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

FIFTH SECTION

CASE OF MOOREN v. GERMANY

(Application no. 11364/03)

JUDGMENT

STRASBOURG

13 December 2007

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 Mooren v. Germany,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 20 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 11364/03) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Burghard Theodor Mooren ("the applicant"), on 26 March 2003.

2. The applicant, who had been granted legal aid, was represented by Mr D. Hagmann, a lawyer practising in Mönchengladbach. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. The applicant complained that, in the proceedings for review of his pre-trial detention, the Court of Appeal, by remitting his case back to the court of first instance instead of quashing the detention order which it had found not to comply with domestic law, had unlawfully deprived him of his liberty and had unduly delayed the judicial review proceedings. Furthermore, he claimed that his defence counsel had been refused access to the investigation files. He relied, in particular, on Article 5 of the Convention.

4. On 27 October 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963. At the date the application was lodged, he was living in Mönchengladbach.

1. The District Court's detention order

6. On 25 July 2002 the applicant was arrested.

7. On the same day the Mönchengladbach District Court, after hearing representations from the applicant, ordered his detention on remand. The applicant was assisted from this point on by counsel. The District Court found that there was a strong suspicion that the applicant had evaded taxes on some twenty occasions between 1996 and June 2002. He had been working as a self-employed commercial agent for several firms in Germany since 1994 and been running a telephone service since 2000. In 2001 the company TMA Aachen had paid him commission amounting to 124,926.22 Deutschmarks (DEM). The court found that, according to the documents before it at that date, the applicant was suspected of having evaded turnover taxes of 57,374 euros (EUR), income taxes of EUR 133,279 and trade taxes of EUR 20,266.

8. The District Court noted that the applicant, who had availed himself of the right to remain silent, was strongly suspected of tax evasion on the basis of the business records that had been seized when his home was searched. He had to be placed in pre-trial detention because of a danger of collusion (*Verdunkelungsgefahr*) (see section 112 § 2 no. 3 of the Code of Criminal Procedure – paragraph 41 below). The documents seized were incomplete. There was therefore a risk that the applicant, if released, might destroy the missing documents or conceal further business transactions and accounts.

2. The District Court's review of the detention order

9. On 7 August 2002 the applicant, represented by counsel, lodged a motion for review of his detention order (*Haftprüfung*) with the Mönchengladbach District Court. His counsel also requested access to the case files. He argued that he had a right to inspect the files in order to examine all the facts and evidence on which the arrest warrant and, in particular, the strong suspicion that an offence had been committed were based and that domestic law prohibited the court from considering facts and evidence to which defence counsel had been refused access pursuant to section 147 § 2 of the Code of Criminal Procedure (see paragraph 44 below).

10. On 12 August 2002 the Mönchengladbach Public Prosecutor's Office informed the applicant's counsel that he was being refused access to the case files pursuant to section 147 § 2 of the Code of Criminal Procedure as access would jeopardise the purpose of the investigation. It added, however, that the public prosecutor in charge of the case was prepared to inform counsel orally about the facts and evidence. The applicant's counsel did not take up that offer.

11. On 16 August 2002 the Mönchengladbach District Court heard representations from the applicant and his defence counsel. The applicant argued that there was no risk of collusion or of his absconding. Should the court nevertheless consider that he might abscond if released he was ready to comply with any conditions imposed by the court, such as handing over his identity papers. The applicant's counsel complained that he had still not had access to the case files.

12. By an order of the same day, the Mönchengladbach District Court, which had before it the case files of the proceedings, upheld the arrest warrant. It found that there was still a risk that, if released, the applicant would tamper with factual evidence or interfere with witnesses. The applicant had so far tried to conceal his true place of residence and other personal details from the authorities and had acted with the intent to mislead which, in the particular circumstances of the case, proved that there was a danger of collusion.

3. The Regional Court's review of the detention order

13. Following the applicant's appeal, which was lodged on 16 August 2002 and was followed up by detailed reasons on 19 August 2002, the Regional Court informed the applicant in a letter dated 27 August 2002 that it considered that the risk of his absconding could serve as a ground for his continued detention. As to his counsel's request for access to the case files, it stated that he should be informed orally about the content of the files in the first instance.

14. In a letter dated 2 September 2002, the applicant contested that view. He claimed, in particular, that in his case mere oral information about the content of the case files would not be sufficient.

15. On 9 September 2002, after hearing representations from the Public Prosecutor's Office and considering the case files, the Mönchengladbach Regional Court dismissed the applicant's appeal against the District Court's decision dated 16 August 2002. It found that there was a strong suspicion that the applicant had evaded income, turnover and trade taxes. Furthermore, there was a danger of his absconding within the meaning of section 112 § 2 no. 2 of the Code of Criminal Procedure (see paragraph 41 below), as the applicant had connections in foreign countries and faced a heavy sentence.

16. In view of defence counsel's refusal to accept the offer made by the Public Prosecutor's Office to explain the content of the case files orally, the Regional Court found that it was impossible to assess whether the information given in this manner would be sufficient. At the present stage of the proceedings, counsel for the defence could not, however, claim to be entitled to unlimited access to the complete case files.

17. The Regional Court's decision was served on the applicant's counsel on 16 September 2002.

4. The Court of Appeal's review of the detention order

18. On 16 September 2002 the applicant, represented by counsel, lodged a further appeal against the detention order. He again claimed that he had a constitutional right to be given access to the facts and evidence on which the detention order was based.

19. On 17 September 2002 the Mönchengladbach Regional Court decided, without giving further reasons, not to amend its decision of 9 September 2002. On 18 September 2002 the Mönchengladbach Public Prosecutor's Office, which had the case files, drafted a report which was sent to the Düsseldorf Chief Public Prosecutor's Office with the files the next day.

20. On 26 September 2002 the Chief Public Prosecutor's Office, in its submissions to the Düsseldorf Court of Appeal, stated that it was not prepared to give the applicant access to the case files. It argued that it was sufficient for the applicant to be notified of the overview of the Düsseldorf Tax Fraud Office on the amount of his income and amount of the taxes evaded in the years in question. The submissions and the case files reached the Düsseldorf Court of Appeal on 2 October 2002.

