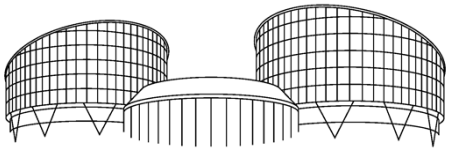

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ASANOVIĆ v. MONTENEGRO

(Application no. 52415/18)

JUDGMENT

Art 5 § 1 • Detention on suspicion of committing a criminal offence in breach of domestic law requirements

STRASBOURG

20 May 2021

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

In the case of Asanović v. Montenegro,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
Jovan Ilievski,
Ivana Jelić,
Arnfinn Bårdsen, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 52415/18) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Nebojša Asanović ("the applicant"), on 23 October 2018;

the decision to give notice of the application to the Montenegrin Government ("the Government");

the parties' observations;

Having deliberated in private on 20 April 2021,

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

INTRODUCTION

1. The present case concerns the applicant's alleged unlawful deprivation of liberty and a lack of an effective domestic remedy in that regard. He relied on Articles 5 § 1 and 13 of the Convention.

THE FACTS

2. The applicant was born in 1965 and lives in Podgorica. He was represented by Mr Z. Jovanović, a lawyer practising in Podgorica.

3. The Government were represented by their Agent, Ms V. Pavličić.

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

A. The applicant's deprivation of liberty and the ensuing proceedings

5. The applicant is a practicing attorney and at the time of lodging the application with the Court he had been a representative of an opposition media outlet for more than twelve years.

6. On 23 December 2016 the Tax Administration reported to the Police Directorate that there were indications that the applicant had committed a criminal offence of tax evasion in relation to his professional activities.

The Police Directorate - Division for Economic Crime Suppression transmitted this to the State Prosecution Office (*Osnovno državno tužilaštvo*; "the SPO") on 27 January 2017.

7. On 12 September 2017 the state prosecutor apparently requested orally (*dao obavezujući usmeni nalog*) police officer G.M. to gather information from the applicant in his capacity "as a citizen" (*prikupljanje obavještenja u svojstvu građanina*), given that he was suspected of the said criminal offence.

8. On 13 September 2017, in the early morning hours, G.M. informed the state prosecutor that the applicant had not been found at his address and that his phone had been switched off. Apparently considering that the applicant was hiding the state prosecutor requested the police officers to find him and "deprive him of liberty" (*liše slobode*).

9. At 9h30 the same day G.M. and three other officers approached the applicant in front of the Court of First Instance (*Osnovni sud*) in Podgorica and served him summons. It specified that the applicant was summoned to the Police Directorate "at once" (*odmah*) in order to provide information "as a citizen". It also specified that if he did not comply with it he would be brought in by force.

10. The applicant submitted to the Court that he had been put in a vehicle and taken to the police station (*Centar bezbjednosti*). The Government submitted that he had been offered, without any verbal or physical force, to be taken by an official vehicle with civilian registration plates to the police station, so that he could give his statement.

11. After the applicant gave the statement G.M. served him the minutes thereof and an official report (*službena zabilješka*). The official report stated that the applicant had been deprived of liberty that day at 10h40 on the order of the state prosecutor, in relation to Article 264 § 1 of the Criminal Code in conjunction with Article 49 (see paragraphs 33-34 below), and that he would be brought before the state prosecutor that same day. It further noted that no means of force had been used and that he had been duly informed of his rights and the reasons for his deprivation of liberty. The report was signed by police officers G.M. and S.L.

12. The applicant's fingerprints were taken, he was photographed and his personal belongings were taken, including his glasses, and he was put in a cell with no windows. At 12h10 he was handcuffed and taken in a police vehicle to the state prosecutor. The state prosecutor questioned him from 12h30 to 13h54, after which he was released. During the questioning the applicant denied having committed the said criminal offence. He also stated that earlier that morning he had been visiting a client in prison, where there was no telephone signal and the use of telephones was prohibited, all of which could be easily verified. After leaving the prison he had switched the phone on, contacted the police officer who had told him to come in front of the court building, where he had been deprived of liberty.

13. The same day, on 13 September 2017, the Division for Economic Crime Suppression filed a criminal complaint against the applicant with the SPO for a reasonable suspicion of tax evasion.

14. On 14 September 2017 the SPO joined the two cases (the one initiated by the Tax Administration and the one initiated by the Division for Economic Crime Suppression; see paragraphs 6 and 13 above).

