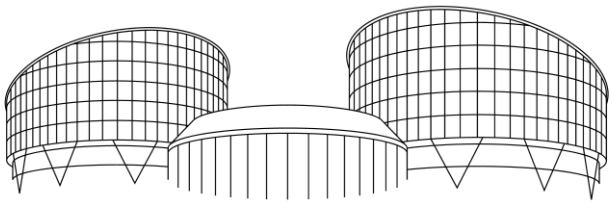

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MURADKHANYAN v. ARMENIA

(Application no. 12895/06)

JUDGMENT

STRASBOURG

5 June 2012

FINAL

05/09/2012

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

In the case of Muradkhanyan v. Armenia**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 15 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 12895/06) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Ararat Muradkhanyan ("the applicant"), on 27 March 2006.

2. The applicant was represented by Mr L. Simonyan, a lawyer practising in Yerevan, and Mr C. Meyer, a lawyer practising in Strasbourg. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. On 12 December 2007 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1963 and is currently serving his sentence in a penitentiary institution.

1. Institution of two sets of criminal proceedings against the applicant in Armenia and Ukraine

(a) Institution of criminal proceedings against the applicant in Armenia

5. On 24 June 2002 criminal proceedings no. 12207102 were instituted on account of premeditated murder of several individuals committed on that day in Yerevan. The applicant, whose whereabouts were unknown, was suspected of committing the murders.

6. On 5 July 2002 a charge of illegal possession of firearms was brought against the applicant under Article 232 of the former Criminal Code of Armenia and a motion was filed by the investigator seeking to have him detained.

7. On the same date the Kentron and Nork-Marash District Court of Yerevan granted this motion in the applicant's absence and ordered his detention for a period of two months, stating:

> "Having examined the motion filed by [the investigator] and the materials of the criminal case, taking into account the nature and the gravity of the imputed offence and the fact that the only penalty envisaged for the offence committed by the accused is imprisonment, the court came to the conclusion that the materials obtained in the criminal case provide sufficient grounds to believe that the motion must be granted, since the accused is hiding from the authority dealing with the case and his whereabouts are unknown."

8. Since the applicant's whereabouts were unknown, a search was initiated for him.

9. On 11 September 2002 the charge against the applicant was modified by the General Prosecutor's Office of Armenia and he was accused of murder, attempted murder and illegal possession of firearms under Articles 99, 15-99 and 232 of the former Criminal Code of Armenia.

10. On 25 October 2002 the criminal proceedings against the applicant were stayed since his whereabouts could not be established.

(b) The applicant's detention in Ukraine in connection with another criminal charge

11. On an unspecified date criminal proceedings no. 01710009 were instituted in Ukraine on account of the murder of an individual committed on 31 March 2001 in Poltava, Ukraine.

12. According to the applicant, on 24 January 2003 he was arrested in Voronezh, Russia, by Ukrainian law enforcement officers and forcibly transported to Poltava, where on 27 January 2003 he was placed in custody.

13. On 30 January 2003 the Kyivsky District Court of Poltava Region ordered the applicant's detention.

14. On 13 March 2003 the applicant was formally accused of murder and threat to kill under Articles 115 and 129 of the Criminal Code of Ukraine.

15. It appears that the applicant's detention was thereafter extended on several occasions by the Ukrainian courts.

16. On 30 January 2004 the General Prosecutor's Office of Armenia requested the applicant's extradition to Armenia in connection with criminal case no. 12207102.

17. On 12 April 2004 the Ukrainian authorities decided to extradite the applicant to Armenia and to transmit criminal case no. 01710009 to the Armenian authorities for further investigation.

2. The applicant's detention in Armenia

(a) The applicant's detention during pre-trial proceedings

18. On 18 May 2004 the applicant was extradited to Armenia, where he was immediately detained.

19. On 24 May 2004 criminal proceedings no. 12207102 were resumed.

20. On 21 June 2004 the criminal charge against the applicant was modified and brought into conformity with the new Criminal Code adopted in August 2003. The applicant was accused under Articles 104, 34-104 and 235 of the Criminal Code of murder and attempted murder of several individuals, and illegal possession of firearms.

21. On 12 July 2004 the Kentron and Nork-Marash District Court of Yerevan examined and granted the investigator's motion seeking to extend the applicant's detention, which was to expire on 18 July 2004, for another two months, namely until 18 September 2004. The District Court found that it was necessary to extend the applicant's detention in order to carry out a number of investigative measures. Such measures, according to the investigator, included the identification of the applicant by three eyewitnesses, their further questioning, possible confrontations between the applicant and these witnesses, a number of medical examinations and activities aimed at finding the murder weapon.

22. On the same date the investigator dealing with the case found that it was impossible to continue the investigation into criminal case no. 01710009 on Armenian territory and decided to return that case to the Ukrainian authorities.