21. On 2 October 2002 the applicant sent further observations to the Düsseldorf Court of Appeal.

22. On 9 October 2002 the applicant, who had been sent the submissions of the Chief Public Prosecutor's Office on 7 October 2002, contested its arguments. He stated that the overview was merely a conclusion of the Tax Fraud Office the merits of which he could not examine without having access to the documents and records on which it was based.

23. On 14 October 2002 the Düsseldorf Court of Appeal, on the applicant's further appeal, quashed the District Court's decision dated 16 August 2002 and the Regional Court's decision dated 9 September 2002 upholding the applicant's detention, and remitted the case to the District Court.

24. The Court of Appeal, which had the investigation files before it, found that the detention order issued by the District Court on 25 July 2002 did not comply with the legal requirements. Therefore, the decisions taken in the judicial review proceedings by the District Court on 16 August 2002 and by the Regional Court on 9 September 2002 (but not the detention order

of 25 July 2002 itself) had to be quashed. Pursuant to section 114 § 2 of the Code of Criminal Procedure (see paragraph 42 below), the facts leading to a strong suspicion that the accused had committed a particular offence and the reasons for detention had to be set out in the detention order. In order to comply with the constitutional rights to be heard and to a fair trial, the facts and evidence on which the suspicion and the reasons for the defendant's detention on remand were based had to be described in sufficient detail to enable the accused to comment on them and defend himself effectively.

25. The Court of Appeal noted that, in its decisions on the applicant's detention, the District Court had, however, merely stated that the applicant was strongly suspected of tax evasion "on the basis of the business records seized when his home was searched". It should, at minimum, have summarised the results of the evaluation of those records in order to enable the accused to oppose the decision on detention by making his own submissions or presenting evidence. This defect had not been remedied in the course of the subsequent decisions on the applicant's continued detention. As counsel for the defence had also been refused access to the case files under section 147 § 2 of the Code of Criminal Procedure, these defects amounted to a denial of the right of the accused to be heard.

26. The Court of Appeal declined to take its own decision on the applicant's detention itself pursuant to section 309 § 2 of the Code of Criminal Procedure (see paragraph 43 below) or to quash the detention order of 25 July 2002, which it considered to be defective in law (*rechtsfehlerhaft*), but not void (*unwirksam*). It stated that it would only quash the detention order if it was obvious that there was no strong suspicion that the accused had committed an offence and that there were no reasons for the arrest. It was for the District Court to inform the accused of the reasons on which the suspicion of his having committed an offence were based and to hear representations from him on that issue. Should the Public Prosecutor's Office persist, in the interest of its investigations, in not informing the accused of the reasons, the detention order would have to be quashed.

27. As a consequence, the applicant remained in custody.

5. Fresh proceedings before the District Court

28. On 17 October 2002 the Mönchengladbach Public Prosecutor's Office requested the District Court to issue a fresh amended detention order against the applicant.

29. On 29 October 2002 the Mönchengladbach District Court again heard representations from the applicant, his defence counsel, the Public Prosecutor's Office and an official in charge of investigations at the Düsseldorf Tax Fraud Office on the applicant's motion for judicial review of the detention order. The applicant's counsel was given copies of four pages of the voluminous case files containing an overview by the Düsseldorf Tax

Fraud Office of the amounts of income and taxes evaded by the applicant between 1991 and 2002. Relying on the applicant's rights to be heard and to a fair trial, the applicant's counsel complained that he had not been granted access to the case files before the hearing.

30. The Mönchengladbach District Court then issued a fresh detention order against the applicant. It stated that there was a strong suspicion that the applicant had evaded taxes on some twenty occasions between 1991 and June 2002. Listing in detail the applicant's income from his various activities as a self-employed commercial agent and the amounts of tax payable, the District Court found that there was a strong suspicion that he had evaded turnover taxes of DEM 125,231.79, income taxes of DEM 260,025, solidarity taxes of DEM 15,240.11 and trade taxes of DEM 36,930. It based its suspicion on documents whose content was explained by a tax official present at the hearing, witness statements of the owners of the firms the applicant was working for, the applicant's contracts of employment and the wage slips and commission statements that had been issued by the firms.

31. The District Court further found that there was a risk of the applicant's absconding, which was a ground for detention under section 112 § 2 no. 2 of the Code of Criminal Procedure. He faced a lengthy prison sentence which could no longer be suspended on probation, had not notified the authorities of his place of residence for several years and had claimed that he was living in the Netherlands.

32. By an order of the same day, the Mönchengladbach District Court decided to suspend the execution of the arrest warrant on condition that the applicant, who in the meantime had complied with his duty to inform the authorities of his address, informed the court of every change of address, complied with all summonses issued by the court, the Public Prosecutor's Office and the police, and reported to the police three times a week. It suspended the execution of the order to release the applicant at the request of the Public Prosecutor's Office, which had immediately lodged an appeal.

6. Renewed proceedings before the Regional Court and further developments

33. On 7 November 2002, after hearing representations from the applicant and the Public Prosecutor's Office, the Mönchengladbach Regional Court dismissed the applicant's appeal against the detention order. It likewise dismissed the appeal lodged by the Public Prosecutor's Office against the decision to suspend the execution of the detention order on the additional conditions that the applicant hand over his identity papers to the Public Prosecutor's Office and deposit DEM 40,000 as security.

34. Having deposited the security, the applicant was released from prison on 7 November 2002.

35. On 8 November 2002 the applicant lodged a further appeal against the Regional Court's decision, complaining that his counsel had still not been granted access to the case files.

36. By a letter dated 18 November 2002, the Mönchengladbach Public Prosecutor's Office granted the applicant's counsel access to the case files. It stated that it had intended to send the files to him at an earlier date. However, this had not been possible as the files had been at the Regional Court and had only recently been returned to the Public Prosecutor's Office. The applicant's counsel received the files for inspection on 20 November 2002. The applicant withdrew his further appeal on 10 December 2002.