15. On 15 September 2017 the applicant filed a constitutional appeal for unlawful deprivation of liberty. He supplemented it on 25 September 2017 and 23 January 2018: he relied on the Bar Act and informed the Constitutional Court that there was no criminal case-file related to his deprivation of liberty in the Court of First Instance (see paragraph 18 below).

16. On 22 September 2017 the Bar Association sent a public letter of protest to the Minister of Interior because of the applicant's deprivation of liberty.

17. On 1 November 2017 the Council for Civic Control of Police (*Savjet za građansku kontrolu rada policije*) issued its findings in reaction to the applicant's complaint. It considered that the police inspectors had acted unlawfully, in particular because the applicant, as a lawyer, could not have been deprived of liberty without the relevant court's decision in that regard.

18. On 17 January 2018 the president of the Court of First Instance informed the applicant, upon his enquiry of 25 December 2017, that there were no cases registered in that court relating to his deprivation of liberty.

19. On 11 July 2018 the Constitutional Court dismissed the applicant's constitutional appeal. It considered, in substance, that the police officers and the SPO had acted lawfully, and found that the applicant had not complied with summons which specified that in such a case he could be brought in by force. He had been deprived of liberty at 10h40, following the state prosecutor's order to that effect, after which he had been questioned by the state prosecutor and then released. The court made no reference to the existence and/or exhaustion of other effective domestic legal remedies.

20. On 2 October 2018 the Ombudsperson institution issued its opinion. It found that the applicant's rights under Article 29 of the Constitution and Article 5 § 1 (c) of the Convention had been breached. In particular, he had not been first given an opportunity to comply with the summons on his own, but had been told to go "at once" with police officers, which was contrary to Article 259 § 1 of the Criminal Procedure Code ("the CPC"). This had constituted *de facto* deprivation of liberty as of 9h30, as of that moment he had been under the control of police officers. There had been no legal grounds for it at the time, given that none of the reasons for detention, as stipulated in Article 175 of CPC, had been indicated.

21. On 12 October 2018 the applicant instituted civil proceedings for unlawful deprivation of liberty against the State - Ministry of Interior, Police Department and the SPO. He relied in his claim on Article 29 § 1 of

the Constitution and Article 5 § 1 (c) of the Convention. He sought compensation and an order for the publication of a statement in all printed and electronic Montenegrin media to the effect that the Police Directorate had violated his rights by unlawfully depriving him of liberty. In his claim he raised the same complaints that he later submitted in his application to the Court.

22. On 18 April 2019 the state prosecutor issued an indictment against the applicant for a reasonable suspicion that he had committed a continuing criminal offence of tax and social contributions evasion between 1 January 2014 and 30 April 2016. The criminal proceedings are currently ongoing.

23. On 6 December 2019 the civil proceedings were stayed (*prekida se postupak*), upon request by the applicant and the respondent party, until the criminal proceedings against the applicant were terminated. Apparently later that day, a hearing was held in the same proceedings during which the applicant clarified that the object of his claim was not compensation of non-pecuniary damage for unlawful deprivation of liberty (*zbog neosnovanog lišenja slobode*), but for a violation of his honour and reputation, and the right to liberty (*prava na slobodu*). He relied on all the evidence invoked in his application before the Court.

B. Other relevant facts

24. Several media outlets reported on the applicant's deprivation of liberty.

25. On 9 May 2018 the Ombudsman found that the applicant had been discriminated against by the Tax Administration on account of his presumed political affiliation. Notably, the Tax Administration had not proved that it had treated the applicant in the same manner as other practicing attorneys - tax payers.

26. On 11 May 2018 the applicant instituted civil proceedings against the State – Tax Administration, for discrimination. These proceedings are currently pending.

27. On 26 October 2018 the applicant instituted civil proceedings against the State – the SPO, for violating his right to defence in connection with his questioning following his deprivation of liberty. On 18 March 2020 the Court of First Instance in Podgorica ruled partly in favour of the applicant. It awarded him 1,500 euros and ordered the respondent party to have this judgment published in all printed and electronic Montenegrin media within 15 days. The court found, *inter alia*, that before having been brought before the state prosecutor the applicant had not been informed that he was to be questioned. It also found that even though he had explained to the police officers that he had had two hearings in court that day, the police

officers had taken him by the arms and into their vehicle, and had taken him to the police station.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Constitution of Montenegro 2007 (*Ustav Crne Gore*, published in the Official Gazette of Montenegro - OGM - nos. 001/07 and 038/13)

28. Article 20 provides for the right to a legal remedy against a decision on someone's right or a statute-based interest.

