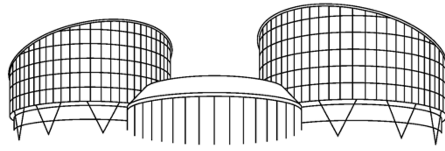

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BUZADJI v. THE REPUBLIC OF MOLDOVA

(Application no. 23755/07)

JUDGMENT

STRASBOURG

5 July 2016

This judgment is final but it may be subject to editorial revision.

In the case of Buzadji v. the Republic of Moldova,

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

Guido Raimondi, *President,*
András Sajó,
Işıl Karakaş,
Angelika Nußberger,
Dmitry Dedov,
Ledi Bianku,
Nona Tsotsoria,
Nebojša Vučinić,
Vincent A. De Gaetano,
Erik Møse,
Paul Mahoney,
Krzysztof Wojtyczek,
Valeriu Griţco,
Faris Vehabović,
Robert Spano,
Branko Lubarda,
Yonko Grozev, *judges,*
and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 7 October 2015 and 4 May 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 23755/07) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Moldovan national, Mr Petru Buzadji (“the applicant”), on 29 May 2007.

2. The applicant was represented by Mr F. Nagacevschi, a lawyer practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr L. Apostol.

3. The applicant alleged, in particular, that his detention pending trial had not been based on relevant and sufficient reasons as required by Article 5 § 3 of the Convention.

4. The application was assigned to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). In a judgment delivered on 16 December 2014 a Chamber of that Section declared the application admissible, and found by a majority that there had been a violation of

Article 5 § 3 of the Convention. The Chamber was composed of Josep Casadevall, President, Luis López Guerra, Ján Šikuta, Dragoljub Popović, Kristina Pardalos, Valeriu Griţco and Iulia Antoanella Motoc, judges, and also Stephen Phillips, Section Registrar. Four judges (Josep Casadevall, Luis López Guerra, Dragoljub Popović and Iulia Antoanella Motoc) expressed separate opinions. On 16 March 2015, under Article 43 of the Convention, the Government requested the referral of the case to the Grand Chamber. The panel of the Grand Chamber acceded to this request on 20 April 2015.

5. The composition of the Grand Chamber was decided in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Dmitry Dedov and Robert Spano, replaced Dean Spielmann and George Nicolaou, who were unable to take part in the further consideration of the case (Rule 24 § 3).

6. Both the applicant and the Government submitted further written observations on the merits (Rule 59 § 1).

7. A public hearing was held in the Human Rights Building in Strasbourg on 7 October 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr L. APOSTOL, *Agent*;

(b) *for the applicant*
Mr F. NAGACEVSCHI, *Counsel*.

The Court heard statements by them, and the replies given by them to the questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1947 and lives in Comrat, Republic of Moldova.

A. The criminal proceedings against the applicant

9. The applicant was a minority shareholder in and the CEO of a liquefied gas supply company from southern Moldova in which the State

owned 82% of the shares. In July 2006 a criminal investigation was initiated in respect of an alleged unsuccessful attempt by the applicant to commit a fraud in connection with his activity at the company. In particular, he was accused of having, between 2000 and 2006, devised a scheme involving the importation of liquefied gas from Kazakhstan and Ukraine, as a result of which the company had sustained major financial losses. According to the accusation, instead of purchasing gas directly from the producers, he had called on the services of intermediary companies, resulting in a significant increase in the price of the gas. Those intermediary companies also had ties with his sons. Later, when his company was faced with a court claim from the intermediary companies amounting to 594,067 United States dollars plus penalties, he had acknowledged that debt in court proceedings.

10. In this connection, in July 2006 the investigating authorities summoned the applicant to appear before them and to make a statement. In his defence the applicant argued that his company could not purchase gas directly from the producers, because the minimum quantity which the producers agreed to sell exceeded his company's needs for a period of five years. Therefore, it was impossible for his company to purchase the amounts of gas needed directly from the producers. Moreover, the producers only accepted 100% pre-payment and his company did not have the available funds. He submitted that all national gas importers used the same method of importing gas and that the price of the gas purchased by his company was lower than that on the free national market. He further argued that the difference in price between that of the producers and that paid by his company was explained by transportation costs, certification, handling, insurance and other factors. He also denied that his sons were in any way involved in the intermediary companies.

11. The applicant was summoned on several occasions and in each case appeared before the investigating authorities and cooperated with them. In October 2006 the applicant's house was searched, his personal computer was seized and various documents were extracted from it. It does not transpire from the case file that there were any instances when the applicant did not comply with the instructions of the investigators and/or that he was ever accused of obstructing the investigation.

12. The applicant's sons, who were also suspects in the criminal proceedings and were subsequently charged, were summoned to appear before the investigating authorities without being arrested. Later, fourteen different investigations were initiated in respect of the applicant and all of them were joined in a single procedure.

B. The proceedings concerning the applicant's detention

1. *Detention on remand in prison* (arestarea preventivă)

13. On 2 May 2007 the applicant was arrested and on 5 May 2007 he was formally charged with the attempted large-scale misappropriation of goods belonging to the company where he worked, namely with the facts described in paragraph 9 above. On the same date, the prosecutor in charge of the case applied to the Buiucani District Court for a thirty-day detention warrant on the following grounds: the seriousness of the offence, the risk of influencing witnesses and the risk of reoffending.

14. The applicant objected and argued that there was no reasonable suspicion that he had committed an offence. In particular, he submitted that the criminal proceedings against him were nothing but a means of influencing the outcome of pending civil proceedings concerning the debt owned by the State-owned company and the intermediary companies. In any event, the grounds relied upon by the prosecutor were stereotyped and the prosecutor had failed to explain the reasons for his belief that the applicant would attempt to influence witnesses and reoffend. He submitted that he was a well-known person in the region and that he had worked at his company for over thirty years. He had a permanent residence, had been cooperating with the investigation since July 2006 and had never attempted to abscond or hinder the investigation. Moreover, he relied on his age and on his poor state of health, submitting that he had suffered a heart attack and a stroke.

15. On 5 May 2007 the Buiucani District Court partly upheld the prosecutor's application and ordered the applicant's detention pending trial for a period of fifteen days. The court found that:

> "... the deed with which [the applicant] is charged is considered to be an exceptionally serious offence, which allows for detention pending trial. [The court] takes into account the nature and seriousness of the offence and the complexity of the case, and considers that at this incipient stage of the investigation there are reasonable grounds to believe that the accused could collude with others (his sons, who have not been questioned) in order to take a common position.
>
> The other reasons relied upon by the prosecutor, namely the risk of absconding and influencing witnesses or that of destroying evidence, are not substantiated and are not very probable."

16. The applicant appealed, contending that there was no reasonable suspicion that he had committed an offence. He reiterated his previous statement to the effect that the criminal proceedings pursued the ulterior motive of influencing the outcome of pending civil proceedings between the company at which he worked and a third company. He further argued that the ground relied upon by the court to order his detention on remand, namely the risk of his colluding with his sons, had not been invoked by the prosecutor. Moreover, his two sons had not been formally charged and, in

any case, all of them had had plenty of time to collude between July 2006, when they first learned of the investigation, and May 2007 had they been so inclined. The applicant also relied on his serious medical condition and submitted that he was a well-known individual with a family, a residence and a job in Moldova, who had appeared before the investigating authorities whenever he had been summoned during the period from July 2006 to May 2007.

17. On 8 May 2007 the Chişinău Court of Appeal upheld the decision of 5 May 2007, essentially repeating the grounds given by the lower court without giving any reasons for dismissing the arguments put forward by the applicant.

18. On 11 May 2007 the prosecutor in charge of the case applied to the court for the prolongation of the applicant's detention on remand by thirty days. He relied on such reasons as the gravity of the offence, the risk of influencing witnesses, the risk of reoffending and the risk of absconding.