7. Proceedings before the Federal Constitutional Court

37. On 23 October 2002 the applicant lodged a complaint with the Federal Constitutional Court against the decision of the Düsseldorf Court of Appeal dated 14 October 2002 and the detention order issued by the Mönchengladbach District Court on 25 July 2002. In his submission, his rights to liberty, to be heard in court and to be informed promptly by a judge of the reasons for his detention on remand as well as his rights to be heard within a reasonable time and to a fair trial as guaranteed by the Basic Law had been violated. He argued in particular that his right to liberty, the deprivation of which was only constitutional if it was in accordance with the law, had been breached by his illegal detention on the basis of a void detention order. The complete refusal to allow his defence counsel access to the case files pursuant to section 147 § 2 of the Code of Criminal Procedure had violated his right to be heard in court as guaranteed by Article 103 § 1 of the Basic Law (see paragraph 45 below) and his right to liberty under Article 104 § 3 of the Basic Law (see paragraph 46 below). The impugned decisions disregarded both the case-law of the Federal Constitutional Court and the Court's case-law as laid down in its judgments of 13 February 2001 in the cases of *Garcia Alva*, *Lietzow* and *Schöps v. Germany*. The Court of Appeal's refusal to quash the detention order and to take a decision itself and its decision to remit the case to the District Court instead had also breached his right to a fair hearing within a reasonable time.

38. On 4 and 11 November 2002 the applicant extended his constitutional complaint to include the decisions of the Mönchengladbach District Court dated 29 October 2002 and the decision of the Mönchengladbach Regional Court dated 7 November 2002.

39. On 22 November 2002 the Federal Constitutional Court, without giving further reasons, declined to consider the applicant's constitutional complaint against the detention orders issued by the Mönchengladbach District Court on 25 July 2002 and 29 October 2002, the decision of the Mönchengladbach Regional Court dated 7 November 2002 and the decision of the Düsseldorf Court of Appeal dated 14 October 2002.

8. Further developments

40. On 9 March 2005 the Mönchengladbach District Court convicted the applicant on eight counts of tax evasion and sentenced him to a total of one year and eight months' imprisonment suspended on probation. The court found that the applicant, who had confessed to the offences, had evaded turnover taxes of DEM 129,795, income taxes of DEM 344,802 and trade taxes of DEM 55,165.

II. RELEVANT DOMESTIC LAW

1. Code of Criminal Procedure

41. Sections 112 et seq. of the Code of Criminal Procedure (*Strafprozessordnung*) concern detention on remand. Pursuant to section 112 § 1 of the Code, a defendant may be detained on remand if there is a strong suspicion that he has committed a criminal offence and if there are grounds for arresting him. Grounds for arrest will exist where certain facts warrant the conclusion that there is a risk of his absconding (section 112 § 2 no. 2) or of collusion (section 112 § 2 no. 3).

42. According to section 114 §§ 1 and 2 of the Code of Criminal Procedure, detention on remand is ordered by a judge in a written arrest warrant. The arrest warrant names the accused, the offence of which he is strongly suspected, including the time and place of its commission, and the grounds for the arrest. Moreover, the facts establishing the grounds for the strong suspicion that an offence has been committed and for the arrest must be set out in the arrest warrant unless national security would thereby be endangered.

43. Under section 117 § 1 of the Code of Criminal Procedure, remand prisoners may ask at any time for judicial review (*Haftprüfung*) of the decision to issue an arrest warrant or for the warrant to be suspended. They may lodge an appeal under section 304 of the Code of Criminal Procedure (*Haftbeschwerde*) against a decision ordering their (continued) detention and a further appeal (*weitere Beschwerde*) against the Regional Court's decision on the appeal (section 310 § 1 of the Code of Criminal Procedure). If the appeal court considers the appeal against the (continued) detention to be well-founded, it will take a decision on the merits at the same time (section 309 § 2 of the Code of Criminal Procedure). However, according to the domestic courts' case-law, a detention order which does not comply with the duty to set out the grounds for suspecting the accused of an offence is not void, but merely defective in law. If, in such a case, the prosecution also refused access to the case file, the defective reasoning amounts to a refusal to hear representations from the defendant. In these circumstances, the court of appeal – by way of an exception to section 309 § 2 of the Code of

Criminal Procedure – may remit the case to the district court (see Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, *Strafverteidiger* (*StV*) 1994, pp. 318-319; compare also Karlsruhe Court of Appeal, no. 3 Ws 196/00, decision of 26 September 2000, *StV* 2001, pp. 118-120, to which the Düsseldorf Court of Appeal referred in the present case).

44. Section 147 § 1 of the Code of Criminal Procedure provides that defence counsel is entitled to consult the files which have been or will be presented to the trial court, and to inspect the exhibits. Paragraph 2 of this provision allows access to part or all of the files or to the exhibits to be refused until the preliminary investigation has ended if it might otherwise be at risk. At no stage of the proceedings may defence counsel be refused access to records concerning the examination of the accused, acts in the judicial investigation at which defence counsel was or should have been allowed to be present or expert reports (section 147 § 3 of the said Code). Pending the termination of the preliminary investigation, it is for the Public Prosecutor's Office to decide whether to grant access to the files or not; thereafter it is for the president of the trial court (section 147 § 5). An accused who is in detention is entitled to seek judicial review of a decision of the Public Prosecutor's Office to refuse access to the files (ibid.).

2. Provisions of the Basic Law

45. According to Article 103 § 1 of the Basic Law every person involved in proceedings before a court is entitled to be heard by that court (*Anspruch auf rechtliches Gehör*).

46. Article 104 § 3 of the Basic Law provides that every person provisionally detained on suspicion of having committed a criminal offence must be brought before a judge no later than the day following his arrest; the judge must inform him of the reasons for the arrest, hear representations from him and give him an opportunity to raise objections. The judge must then, without delay, either issue a written arrest warrant setting out the grounds therefor or order the detainee's release.

THE LAW

I. THE DETENTION ORDER AND THE SUBSEQUENT PROCEEDINGS

47. The applicant complained that the Court of Appeal had failed to quash the District Court's initial detention order of 25 July 2002 and to release him from prison even though it had found that the detention order

was unlawful. By remitting the case to the District Court, the Court of Appeal had unnecessarily delayed the proceedings for judicial review of his detention order, which thus had not been terminated within a reasonable time. He relied on Articles 5 and 6 of the Convention.