29. Article 29 sets out details as regards the right to liberty. It provides that a deprivation of liberty is allowed only for the reasons and in accordance with the procedure provided for by the law. Unlawful deprivation of liberty is punishable.

30. Article 38 provides that a person deprived of liberty unlawfully or without justification is entitled to compensation from the State.

B. Montenegro Constitutional Court Act 2015 (*Zakon o Ustavnom sudu Crne Gore*, published in the OGM nos. 011/15 and 055/19)

31. This Act entered into force on 20 March 2015. Section 68 thereof provides, *inter alia*, that a constitutional appeal can be lodged by a physical person, if he or she considers that his or her human right or freedom guaranteed by the Constitution was violated by an individual decision, action or omission of a State body, after all other effective legal remedies have been exhausted. If the appellant proves that a legal remedy to which he or she is entitled is not or would not be effective, a constitutional appeal can be lodged without prior exhaustion of effective domestic remedies.

C. Bar Act (*Zakon o advokaturi*; published in the Official Gazette of the Republic of Montenegro - OG RM - nos. 079/06, and OGM nos. 073/10 and 022/17)

32. Section 23 provides that a practicing attorney (*advokat*) can be deprived of liberty for criminal offences related to his or her practice only pursuant to a relevant court's decision.

D. Criminal Code of Montenegro (*Krivični zakonik Crne Gore*; published in the OG RM nos. 070/03, 013/04, and 047/06, and OGM nos. 040/08, 025/10, 073/10, 032/11, 064/11, 040/13, 056/13, 014/15, 042/15, 058/15, 044/17, 049/18, and 003/20)

33. Article 49 defines a continuing criminal offence.

34. Article 264 sets out details as regards the criminal offence of tax and social contributions evasion.

E. Criminal Procedure Code (*Zakonik o krivičnom postupku*; published in the OGM nos. 057/09, 049/10, 047/14, 002/15, 035/15, 058/15, and 028/18)

35. Article 175 sets out reasons for ordering detention when there is a reasonable suspicion that an individual has committed a criminal offence. These are: (a) if the person is hiding or cannot be identified or there are other circumstances indicating that he or she may abscond; (b) there are circumstances indicating that he or she will destroy, hide, change or forge the evidence or the traces of criminal offence or will obstruct the proceedings by influencing the witnesses or accomplices; (c) there are circumstances indicating that he or she will repeat the criminal offence or will finalise the commenced criminal offence or will commit the criminal offence he or she threatened to commit; (d) detention was necessary in order for criminal proceedings to be conducted without obstructions, and it relates to a criminal offence for which the legislation provides for a prison sentence of at least ten years or more, and which is particularly grave due to the manner in which it was committed or its consequences; and (e) duly summoned defendant avoids to appear at a hearing.

36. Article 259 sets out details as regards gathering information from citizens. It provides, *inter alia*, that a person who did not comply with the summons can be brought in by force only if he or she has been warned in that regard in the summons. It also provides that the person who gave a statement can object to the contents (*može staviti primjedbe*) of the official report or the minutes, which the police must note therein.

37. Article 264 § 1 provides, *inter alia*, that authorised police officers can deprive someone of liberty if there is any of the reasons for ordering detention as set out in Article 175. They must immediately inform the state prosecutor thereof, make an official report specifying the time and place of deprivation of liberty, and take that person to the state prosecutor without delay.

38. Article 502 § 1 provides, *inter alia*, that an individual who was deprived of liberty due to an error or unlawful work of a body is entitled to compensation of damage.

39. Article 216 § 1 provides that time-limits are calculated in hours, days, months and years.

F. Obligations Act (*Zakon o obligacionim odnosima*; published in OGM nos. 047/08, 004/11, and 022/17)

40. Section 151 provides for various legal remedies, including claims aimed at finding a violation and awarding compensation for pecuniary and non-pecuniary damage.

41. Section 207 provides that personal rights (*prava ličnosti*) include the right to physical and psychological integrity, and the right to liberty, right to honour, reputation, and dignity.