23. On 13 September 2004 the investigation into criminal case no. 12207102 was over and the applicant was granted access to the case file until 23 September 2004.

(b) The applicant's detention during the trial proceedings

24. On 24 September 2004 the case was transferred to the Erebuni and Nubarashen District Court of Yerevan to be examined on the merits.

25. On 6 October 2004 the District Court decided to set the case down for trial, fixing the date of the first hearing for 14 October 2004. This

decision also stated that "the preventive measure imposed on the accused should remain unchanged".

26. Between 14 October 2004 and 13 October 2005 the District Court held 52 hearings, with a maximum interval of about one and a half months, during which numerous witnesses were questioned and evidence was examined. The applicant remained in detention throughout this period.

(c) Remittal of the case for further investigation

27. On 14 October 2005 the Erebuni and Nubarashen District Court of Yerevan decided to remit the case for further investigation. It found that the investigating authority had failed to ensure a fair examination of the case and to carry out an objective and thorough investigation. In such circumstances, the court was prevented from reaching an objective conclusion on the applicant's guilt or innocence and the omissions in question could not be corrected during the trial. The District Court also stated in its decision that "the detention should remain unchanged".

28. The applicant, the prosecutor and the victims lodged appeals against this decision. In his appeal the applicant argued, *inter alia*, that the District Court had failed to provide reasons for its decision to extend his detention or to take into account the fact that he had been detained since 2003 in violation of Article 5 of the Convention.

29. On 9 November 2005 the Criminal and Military Court of Appeal upheld the decision of the District Court, adding that "the reasons for keeping the applicant in detention still persisted".

30. The applicant, the prosecutor and the victims lodged appeals on points of law. In his appeal on points of law the applicant reiterated his arguments raised in his appeal against the decision of the District Court of 14 October 2005.

31. On 16 December 2005 the Court of Cassation decided to leave the applicant's appeal unexamined, finding that it did not meet the formal requirements. The Court of Cassation added that the applicant's detention "should remain unchanged".

32. On 26 December 2005 the case file was transferred to the General Prosecutor's Office.

33. On 27 December 2005 the investigator took over the case and filed a motion seeking to extend the applicant's detention by two months, namely until 28 February 2006. It was stated in the motion that the applicant had been in pre-trial detention from 18 May to 13 September 2004, while his detention period had been authorised until 18 September 2004. This was the second motion seeking an extension of the applicant's pre-trial detention. It was necessary to extend his detention, taking into account the need to carry out a number of investigative measures, the fact that the applicant had committed a grave crime and that remaining at large he might obstruct the

proceedings and abscond, as well as the fact that the applicant's detention was to expire on 30 December 2005.

34. On 29 December 2005 the applicant lodged objections to this motion. He submitted, *inter alia*, that the motion had been filed in violation of the time-limits prescribed by Article 139 § 1 of the Code of Criminal Procedure (CCP) (see paragraph 54 below). In accordance with the relevant provisions of the CCP, detention in pre-trial proceedings could be imposed and extended only by a court upon an investigator's motion. The last occasion on which his detention had been extended was on 12 July 2004 until 18 September 2004. Even if the time-limits prescribed by Article 139 § 1 of the CCP were to be calculated from the Court of Cassation's decision of 16 December 2005, they would still have been violated, given that 13 days had already passed since that date. As to the investigator's argument that his detention was to expire on 30 December 2005, this was not true since his detention had expired on 18 September 2004. The CCP required that a detainee be released if the detention period had expired and had not been extended. In his case it was not even clear which detention period, that is authorised by which court decision, was being extended. He was being kept in detention without a court decision. The applicant lastly asked the court to indicate the court decision, pursuant to which his detention period was to expire on 30 December 2005.

35. On the same date the Kentron and Nork-Marash District Court of Yerevan granted this motion, finding:

> "Having examined the motion filed by [the investigator] and the materials of the criminal case, having heard the accused and his lawyers, the court has found that it is necessary to extend [the applicant's] detention period in order to carry out a number of investigative measures in the criminal case..."

36. On 10 January 2006 the applicant lodged an appeal in which he made submissions similar to the ones in his objections. He further added that the District Court's decision was unreasoned and that it had failed to address the arguments raised in his objections.

37. On 3 February 2006 the Criminal and Military Court of Appeal found that the decision of the District Court was reasoned and decided to uphold it. This decision stated that it entered into force from the moment of its delivery.

38. On 9 February 2006 the applicant lodged an appeal on points of law, raising similar arguments.

39. By a letter of 27 February 2006 the Chairman of the Court of Cassation returned the appeal unexamined in accordance with the decision of the Council of Court Chairmen (*ՀՀ դատարանների նախագահների խորհուրդ*) of 8 December 2005 taken in connection with the entry into force of the constitutional amendments concerning the status of the Court of Cassation.