19. The applicant objected, submitting that there was no reasonable suspicion that he had committed an offence and no reason to believe that he would influence witnesses who had already been questioned. He also emphasised that he had cooperated irreproachably with the investigation before his arrest and that he had a permanent residence. He therefore asked the court to order the replacement of the measure of detention with another less severe measure. One of his lawyers asked the court to order a less severe measure such as, for instance, house arrest, in place of the detention.

20. On 16 May 2007 the Buiucani District Court extended the applicant's detention on remand by twenty days. After recapitulating the parties' positions and citing the applicable provisions of the law, the court found that:

> "... the grounds relied on when applying the preventive measure [of detention] remain valid, the majority of the investigative actions have been carried out, but a number of additional measures requiring [the applicant's] participation are still necessary in order to send the case to the trial court. The court considers that the application on the part of the defence to replace the preventive measure is premature, taking into account the seriousness and complexity of the case and the need to protect public order and the public interest, as well as to ensure the smooth and objective course of the investigation."

21. The applicant appealed, relying on essentially the same arguments as he had done previously.

22. On 22 May 2007 the Chişinău Court of Appeal upheld the decision of 16 May 2007. The court gave essentially the same reasons as it had done in its decision of 8 May 2007, namely the gravity and the complexity of the case, the risk of absconding or influencing witnesses and the risk of destroying documentary evidence which have not yet been collected by the prosecutors.

23. On 1 June 2007 the prosecutor in charge of the case applied for a further prolongation of the applicant's detention on remand of another thirty days. He argued that the case was complex and that new charges had been brought against the applicant in the context of the same proceedings: he had now been charged also with abusing his position and overstepping his duties. As on previous occasions, the prosecutor argued that the extension of the detention was necessary in order to avoid the risk of the applicant's influencing witnesses and reoffending.

24. The applicant objected and asked the court to replace the measure of detention with another measure. He submitted the same reasons as before and added that his health had considerably deteriorated during detention and that he needed medical care.

25. On 5 June 2007 the Buiucani District Court extended the applicant's detention on remand by another twenty days, stating that the reasons for his continued detention remained valid.

26. The applicant appealed, submitting *inter alia* that the complexity of the case invoked by the prosecutor had been deliberately generated by the latter's refusal to conduct an audit of the company or to question the witnesses cited by the applicant. He also challenged the allegation concerning the gravity of the offence imputed to him, pointing out that he was only being accused of attempting to commit an offence, not of committing it. He claimed that no actual loss had been caused to the company and that the court had failed to take into consideration the accused's individual circumstances.

27. On 11 June 2007 the Chişinău Court of Appeal upheld the lower court's decision, finding that it had been adopted in compliance with the law. The court also noted that the applicant was accused of a particularly serious offence punishable by imprisonment from ten to twenty-five years and that the investigation was still ongoing. The court held that if released the applicant might be able to abscond or to influence witnesses.

28. On 21 June 2007 the prosecutor in charge of the case applied again for a further thirty-day extension of the applicant's detention.

29. The applicant objected on the basis that there were no reasons to believe that he would abscond or influence witnesses. He stressed that the prosecutor had not conducted any investigative measures for a long time and that the investigation was virtually completed. He reiterated that he had a permanent residence and that he had agreed to appear before the investigators whenever necessary. He presented a medical report dated 18 June 2007, according to which it was established *inter alia* that he had arterial hypertension and a slight paralysis of his right leg as a result of a stroke. The doctor recommended treatment in a neurological clinic. The applicant asked the court to dismiss the prosecutor's application and to apply a less severe measure such as conditional release or house arrest.

30. On 26 June 2007 the Buiucani District Court rejected the prosecutor's application and accepted the applicant's request, ordering that he be placed under house arrest for thirty days. The court found that:

> "... the applicant has been detained for fifty-five days and has participated in all the necessary investigative actions; ... Article 5 § 3 of the Convention imposes a presumption that an accused be freed while he awaits his trial; ... certain evidence, which may have been sufficient earlier to justify [detention] or to render alternative preventive measures inadequate, could become less convincing with the passage of time; ... it is for the prosecutor to prove the existence of a risk of absconding, and such a risk cannot be proved only by reference to the severity of the potential punishment; [the court referred to the applicant's medical problems and his age, the lack of a criminal record, his permanent residence and married status]; the [European Court's] case-law provides that detention pending trial should be exceptional, always objectively reasoned and must correspond to the public interest; the court finds that it is implausible that [the applicant] will abscond, influence witnesses or destroy evidence, and that the normal course of the criminal investigation is possible while the accused is under house arrest."

The court set the following conditions for the applicant's house arrest: prohibition from leaving his house; prohibition of using the telephone; prohibition from discussing his case with any other person.

31. The applicant was immediately taken home, where he remained for three days. However, the prosecutor lodged an appeal against the above-mentioned decision and invoked as one of the reasons for the applicant's continued detention in custody the fact that the applicant refused to confess to having committed the offence imputed to him.

32. On 29 June 2007 the Chişinău Court of Appeal quashed the decision of 26 June 2007 and adopted a new one, ordering the applicant's detention pending trial for twenty days. The court found that:

> "... the lower court did not take into account the complexity of the case and the seriousness of the offence with which [the applicant] is charged; the court considers that while under house arrest [the applicant] could communicate with the other accomplices, who are not under arrest and who are, moreover, his sons; he could abscond by fleeing to the [self-proclaimed and unrecognised "Moldovan Republic of Transdniestria"], which is not under the control of the Moldovan authorities; he could influence witnesses, in order to make them change their statements; the applicant has received visits from doctors and can obtain medical assistance in prison."

33. On 11 July 2007 the prosecutor in charge of the case applied again to the court for an extension of the applicant's detention on remand. He relied on the same reasons as before.

34. On 16 July 2007 the Buiucani District Court extended the applicant's detention pending trial by another twenty days. It argued again that the applicant was accused of a serious offence and that he could abscond or hinder the investigation.

35. The applicant appealed, advancing essentially the same arguments as he had done earlier.

2. *House arrest* (arestarea la domiciliu)

36. On 20 July 2007 the Chişinău Court of Appeal quashed the lower court's decision and adopted a new one, changing the preventive measure to house arrest. The court found that:

> "the prosecutor did not provide any evidence confirming the continued need to detain [the applicant], did not submit additional materials confirming the probability that he could exert influence on witnesses who have already been heard; [the applicant] promises to appear before the investigating authorities whenever summoned; there is no specific information concerning any risk of absconding".

The court also prohibited the applicant from communicating with persons who had any link with the criminal case against him and from leaving his house, and obliged him to phone the prosecutor's office every day.

37. On 14 September 2007 the Comrat District Court examined the prosecutor's application to prolong the applicant's house arrest by ninety days. The applicant did not object to the prolongation of the house arrest provided that the measures concerning the limitation on his communication with relatives were discontinued. The court upheld the prosecutor's request and ordered the prolongation of the house arrest for ninety days. It also upheld the applicant's request and discontinued the limitation on his communication with his relatives. The only reason invoked by the court was the seriousness of the offence imputed to the applicant.

38. On 14 December 2007 the Comrat District Court again prolonged the applicant's house arrest for ninety days. The only reason given by the court was the seriousness of the offence imputed to the applicant. The applicant did not object provided that he was allowed to visit the hospital and the court in order to study the case file.

39. On an unspecified date the applicant lodged a *habeas corpus* request with the Comrat District Court asking for the measure of house arrest to be changed for that of provisional release or release on bail. He argued that he had never breached the rules of the house arrest and that he undertook to further comply with all the instructions issued by the investigation organs.

40. On 12 March 2008 the Comrat District Court decided to release the applicant on bail, observing that he had been detained for over ten months and had never breached any of the restrictions imposed on him.