42. Section 210a provides for a just monetary compensation in case of a violation of personal rights, depending on the gravity of the violation and circumstances of the case, and regardless of compensation of pecuniary damage.

G. Ombudsperson Act (*Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore*; published in OGM nos. 042/11, 032/14, and 021/17)

43. Sections 20, 22, 41 and 42, taken together, provide that the Ombudsperson performs his or her function by criticising, giving indications, warnings, suggestions, and recommendations.

H. Internal Affairs Act (*Zakon o unutrašnjim poslovima*, published in OGM nos. 044/12, 036/13, 001/15, and 087/18)

44. Sections 112 and 113 provide that the civic control of police is performed by the Council for Civic Control of Police. The Council gives its findings and recommendations to the Minister of Interior, who must inform the Council about the measures undertaken.

I. Relevant domestic practice

45. Between 14 May 2012 and 31 January 2018 the domestic courts issued a number of judgments in favour of claimants in civil proceedings against the State for unjustified (*neosnovano*) deprivation of liberty, including the following: Gž.br.3924/12-11, Gž.br. 347/2012-11, Rev.br.696/16, Rev.br.774/16, Rev.br.1313/16, Rev.br.457/17, Rev.br.45/17, Rev.br.1358/17, and Rev.br.1522/17. At least two of them were cases of arrest and pre-trial detention in the context of criminal investigation (Gž.br.3924/12-11 and Gž.br. 347/2012-11). The courts, in substance, found violations of the claimants' right to liberty, and awarded damages referring to Article 502 § 1 of the CPC and section 207 of the Obligations Act, or their equivalents from the earlier CPC and Obligations Act, which had been in force at the relevant time.

THE LAW

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

46. The applicant complained under Article 5 § 1 of the Convention about having been unlawfully *de facto* deprived of liberty. The relevant Article reads as follows:

Article 5

"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. Admissibility

1. The parties' submissions

47. The Government maintained that the applicant had not exhausted all available domestic remedies. Notably, shortly before lodging an application with the Court he had instituted civil proceedings for unlawful deprivation of liberty. This was an effective domestic remedy, as demonstrated by the relevant domestic case-law (see paragraph 45 above). The applicant's attempt to differentiate between an "unlawful deprivation of liberty" and a "violation of the right to liberty" was confusing. He had lodged a claim for "unlawful deprivation of liberty", complaining about the police conduct and the deprivation of liberty, which were the subject of the application. Even though not directly connected, the domestic court's ruling in favour of the applicant in respect of his right to defence (see paragraph 27 above) proved that the civil proceedings were an effective domestic remedy. The Government also submitted that the applicant's failure to inform the Court about the ongoing civil proceedings amounted to an abuse of the right to petition.

48. The applicant submitted that he had complained to the Council for Civic Control of Police and the Ombudsperson, and had lodged a constitutional appeal, thereby exhausting all available domestic remedies. There were no other remedies after the Constitutional Court's decision, but to address the Court. He acknowledged that he had instituted civil proceedings, but claimed that they were not for unlawful deprivation of

liberty, but were related to the violation of his right to liberty, and his honour and reputation.

2. The Court's assessment

(a) Exhaustion of domestic remedies

49. The relevant principles as regards the exhaustion of domestic remedies are set out in, for example, *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, § 69-77, 25 March 2014). In particular, the purpose of Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are exempted from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (ibid., § 70).

50. The Court reiterates that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose, for the purpose of fulfilling the requirement of exhaustion of domestic remedies, a remedy which addresses his or her essential grievance. When one remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, §177, 25 June 2019 and the authorities cited therein).

51. Domestic remedies have not been exhausted when an appeal is not accepted for examination because of a procedural mistake by the applicant. However, non-exhaustion of domestic remedies cannot be held against him if, in spite of his failure to observe the forms prescribed by law, the competent authority has nevertheless examined the substance of the appeal (see *Gäfgen v. Germany* [GC], no. 22978/05, § 143, ECHR 2010). Article 35 § 1 will be complied with where an appellate court examines the merits of a claim even though it considers it inadmissible (see *Voggenreiter v. Germany* (dec.), no. 47169/99, 28 November 2002, and *Thaler v. Austria* (dec.), no. 58141/00, 15 September 2003).