48. The Government contested the applicant's view.

49. The Court considers that the applicant's complaints fall to be examined under Article 5 of the Convention alone, which, in so far as relevant, reads:

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

A. Admissibility

1. The parties' submissions

50. The Government argued that several reasons existed for saying that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in respect of this part of the application. The applicant's constitutional complaint to the Federal Constitutional Court, which was an effective remedy in respect of the duration of criminal proceedings, was inadmissible for several reasons, even though that court had not expressly stated this in its decision. The applicant had failed to show that he still had a legal interest in the Constitutional Court's decision on the speediness of the judicial review of his detention order after the Regional Court's decision of 7 November 2002. He had also failed sufficiently to substantiate a violation of his right to judicial review of his detention order within a reasonable time in his constitutional complaint. Moreover, in so far as the applicant also contested the District Court's decision of 29 October 2002 and the Regional Court's decision of 7 November 2002 he had failed to pursue his further appeal to the Düsseldorf Court of Appeal. He had not complained about the length of the

judicial review proceedings as a whole before the Federal Constitutional Court, but only about the Court of Appeal's decision of 14 October 2002 to remit the case to the District Court. In addition, he had not requested a reduction in his prison sentence to compensate for the allegedly excessive length of the proceedings for judicial review of the detention order.

51. The applicant contested this view. He argued that his constitutional complaint had not been inadmissible. Had it been, the Federal Constitutional Court would have expressly said so. He had shown in his complaint that despite his release from custody, he still had a legal interest in the Constitutional Court's ruling. Likewise, he had duly complained about the duration of the judicial review proceedings as a whole, and particularly about the remittal of the case by the Court of Appeal to the court of first instance. He said that the Government had also failed to explain which motion he should have brought in the course of the main criminal proceedings in order to complain about the excessive length of the proceedings for judicial review of the detention order. It was for the criminal courts themselves to secure *ex officio* the compliance of the proceedings with human rights.

2. The Court's assessment

52. The Court notes that, according to the Government, the applicant failed to exhaust domestic remedies with respect to the conduct of the judicial review proceedings as a whole as he only objected to the remittal of the case by the Court of Appeal to the court of first instance. In the Government's submission, he did not complain about the proceedings until the Court of Appeal's decision or pursue the renewed judicial review proceedings before the Court of Appeal.

53. In view of the Government's objections, the Court finds it necessary first to determine the scope of the applicant's complaints before it. The applicant claimed that his detention had been illegal as it had been based on an unlawful detention order and that the Court of Appeal, by remitting the case to the District Court, had unnecessarily delayed the proceedings for judicial review, which therefore were not terminated within a reasonable time. It is true that, as submitted by the Government, the applicant thus considered the procedure followed by the Court of Appeal to be at the root of the delay caused, as the proceedings had to restart in the court of first instance. The conduct of the proceedings by the Court of Appeal cannot, however, be examined in the abstract, but must be considered in the context of the judicial review proceedings as a whole, including both the conduct of the proceedings up to that court's decision and the consequences that decision had on the continuation of the proceedings. The Court is satisfied that the applicant raised his complaint about the conduct of the judicial review proceedings in the manner that has already been referred to in his complaint to the Federal Constitutional Court. Therefore, the Government's

plea of non-exhaustion of domestic remedies must be dismissed in this respect.

54. As to the Government's objection that the applicant's constitutional complaint was inadmissible as he had both failed to substantiate his complaint sufficiently and to show a legal interest in the Constitutional Court's decision on the speediness of the judicial review proceedings, the Court observes that the Federal Constitutional Court declined to consider the applicant's complaint without giving any reasons for its decision. As the Court has already found in comparable cases (see *Süss v. Germany* (dec.), no. 63309/00, 13 October 2005; *Petersen v. Germany* (dec.), nos. 38282/97 and 68891/01, 12 January 2006 and, *a fortiori*, *Uhl v. Germany*, no. 64387/01, 6 May 2004), it is not the function of the Court in such circumstances to substitute itself for the Federal Constitutional Court and to speculate why that court decided not to admit the applicant's complaint. It is notably not for the Court to determine whether or not the Constitutional Court considered or should have considered the applicant's complaint as insufficiently substantiated or as lacking a legal interest and therefore as inadmissible. The Court concludes that the Government's objection of failure to exhaust domestic remedies in this respect must likewise be dismissed.

55. The Government pleaded, lastly, that the applicant had not exhausted domestic remedies in the judicial review proceedings at issue because he had not sought a reduction in his prison sentence in the (main) criminal proceedings to compensate for the allegedly excessive length of the review proceedings. The Court notes that the applicant pursued the proceedings for judicial review of his detention order, which are the only proceedings at issue before the Court, to a conclusion in that he obtained a decision of the Federal Constitutional Court on 22 November 2002. The main criminal proceedings were not part of the proceedings at issue here. It follows that the Government's objection cannot be upheld in this respect either.

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

B. Merits

1. Complaint concerning the lawfulness of the detention

a. The parties' submissions

57. The applicant argued that he had been deprived of his liberty contrary to Article 5 § 1. In its decision of 14 October 2002 the Court of

Appeal had ordered his detention to continue even though it considered the original detention order of 25 July 2002 to be unlawful.

58. In the Government's submission, the applicant's detention was lawful and in accordance with a procedure prescribed by law. They conceded that the arrest warrant of 25 July 2002 did not comply with the formal requirements of section 114 § 2 of the Code of Criminal Procedure, as had been found by the Court of Appeal on 14 October 2002. However, the substantive requirements for issuing the warrant had been met and the Mönchengladbach District Court had issued a new warrant on 29 October 2002 which complied with the procedural requirements of the Code of Criminal Procedure. According to an exception to section 309 § 2 of the Code of Criminal Procedure introduced in the case-law, courts of appeal were entitled to remit a case to the court of first instance if there was a procedural error which the court of appeal could not correct itself.

b. The Court's assessment

i. Relevant principles

59. When stipulating that detention must be "lawful" and "in accordance with a procedure prescribed by law", the Convention essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see, *inter alia*, *Bouamar v. Belgium*, judgment of 29 February 1988, Series A no. 129, p. 20, § 47; *Erkalo v. the Netherlands*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2477, § 52; and *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2735, § 54).

60. Where the Convention refers directly back to domestic law, as in Article 5, compliance with such law is an integral part of the Contracting States' "engagements" and the Court is accordingly competent to satisfy itself of such compliance. The scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Kemmache v. France (no. 3)*, judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, § 37; and *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 753, § 41).

61. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (compare *Bozano v.*

France, judgment of 18 December 1986, Series A no. 111, pp. 23 and 24, § 55 and *Benham*, cited above, p. 753, § 42).

ii. Application of those principles to the present case

62. The Court finds that the applicant's pre-trial detention was ordered for the purpose of bringing him before the competent legal authority on reasonable suspicion that he was guilty of tax evasion. Accordingly, his detention falls under Article 5 § 1 (c) of the Convention.