40. On 23 February and 26 April 2006 the Kentron and Nork-Marash District Court, upon the investigator's relevant motions, extended the applicant's detention on two further occasions. In addition to the reasons given before, the District Court stated that the applicant, if released, could obstruct the investigation of the case by exerting unlawful influence on persons involved in the proceedings and could abscond.

41. These decisions were upheld by the Criminal and Military Court of Appeal on 21 March and 23 May 2006 respectively. The Court of Appeal added that the applicant was accused of a very grave crime, that he had fled before and a search had been initiated to find him and that, if released, he could abscond and obstruct the investigation.

42. On 4 May 2006 the Court of Cassation once again decided to leave the applicant's appeal on points of law lodged against the Court of Appeal's decision of 21 March 2006 unexamined apparently for the same reasons as before.

(d) Resumption of the trial proceedings and the applicant's conviction at first instance

43. On 24 May 2006 the case was transmitted to the Kentron and Nork-Marash District Court of Yerevan to be examined on the merits.

44. On 25 May 2006 the applicant requested the District Court to terminate the prosecution and to release him.

45. On 2 June 2006 the District Court decided to set the case down for trial, fixing the date of the first hearing for 19 June 2006. In its decision, the District Court stated that the detention was to remain unchanged.

46. The hearing of 19 June 2006 was adjourned for unknown reasons for an indefinite period of time.

47. On 16 October 2006 the District Court held the first hearing on the applicant's case. This was followed by the court hearings of 17 and 18 October 2006. The District Court held further hearings on 14-16, 20 and 22-23 November 2006.

48. At the hearing of 20 November 2006 the applicant and his lawyers verbally requested that the preventive measure imposed on him be modified and that he be released on the ground that, *inter alia*, his detention had been lengthy.

49. On the same date the District Court decided to refuse this request, finding:

> "[The applicant] has been accused of crimes envisaged under Article 104 § 2 (1) and (6), Article 34-104 § 2 (1) and (6) and Article 235 § 1 of the Criminal Code. Detention was imposed on him as a preventive measure by a court decision in the course of the investigation. The reasons contained in the above-mentioned decision still persist at this stage of the proceedings..."

50. Further hearings were held on 22 and 23 November 2006, 11-13 December 2006, 16, 17 and 30 January 2007, 1, 14-16, 26 and

27 February 2007, and 28 March-2 April 2007. On the latter date the District Court retired to the deliberation room but decided to resume the trial on 12 April 2007. The following hearings were held on 27 June, 11 and 26 July and 21 August 2007, following which the District Court again retired to the deliberation room.

51. On 24 September 2007 the District Court of Yerevan found the applicant guilty and sentenced him to life imprisonment. At least 37 witnesses were heard in the course of the proceedings and a number of investigative measures undertaken, including several medical and other examinations.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution (following the amendments introduced in 2005)

52. Article 92 prescribes that in Armenia the courts of general jurisdiction are the first instance courts, the appeal courts and the Court of Cassation. The highest judicial instance, except matters falling within constitutional jurisdiction, is the Court of Cassation which is called upon to ensure the uniform application of the law.

B. The Criminal Code (in force from 1 August 2003)

53. The relevant provisions of the Criminal Code read as follows:

Article 34: Attempted crime

"An attempted crime is a premeditated action (inaction) aimed directly at committing a crime, if the commission of the crime has not been completed due to circumstances which were beyond the person's will."

Article 104: Murder

"2. Murder: (1) of two or more individuals; ... (6) [committed] in a manner dangerous to the lives of many ... shall be punishable by imprisonment from eight to fifteen years or life imprisonment."

Article 235: Illegal acquisition, sale, possession, trafficking or carrying of arms, ammunition, explosives or explosive devices

"Illegal acquisition, sale, possession, trafficking or carrying of firearms, except for smooth-bore firearms and their cartridges, of ammunition, rifle cartridges, explosives or explosive devices shall be punishable by a maximum of three months of detention or a maximum of three years of imprisonment."

C. The Code of Criminal Procedure (in force from 12 January 1999)

54. The relevant provisions of the CCP, as in force at the material time, read as follows:

Article 65: The rights and obligations of the accused

"2. The accused, in accordance with the procedure prescribed by this Code, is entitled: ... (12) to file motions..."

Article 134: The concept and types of preventive measures

"1. Preventive measures are measures of compulsion imposed on the suspect or the accused in order to prevent their inappropriate behaviour in the course of the criminal proceedings and to ensure the enforcement of the judgment.

2. Preventive measures include: (1) detention; (2) bail; ...

3. Detention and bail can be imposed only on the accused...

4. ...Bail is considered as an alternative preventive measure to detention and can be imposed only if a court decision has been issued to detain the accused."