C. The termination of the criminal proceedings against the applicant

41. On 9 June 2011 the applicant was acquitted of the charges for which he had been detained between 2 May 2007 and 12 March 2008. The court found that no offence had taken place in regard to the facts imputed to him. At the same time he was acquitted of thirteen other charges brought against him and was found guilty on one count, namely that of having illegally sold liquefied gas which had been seized by a bailiff, for which he was sentenced

to a fine of 20,000 Moldovan lei (approximately 1,000 euros). Neither the applicant nor the prosecutor appealed against that judgment, which became final. The applicant's sons were acquitted.

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. In their version as applicable at the material time, the relevant provisions of the Code of Criminal Procedure read as follows:

Article 166. Reasons for arresting a person suspected of having committed a criminal offence

(1) The investigation body has the right to arrest a person if there is a reasonable suspicion that he or she committed an offence punishable with imprisonment of more than one year, only in the following cases:

1) if the person is apprehended *in flagrante delicto*;

2) if a witness or the victim indicate that this very person has committed the offence;

3) if obvious traces of the offence are found on the suspect's body or clothes, or in his or her house or car;

...

(5) The arrest of a person in the conditions of the present articled cannot last longer than 72 hours.

...

(7) A person arrested within the conditions of the present article shall be brought as soon as possible, but before the expiry of the time limit indicated in paragraph (5) ..., before an investigation judge in order for the latter to decide on the matter of his or her remand in custody or release...

Article 175. Definition and different categories of preventive measures

(1) Measures of constraint by which the person suspected or charged with a criminal offence is hindered to carry out actions capable of harming the criminal investigation ... are preventive measures.

...

(3) Preventive measures can be:

1) undertaking not to leave the town;

2) undertaking not to leave the country;

3) personal guarantee;

4) guarantee of an organisation;

5) temporary withdrawal of the driving licence;

...

8) provisional release under judicial control;

9) provisional release on bail;

10) house arrest;

11) remand in custody.

Article 176. Reasons for applying preventive measures

(1) Preventive measures may be applied by the prosecuting authority or by the court only in those cases where there are sufficient reasonable grounds for believing that an accused ... will abscond, obstruct the establishment of the truth during the criminal proceedings or reoffend, or they can be applied by the court in order to ensure the enforcement of a sentence.

...

(3) In deciding on the necessity of applying preventive measures, the prosecuting authority and the court will take into consideration the following additional criteria:

1) the character and degree of harm caused by the offence,

2) the character of the ... accused,

3) his/her age and state of health,

4) his/her occupation,

5) his/her family status and existence of any dependants,

6) his/her economic status,

7) the existence of a permanent place of abode,

8) other essential circumstances."

Article 185. Remand in custody

(1) The remand in custody consists of the suspect's detention in places and under conditions provided by law ...

43. According to Article 188 of the Code of Criminal Procedure, house arrest may only be implemented where the conditions for applying the measure of remand in custody are met, and is governed by the rules applicable to remand in custody. In that connection, the duration of and the manner of imposing, prolonging and challenging the measure of house arrest are exactly the same as for remand in custody. The measure of house arrest is accompanied by one or more restrictions, such as a prohibition on leaving the house, a prohibition on using the telephone, mail or other means of communication, and a ban on communicating with certain persons or receiving visits from them. The suspect may also be subjected to such conditions as the wearing of electronic devices designed to control him or her, answering or making telephone calls for the purpose of checks, and appearing personally before the investigation body or in court when necessary. If the suspect fails to comply with the restrictions and conditions imposed, the measure of house arrest may be replaced with that of remand in custody.

44. According to Article 88 of the Criminal Code and Article 395 of the Code of Criminal Procedure, time spent under house arrest is discounted from the final sentence in the same manner as time spent in custody during pre-trial detention.

III. LAW AND PRACTICE IN THE COUNCIL OF EUROPE MEMBER STATES

45. The Court has examined practices concerning the grounds justifying detention on remand in 31 Council of Europe member States, namely Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom.

46. On the basis of the comparative law survey conducted by the Court, it would seem that arrest and initial detention prior to judicial involvement are explicitly regulated and strictly limited in time in the legislation of all 31 member States under survey.

47. Only five of the member States surveyed (Armenia, Bulgaria, Italy, Lithuania and Switzerland) allow for initial detention on the sole ground of the existence of a "*reasonable suspicion*" of committing an offence. In these member States, the legal authorities have a time-limit of 24 to 96 hours to provide other justifications for prolonging the initial detention.

48. The other 26 member States require the existence from the outset of at least one additional relevant and sufficient ground.

49. The most common of those conditions (in 17 member States) is the risk of absconding or hiding, and the need to ensure the suspect's presence during the proceedings, followed by the risk of reoffending (13 member States) and the need to put an end to a commission of a crime (2 member States). The risk of the obstruction of justice is explicitly foreseen by 14 member States.

50. In addition, in 12 member States, initial detention is justified if the suspect has been caught in the very act of committing a crime or other wrongdoing (*in flagrante delicto*), or immediately thereafter (in 3 out of those 12 member States).

51. The maximum length of initial detention varies between 24 hours (8 member States) and 96 hours (3 member States). The majority of member States sets a time-limit of 48 hours (12 member States).

52. As to the detention on remand following judicial involvement, in all member States surveyed (31), the existence of a "*reasonable suspicion*" of the commission of an offence is a condition *sine qua non* for its lawfulness. However, all member States surveyed also agree that in general "*reasonable suspicion*", of itself, is not sufficient to justify detention on remand. There is

a narrow exception in 6 States (Austria, Belgium, Germany, Serbia, Switzerland and Turkey), where a "*reasonable suspicion*" is, of itself and exceptionally, a sufficient ground for ordering detention in the case of serious crime.

53. With the exception of these 6 countries, a "*reasonable suspicion*" is not sufficient to order detention.

54. The legislation of all member States surveyed (31) provides that the authorities can subject a person to detention on remand only when additional grounds exist, with the narrow exception mentioned in paragraph 52 above. In all the States these additional grounds must be established when the person concerned is first brought before a judge. It can therefore be said that, right from the first application for the person's detention, the national judicial authorities must convincingly establish the additional grounds justifying that detention.

55. The grounds most frequently invoked in domestic legislation are the risk of absconding (all member States surveyed), the risk of repetition of the offence (30 out of 31) and the risk of obstruction of the proceedings (28 out of 31).

56. Moreover, a majority of member States (18 out of 31) provide that detention on remand can be imposed only when the relevant offence is of a certain degree of seriousness. Some member States (10 out of 31) require the domestic authorities to consider the personal circumstances of the person concerned (such as personality, age, health, occupation and any prior criminal activity, as well as social, family and business ties). A number of member States (6 out of 31) also mention the necessity to preserve public order as a relevant condition.

57. In order to assess the relevance of the additional grounds, the legislation of the member States surveyed establishes a number of specific factors that must be taken into account.

58. All the member States surveyed (31) agree that the competent national authorities are under an obligation to provide relevant and sufficient reasons both when ordering as well as when extending each period of detention on remand.

59. Therefore, extending detention on remand requires the same level of reasoning with regard to the fulfilment of the conditions established on the occasion of its first application. It is reasonable to deduce that the reasons invoked by the domestic courts to order and prolong detention cannot be stereotyped or abstract.

60. The domestic legislation of almost half of the member States surveyed (15 out of 31) establishes maximum periods of prolongation of detention on remand and/or a fixed term for its total length. However, there is no common standard as regards the length of prolongations or of the maximum total length.

THE LAW

61. In his application the applicant, referring to Article 5 § 1 of the Convention, complained that the domestic courts had given insufficient reasons for their decisions to remand him in custody. The Court finds it more appropriate to examine this complaint under Article 5 § 3 of the Convention, which reads:

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

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

62. Before the Grand Chamber the Government argued for the first time in the proceedings that the applicant had failed to challenge the court decisions by which his house arrest had been ordered and had thus failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They submitted that they had not been in a position to raise this objection before the Chamber because the statement of facts prepared by the Court at the stage of communication did not refer to facts beyond the date of 29 June 2007. Therefore, they could not be considered estopped from raising this objection at the present stage.