52. Turning to the present case, the Court firstly reiterates that in principle the Ombudsperson cannot be considered as an effective remedy, in particular due to the non-binding nature of the advice given (see *Lehtinen v. Finland* (dec.), no. 39076/97, ECHR 1999-VII, and *Jasar v. the former Yugoslav Republic of Macedonia* (dec.), no. 69908/01, 11 April 2006). The Court notes that as a rule under Montenegrin law the Ombudsperson is not empowered to address binding decisions to the Government, but only to formulate recommendations, which is also the case

with the Council for Civic Control of Police (see paragraphs 43 and 44 above).

53. Noting that the applicant's complaint under Article 5 § 1 is that his deprivation of liberty on 13 September 2017 was unlawful, the Court observes that a claim under the relevant provisions of the Obligations Act and the CPC can result in an express acknowledgement of such unlawfulness and in a consequent award of compensation, as demonstrated by the relevant domestic case-law (see paragraphs 30, 38, 40-42, and 45 above). Under the Court's case-law, such a remedy can in principle provide adequate redress, if the situation alleged to amount to a breach of Article 5 § 1 of the Convention has come to an end (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008, and, *mutatis mutandis*, *Tsonev v. Bulgaria* (dec.), no. 9662/13, § 58, 30 May 2017), as in the applicant's case. Indeed the applicant has instituted civil proceedings alleging a violation of his right to liberty and claiming damages in that respect, relying on Article 5 § 1 of the Convention (see paragraph 21 above). In doing so, he referred to the same evidence as before this Court.

54. However, before filing his civil claim the applicant had made use of a constitutional appeal, the latter being an effective legal remedy in Montenegro (see *Siništaj and Others v. Montenegro*, nos. 1451/10 and 2 others, § 123, 24 November 2015). The relevant domestic legislation provides that a constitutional appeal can be lodged only after all other effective legal remedies have been exhausted, unless the appellant proves that a particular remedy is not or would not be effective in the particular case (see paragraph 31 above). In the applicant's case, however, the Constitutional Court did not examine the issue of existence and/or prior exhaustion of other effective domestic legal remedies but proceeded to the merits of his constitutional appeal and found that his deprivation of liberty had been lawful. The question arises, therefore, whether in such circumstances the applicant has exhausted domestic remedies in accordance with Article 35 of the Convention.

55. The respondent Government have not submitted any domestic case-law demonstrating the effectiveness of the compensation remedy in such a specific situation, when the Constitutional Court has already decided before the civil court. The Court considers that the Constitutional Court's going into the examination of the merits implies that, for one reason or another, it considered that the applicant was not required to make use of any prior remedies, the civil claim included. In these circumstances, the Court considers that it would be unduly formalistic to require the applicant to exercise a remedy which even the highest court of the country concerned had not obliged him to use (see, *mutatis mutandis*, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 28 and 117-118, ECHR 2007-IV). Furthermore, the Court considers that in a situation when

the Constitutional Court already examined the merits of the complaint concerning the lawfulness of the applicant's deprivation of liberty, it cannot be said that the national authorities have not been given the opportunity to put matters right through the national legal system. The fact that the civil proceedings are still pending cannot affect this conclusion.

56. In view of the specific circumstances of the present case, the Court concludes that the application cannot be rejected for failure to exhaust domestic remedies. That being so, the Government's objection in this regard must be dismissed.

(b) Abuse of the right of application

57. The relevant principles as regards the abuse of the right of application are set out, for example, in *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014. In particular, the submission of incomplete and therefore misleading information may amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information.

58. Turning to the present case, the Court notes that the applicant did not inform the Court in his application that he had instituted civil proceedings but acknowledged it only in his observations in reply to those of the Government. However, given its conclusion as regards the exhaustion of domestic remedies, the Court considers that the information in question did not concern the very core of the case. That being so, the Court considers that the circumstances of the present case are not those that would justify a decision to declare the application inadmissible as an abuse of the right of application. It follows that the Government's objection in this regard must also be dismissed.

(c) The Court's assessment

59. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

60. The applicant submitted that he had been deprived of liberty without a court's decision to that effect and without any legal grounds from Article 175 of the CPC. The official report wrongly stated that he had been arrested in the police station, as he had been deprived of liberty in front of the Court of First Instance. He could not have objected to or appealed against the report as the CPC provided for no such possibility. He further maintained

that it was not true that he had not complied with the police summons and submitted that the time-limit "at once", specified therein, did not exist.