Article 135: Grounds for imposing a preventive measure

"1. The court, the prosecutor, the investigator or the body of inquiry can impose a preventive measure only when the materials obtained in the criminal case provide sufficient grounds to believe that the suspect or the accused may: (1) abscond from the authority dealing with the case; (2) obstruct the examination of the case during the pre-trial or trial proceedings by exerting unlawful influence on persons involved in the criminal proceedings, by concealing or falsifying materials significant for the case, by failing to appear upon the summons of the authority dealing with the case without valid reasons or by other means; (3) commit an act prohibited by criminal law; (4) avoid criminal liability and serving the imposed sentence; and (5) hinder the execution of the judgment.

2. Detention and its alternative preventive measure can be imposed on the accused only if the highest punishment prescribed for the [imputed] crime is imprisonment for a period exceeding one year or if there are sufficient grounds to believe that the suspect or the accused can commit any of the actions referred to in the first paragraph of this article.

3. When deciding on the necessity of imposing a preventive measure or choosing the type of preventive measure to be imposed on the suspect or the accused, the following should be taken into account: (1) the nature and the gravity of the imputed offence; (2) the personality of the suspect or the accused; (3) age and state of health; (4) sex; (5) occupation; (6) family status and dependants, if any; (7) property situation; (8) whether he has a permanent residence; and (9) other important circumstances."

Article 136: Imposition of a preventive measure

"2. Detention and bail shall be imposed only by a court decision upon the investigator's or the prosecutor's motion or of the court's own motion during the trial proceedings of a criminal case. The court can replace detention with bail also upon the motion of the defence."

Article 137: Detention

"1. Detention is the holding of a person in custody in places and conditions prescribed by law.

...

4. When deciding on detention, the court shall also decide on the possibility of releasing the accused on bail and, if such release is possible, shall set the amount of bail...

5. The court's decision to choose detention as a preventive measure may be contested before a higher court."

Article 138: Detention period

"1. The accused's detention period shall be calculated from the moment of his being actually taken into custody when being arrested or, if he was not arrested, from the moment of enforcement of the court decision imposing detention.

...

3. During the pre-trial proceedings of a criminal case the detention period may not exceed two months, except for cases prescribed by this Code ... During the pre-trial proceedings of a criminal case the running of the detention period shall be suspended on the date when the prosecutor transmits the criminal case to the court or when the accused or his lawyer are familiarising themselves with the case file or when detention is cancelled as a preventive measure.

4. During the pre-trial proceedings of a criminal case the accused's detention period may be extended by a court up to one year in view of the particular complexity of the case.

5. During the pre-trial proceedings of a criminal case the accused's detention period may not exceed ... one year...

6. There is no maximum detention period during the trial proceedings."

Article 139: Extension of the detention period

"1. If it is necessary to extend the accused's detention period, the investigator or the prosecutor must submit a well-grounded motion to the court not later than ten days before the expiry of the detention period. The court, agreeing with the necessity of

extending the detention period, shall adopt an appropriate decision not later than five days before the expiry of the detention period.

2. When deciding on the extension of the detention period, the court is entitled to accept the possibility of releasing the accused on bail and to set the amount of bail.

3. When deciding on the extension of the accused's detention period, the court shall extend the detention period within the limits prescribed by this Code, on each occasion for a period not exceeding two months."

Article 288: Judicial control of the lawfulness and reasoning of a decision imposing or not imposing detention as a preventive measure

"1. The judicial control of lawfulness and reasons of imposing or not imposing detention as a preventive measure, as well as of extending or refusing to extend a detention period, shall be performed by the appeal court."

Article 292: Decisions to be adopted when preparing a case for trial

"The judge who has taken over a case shall examine the materials of the case and within fifteen days from the date of taking over the case shall adopt one of the following decisions: (1) to set the case down for trial..."

Article 293: The decision to set the case down for trial

"2. The decision setting the case down for trial shall contain ... a decision cancelling, modifying or imposing a preventive measure..."

Article 300: A decision on preventive measures

"When adopting decisions ... the court is obliged to decide on the issue whether or not to impose on the accused a preventive measure and whether or not the preventive measure, if such has been imposed, is justified."

Article 311: Remittal of a criminal case for further investigation

"The court shall remit the case for further investigation:

1) if there has been a substantial violation of procedural law by the body of inquiry or the investigating authority which cannot be eliminated during the trial proceedings;

2) upon the prosecutor's motion, when there are grounds to substitute the prosecution with a more severe one or different from the initial one for factual reasons."

Article 312: Deciding on a preventive measure

"The court, in the course of the trial proceedings, having heard the defendant's explanation and the opinion of the parties, is entitled to impose, modify or cancel a preventive measure in respect of the defendant."