63. The applicant argued that the Government were estopped from raising this exception before the Grand Chamber. In the alternative, he submitted that their objection was unfounded.

64. The Court reiterates that, according to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 79, ECHR 2014 (extracts)).

65. It is true that the statement of facts prepared by the Court Registry, which the Court enclosed with its letter of 18 January 2010 to the respondent Government when giving the latter notice of the application pursuant to Rule 54 § 2(b) of the Rules of Court, referred to documents which were in the Court's possession at that time and thus mentioned facts that had occurred before 29 June 2007. The Court's letter of 18 January 2010 specified that "should [the] Government decide to submit observations they should only deal with *the complaints concerning reasons for detention pending trial* (Article 5 § 3 of the Convention) [emphasis added]". When

availing themselves of the possibility to file observations, the Government attempted to limit the scope of the case by submitting that the Court shall not pay attention to the facts that took place before 2 May 2007, i.e. before the applicant's arrest, and after 29 June 2007. Nevertheless, as they submitted, "...the Government consider it necessary to point out certain procedural acts that followed the above-mentioned period [2 May-29 June 2007]. Those references are indispensable for submitting the Government's position regarding the admissibility and merits of the case".

66. Thus the Court considers that, in the particular context, it ought to have been sufficiently clear from the nature and the underlying circumstances of "the complaints" that in examining these under Article 5 § 3 of the Convention the Court could not disregard the facts preceding the applicant's arrest on 2 May 2007 and that the complaints referred to a continuing situation, namely to the alleged lack of justification for the applicant's "detention pending trial" as a whole, and were not limited in the way suggested by the Government. It is reasonable to assume that, when given notice of the application, the Government were fully cognizant of the situation also after 29 June 2007 and so were in a position to make their plea of inadmissibility in accordance with the Rule 55 requirements.

67. However, the issue of non-exhaustion of domestic remedies was raised by the Government for the first time in their written submissions before the Grand Chamber. The Court sees no exceptional circumstances which could have dispensed them from the obligation to raise their preliminary objection before the adoption of the Chamber's decision on admissibility. Consequently, the Government are estopped from raising their preliminary objection of non-exhaustion of domestic remedies at this stage of the proceedings, which objection must therefore be dismissed.

B. Victim status

68. In the event of the Court rejecting their above-mentioned objection of non-exhaustion of domestic remedies, the Government argued by way of an alternative submission that the applicant could not claim to be a "victim" in the sense of Article 34 of the Convention for the purposes of his complaint under Article 5 § 3 about his house arrest. He had himself requested to be placed under house arrest, and the decision to do so had constituted compensation for any possible violation of Article 5 § 3 which had taken place prior to the measure. The measure had been equivalent to granting him release from his initial detention. That being so, it constituted a form of compensation for any possible breach of his rights guaranteed by Article 5 § 3 of the Convention.

69. The applicant's position in respect of this objection was similar to that expressed in respect of the objection concerning non-exhaustion of domestic remedies (see paragraph 63 above).

70. The Court sees no need to examine whether the Government are estopped from making the above objection since it finds in any event that it concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see, for instance, *R.P. and Others v. the United Kingdom*, no. 38245/08, § 47, 9 October 2012). It considers that, in the particular circumstances of the present case, the argument is so closely linked to the substance of the applicant's complaint that it should be joined to the merits (see paragraphs 106-111 below).

C. Conclusions

71. The Government are estopped from raising their preliminary objection concerning non-exhaustion of domestic remedies. The Court therefore dismisses that preliminary objection. On the other hand, it decides to join the objection concerning the applicant's lack of victim status to the merits.

II. MERITS

A. The Chamber judgment

72. Relying on the applicable case-law concerning the obligation to give "relevant and sufficient reasons" for detention, the Chamber found a breach of Article 5 § 3 of the Convention owing to the insufficient reasons given by the courts when ordering the applicant's detention. In so doing it relied on the Court's case-law establishing that house arrest constituted deprivation of liberty.

73. The Chamber noted that while the domestic courts were obliged under domestic law to verify a number of circumstances, they had in fact not done so but had limited themselves to repeating in their decisions in an abstract and stereotyped manner the formal grounds for detention provided by law without explaining how they had been applicable *in concreto* to the applicant's situation. Moreover, while examining essentially the same case file, they had reached opposite conclusions on various occasions (§§ 35-38 of the Chamber judgment).

74. The Chamber, lastly, referred to the prosecutor's inertia in obtaining certain documents for over a year, even though the lack of those documents was relied on by the courts to extend the applicant's detention, as well as to the fact that after the applicant's placement under house arrest during three days after 26 June 2007 he had had three days during which to collude with his sons had he so wished (§§ 40-41 of the Chamber judgment).

B. The parties' submissions

1. The applicant

75. The applicant maintained that at the time of the events there had been a practice of placing accused persons in pre-trial detention automatically, without any justification and solely on the basis of stereotyped and repetitive reasons. He also cited the then Government Agent who had admitted that pre-trial detention was a rule rather than an exception.

76. Referring to the reasons required to justify house arrest, the applicant submitted that domestic law did not provide that a less stringent requirement to give reasons ought to apply for decisions imposing house arrest and stressed that the courts were bound to apply exactly the same rules and provide the same reasons for both house arrest and detention in custody. Accepting the Government's position according to which a less strict requirement to provide reasons ought to be permissible in respect of house arrest raised the risk of abuse on the part of the State, which might consider itself free to apply house arrest arbitrarily. Moreover, accepting such a position in the present case would amount to disregarding the domestic law.

77. The applicant contended that there were no arguments in favour of his deprivation of liberty and that neither the detention in custody nor the house arrest had been based on relevant and sufficient reasons. He submitted that the absence of reasons for his deprivation of liberty was confirmed by his subsequent acquittal and by the fact that the Prosecutor's Office had not challenged the court judgment by which he had been acquitted.

78. As to the Government's contention that the applicant himself asked to be placed under house arrest, the applicant argued that the domestic courts were still under an obligation to verify whether there were sufficient reasons for ordering house arrest. He also submitted that the State had alternative means of ensuring his appearance at trial and of securing the integrity of the evidence.

2. The Government

79. In the Government's view, the applicant failed to sufficiently substantiate his *habeas corpus* requests both in the domestic proceedings and in the proceedings before the Court. They referred to the applicant's reliance on his health problems and submitted that there was no general obligation under the Court's case-law to release detainees on health grounds. The domestic courts had ignored the reasons adduced by the applicant because they lacked pertinence.

80. The Government also contended that the decisions to detain the applicant in custody and to prolong his detention were based on relevant and

sufficient reasons. Even though those reasons might seem vague and abstract, in fact they were concrete and succinct. The decisions were based on such reasons as the complexity of the case and the risk of the applicant's interfering with the criminal investigation and colluding with his sons. In the Government's view, the fact that the applicant and his sons were accomplices in itself constituted interference in the normal course of the investigation and required their isolation from one another.

81. The Government expressed the view that the present case was similar to *W. v. Switzerland* (26 January 1993, Series A no. 254-A) and contended that the Court should reach in the present case the same finding of non-violation as in that case.

82. The Government emphasised the fact that it was the applicant himself who had asked to be placed under house arrest and that he did not challenge the court decisions granting his request or prolonging the house arrest.

83. The Government agreed that house arrest constituted deprivation of liberty for the purposes of Article 5 of the Convention. Nevertheless, they considered that lesser reasons were required in order to justify house arrest because this measure was milder than detention in custody. That was moreover so in the instant case where the applicant had himself requested placement under house arrest.

