CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF NEŠŤÁK v. SLOVAKIA

(Application no. 65559/01)

JUDGMENT

STRASBOURG

27 February 2007

FINAL

27/05/2007

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 Nešťák v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 6 February 2007,

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

PROCEDURE

1. The case originated in an application (no. 65559/01) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Filip Nešťák ("the applicant"), on 20 December 2000.

2. The applicant was represented by Mr R. Hargaš, a lawyer practising in Trenčín, who was succeeded by Mr J. Šimko, a lawyer also practising in Trenčín. The Slovakian Government ("the Government") were represented by Mrs A. Poláčková, their Agent.

3. The applicant raised various complaints under Articles 5 § 1 (c) and 6 §§ 1 and 2 of the Convention about his detention on remand and criminal proceedings leading to his conviction for complicity in armed robbery.

4. On 24 November 2004 the Court decided to communicate to the Government the complaints concerning the lawfulness of the applicant's detention, the unfairness of the proceedings concerning his detention, the bias of the Regional Court's judges involved in his case and the violation of the applicant's right to be presumed innocent. Under the provisions of Article 29 § 3 of the Convention, it was 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 1979 and lives in Moravské Lieskové.

6. On 6 April 2000, at around 1.30 a.m., two individuals robbed a gambling house in Liptovský Mikuláš. They were masked with stockings pulled over their heads and entered the club after closing time. They forced the last remaining employee to hand over cash and a stock of cigarettes by threatening him with a starting pistol and an electric paralyser.

7. On 6 April 2000, after 6 a.m., the police detained and subsequently charged the applicant and his former classmate and friend, R., with armed robbery within the meaning of Article 234 §§ 1and 2 (b) of the Criminal Code (CC). The applicant who was assigned an *ex officio* lawyer did not appeal against the charge.

8. At his first interrogation R. confessed to having committed the robbery together with the applicant and gave all relevant details. The applicant only confessed to having planned and prepared the robbery. According to him he had withdrawn from the plan at the last minute because he had become anxious. He had driven R. to the scene and had agreed to wait for him in a place agreed upon, but R. had not come to that place.

9. In his subsequent interrogation before a judge of the Liptovský Mikuláš District Court (*Okresný súd*) the applicant repeated the above version. He did not know the person who had committed the robbery with R. and had no explanation as to why R. wished to inculpate him. The applicant added that he had a debt which he intended to pay off from the proceeds of the planned robbery. He and R. had previously wanted to burgle a holiday cottage, but had abandoned the idea after a light had gone on inside. The applicant also stated that he was a self-employed entrepreneur and could settle his debt using money from his business or obtained from his father.

10. On 7 April 2000 the District Court remanded the applicant in detention. Testimonies of R. and a witness and other evidence provided a basis for a strong suspicion against the applicant. Even assuming that he had not taken part in the robbery as such, his involvement had in any event amounted to the offence of aiding and abetting under Article 10 § (c) of the CC. As the motive of his actions was his need to obtain money to pay off his debt, it could be presumed that, if released, the applicant would carry on his criminal activities to achieve that objective. This rendered his detention justified under Article 67 § 1 (c) of the Code of Criminal Procedure (CCP). On 12 April 2000 the District Court corrected clerical errors in the decision.

11. The applicant filed a complaint (*sťažnosť*) against his detention arguing that he had no previous convictions and that the weapon had been used by R.

12. On 16 May 2000 the Žilina Regional Court (*Krajský súd*) dismissed the applicant's complaint observing that the testimony of R. and documentary evidence justified the suspicion that the applicant had been at least an accomplice to the robbery. It was true that he had no previous convictions but, at the same time, it was clear from his own submissions that his objective was to obtain money to discharge his debt. The reasons for detaining him, as established by the District Court, were therefore valid.

13. On 19 June 2000 the applicant discharged his lawyer and appointed a new one.

14. On 22 June 2000 the applicant was indicted to stand trial in the District Court on charges of conspiracy and robbery (Articles 9 § 2 and 234 §§ 1 and 2 (b) of the CC).

15. On 6 July 2000 the applicant's new lawyer lodged a petition for the applicant's release. He relied on extracts from the applicant's accounting books and argued that the recent profits of his business were sufficient to settle the applicant's debt. There was therefore no need to detain him.

16. On 11 July 2000 the District Court informed the applicant that a request for his release had been submitted on his behalf by a lawyer but that it could not be processed because the lawyer had not shown that he had a valid power of attorney from the applicant. On the same day the previous lawyer informed the District Court that his power of attorney had been terminated and that the applicant had new legal representation.