Article 403: Review of the judgment and decisions through cassation proceedings [as in force at the material time]

"Judgments and decisions of the first instance court and the court of appeal which have entered into legal force, and judgments and decisions of the court of appeal which have not entered into legal force can be reviewed through cassation proceedings."

D. Decision no. 20 of the Council of Court Chairmen of 12 February 2000

55. Paragraph 4 of this decision stated that Article 137 § 5 of the CCP prescribed that the court's decision to choose detention as a preventive measure might be contested before a higher court. However, the CCP did not provide for a procedure of contesting the lawfulness and reasons of the appeal court's decisions imposing and extending detention. Hence, in such cases the appeal court's decisions might be contested before the Court of Cassation.

E. Decision no. 83 of the Council of Court Chairmen of 8 December 2005

56. This decision states that Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000 must be repealed, taking into account that under Article 92 of the Constitution the Court of Cassation, as the highest general jurisdiction court, is called upon to ensure the uniform application of the law.

F. Decision no. 96 of the Council of Court Chairmen of 5 April 2006

57. This decision sets out the new text of Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000, which provides that under Article 92 of the Constitution the highest judicial instance is the Court of Cassation which is called upon to ensure the uniform application of the law. In such circumstances an appeal to the highest judicial instance against decisions taken in pre-trial proceedings, including any decision on detention, does not follow from its constitutional status. Such appeals must be left unexamined. In exceptional cases they may be examined by the Court of Cassation if they raise issues of importance for judicial practice. At

the same time, appeals may be brought against decisions of the appeal court whereby it imposes detention at first instance.

THE LAW

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

58. The applicant complained that the extension of his detention by the decision of 29 December 2005 was unlawful, since his detention preceding that decision was not based on a court decision as required by law. He invoked Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so[.]"

A. Admissibility

59. 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

(a) The Government

60. The Government submitted that the extension of the applicant's detention on 29 December 2005 was compatible with the guarantees of Article 5 § 1. On 12 July 2004 the District Court extended his detention for a further two months, namely until 18 September 2004. On 13 September 2004, five days prior to the expiry of that period, the running of the

applicant's detention period was suspended pursuant to Article 138 § 3 of the CCP, because he was granted access to the case file. Thus, the investigating authority had five more days to keep the applicant in detention in accordance with that Article. On 14 October 2005 the case was remitted for further investigation. This decision was confirmed in the final instance by the Court of Cassation on 16 December 2005. The case file, however, was transferred to the General Prosecutor's Office on 26 December. Since the investigating authority had five more days to keep the applicant in detention, the date of expiry was considered to be 30 December, counting from the date of transfer of the case file.

61. The Government further submitted that the applicant's detention between 14 October and 29 December 2005 was lawful. Following the remittal of the case for further investigation, the pre-trial proceedings and detention re-started from the date of the Court of Cassation's decision, that is 16 December 2005, and consequently prior to this date the applicant was in detention under trial proceedings pursuant to Article 312 of the CCP. Between 16 and 29 December 2005 the applicant was in detention on the basis of the above-mentioned decision of the Court of Cassation.

(b) The applicant

62. The applicant submitted that the statement in the investigator's motion of 27 December 2005 that his detention was to expire on 30 December 2005 did not correspond to reality. His pre-trial detention was extended until 18 September 2004 and he had actually spent that entire period in detention. The Government's allegation that the investigating authority had five more days to keep him in pre-trial detention by virtue of the decision of 12 July 2004 was incompatible with Article 5. Thus, from 16 to 29 December 2005 he was detained without an appropriate court decision. The same applies to the period after 18 September 2004.

63. Even assuming that his detention under pre-trial proceedings restarted on 16 December 2005 and that the investigating authority had five more days to keep him in detention within the meaning of Article 139 of the CCP, there would still be a breach of Article 5 since thirteen days had elapsed until the court decided on 29 December 2005 to extend his detention. The Government justified this with the fact that the case file was transferred to the General Prosecutor's Office only on 26 December 2005, which was unacceptable as it suggested that a person could remain in detention without an appropriate court decision and for an indefinite period of time just because the case file was transferred belatedly from one public authority to another. Furthermore, if the starting point for his detention under pre-trial proceedings was the decision of 16 December 2005, then the manner in which this decision was taken contradicted the CCP, namely the requirement that time-limits be set when ordering detention during pre-trial proceedings. Lastly, it was not clear which term of detention was extended

by the decision of 29 December 2005. The decisions taken between 14 October and 16 December 2005 did not set any time-limits for his detention. Thus, the practice of keeping a person in detention without any legal basis as a result of the lack of specific rules, as a result of which a detainee could be imprisoned in perpetuity without judicial authorisation, did not meet the principle of legal certainty and protection against arbitrariness.

2. The Court's assessment

64. The Court reiterates that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a "democratic society" within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33).