C. The Court's assessment

1. General principles

84. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual (see, for example, its link with Articles 2 and 3 in disappearance cases such as *Kurt v. Turkey*, 25 May 1998, § 123, *Reports of Judgments and Decisions* 1998-III), and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see, for example, *Lukanov v. Bulgaria*, 20 March 1997, § 41, *Reports* 1997-II; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII). Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly (see *Ciulla v. Italy*, 22 February 1989, § 41, Series A no. 148) and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33); and the importance of the promptness or speediness

of the requisite judicial controls (under Article 5 §§ 3 and 4) (see *McKay v. the United Kingdom* [GC], no. 543/03, § 34, ECHR 2006-X).

85. One of the most common types of deprivation of liberty in connection with criminal proceedings is detention pending trial. Such detention constitutes one of the exceptions to the general rule stipulated in Article 5 § 1 that everyone has the right to liberty and is provided for in sub-paragraph (c) of Article 5 § 1 of the Convention. The period to be taken into consideration starts when the person is arrested (see *Tomasi v. France*, 27 August 1992, § 83, Series A no. 241-A) or remanded in custody (see *Letellier v. France*, 26 June 1991, § 34, Series A no. 207), and ends when he or she is released and/or the charge is determined, even if only by a court of first instance (see, among other authorities, *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7; *Labita v. Italy* [GC], no. 26772/95, § 147, ECHR 2000-IV; *Kalashnikov v. Russia*, no. 47095/99, § 110, ECHR 2002-VI; and *Solmaz v. Turkey*, no. 27561/02, §§ 23-24, 16 January 2007).

86. While paragraph 1 (c) of Article 5 sets out the grounds on which pre-trial detention may be permissible in the first place (see *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 44, Series A no. 77), paragraph 3, which forms a whole with the former provision, lays down certain procedural guarantees, including the rule that detention pending trial must not exceed a reasonable time, thus regulating its length.

87. According to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings (see, among many other authorities, *Letellier*, cited above, § 35, and *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012). The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial (ibid.).

88. Justifications which have been deemed "relevant" and "sufficient" reasons (in addition to the existence of reasonable suspicion) in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee (see, for instance, *Stögmüller v. Austria*, 10 November 1969, § 15, Series A no. 9; *Wemhoff*, cited above, § 14; *Tomasi*, cited above, § 95; *Toth v. Austria*, 12 December 1991, § 70, Series A no. 224; *Letellier*, cited above, § 51; and

I.A. v. France, 23 September 1998, § 108, *Reports of Judgments and Decisions* 1998-VII).

89. The presumption is always in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p. 37, § 4), the second limb of Article 5 § 3 – that is release pending trial – does not give the judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. It is the provisional detention of the accused which must not be prolonged beyond a reasonable time (see *Wemhoff*, cited above, § 5); even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time (see *Stögmüller*, cited above, § 5). Until conviction, he or she must be presumed innocent, and the purpose of the provision under consideration is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable (see *McKay*, cited above, § 41).

90. The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Labita*, cited above, § 152, and *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI). With particular regard to the risk of absconding, consideration must be given to the character of the person involved, his or her morals, assets, links with the State in which he or she is being prosecuted and the person's international contacts (see, *Neumeister* cited above, § 10).

91. It primarily falls 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. Accordingly, they must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule in Article 5, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, among other authorities, *Kudła*, cited above, § 110, and *Idalov*, cited above, § 141).

2. *Whether there is a need to develop the Court's case-law*

(a) The initial period of detention and the problem concerning the "certain lapse of time"

92. As mentioned above (see paragraph 87), the persistence of reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but does not suffice to justify the prolongation of the detention after a certain lapse of time. This dictum was enunciated for the first time in *Stögmüller* (cited above, § 4). It later became better known as one of the more comprehensive "*Letellier* principles", which were reaffirmed in a number of successive Grand Chamber judgments (see notably *Labita*, cited above, § 153; *Kudła*, cited above, § 111; *McKay*, cited above, § 44; *Bykov v. Russia* [GC], no. 4378/02, § 64, 10 March 2009; and most recently in *Idalov*, cited above, § 140). The said principle enabled a distinction to be drawn between a first phase, when the existence of reasonable suspicion is a sufficient ground for detention, and the phase coming after a "certain lapse of time", where reasonable suspicion alone no longer suffices and other "relevant and sufficient" reasons to detain the suspect are required.

93. Since the applicant did not claim in the proceedings before the Court that there was no reasonable suspicion that he had committed an offence, the Court does not consider it necessary to examine this issue. However, in view of the weaknesses of the additional reasons (other than reasonableness of suspicion) relied on by the domestic courts, the question arises as to the point in time from which such additional reasons were required. An answer to this question would depend on the meaning of the expression "certain lapse of time".

94. The Court has hitherto not defined in its case-law the scope of the expression "certain lapse of time" or laid down any general criteria in this regard. In the recent case of *Magee and Others v. the United Kingdom*, nos. 26289/12, 29062/12 and 29891/12, 12 May 2015, the Court recognised that there was no fixed time-frame applicable to the "certain lapse of time". It observed:

> " 88. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this will no longer be enough to justify continued detention. The Court has not attempted to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence (*Stögmüller v. Austria*, no. 1602/62, § 4, 10 November 1969)."

95. It nonetheless transpires that in a number of cases (see, for instance, *Ţurcan and Ţurcan v. Moldova*, no. 39835/05, § 54, 23 October 2007; *Patsuria v. Georgia*, no. 30779/04, § 67, 6 November 2007; *Osmanović v. Croatia*, no. 67604/10, §§ 40-41, 6 November 2012; and *Zayidov v. Azerbaijan*, no. 11948/08, § 62, 20 February 2014) the Court has taken

the view that even after a relatively short period of a few days, the existence of reasonable suspicion cannot on its own justify pre-trial detention and must be supported by additional grounds.

96. In the light of the above, the Court considers that it would be useful to further develop its case-law as to the requirement on national judicial authorities to justify continued detention for the purposes of the second limb of Article 5 § 3.

97. As a starting point, it should be reiterated that, as has already been mentioned in paragraph 85 above, the period to be taken into consideration for the assessment of the reasonableness of the detention under the *second* limb begins when the person is deprived of his or her liberty.

98. As from that same moment, the person concerned also has a right under the *first* limb of paragraph 3 to be brought "promptly before a judge or other officer authorised by law to exercise judicial power" offering the requisite guarantees of independence from the executive and the parties. The provision includes a procedural requirement on the "judge or other officer authorised by law" to hear the individual brought before him or her in person, and a substantive requirement on the same officer to review the circumstances militating for or against detention, i.e. whether there are reasons to justify detention and of ordering release if there are no such reasons (see *Ireland v. the United Kingdom*, 18 January 1978, § 199, Series A no. 25; *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34; and *McKay*, cited above, § 35). In other words Article 5 § 3 requires the judicial officer to consider the merits of the detention (see *T.W. v. Malta* [GC], no. 25644/94, § 41, 29 April 1999; *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III; and *McKay*, cited above, § 35).

99. The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not the reasonable suspicion that the arrested person has committed an offence persists, or in other words, ascertaining that detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention is considered not to fall under the above permitted exception the judicial officer must have the power to release (*McKay*, cited above, § 40). Whether the mere persistence of suspicion suffices to warrant the prolongation of a lawfully ordered detention on remand is covered, not by paragraph 1 (c) as such, but by paragraph 3: it is essentially the object of the latter, which forms a whole with the former, to require provisional release once detention ceases to be reasonable (see *De Jong, Baljet and Van den Brink*, cited above, § 44, with further references).

