraph 143 above) and opted for probation instead of a prison sentence, taking into account various mitigating circumstances (compare and contrast *Cumpănă and Mazăre*, cited above, §§ 37, 112, 113 *in fine* and 118). The trial court gave cogent reasons for its ruling on this point, in line with this Court's case-law that a criminal sentence for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49, Series A no. 316-B; *Krutil v. Germany* (dec), no. 71750/01, 20 March 2003; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, § 110, 16 June 2005; and *Steel and Morris*, cited above, § 96).

158. In sum, in view of the reasons adduced by the national courts for convicting the applicant and of the relative lenience of the punishment imposed on him, the Court is satisfied that the authorities did not overstep their margin of appreciation.

159. There has therefore been no violation of Article 10 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

160. Lastly, the applicant complained of various procedural defects which had allegedly been committed by the investigating authorities and domestic courts in the course of the criminal proceedings against him.

161. Having regard to all the material in its possession, the Court finds that the evidence discloses no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

162. 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

163. The applicant claimed 529,500 US dollars (USD) in respect of pecuniary damage. He submitted that that sum represented capital losses accrued during his detention. The applicant argued that he had not been able to work during the criminal proceedings, his property and money had been seized by the investigating authorities during a search of his house, his relatives had borne the expenses of his detention and conviction, they had also paid for the services of bodyguards to protect the applicant's life and the lives of his family members, and the applicant's health had significantly deteriorated as a result of his detention and conviction. He further claimed USD 50,000,000 in respect of non-pecuniary damage.

164. The Government submitted that the applicant's claims were unsubstantiated and excessive. They further contested the existence of a causal link between the alleged violation and the pecuniary loss alleged by the applicant, as the decision to prefer criminal charges against the applicant was not the subject of the Court' s review in the present case.

165. The Court shares the Government's view that there is no causal link between the violations found and the pecuniary damage claimed (see *Nakhmanovich v. Russia*, no. 55669/00, § 102, 2 March 2006). Furthermore, the applicant did not submit documents confirming expenses which he allegedly accrued. Consequently the Court finds no reason to award the applicant any sum under this head.

166. As to non-pecuniary damage, the Court observes that it has found a combination of violations in the present case. The Court accepts that the applicant suffered humiliation and distress because of the excessive length of his detention on remand and the domestic authorities' failure to examine effectively and/or speedily his applications for release and appeals against detention orders. In these circumstances, it considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, and taking into account in particular, the length of the applicant's detention, it awards the applicant 5,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

167. The applicant also claimed USD 100,067,578 for costs and expenses incurred before the domestic courts and the Court, of which USD 23,842 represented postal expenses, office supplies and expenses for the preparation of documents and USD 100,043,736 legal fees and interest on a part of the legal fees which the applicant had been unable to pay to his lawyers due to insolvency. The applicant relied on contracts with his lawyers, including Ms Liptser, and receipts showing that he had paid 50,000 Russian roubles (RUB) to Ms Liptser and RUB 27,150 to two other lawyers who had represented the applicant in the domestic proceedings.

168. The Government submitted that the applicant had only been able to substantiate his claim of RUB 50,000 which he had paid to Ms Liptser for her assistance with lodging the application before this Court.

169. The Court reiterates that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and are reasonable as to quantum, are recoverable under Article 41 of the Convention (see, for example, *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII). The Court firstly observes that the applicant did not provide receipts and vouchers to substantiate his expenses for the preparation and sending of the documents. The Court is therefore unable to determine whether the expenses claimed by the applicant were in fact incurred in the amount he claimed and it therefore makes no award under this head.

170. The Court further observes that the applicant was represented by several lawyers in the domestic proceedings, which involved complex issues, *inter alia* the complaints about the reasons for the applicant's continued detention, and required qualified legal advice. The Court also notes that in 2002 the applicant issued Ms Liptser, a lawyer from the International Protection Centre in Moscow, with authority to represent his interests in the proceedings before the European Court of Human Rights. The counsel acted as the applicant's representative throughout the procedure. It is clear from the length and detail of the pleadings submitted by the applicant that a great deal of work was carried out on his behalf. However, having regard to the documents submitted, the Court considers that the applicant was only able to substantiate a part of his claims for legal fees. The Court therefore awards him EUR 1,730 covering costs under this head, plus any tax that may be chargeable to him on that amount.

C. Default interest

171. 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 complaints concerning the unlawfulness of the applicant's arrest, the excessive length of his detention on remand, the failure of the domestic authorities to examine the applicant's appeal against the decision of 8 October 2003 and his request for release lodged on 24 November 2003 and to decide "speedily" on the lawfulness of his detention after 29 December 2003, the absence of the applicant and his lawyers from the trial hearings on the libel charge and unjustified interference with his right to freedom of expression admissible and the remainder of the application inadmissible;

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 on account of the delays in examining the lawfulness of the applicant's detention after 29 December 2003 and the failure to consider the substance of the applicant's appeal against the decision of 8 October 2003 and his request for release lodged on 24 November 2003;

5. *Holds* that there has been no violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention;

6. *Holds* that there has been no violation of Article 10 of the Convention;

7. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 1,730 (one thousand seven hundred and thirty euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

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

Done in English, and notified in writing on 22 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President