65. The expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof (see, among other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

66. However, the "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among other authorities, *Winterwerp*, cited above, § 45, and *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI).

67. 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 (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports of Judgments and Decisions* 1998-VII).

68. Turning to the circumstances of the present case, the Court observes that the applicant was detained upon the investigator's motion on 18 May

2004 for a period of two months following his extradition to Armenia. His detention was then extended by two more months by the decision of 12 July 2004. Following the completion of the investigation and the transfer of the applicant's case for trial, on 6 October 2004 the District Court extended his detention of its own motion under the procedure prescribed by Article 293 § 2 of the CCP. After more than a year of trial proceedings, on 14 October 2005 the trial court decided to remit the case for further investigation. By the same decision it decided to keep the applicant in detention. This decision was confirmed by the Court of Appeal and the Court of Cassation on 9 November and 16 December 2005 respectively. On 26 December 2005 the case file was transmitted to the General Prosecutor's Office and on 27 December 2005 the investigator filed a motion seeking to extend the applicant's detention by two months. It was stated in that motion that his detention was to expire on 30 December 2005. On 29 December 2005 the court granted that motion.

69. In this connection, the Court notes that Armenian law distinguishes between detention during pre-trial and trial proceedings and provides for two distinct procedures to follow in each case. In particular, during pre-trial proceedings detention or its extension are authorised by a court only upon the investigator's or prosecutor's motion, each time for a period not exceeding two months (Article 136 § 2, Article 138 §§ 3 and 4 and Article 139 § 3 of the CCP), while during the trial proceedings the court decides on detention or its extension of its own motion and without setting any specific time-limits (Article 136 § 2 and Article 138 § 6 of the CCP). Furthermore, a motion seeking extension of detention during pre-trial proceedings must be filed ten days, while the court decision must be taken five days, prior to the expiry of the authorised detention period (Article 139 § 1 of the CCP). If a case is remitted for further investigation, the rules governing detention under pre-trial proceedings are applicable, as in the applicant's case. Thus, in order to answer the question of whether the applicant's detention was extended by the court decision of 29 December 2005 in compliance with the time-limits prescribed by Article 139 § 1 of the CCP, the Court is required to address first the nature of the detention period preceding that court decision.

70. The Court notes that the applicant's detention under trial proceedings started from 6 October 2004. It has no reason to doubt the lawfulness of the decision authorising that period of detention, which was taken on that date by the trial court pursuant to Article 293 § 2 of the CCP. On 14 October 2005, however, the same trial court decided of its motion to remit the case for further investigation. The Court notes in this respect that the Government's allegation that the pre-trial proceedings did not restart on that date but only when that decision was upheld at final instance on 16 December 2005 is not based on any domestic legal provision. Indeed, there is no provision in the criminal procedure law which would clearly

indicate the date of resumption of pre-trial proceedings once a decision is taken to remit the case for further investigation. Thus, it is not clear which detention rules were applicable to the applicant's case during the period between 14 October and 16 December 2005, those concerning pre-trial or trial proceedings. It therefore cannot be said that the applicant's detention during that period was based on clear and foreseeable rules.

71. As regards the period between 16 and 29 December 2005, the Court notes that the Government's submissions here are even more contradictory. At first they claimed that this period of detention included the time necessary to transfer the file back to the Prosecutor's Office (16 to 26 December 2005) and the five days which the investigating authority still had at its disposal to keep the applicant in detention by virtue of the decision of 12 July 2004 (26 to 30 December 2005). Later, however, the Government claimed that during that entire period the applicant remained in detention on the basis of the Court of Cassation's decision of 16 December 2005. As to their first allegation, the Court observes once again that it is not based on any domestic legal provision. As to the second allegation, it is true that the Court of Cassation in its decision of 16 December 2005, while upholding the remittal of the case for further investigation, also stated that the applicant was to remain in detention. However, it is undisputed that from that date onwards the proceedings were once again in their pre-trial stage and, as already indicated above, during pre-trial proceedings detention could be authorised by a court only upon the investigator's or prosecutor's motion and with indication of a specific time-limit. In this case there was no such motion and the Court of Cassation failed to indicate any time-limit. It follows that the applicant's detention during that period was imposed in violation of the domestic procedural law.

72. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's detention between 14 October and 29 December 2005 failed to meet the Convention requirement of lawfulness. It appears that this was due to the absence of clear rules governing detention procedures once a trial court decided to remit a case for further investigation.

73. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

74. The applicant complained that his continued detention was in violation of the guarantees of Article 5 § 3 of the Convention, which, in so far as relevant, reads as follows:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

75. 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

(a) The Government

76. The Government submitted that the length of the applicant's detention was not in breach of the "reasonable time" requirement. The applicant was accused of a serious crime and there was a risk of his absconding. His detention was also necessary in order to maintain public order. It lasted only 8 months and 25 days, which was acceptable in the circumstances of the case.