100. The need to further elaborate the case-law appears to stem from the fact that the period during which the persistence of reasonable suspicion may suffice as a ground for continued detention under the second limb is subject to a different and far less precise temporal requirement – "a certain lapse of time" (as developed in the Court's case-law) – than under the first

limb – “promptly” (as provided in the text of the Convention) – and that it is only after that “certain lapse of time” that the detention has to be justified by additional relevant and sufficient reasons. It is true that in some instances the Court has held that “[t]hese two limbs confer distinct rights and are not on their face logically or temporally linked” (see, most notably, *McKay*, cited above, § 31; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 119, ECHR 2010 – the latter being concerned only with the first limb). However, it should be noted that in each context the period will start to run from the time of arrest, and that the judicial authority authorising the detention is required to determine whether there are reasons to justify detention and to order release if there are no such reasons. Thus, in practice, it would often be the case that the application of the guarantees under the second limb would to some extent overlap with those of the first limb, typically in situations where the judicial authority which authorises detention under the first limb at the same time orders detention on remand subject to the guarantees of the second limb. In such situations, the first appearance of the suspect before the judge constitutes the “crossroads” where the two sets of guarantees meet and where the second set succeeds the first. And yet, the question of when the second applies to its full extent, in the sense that further relevant and sufficient reasons additional to reasonable suspicion are required, is left to depend on the rather vague notion of “a certain lapse of time”.

101. The Court further notes that, according to the domestic laws of the great majority of the thirty-one High Contracting Parties to the Convention covered by the comparative law survey referred to in paragraph 54 above, the relevant judicial authorities are obliged to give “relevant and sufficient” reasons for continued detention if not immediately then only a few days after the arrest, namely when a judge examines for the first time the necessity of placing the suspect in pre-trial detention. Such an approach, if transposed to Article 5 § 3 of the Convention, would not only simplify and bring more clarity and certainty into the Convention case-law in this area, but would also enhance the protection against detention beyond a reasonable time.

102. In the light of all of the above considerations, the Court finds compelling arguments for “synchronising” the second limb of guarantees with the first one. This implies that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say “promptly” after the arrest.

(b) Particular problems concerning house arrest

(i) Whether house arrest is deprivation of liberty and whether the applicant had waived his right to liberty

103. As it does in many other areas, the Court insists in its case-law on an autonomous interpretation of the notion of deprivation of liberty. A systematic reading of the Convention shows that mere restrictions on the liberty of movement are not covered by Article 5 but fall under Article 2 § 1 of Protocol No. 4. However, the distinction between the restriction of movement and the deprivation of liberty is merely one of degree or intensity, and not one of nature or substance. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be the concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39).

104. According to the Court's case-law (see, among many others, *Mancini v. Italy*, no. 44955/98, §17, ECHR 2001-IX; *Lavents v. Latvia*, no. 58442/00, §§ 64-66, 28 November 2002; *Nikolova v. Bulgaria (no. 2)*, no. 40896/98, § 60, 30 September 2004; *Ninescu v. the Republic of Moldova*, no. 47306/07, § 53, 15 July 2014; and *Delijorgji v. Albania*, no. 6858/11, § 75, 28 April 2015), house arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 of the Convention.

105. The Court sees no reason to depart from this case-law. Having regard to the modalities of the applicant's house arrest as described in paragraphs 30 and 36-40 above, it considers that subjecting him to this measure between 26 and 29 June 2007 and between 20 July 2007 and 12 March 2008, i.e. for a period of seven months and a half, constituted deprivation of liberty in the sense of Article 5 of the Convention. In this connection, it is of interest to note that, in the instant case, house arrest is also considered as deprivation of liberty under the relevant national law and that the Government themselves accepted that the applicant's house arrest constituted deprivation of liberty (see paragraphs 43, 44 and 83 above).

106. One issue raised by the Government (and which has been joined to the merits, see paragraph 71 above) was the fact that the applicant himself had asked to be placed under house arrest and had not challenged the court decisions ordering this measure. This raises an important question, namely whether the applicant had waived his right to liberty.

107. In *Storck v. Germany* (no. 61603/00, § 75, ECHR 2005-V) the Court held that the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the sole reason that he gives himself up to be taken into detention. Detention might violate Article 5 even though the

person concerned might have agreed to it (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12).

108. In view of the Government's submission to the effect that it was the applicant himself who had asked to be placed under house arrest (see paragraph 82 above), the Court notes that in the present case there was a clear element of coercion in the application of this type of measure. In particular, it appears clearly from the facts of the case that the idea behind the applicant's seeking to be placed in house arrest was to avoid the continuation of his detention in custody after the courts had dismissed his *habeas corpus* requests on numerous occasions. It also transpires that his state of health considerably deteriorated during his remand in custody and that he was ready to make concessions in order to put an end to it (see paragraphs 14, 24 and 29 above). This is understandable behaviour for a person who had previously suffered a heart attack and a cerebral stroke and who was seeing his health deteriorating. In the Court's view, the applicant was under a clear state of duress when he was placed under house arrest. In such circumstances, one could not reasonably expect the applicant to challenge the court decisions ordering his house arrest.

109. In view of the above, the Court is not prepared to accept that the applicant's attitude to his house arrest and omission to challenge the measure amounted to a waiver of his right to liberty.

110. This state of affairs, even assuming that the applicant may be considered to have consented to be placed under house arrest, cannot be equated to release from detention, as argued by the Government. Nor could it, as the Government appear to suggest, be viewed as a form of reparation complying with the requirement under Article 5 § 5 to afford a right to compensation. The Government's objection concerning the applicant's lack of victim status must therefore be dismissed.

(ii) Reasons for ordering house arrest

111. The Government submitted that lesser reasons were required in order to justify house arrest than detention in an ordinary remand facility because the former measure was more lenient than the latter.

112. It is true that in most cases house arrest implies fewer restrictions and a lesser degree of suffering or inconvenience for the detainee than ordinary detention in prison. That is the case because detention in custody requires integrating the individual into a new and sometimes hostile environment, sharing of activities and resources with other inmates, observing discipline and being subjected to supervision of varying degrees by the authorities twenty-four hours a day. For example, detainees cannot freely choose when to go to sleep, when to take their meals, when to attend to their personal hygiene needs or when to perform outdoor exercise or other activities. Therefore, when faced with a choice between imprisonment

in a detention facility and house arrest, as in the present case, most individuals would normally opt for the latter.

113. However, the Court notes that no distinction of regime between different types of detention was made in the *Letellier* principles (see paragraph 92 above). It further reiterates that in *Lavents* (cited above), where the Court was called upon to examine the relevance and sufficiency of reasons for depriving the applicant of liberty pending trial for a considerable period of time, the respondent Government had unsuccessfully argued that different criteria ought to apply to the assessment of the reasons for the impugned restriction on liberty as the applicant had been detained not only in prison but also been held in house arrest and in hospital. The Court dismissed the argument, stating that Article 5 did not regulate the conditions of detention, referring to the approach previously adopted in *Mancini* (cited above) and other cases cited therein. The Court went on to specify that the notions of “degree” and “intensity” in the case-law, as criteria for the applicability of Article 5, referred only to the degree of restrictions to the liberty of movement, not to the differences in comfort or in the internal regime in different places of detention. Thus, the Court proceeded to apply the same criteria for the entire period of deprivation of liberty, irrespective of the place where the applicant was detained.

114. The Court finds no reason to adopt a different approach in the present case. In its view, it would hardly be workable in practice were one to assess the justifications for pre-trial detention according to different criteria depending on differences in the conditions of detention and the level of (dis)comfort experienced by the detainee. Such justifications should, on the contrary, be assessed according to criteria that are practical and effective in maintaining an adequate level of protection under the Article 5 without running a risk of diluting that protection. In short, the Court finds it appropriate to follow the same approach as in *Lavents* for its examination of the present case.

3. Whether there were relevant and sufficient reasons in the present case

115. Turning to the justifications provided for the applicant’s provisional detention in the present case, the Court observes that the domestic court, which on 5 May 2007 issued the initial order to detain the applicant on remand, relied only on the risk of his collusion with his sons and on the seriousness of the offence imputed to him. While the latter reason is normally invoked in the context of the risk of absconding, the national court considered that the danger of absconding along with the risk of influencing witnesses and the risk of the applicant’s tampering with evidence had not been substantiated by the prosecutor and were implausible.