61. The Government maintained that the SPO's requesting the police to find the applicant and deprive him of liberty had been in accordance with the domestic legislation, as there had been a reasonable suspicion that he had been hiding after having committed an offence. He had not been taken to the police station by force but had voluntarily accepted, probably for practical reasons, to be transported there to give a statement. He had been deprived of liberty after having given his statement, at 10h40, which was specified in the official report, to which he had not objected.

62. In the Government's view, all the facts relating to the event in question and all the other relevant circumstances needed to be clarified in the domestic proceedings, which were currently stayed. The Government therefore considered that neither them nor the Court could go into the merits for the time being, as that would prejudge the decision that should be issued by the domestic courts. Were it otherwise the Court would take over the role of the national court, which was contrary to the fundamental principles of the Convention.

2. The Court's assessment

63. The Court reiterates its established case-law to the effect that Article 5 § 1 may also apply to deprivations of liberty of a very short length (see, among many authorities, M.A. v. Cyprus, no. 41872/10, § 190, ECHR 2013).

64. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law (*Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 135, 4 December 2018, and *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 74, 22 October 2018).

65. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness"

set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (*Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 91-92, 15 December 2016, and *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013, with further references).

66. Turning to the present case, the Court notes that Article 259 of the CPC provides, *inter alia*, that a person who did not comply with the summons can be brought in by force only if he or she was warned in that regard in the summons (see paragraph 36 above). While the summons in the applicant's case contained the said warning it also indicated that the applicant had to come "at once". The Court considers that such wording did not give the applicant a prior opportunity to comply with the summons on his own. While the parties disagree as to whether the applicant complied with the summons voluntarily or was taken by the police, the domestic court found that the police officers had taken him by his arms into their vehicle and then to the police station (see paragraph 27 *in fine* above). The Court thus finds it established that the applicant was brought to the police by force contrary to Article 259 § 1 of the CPC, which constituted his *de facto* deprivation of liberty.

67. It is further noted that the applicant was officially deprived of liberty at 10h40 by the official report issued by the police following the state prosecutor's request to that effect. Pursuant to Article 264 § 1 of CPC police officers can deprive a person of liberty if there are reasons for detention set out in Article 175 of CPC (see paragraph 35 above). However, the said report referred only to the criminal offence the applicant was suspected of, without indicating any of the legal grounds specified in Article 175 of the CPC for deprivation of liberty. The Court also notes that the applicant is a practising attorney and that the Bar Act explicitly provides that a practicing attorney can be deprived of liberty for criminal offences related to his or her practice only pursuant to a relevant court's decision (see paragraph 32 above). It is undisputed by the Government that such a decision did not exist in the applicant's case. Therefore, even if the police had indicated one of the grounds listed in Article 175 of the CPC, the applicant's deprivation of liberty would still have been unlawful.

68. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1, failure to comply with domestic law entails a breach of the Convention, and the Court can and should therefore review whether this law has been complied with (*Mooren v. Germany* [GC], no. 11364/03, § 73, 9 July 2009). In view of the above, the Court finds that the applicant's deprivation of liberty was not in compliance with Articles 259 and 264 of the CPC and section 23 of the Bar Act, and thus was unlawful. The foregoing considerations are

sufficient to enable the Court to conclude that there has been a violation of Article 5 § 1 (c) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

69. The applicant complained under Article 13 of the Convention that he had had no effective domestic remedy for his unlawful deprivation of liberty.

70. The Government contested his complaint.

71. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

72. As already noted, a constitutional appeal is an effective domestic remedy in Montenegro (see *Siništaj and Others*, cited above, § 123) and the applicant made use of it, explicitly complaining about the lawfulness of his deprivation of liberty. The Constitutional Court decided it had jurisdiction to rule on this complaint and it duly examined it on the merits. Quite apart from whether the applicant's complaint before this Court falls to be examined under Article 13 in view of the fact that Article 5 (4) would normally be *lex specialis* (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009) in respect of issues related to detention, the Court recalls that, in any event, Article 13 does not require the certainty of a favourable outcome in respect of any proceedings made use of domestically (see *Amann v. Switzerland* [GC], no. 27798/95, § 88, ECHR 2000-II) including before the Constitutional Court. In view of those circumstances the Court considers that the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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."

74. The applicant claimed no damages, either pecuniary or non-pecuniary, nor costs and expenses. That being so the Court makes no award.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 5 § 1 concerning the lawfulness of the applicant's deprivation of liberty admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 20 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President