77. The Government further submitted that the proceedings against the applicant were conducted with special diligence. He was charged with the murder of several individuals and illegal possession of firearms. It was a complex case with numerous episodes of alleged crimes, numerous investigative measures to be taken, a large number of witnesses to be questioned and facts to be examined. It was therefore necessary to adjourn the hearing on numerous occasions.

(b) The applicant

78. The applicant submitted that the gravity of the offence of which he was accused was not a sufficient ground to assume that he would abscond. The decisions extending his detention were taken mechanically and were based on standard formulations. The length of his detention failed to satisfy the "reasonable time" requirement. After the case was brought before the courts for the second time, the hearing scheduled for 19 June 2006 did not take place and was adjourned for an indefinite period. The next hearing was held only on 16 October 2006. No court decision on his detention was taken during that period. On 20 November 2006 the court refused his motion for release, despite the fact that the victims and all the main witnesses had already been examined by then and he was not able to exert any unlawful influence on them.

2. The Court's assessment

79. The Court must first determine the period to be taken into consideration. It notes that the applicant's pre-trial detention lasted from 18 May 2004 until his conviction on 24 September 2007, that is three years, four months and six days.

80. The Court reiterates that the reasonableness of the length of detention must be assessed in each case according to its specific features. Continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty. It falls in the first place to the national judicial authorities to examine the circumstances for or against the existence of such an imperative interest, and to set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions, and of the facts established by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities were "relevant" and "sufficient" to continue to justify the deprivation of liberty (see *Kudła v. Poland* [GC], no. 30210/96, §§ 110-111, ECHR 2000-XI, and *Ječius v. Lithuania*, no. 34578/97, § 93, ECHR 2000-IX).

81. The Convention case-law has developed four basic acceptable reasons for detaining a person before judgment when that person is suspected of having committed an offence: the risk that the accused would fail to appear for trial (see *Stögmüller v. Austria*, 10 November 1969, § 15, Series A no. 9); the risk that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff v. Germany*, 27 June 1968, § 14, Series A no. 7) or commit further offences (see *Matznetter v. Austria*, 10 November 1969, § 9, Series A no. 10) or cause public disorder (see *Letellier*, cited above, § 51).

82. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect (see, among many other authorities, *Letellier v. France*, 26 June 1991, § 35, Series A no. 207, and *Van der Tang v. Spain*, 13 July 1995, § 55, Series A no. 321).

83. The Court accepts that the offences of which the applicant was suspected were of a very serious nature and were punishable by the highest penalty, namely life imprisonment. However, the existence of a strong suspicion of the involvement of a person in serious offences, while

constituting a relevant factor, cannot alone justify a long period of pre-trial detention (see *Tomasi v. France*, 27 August 1992, § 89, Series A no. 241-A).

84. As to the danger of the applicant's absconding, the Court notes that this ground can be said to have been implicitly contained in the very first court decision of 5 July 2002 authorising the applicant's detention (see paragraph 7 above). However, the next occasion on which the Armenian courts explicitly referred to this ground was as late as February 2006, which was almost two years after the applicant's actual arrest in May 2004. The Court considers that such protracted lack of reasoning on the part of the domestic courts cannot be regarded as being compatible with the requirement of Article 5 § 3 of the Convention to provide reasons for the applicant's continued detention.

85. Furthermore, turning to the conduct of the proceedings, the Court admits that the case appears to be a rather complex one which required numerous investigative measures to be carried out. However, in view of the fact that the applicant was deprived of his liberty, the authorities were required to deal with the case with special diligence which they appear to have failed to do. The Court notes in this respect that a significant and unnecessary delay in the proceedings can be attributable to the conduct of the authorities. In particular, because of the failure of the investigating authority to carry out an objective and thorough investigation at the initial stage of the proceedings, the trial court, to which the case was referred for examination on the merits, had to hold 52 hearings and to examine numerous witnesses, which lasted an entire year, only to conclude that it was unable to decide on the applicant's guilt or innocence and to be compelled to remit the case for further investigation (see paragraphs 26 and 27 above). Furthermore, the taking of such a decision in its turn triggered an appeal process and caused another delay of at least two months (see paragraphs 27-32 above). Lastly, no explanation was provided for an interval of at least four months between 2 June and 16 October 2006, during which no proceedings were conducted whatsoever (see paragraphs 45-47 above). Thus, the applicant's detention was prolonged for a total of at least one and a half years due to the apparent lack of diligence on the part of the authorities.

86. The foregoing considerations are sufficient to enable the Court to conclude that the length of the applicant's continued detention was in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention.