116. The applicant appealed and argued, *inter alia*, that the risk of collusion had not been invoked by the prosecutor and that, in any event, he

had had plenty of time to collude with his sons, had he had such an intention. However, his appeal was dismissed by the Court of Appeal, without any answer to his objections.

117. In this connection the Court notes, as the applicant pointed out, that the prosecutor had not relied on such a reason as the danger of collusion with his sons. Moreover, it follows clearly from the facts of the case that the investigation against the applicant and his sons was initiated in July 2006, i.e. some ten months before the applicant's arrest and that he would indeed have had enough time to collude with them had he had such an intention (see paragraphs 9-12 above). In such circumstances, the Court sees no merit whatsoever in this argument. Furthermore, it notes that the Court of Appeal failed to give an answer to this objection raised by the applicant. There is no indication in the judgments that the courts took into account such an important factor as the applicant's behaviour, between the beginning of the investigation in July 2006 and the moment when first ordering his remand in custody.

118. When prolonging the applicant's detention for the first and second times, on 16 May and 5 June 2007 respectively, the courts no longer relied on the risk of collusion, which was, in essence, the only supplementary reason relied upon by the courts to order his remand in the first place. This time the courts invoked other reasons, namely the danger of absconding and the risk of influencing witnesses and tampering with evidence (see paragraphs 20 and 25 above). In this regard, the Court notes that these were the same reasons as had been invoked by the prosecutor in the initial application for placing the applicant in detention on remand but which both the first-instance court and the Court of Appeal had dismissed as being unsubstantiated and improbable (see paragraphs 15 and 17 above). There is no explanation in the court decisions prolonging the applicant's detention as to why those reasons became relevant and sufficient only later (see, for instance, *Koutalidis v. Greece*, no. 18785/13, § 51, 27 November 2014), for instance whether anything in the applicant's behaviour had prompted the change. As in the case of the initial detention order, no assessment was made by the courts of the applicant's character, his morals, his assets and links with the country and his behaviour during the first ten months of the criminal investigation.

119. When examining the prosecutor's application for the third prolongation, on 26 June 2007, the first-instance court dismissed the prosecutor's arguments in favour of detention and found in essence that there were no grounds militating for his continued detention. Nevertheless, the court ordered the applicant's continued detention under house arrest (see paragraph 30 above).

120. After three days of house arrest, the Court of Appeal quashed that detention order on 29 June 2007, while finding again that the applicant could abscond, influence witnesses, tamper with evidence and collude with

his sons if kept under house arrest. It therefore ordered that his continued detention take place in a remand facility. The court did not explain the reasons why it disagreed with the first-instance court as to the absence of reasons to detain him, nor did it explain the basis for its fear that he might abscond, influence witnesses and tamper with evidence (see paragraph 32 above).

121. When examining the prosecutor's fourth application for prolongation, the Court of Appeal dismissed all the reasons invoked by the prosecutor and stated that there were no reasons to believe that the applicant would abscond or interfere with the investigation. Nevertheless, in spite of the absence of such reasons, the court ordered his house arrest, which was later prolonged until March 2008 (see paragraph 36 above). The decisions ordering and prolonging house arrest did not rely on any reasons in support of such a measure other than the seriousness of the offence imputed to him (see paragraphs 37 and 38 above).

122. In addition to the above-mentioned problems, the Court considers that the reasons invoked by the domestic courts for ordering and prolonging the applicant's detention were stereotyped and abstract. Their decisions cited the grounds for detention without any attempt to show how they applied concretely to the specific circumstances of the applicant's case. Moreover, the domestic courts cannot be said to have acted consistently. In particular, on some occasions they dismissed as unsubstantiated and implausible the prosecutor's allegations about the danger of the applicant's absconding, interfering with witnesses and tampering with evidence. On other occasions they accepted the same reasons without there being any apparent change in the circumstances and without explanation. The Court considers that where such an important issue as the right to liberty is at stake, it is incumbent on the domestic authorities to convincingly demonstrate that the detention is necessary. That was certainly not the case here.

123. In the light of all of the above factors, the Court considers that there were no relevant and sufficient reasons to order and prolong the applicant's detention pending trial. It follows that in the present case there has been a violation of Article 5 § 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. 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

125. The applicant claimed EUR 50,000 in respect of non-pecuniary damage. He submitted that he had suffered considerable stress and that his reputation had been considerably damaged as a result of his unjustified detention. He also argued that the detention had adversely affected his health.

126. The Government did not submit any comment regarding the non-pecuniary damage claimed by the applicant.

127. The Court considers that the applicant must have been caused a certain amount of stress and anxiety as a result of the violation of his rights under Article 5 § 3 of the Convention. Deciding on an equitable basis, it awards the applicant EUR 3,000.

B. Costs and expenses

128. The applicant also claimed EUR 4,837 for the costs and expenses incurred before the Court. The amount included the lawyer’s fees before both the Chamber and the Grand Chamber, travel and subsistence expenses for his attendance of the hearing before the latter, and also certain postal expenses.

129. The Government did not make any comment regarding the costs claimed by the applicant.

130. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the entire amount claimed for costs and expenses for the proceedings before it.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Dismisses*, by fifteen votes to two, the Government's preliminary objection concerning the non-exhaustion of domestic remedies;

2. *Joins to the merits*, unanimously, the Government's preliminary objection concerning victim status and *dismisses* it;

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

4. *Holds*, unanimously,
 (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 (ii) EUR 4,837 (four thousand eights hundred and thirty-seven euros), plus any tax that may be chargeable, in respect of costs and expenses;
 (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 July 2016.

Søren Prebensen
Deputy to the Registrar

Guido Raimondi
President

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

(a) joint concurring opinion of Judges Nuβberger and Mahoney;

(b) concurring opinion of Judge Spano joined by Judge Dedov;

(c) joint partly dissenting opinion of Judges Sajó and Wojtyczek.

G.R.A.
S.C.P.

JOINT CONCURRING OPINION OF JUDGES NUSSBERGER AND MAHONEY

We share the conclusion of Judges Sajó and Wojtyczek in their joint partly dissenting opinion that the respondent Government were not estopped from raising their preliminary objection of non-exhaustion of domestic remedies as, when the application was communicated to them in January 2010, any detention beyond the date of 29 June 2007 had not been included in the statement of facts prepared by the Registry and they had not been asked to comment on this period (see paragraph 65 of the judgment). Governments should be able to rely in good faith on the Court’s clear indications as to the Convention issues to be addressed by them, without fear of being estopped from raising relevant objections if and when further Convention issues, outside the Court’s indications, are later introduced into the case.

At the same time, in the specific circumstances of the case, the applicant could not reasonably have been expected to challenge the court decisions ordering house arrest in place of the more severe measure of ordinary detention on remand, given that he would have exposed himself to the risk of making his situation worse. We agree with the majority that in this regard he was under a “clear state of duress” (see paragraph 108 of the judgment). Consequently, in our view, although the respondent Government should not, as a matter of fair procedure, be estopped from raising their objection of non-exhaustion of domestic remedies, that objection is not founded on its merits in the circumstances of the applicant’s case and is to be rejected. We thus arrive at the same end-result as the majority on this point, but for different reasons.

CONCURRING OPINION OF JUDGE SPANO JOINED BY JUDGE DEDOV

I.

1. Today's Grand Chamber judgment provides a welcome clarification of the case-law on Article 5 § 3 of the Convention concerning the requirement that deprivation of liberty must be based throughout on relevant and sufficient grounds in order to remain valid. I fully concur with the judgment.