63. It remains to be established whether the applicant's detention, in view of the Court of Appeal's finding and the referral of the case back to the court of first instance, was lawful and in accordance with a procedure prescribed by law within the meaning of Article 5 § 1. The Court notes that the Court of Appeal itself found in its decision of 14 October 2002 that the detention order of 25 July 2002 failed to comply with the formal requirements of section 114 § 2 of the Code of Criminal Procedure. However, this finding did not, according to the Court of Appeal, render the initial detention order of 25 July 2002 void and did not retrospectively render the applicant's detention from 25 July 2002 until 14 October 2002 unlawful. According to the case-law of the domestic courts (see paragraph 43 above), there was a distinction between detention orders – such as the one in the applicant's case – which, though defective on formal grounds, remained a valid basis for detention until replaced, and orders which – notably for lack of compliance with the substantive requirements of the provisions on pre-trial detention – were void. As a consequence, the applicant's detention from 25 July 2002 until the fresh detention order of 29 October 2002, which was issued in compliance with the formal requirements of section 114 § 2 of the Code of Criminal Procedure, was not unlawful under German law, as it was based on the initial detention order of 25 July 2002. It being in the first place for the national authorities to interpret domestic law, the Court is prepared to accept that the applicant's pre-trial detention remained lawful under domestic law and in accordance with a procedure prescribed by law even after the Court of Appeal considered the initial detention order to have been defective for lack of sufficient reasons.

64. For the applicant's detention to comply with Article 5 further requires the absence of arbitrariness. In this connection, the Court notes that the Court of Appeal's decision not to rule on the merits of the applicant's request for review of his detention order itself, but to remit the case to the court of first instance contrary to the wording of section 309 § 2 of the Code of Criminal Procedure, led to uncertainty. However, the Court of Appeal's finding that the applicant had to be informed by the court of first instance of the reasons for suspecting him of an offence and had to be allowed to make representations on that subject necessitated practical arrangements to be made. In these circumstances, the lapse of time between the Court of

Appeal's decision and the issuing of the new detention order on 29 October 2002 cannot be considered as rendering the applicant's detention arbitrary (compare also *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 21, § 49 and *Erkalo*, cited above, p. 2478, § 57).

65. Consequently, there has been no violation of Article 5 § 1 of the Convention.

2. Complaint of the lack of a speedy judicial review

a. The parties' submissions

66. The applicant claimed that the decisions on his request for judicial review of his detention order were not taken within a reasonable time as required by Article 6 § 1 of the Convention. In particular, on 14 October 2002 the Düsseldorf Court of Appeal remitted the case to the District Court, instead of taking a decision itself on his further appeal. As the Court of Appeal itself found, the District Court's initial detention order of 25 July 2002 was not lawful. The Court of Appeal should therefore have quashed that detention order and ordered the applicant's release. Its failure to do so had unnecessarily delayed the review proceedings.

67. The Government submitted that the lawfulness of the applicant's detention had been decided speedily in the judicial review proceedings before the German courts as required by Article 5 § 4. The proceedings, which involved complex charges of tax evasion, had been terminated speedily by the Mönchengladbach District Court and the Mönchengladbach Regional Court. In particular, in view of the speedy decision-making process, the delay of one week between the Regional Court's decision and the day the decision was served on the applicant's counsel did not render the proceedings as a whole unreasonably slow. The Government further argued that in view of the necessary involvement of the Chief Public Prosecutor's Office, the proceedings before the Düsseldorf Court of Appeal had still been terminated quickly, in twenty-eight days. The Mönchengladbach District Court, to which the case had been remitted, had then issued a fresh detention order in only two weeks.

68. The Government conceded that there had been a delay in the proceedings owing to the fact that the initial detention order had not been issued in the form prescribed by law, which led to the case being remitted to the District Court. However, as the subsequent proceedings had been conducted very speedily before the District Court and the Regional Court, they still complied with the requirements of Article 5 § 4. In the present case, the Court of Appeal had considered that there had been a procedural error which it could not correct itself as the applicant had been denied the right to make representations. As it had remitted the case to the District Court, the applicant had retained a right of appeal to two higher courts.

b. The Court's assessment

i. Relevant principles

69. The Court reiterates that Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II; *Baranowski v. Poland* [GC], no. 28358, § 68, ECHR 2000-III; and *G.B. v. Switzerland*, no. 27426/95, § 32, 30 November 2000). The question whether the right to a speedy decision has been respected must – as is the case for the "reasonable time" stipulation in Articles 5 § 3 and 6 § 1 of the Convention – be determined in the light of the circumstances of each case (see *G.B. v. Switzerland*, cited above, § 33; and *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII).

ii. Application of those principles to the present case

70. As to whether the applicant received a speedy decision by a court in the proceedings reviewing the lawfulness of his detention as required by Article 5 § 4, the Court notes that the period to be taken into consideration started on 7 August 2002 when the applicant filed his request for judicial review of the detention order. In view of the fact that the applicant's complaint essentially concerns the Court of Appeal's decision to remit the case to the court of first instance instead of taking its own decision on the lawfulness of the detention order, the period under consideration must be considered as having ended on 29 October 2002, when the District Court (rather than the Court of Appeal) issued a fresh detention order against the applicant. Thus, two months and twenty-two days elapsed between the applicant's request and the District Court's decision.

71. Having regard to the various stages of the judicial review procedure, the Court observes that when the applicant lodged his further appeal with the Court of Appeal on 16 September 2002, the proceedings had been pending before the District Court for nine days and before the Regional Court for thirty-one days. In the latter proceedings, there had notably been a delay of seven days between the date on which the decision was taken by the Regional Court and that on which it was served on the applicant's counsel. The proceedings then stood pending for twenty-eight days before the Court of Appeal, including the period of fourteen days it had taken to obtain the case-files and consult the Chief Public Prosecutor's Office. The Court of Appeal quashed the previous decisions taken in the judicial review proceedings on 14 October 2002 and decided to remit the case to the court of first instance without taking a decision on the merits of the applicant's

request. As a consequence, another fifteen days elapsed before the District Court gave its decision on the merits of the applicant's request.