87. There has accordingly been a violation of that provision.

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

88. The applicant complained about the refusal of the Court of Cassation to examine his appeal on points of law of 9 February 2006. The applicant invoked Article 5 § 4, Article 6 § 1 and Article 13 of the Convention. The Court considers that this complaint falls to be examined under Article 5 § 4 of the Convention, which reads as follows:

> "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."

Admissibility

89. The applicant submitted that Article 403 of the CCP conferred on him the right to bring an appeal on points of law against the decision of the Court of Appeal of 3 February 2006. The decision of the Council of Court Chairmen of 8 December 2005 was only of a consultative nature and did not constitute a law. The decision of the Court of Cassation not to examine his appeal was therefore unlawful.

90. The Government submitted that the applicant did not enjoy a right to bring an appeal on points of law against pre-trial decisions extending his detention. The right to appeal against such decisions was prescribed by Articles 137 § 5 and 288 § 1 of the CCP, which provided that an appeal could be lodged with the Court of Appeal. The amendments introduced in the Constitution on 6 December 2005 brought about changes in the status of the Court of Cassation, whose role, pursuant to Article 92, was to be limited to ensuring the uniform application of the law. Consequently, on 8 December 2005 the Council of Court Chairmen, a body vested with the authority of providing advisory and non-binding interpretation of domestic law, adopted Decision no. 83 in order to align the judicial practice with the new provisions of the Constitution.

91. The Court reiterates that Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which institutes such a system must in principle accord detainees the same guarantees on appeal as at first instance (see *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224). Furthermore, although Article 5 § 4 of the Convention does not guarantee a right to appeal against decisions on the lawfulness of detention, it follows from the aim and purpose of this provision that its requirements must be respected by appeal courts if an appeal lies against a decision on the lawfulness of detention (see *Rutten v. the Netherlands*, no. 32605/96, § 53, 24 July 2001).

92. The Court notes that the first question to be answered in the present case is whether the applicant enjoyed a right under the domestic law to bring an appeal on points of law against the first instance court's decision to extend his detention during the investigation. Having regard to the relevant domestic provisions, it indeed appears that both Articles 137 § 5 and 288 § 1 of the CCP, which regulated this issue, prescribed explicitly only a right to appeal to the Court of Appeal and said nothing about the Court of Cassation (see paragraph 54 above). The same follows from Decision no. 20 of the Council of Court Chairmen of 12 February 2000 which stated that an appeal procedure before the Court of Cassation was not regulated by the CCP and advised that such appeals should, nevertheless, be examined (see paragraph 55 above). Thus, it cannot be said that the applicant explicitly enjoyed in law a right of appeal to the Court of Cassation against pre-trial decisions on detention at the material time.

93. It is true that prior to the constitutional amendments of 6 December 2005, such a right appears to have existed in practice if not in law. This practice, however, was abandoned following these amendments which, *inter alia*, re-defined the status of the Court of Cassation and restricted its role to ensuring the uniform application of the law (see paragraphs 56 and 57 above). The Court considers that the fact that following the above-mentioned constitutional amendments the applicant no longer enjoyed in practice the right in question does not raise an issue under Article 5 § 4 of the Convention.

94. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

95. The applicant also raised a number of other complaints under Article 5 of the Convention, namely that his detention was not based on a reasonable suspicion, that his detention during the pre-trial proceedings lasted more than the maximum one-year period permitted under Article 138 § 5 of the CCP and that there was no court decision authorising his detention between 18 and 24 September 2004.

96. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage. This claim included lost income in the amount of EUR 80,000 or alternatively the loss of the salary he could have earned had he not been detained, in the amount of EUR 4,000, as well as the cost of parcels which he received from his family while in detention in the total amount of EUR 20,000. The applicant also claimed EUR 250,000 in respect of non-pecuniary damage.

99. The Government submitted that there was no causal link between the pecuniary damages claimed and the violations alleged. The applicant has failed to produce any explanation as to the basis on which the amount of the alleged lost income was calculated, while his claim for lost salary was of a speculative nature. His claim for the cost of parcels was unsubstantiated and concerned expenses of third persons. The Government further requested the Court to reject the applicant's claim for non-pecuniary damages.

100. The Court notes that the applicant's claim in respect of the alleged lost income is of a speculative nature and is not supported by any evidence. Similarly, no proof has been submitted in support of the claim for the cost of parcels. The Court therefore rejects the applicant's claim for pecuniary damages. On the other hand, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

101. The applicant also claimed EUR 227 for postal costs.

102. The Government submitted that such postal costs had not been necessary since the applicant had the choice of resorting to a cheaper postal service than the express one used by him.

103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 227 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the lawfulness of the applicant's detention period prior to the decision of the Kentron and Nork-Marash District Court of Yerevan of 29 December 2005 and the length of his detention admissible under Article 5 §§ 1 and 3 of the Convention and the remainder of the application inadmissible;

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

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 227 (two hundred and twenty-seven euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 5 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President