2. However, I consider it necessary to write separately to highlight an issue dealt with in paragraphs 106-110 of the judgment, which are prompted by an argument submitted by the Government dealing with the applicant's house arrest. The Government rely on the fact that the applicant himself had asked to be placed under house arrest and had not challenged the court decisions ordering that measure. The Court proceeds by stating that this argument "raises an important question, namely whether the applicant had waived his right to liberty" and concludes in paragraph 109 that it is not prepared, on the facts, to accept that the applicant's acquiescence in his house arrest and omission to challenge the measure amounted to a waiver of his rights under Article 5 of the Convention.

3. Although the reasoning is not fully clear on this issue, it seems to suggest that the Court proceeds on the assumption that, in principle, those detained within the meaning of Article 5 § 1 of the Convention can, by their actions, in effect waive their right to liberty. For the reasons that follow, this assumption is neither based on sound doctrinal or legal principles, nor does it have any basis in the Court's existing case-law. In other words, the nature and substance of the fundamental right to liberty is not in my view subject to limitations based on the fact that a person who has been deprived of his liberty is considered to have waived his rights under Article 5.

II.

4. To begin with, some conceptual remarks. For the question to arise whether a person can waive his right to liberty, one must exclude those situations where the person in question is not, de facto, detained within the meaning of Article 5 § 1. A homeless person or a vagrant who walks into a police station asking for a place to sleep, his wishes being met by placing him in a prison cell, is not deprived of his liberty if he can leave whenever he so chooses. Thus, by definition, deprivation of liberty arises where such a measure by a public authority, for example detention in prison or house arrest, is imposed on an unwilling person, thus limiting his or her personal autonomy and physical integrity. It is only in those situations where the question of his or her possible acquiescence arises, and consequently if and to what extent the acceptance of being detained can have a bearing on the protections afforded under Article 5 of the Convention.

5. To clarify this further, let us imagine a situation where a person suspected of a criminal offence is informed by a prosecutor that the latter considers that all legal conditions are met for detaining the suspect on remand. However, so as not to waste time, the prosecutor asks whether the suspect accepts being detained for thirty days without the prosecutor seeking confirmation by a court as required by domestic law. The suspect accepts and is detained.

6. Does the suspect's consent to the imposition of the detention measures have any bearing on his right to liberty? In other words, can the fact that the suspect, on the basis of clear and informed consent, has acquiesced in being detained limit his protections under Article 5 of the Convention, namely that the detention must be "lawful" under paragraph 1 and can only be permitted under one of the sub-paragraphs of the same paragraph? Or does it mean that the State is no longer under an obligation to bring the suspect promptly before a judge under Article 5 § 3 or to provide the detainee with the procedural safeguards of having the detention reviewed by a court under Article 5 § 4 in order to examine whether it is still based on relevant and sufficient grounds?

7. In my view, the answer is in the negative. The nature and substance of the right to liberty under the Convention is not amenable to any kind of "waiver of rights" analysis akin to the one accepted by the Court under Article 6 of the Convention. Also, and not surprisingly, this has been the consistent position of the Court until today. In its settled case-law, the Court has proclaimed that the right to liberty is too important in a "democratic society", within the meaning of the Convention, for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention may violate Article 5 even though the person concerned has agreed to it (see *Venskutė v. Lithuania*, no. 10645/08, § 72, 11 December 2012, with further references, and *Storck v. Germany*, no. 61603/00, § 75, ECHR 2005-V). Also, as to the Court's important supervisory role in this regard, the Court proclaimed as early as in the *Belgian Vagrancy* Case of 1971 (*De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12) that "when the matter is one which concerns ordre public within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees are necessary in every case".

8. In conclusion, I am respectfully of the view that the Grand Chamber erred in the present case in proceeding on the assumption that a waiver of the right to liberty is, in principle, possible under Article 5 of the Convention. The Government's arguments as to the applicant's acquiescence in his house arrest should have been dealt with as, in essence, a non-exhaustion of domestic remedies argument under Article 35 § 1 of the Convention. Taking account of the flexible concept of exhaustion of

domestic remedies in the Court's case-law, that argument should then have been rejected, the Court accepting that in the light of the particular circumstances of the case the applicant was not required to challenge the court decisions ordering the measure.

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ AND WOJTYCZEK

1. We respectfully disagree with the majority on the question whether the Government's objection of non-exhaustion of domestic remedies should have been dismissed.

I

2. The instant case raises a serious issue of procedural fairness. The efficient protection of Convention rights requires not only respect for the procedural rights of the parties to the proceedings before the Court but also mutual trust in relations between the Court and the parties. Therefore, if the Court gives instructions to the parties, the latter should have the certainty that if they comply in good faith with those instructions they will not find themselves in a legal trap and have their legitimate procedural interests affected as a result.

3. In the instant case, the Court, at the communication stage, prepared a statement of facts listing the developments which had taken place until the Chişinău Court of Appeal's decision of 29 June 2007. The Court also informed the parties about the applicant's grievances under Article 5 in the following way:

> "The applicant complains under Article 5 §§ 1 and 4 of the Convention that the courts ordered and then extended his detention pending trial without giving relevant and sufficient reasons for doing so."

The following instruction was included in the letter of 18 January 2010 from the Registrar:

> "Should your Government decide to submit observations, they should only deal with the complaints concerning reasons for detention pending trial (Article 5 § 3 of the Convention) set out in the document appended to this letter."

As noted above, the appended document presented only the facts that took place until 29 June 2007. The question of house arrest was not included in the statement of facts. The Government have never been explicitly invited to comment on this aspect of the case.

4. The Moldovan Government in their letter dated 16 June 2011 gave a detailed account of the developments which had taken place after 29 June 2007. They also stated that they would not address these developments "bearing in mind the applicant's complaints and the limits of the notification [given] by the Court". Therefore, in their submissions the Government did not address the issue whether the applicant had exhausted domestic remedies in respect of house arrest.

It is true that in a case involving a continuing situation the respondent Government should take a position on all the relevant developments occurring after the communication that form part of this continuing situation. However, the assessment of whether pre-trial detention and subsequent house arrest are elements of a continuing situation is far from obvious. That is precisely the gist of the present case.

In the instant case, the applicant was released from detention on remand and placed under house arrest by a decision of 20 July 2007. There is no doubt that house arrest constitutes deprivation of liberty within the meaning of Article 5. At the same time, the conditions of house arrest differ substantially from remand in custody. Therefore, the question whether house arrest is part of a continuing situation which starts with remand in custody for the purpose of the assessment of exhaustion of domestic remedies is an issue on which two reasonable lawyers may disagree. There is no reason to doubt that the Government, when responding to the communication of the case by the Court, followed the Court's instructions strictly and in good faith. In this context, it is impossible to blame them for not having raised the objection of non-exhaustion of domestic remedies in respect of house arrest before the Chamber judgment was delivered. Given the content of the instructions addressed to the Government at the communication stage, the Court has been estopped from using the argument of tardiness.

5. Despite all that, the majority decided to dismiss the Government's objection of non-exhaustion as being out of time. At the stage of the Grand Chamber proceedings, it is simply unfair to blame the Government – who were merely trying to observe the instructions they had received – for not having raised the issue of exhaustion of domestic remedies earlier. In our view, dismissing the Government's objection of non-exhaustion of domestic remedies is a breach of procedural fairness.

II

6. We fully agree with the majority that the applicant's attitude to his house arrest and omission to challenge the measure did not amount to a waiver of his right to liberty (see paragraph 109 of the judgment). However, we are not persuaded that one could not reasonably have expected the applicant to challenge the court decisions ordering his house arrest (see paragraph 108). This assertion by the majority seems to be based on the assumption of a structural flaw in the Moldovan legal system and of harassment of the applicant by the competent authorities. However, there is nothing to suggest that challenging his house arrest would have placed the applicant at risk of being detained on remand again.

III

7. For the reasons set out above we have voted against dismissing the Government's objection of non-exhaustion of domestic remedies.