17. On 17 July 2000 the District Court held a private session (*neverejné zasadnutie*) to examine the petition of 6 July 2000 for the applicant's release. The session was attended by a public prosecutor, but neither the applicant nor his lawyer was present. The District Court dismissed the petition. It referred to a previous statement by the applicant according to which it was the applicant who had proposed to R. that they should find a way to obtain money. The fact that the applicant had income from his business was not new. However, the information submitted by him as to the amount of his earnings was inconsistent and had no impact on the necessity to keep him in detention.

18. On 26 July 2000 the applicant complained of the decision of 17 July 2000 to the Regional Court. He argued that at the time of his remand he had not had detailed information about his financial situation. He now had such information and it showed that his financial standing had improved and was better than expected.

19. On 16 August 2000 the Regional Court held a private session to decide on the applicant's complaint. It was attended by the prosecutor but not by the applicant and his lawyer. The Regional Court dismissed the complaint. It considered that the concern that the applicant might commit

further offences was still justified. He had a debt which he could not repay and the evidence available indicated that this was the reason why he and R. had decided to carry out the robbery. As for the extracts from the accounting books which he had submitted, it could not be established whether they related to the business of the applicant or his father's.

20. On 25 September 2000 the District Court held a hearing (*hlavné pojednávanie*) in the case. It took evidence from the applicant and R. and examined depositions of four witnesses.

The applicant again petitioned for release arguing that he had sufficient means to pay off his debt and that the initial reason for detaining him therefore no longer existed. His petition was dismissed as the court found no new relevant facts which would invalidate the reasons for the applicant's detention as set out in the earlier decisions.

The hearing was adjourned until 23 October 2000 in order to await a judgment of the Nové Mesto nad Váhom District Court in a different criminal trial against R.

21. On 28 September 2000 the applicant filed a complaint against the dismissal of his petition for release. He argued that the courts had not convincingly refuted his argument that he had sufficient means to settle his debt. The applicant further complained of a violation of his right to be presumed innocent in that in their previous decisions the courts had expressed the view that he had committed the robbery despite the fact that he had not yet been convicted.

22. On 11 October 2000 the Regional Court held a private session to consider the applicant's complaint. It was attended by the prosecutor in the absence of the applicant and his lawyer. The Regional Court dismissed the complaint holding that:

> "The accused was indicted for complicity in robbery ... The evidence which has been taken so far has proved that the accused Nešťák committed that offence as he needed money to pay off his debts ("*...bolo preukázané, že obžalovaný Nešťák uvedeného trestného činu dopustil sa z dôvodu, že potreboval peniaze ...*"). On this basis the authorities dealing with the case established that [the applicant's] detention was necessary within the meaning of Article 67 § 1 (c) of the Code of Criminal Procedure, as the specific fear persisted that the accused would continue criminal activities in case of his release.
>
> Having examined the challenged decision and the reasons for the complaint against it, the Regional Court [considers] that the danger still exists that the accused will continue committing offences in case of his release regardless of his argument that his financial situation has improved and that he can pay off the debt. The Regional Court reached this conclusion also having regard to the fact that the accused had been tried by the District Court in Nové Mesto nad Váhom on 25 September 2000 and the District Court in Liptovský Mikuláš adjourned the hearing only because the judgment of [25 September 2000] had not become final and [the District Court in Liptovský Mikuláš] may be required to impose a consolidated penalty. The above thus shows that the accused has a tendency to commit offences regardless of his financial

situation. The risk that, if released, he may continue to commit further offences with a view to obtaining financial means therefore still persists.

The way in which the offence was committed also indicates the extent to which the accused is corrupt. This confirms the conclusion that he could commit further offences."

23. On 23 October 2000 the District Court held another hearing following which, on the same day, it found the applicant guilty as charged and sentenced him to five and a half years' imprisonment.

The District Court noted that, at the pre-trial stage of the proceedings, the applicant had admitted that he had come up with the idea of illegally obtaining money and that with R. they had explored the possibilities of doing so. At that time he had claimed that he had participated in preparing the robbery but had finally abandoned the idea of carrying it out. However, at the hearing, the applicant had changed his testimony and alleged that he had informed R. beforehand that he would not participate in the crime.