72. The Court observes that there were no substantial periods of inactivity in the judicial review proceedings concerning the applicant's detention on suspicion of a number of tax evasion offences. However, where an individual's personal liberty is at stake, the Court has set up strict standards concerning the States' compliance with the requirement that the decision on the lawfulness of a person's detention be taken “speedily”. In the case of *Rehbock* (cited above, §§ 84-88), for example, the Court found that a period of twenty-three days for a domestic court to decide a remand prisoner's request for release failed to comply with the requirement of a speedy decision as guaranteed by Article 5 § 4. Similarly, the Court held in the case of *G.B. v. Switzerland* (cited above, §§ 27, 32-39) that in proceedings brought by a remand prisoner for release, in which it took the Federal Attorney and the Federal Court a total of thirty-two days to take their decision on the applicant's request, the review had not been “speedy” within the meaning of Article 5 § 4.

73. At the time the Court of Appeal took its decision, the judicial review proceedings had already been pending for two months and seven days before the domestic courts. As that court quashed all the decisions that had been taken up to that point in the judicial review proceedings and remitted the case to the District Court, it was only two months and twenty-two days after lodging his request that the applicant, after making due representations, obtained a decision that complied with the requirements of domestic law on the merits of his request. Having regard to the time it took for the Court of Appeal to reach its decision, the Court finds that the remittal caused an unjustified delay in the proceedings. It notes in this connection that the Government argued that, by remitting the case, the Court of Appeal had preserved the applicant's right to make representations before two levels of jurisdiction. However, as the applicant could, according to section 117 § 1 of the Code of Criminal Procedure (see paragraph 43 above), restart judicial review proceedings at any time, the Court is not convinced that this justified the delays caused by the remittal.

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

II. THE REFUSAL TO GRANT THE APPLICANT'S COUNSEL ACCESS TO THE CASE FILES

75. The applicant further complained that in the proceedings for the review of his detention pending trial, his counsel was refused access to the case files, which made it impossible for him to defend himself effectively. He relied on Articles 5 and 6 of the Convention.

76. The Government contested that argument.

77. The Court considers that this complaint falls to be examined under Article 5 of the Convention alone which, in so far as relevant, provides:

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

A. Admissibility

1. The parties' submissions

78. The Government argued that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention in respect of this part of the application either. He had failed to lodge with the Regional Court a separate motion for judicial review of the Public Prosecutor's decision not to grant his counsel access to the case files pursuant to section 147 § 5, second sentence, of the Code of Criminal Procedure. Even though the Regional Court had found that the District Court's detention order did not have to be quashed despite the refusal to grant access to the case files, such a separate motion for judicial review of the Public Prosecutor's decision not to grant access to the case files would not necessarily have been futile, and the applicant could subsequently have complained to the Federal Constitutional Court.

79. In the Government's submission, this part of the application was, moreover, incompatible *ratione personae* with the Convention as the applicant had lost his status as a victim of a violation of the Convention within the meaning of Article 34 of the Convention. In its decision of 14 October 2002, the Düsseldorf Court of Appeal had expressly found that the refusal to grant the applicant's counsel access to the case files, at least in connection with the lack of a precise statement of the underlying reasons for the arrest and the evidence relied on in the detention order of 25 July 2002, had breached the applicant's right to be heard. The applicant had been granted redress in that an arrest warrant complying with the statutory requirements had been issued on 29 October 2002. Moreover, his counsel had been granted access to the case files at a time when, despite the applicant's conditional release from detention, the proceedings for judicial review of his detention order were still pending.

80. The applicant contested that view. As to the Government's plea of non-exhaustion, he argued that it had not been necessary for him to lodge a separate request for judicial review of the prosecution's decision not to grant him access to the case files pursuant to section 147 § 5 of the Code of Criminal Procedure. He had applied for his arrest warrant to be quashed, arguing that he had not had access to the case files. His request for judicial review of the Public Prosecutor's decision not to grant his counsel access to

the files had therefore been included in his request for judicial review of the detention order. Accordingly, the Regional Court, which would also have had jurisdiction to consider a separate motion for judicial review under section 147 § 5 of the Code of Criminal Procedure, had addressed his request for access to the case files in its decision reviewing the detention order.

81. The applicant further denied that he had lost his victim status as a result of the Court of Appeal's decision of 14 October 2002. The Court of Appeal had found the detention order to be defective as he had not been properly informed of the facts and evidence on which his detention was based. However, the court's finding had not had any consequences, as he had not been released from prison and his counsel had not been granted access to the case files as requested without delay.

2. The Court's assessment

82. As to the Government's plea of non-exhaustion, the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are available and sufficient in the domestic legal system to afford redress for the violation complained of (compare *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 11, § 19; *Iatridis v. Greece* [GC], no. 31107/96, § 47, ECHR 1999-II and *İlhan v. Turkey* [GC], no. 22277/93, § 58, ECHR 2000-VII). It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, judgment of 19 September 1996, *Reports* 1996-IV, p. 1211, § 68; and *Horvat v. Croatia*, no. 51585/99, § 39, ECHR 2001-VIII). Thus, an applicant cannot be criticised for not having made use of a legal remedy which would have been directed to essentially the same end as the proceedings the applicant pursued to a conclusion and which moreover would not have had a better prospect of success (compare *Iatridis*, cited above, § 47; and *Miailhe v. France (No. 1)*, judgment of 25 February 1993, Series A no. 256-C, p. 87, § 27).

83. The Court observes that the applicant in the present case primarily sought to have the lawfulness of his detention reviewed. It was in this connection, namely in the proceedings for judicial review of his detention order, that he argued, *inter alia*, that he was not in a position effectively to

defend himself without his counsel being granted access to the case files, and that, therefore, his right to be heard and his right to liberty were breached. Accordingly, in the course of these review proceedings, which he pursued to a conclusion, the Regional Court, as well as the Court of Appeal, dealt with the applicant's complaint about the refusal to grant his counsel access to the case files. He also raised this issue in his complaint to the Federal Constitutional Court.

84. The Court notes that additional proceedings for judicial review of the decision not to grant the applicant's counsel access to the case files under section 147 § 5 of the Code of Criminal Procedure would not have been capable of providing redress in respect of the alleged unlawfulness of the detention order. Such proceedings could therefore only have afforded redress in respect of one aspect of the violation the applicant complained of. Moreover, both the Regional Court, which would have had jurisdiction to hear a motion under section 147 § 5 of the Code of Criminal Procedure, and the Federal Constitutional Court were called to examine the applicant's complaint about the refusal to let his counsel inspect the files in the proceedings for judicial review of the detention order. In these circumstances, the Court is not convinced by the Government's submission that an additional motion for judicial review under section 147 § 5 of the Code of Criminal Procedure would have been an effective remedy offering reasonable prospects of success against the refusal to grant the applicant's counsel access to the files or, therefore, one which the applicant should have exhausted. The fact that the applicant withdrew his further appeal on 10 December 2002 (see paragraph 36 above) does not warrant a different conclusion on the question of exhaustion of domestic remedies. Given that the applicant had been released, his counsel had been granted access to the case files and the Court of Appeal and the Federal Constitutional Court had both already given a decision on the question of his counsel's right of access to the files, the Court does not accept that pursuing his further appeal to a conclusion and obtaining another decision of the Federal Constitutional Court were remedies which were capable of providing redress and offered reasonable prospects of success in the circumstances of the case. The Government's objection must therefore be dismissed in this respect.

85. The Government further raised the objection that this part of the application was incompatible *ratione personae* with the Convention as the applicant has lost his status as a victim of a violation of the Convention. The Court reiterates that Article 34 requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. In particular, Article 34 may not be used to found an action in the nature of an *actio popularis* (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33; and *Očić v. Croatia* (dec.), no. 46306/99, ECHR 1999-VIII). If an individual cannot claim to be personally affected by the act or omission in question, he cannot

claim to be the victim of a violation of a Convention right and his claim is incompatible *ratione personae* with the Convention (compare *Očić*, cited above; and *Lustgarten v. the United Kingdom* (dec.), no. 69189/01, 30 April 2002).

86. The Court notes that in the present case the applicant himself was affected by the measure he complains of, namely that neither he nor his counsel had been granted access to the case-files while in detention. The Court observes that the question whether, as claimed by the Government, the Court of Appeal can be considered as having acknowledged a breach of Article 5 § 4 of the Convention and granted the applicant redress therefor depends on the substantive scope of the applicant's right under that Article to fairness in the judicial review proceedings that were still pending at the time as a whole. It therefore concerns the merits of the applicant's complaint. It follows that the Government's objection cannot be upheld in this respect either.

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

B. Merits

1. The parties' submissions

88. In the applicant's view, the proceedings for judicial review of his detention order were unfair as the Public Prosecutor's Office had refused his defence counsel access to the case files throughout his detention. This had violated the principle of equality of arms and had made it impossible for him effectively to defend himself by commenting cogently on the accusations against him. Not least because of the complexity of proceedings concerning suspected tax evasion it would have been insufficient for his counsel to be informed merely orally about the content of the case files by the Public Prosecutor's Office or to be handed over copies of just a few pages of the files. The prosecution could not be expected to inform defence counsel of the material that would militate against the applicant's pre-trial detention. Therefore, the defence had a right of access to the entire case files even at that stage of the proceedings.

89. The Government argued that the refusal to grant the applicant's counsel access to the case files had not breached Article 5 § 4 of the Convention. At the time the applicant's proceedings for judicial review were pending, the District Court had already granted search warrants for fifteen other premises. The success of the execution of those warrants would have been jeopardised if the applicant's lawyer had been granted access to the entire case files.

90. In the circumstances of the present case, the applicant could have mounted an effective challenge against the detention order simply by instructing his counsel to agree to be informed orally by the Public Prosecutor's Office of the essential facts and items of evidence contained in the case files. The suspicion against the applicant was grounded essentially on business documents that had been seized at the applicant's home and at the firms he was working for, and only to a negligible degree on witness statements. The case therefore had to be distinguished from the cases of *Schöps, Lietzow* and *Garcia Alva v. Germany*, in which an oral summary, notably of witness statements by the prosecution authorities, was not considered sufficient to comply with the requirements of Article 5 § 4.

2. The Court's assessment

a. Relevant principles

91. The Court reiterates that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial as guaranteed by Article 6 of the Convention (see, *inter alia*, *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; *Lietzow v. Germany*, no. 24479/94, § 44, ECHR 2001-I; *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001; *Shishkov v. Bulgaria*, no. 38822/97, § 77, ECHR 2003-I; and *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-...). The proceedings before the court examining an appeal against detention must thus be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, in particular, *Schöps*, cited above, § 44; *Lietzow*, cited above, § 44; *Garcia Alva*, cited above, § 39; and *Svipsta*, cited above, § 129).

92. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see, among other authorities, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29; *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II; *Schöps*, cited above, § 44; *Shishkov*, cited above, § 77; and *Svipsta*, cited above, § 129). The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of

substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (compare *Lietzow*, cited above, § 47; *Garcia Alva*, cited above, § 42; *Shishkov*, cited above, § 77; and *Svipsta*, cited above, § 137).

b. Application of those principles to the present case

93. The Court therefore needs to determine whether, in the present case, information which was essential for the assessment of the lawfulness of the applicant's detention was not made available in an appropriate manner to the applicant's lawyer. It observes that the domestic courts reached their conclusion that there was a strong suspicion of the applicant having committed tax evasion by reference to the contents of the voluminous case files before them. The files included business records seized at the applicant's home, but also witness statements made by the proprietors of firms the applicant had been working for, as well as contracts of employment and wage slips and commission statements. The content of the investigation files thus appears to have played a key role in the courts' decisions to prolong the applicant's pre-trial detention.

94. The Court further notes that, while the Public Prosecutor's Office and the courts were familiar with the files, their precise content was not initially brought to the knowledge of the applicant's counsel. The Public Prosecutor's Office repeatedly dismissed counsel's request for access to the case files on the ground that consultation of these documents would endanger the purpose of the investigations.

95. It was only after the Court of Appeal's decision of 14 October 2002 (see paragraphs 23-29 above) that the applicant's counsel was provided with copies of four pages of the voluminous case files containing an overview by the Düsseldorf Tax Fraud Office on the amount of the applicant's income and the taxes he was suspected of having evaded. However, these documents only gave an account of the facts as construed by the prosecution authorities on the basis of all the information available to them. It is virtually impossible for an accused, even if assisted by counsel, properly to challenge the reliability of such an account without being aware of the evidence on which it is based. Even in a case such as the present one in which the detention order was partly based on evidence seized at the defendant's home which, in principle, he would have been familiar with, his defence counsel must be given sufficient opportunity to acquaint himself personally with the underlying statements and other pieces of evidence.

96. For the same reasons, the proposal by the prosecution, which was endorsed by the courts, to give the applicant's counsel merely an oral account of the facts and evidence in the case files (compare also *Garcia Alva*, cited above, §§ 18, 43) was not sufficient. The suspicion against the applicant was grounded not only on business documents seized at the

applicant's home, but also on documentary evidence obtained from his employers and on witness statements made by them, in other words on a large quantity of material which was only referred to in general terms in the detention orders. The Court does not lose sight of the fact that the refusal to grant the applicant's counsel access to the case files was based on a risk of compromising the success of the ongoing investigations. However, as reiterated above (at paragraph 92), this legitimate goal may not be pursued at the expense of substantial restrictions on the rights of the defence. Counsel must therefore be given access to those parts of the case files on which the suspicion against the applicant was essentially based. It follows that the applicant, assisted by counsel, did not**,** at that stage of the proceedings, have an opportunity adequately to challenge the findings referred to by the Public Prosecutor or the courts as required by the principle of "equality of arms".

97. The Court further observes that, in its decision of 14 October 2002, the Court of Appeal quashed the decisions taken by the District Court and the Regional Court in the proceedings for judicial review of the detention order. It found that the detention order was defective because the facts and evidence on which the suspicion that an offence had been committed and the reasons for the applicant's detention were based were not described in such detail as to enable him to comment and defend himself effectively. According to the Court of Appeal, these defects amounted to a denial of the right of the accused to be heard in view of the fact that counsel for the defence had been refused access to the case files under section 147 § 2 of the Code of Criminal Procedure.

98. The Court notes that the Court of Appeal thus acknowledged that the applicant's procedural rights were curtailed by the failure to grant the applicant's counsel access to the case files. However, as is clear from the wording of paragraphs 3 and 4 of Article 5, the protection of the rights under that Article, in view of the fact that the person concerned is being deprived of his or her liberty, can only be effective if its, guarantees are applied speedily (compare also *Lamy* cited above, pp. 16-17, § 29). In the present case, not only, as found above, were the proceedings reviewing the lawfulness of the applicant's detention as such unduly delayed, contrary to Article 5 § 4, his counsel was not granted access to the case files until after the applicant's conditional release from prison. In these circumstances, the fact that the domestic authorities allowed the applicant's counsel to inspect the case files at a later stage of the proceedings could no longer remedy in an effective manner the procedural shortcomings in the earlier stages of the proceedings.

99. It follows that the proceedings for a review of the applicant's detention pending trial cannot be considered to have complied with the guarantees afforded by Article 5 § 4 in this respect. There has accordingly been a violation of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage. He argued that an award of this level was necessary in order to secure the domestic courts' future compliance with the Convention rights in comparable cases.

102. The Government considered the applicant's claim to be excessive.

103. As regards the non-pecuniary damage allegedly suffered by the applicant on account of the absence of procedural guarantees during his detention the Court, having regard to its case-law on that issue (compare, *inter alia*, *Nikolova*, cited above, § 76; *Lietzow*, cited above, § 52; *Garcia Alva*, cited above, § 47), considers that the finding of a violation constitutes sufficient just satisfaction. Conversely, it finds that the applicant must have suffered distress as a result of the delays in the proceedings for judicial review of the lawfulness of his detention which is not sufficiently compensated for by the finding of a violation. Ruling on an equitable basis, it awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

104. The applicant also claimed a total of EUR 5,164.76 for the costs and expenses incurred before this Court (EUR 2,908.70 for drafting the observations and EUR 2,256.06 for their translation into English) and EUR 2,908.70 for those incurred before the Federal Constitutional Court. According to the bills submitted by the applicant, these amounts include VAT.

105. The Government left the amount to be awarded to the applicant for costs and expenses to the Court's discretion.

106. According to the Court's case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Nikolova*, cited above, § 79; and *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X).

107. In the present case, regard being had to the information in its possession and the above criteria, the Court is satisfied that the costs of the proceedings before the Federal Constitutional Court were incurred in order to establish and redress a violation of the applicant's Convention rights. It further notes that the application before the Court was essentially well-founded. Making its own assessment, the Court considers it reasonable to award the sum of EUR 6,000 covering costs under all heads, less the sum received by way of legal aid from the Council of Europe (EUR 850), making a total of EUR 5,150. This sum includes VAT.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by five votes to two that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention in so far as the applicant complained of the lack of a speedy review of the lawfulness of his detention;

4. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention in so far as the applicant complained about the refusal to grant his counsel access to the case files in the proceedings for review of the lawfulness of his detention;

5. *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, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage and EUR 5,150 (five thousand one hundred and fifty euros) 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;

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

Done in English, and notified in writing on 13 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mrs Tsatsa-Nikolovska and Mr Borrego Borrego is annexed to this judgment.

P.L.
C.W.

JOINT DISSENTING OPINION OF JUDGES TSATSA-NIKOLOVSKA AND BORREGO BORREGO

Much to our regret, we do not share the majority's decision with regard to Article 5 § 1 of the Convention.

Article 5 of the Convention is of paramount importance. One of the most important constituent parts of the Court's case-law is the "repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law" (*McKay v. the United Kingdom* [GC], no. 543/03, 3 October 2006).

If the Düsseldorf Court of Appeal (14 October 2002) found that "the detention order issued by the District Court on 25 July 2002 did not comply with the legal requirements" (§ 24), it seems evident that the fact that the applicant was deprived of his liberty constitutes a violation of Article 5 § 1 of the Convention.

Even accepting the distinction made in paragraph 63 between void detention orders and defective detention orders – such as the one in the instant case, which therefore remained a valid basis for detention until replaced – there is still evidence of a violation of Article 5, since "the importance of promptness or speediness of the requisite judicial controls" constitutes one of its applicable principles.

The replacement of the defective detention order in this case should have been faster. A lapse of fifteen days cannot be considered as complying with Article 5, as stated in paragraph 64. Especially if we take into consideration that in *Gębura v. Poland* (no. 63131/00, § 34, 6 March 2007) a delay of over forty-eight hours in the applicant's release from prison was considered a violation of Article 5 § 1of the Convention.

For the reasons set out above, we cannot support the conclusion that there has been no violation of Article 5 § 1 of the Convention.