The District Court also noted that R. had described in detail how the offence had been committed. According to him the initiative to steal money had come from the applicant and the applicant had actually carried out the robbery with him. This version of facts was supported by other evidence, in particular by the statements of the employee of the club and two other witnesses. It was corroborated by police reports concerning the discovery of weapons and other items connected with the robbery and the booty. The District Court found no grounds to disbelieve the version of R. The applicant's version was however not supported by any evidence and was thus unreliable.

24. The applicant appealed. He argued that the first-instance court had failed to establish adequately the relevant facts and to give convincing reasons for its conclusion. In particular it had relied exclusively on the statements of R. and had given no relevant reasons for rejecting the applicant's version. There was no evidence showing that the applicant had actually committed the robbery and the District Court had failed to address his argument that there were inconsistencies in the submissions of R.

25. On 7 November 2000 the District Court dismissed another request for release lodged by the applicant.

26. On 10 November 2000 the applicant complained about the decision of 7 November 2000 and challenged the judges of the Regional Court dealing with his case. He contended that in the above decision of 11 October 2000 they had expressed the view that the applicant had a tendency to commit offences and, in that connection, referred to the judgment of the Nové Mesto nad Váhom District Court of 25 September 2000. That judgment, however, concerned R. and not the applicant. According to the applicant, in the circumstances, the impartiality of the Regional Court's judges was open to doubt.

27. On 15 December 2000, under Article 31 § 5 of the CCP, a different chamber of the Regional Court found that the three Regional Court judges dealing with the applicant's case were not biased. It acknowledged that the reference in the decision of 11 October 2000 to the judgment of 25 September 2000 was a mistake. However, that mistake had no impact on the determination of the charges against the applicant.

28. On 10 January 2001 the Regional Court modified the first-instance judgment in that it reduced to five years the sentence imposed on the applicant. The chamber of the Regional Court was composed of the same judges who had delivered the decision of 11 October 2000.

In its judgment the Regional Court addressed the applicant's arguments. It found no discrepancy in the relevant part of the statements of R. indicating that he had committed the offence together with the applicant. Relying on the contents of the case file, the Regional Court upheld the conclusion that the applicant had initiated the offence and that he had committed it together with R.

29. On 10 January 2001 the Regional Court dismissed the applicant's complaint against the decision of 7 November 2000. It noted that the applicant's conviction had become final and that he was to start his sentence. In any event, at the relevant time the applicant's detention under Article 67 § 1 (c) of the CCP had been justified.

30. On 25 August 2003 the Trenčín District Court released the applicant on parole.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution (Constitutional Law no. 460/1992 Coll., as applicable at the relevant time) and the Constitutional Court's practice

31. Article 11 provides that international instruments on human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements have precedence over national laws, provided that they guarantee greater constitutional rights and freedoms.

32. Under the Constitutional Court's case-law (see, for example, the decision of 22 March 2000, file no. I. ÚS 9/00) ordinary courts are obliged in civil proceedings to interpret and apply the relevant laws in accordance with the Constitution and with international treaties. Accordingly, the ordinary courts have the primary responsibility for upholding rights and fundamental freedoms guaranteed by the Constitution or international treaties.

33. Pursuant to Article 17 § 2 no one shall be prosecuted or deprived of their liberty except for reasons and in a manner provided for by law.

34. Under Article 50 § 2 any person against whom criminal proceedings are conducted is to be presumed innocent until proved guilty by a final judgment by a court of law.

B. Criminal Code (Law no. 140/1961 Coll., as applicable at the relevant time)

35. Article 9 § defines criminal complicity. Pursuant to that provision if a criminal offence has been committed by a common action of two or more individuals, each of them is criminally liable as if he or she committed the offence alone.

36. The offence of robbery is defined in Article 234. It provides that anyone who uses violence or a threat of immediate violence against another with the intention to take hold of someone else's property is to be punished by imprisonment of two to ten years (§ 1). Imprisonment of five to twelve years applies if a weapon is used (§ 2 (b)).

C. Code of Criminal Procedure (Law no. 141/1961 Coll., as applicable at the relevant time)

37. Article 2 lays down fundamental principles of criminal proceedings. Pursuant to its paragraph 2 a person against whom the proceedings are conducted cannot be considered guilty until convicted by a final judgment of a court of law.

38. Basic legal rules concerning exclusion of judges are encompassed in Article 30. Judges should be excluded from taking part in steps in criminal proceedings if their impartiality is open to doubt on account of their link to the subject-matter of the proceedings, the persons directly concerned, the legal representatives or the prosecuting authorities involved (paragraph 1). After the bill of indictment (*obžaloba*) is lodged, judges should be excluded who at the pre-trial stage of the proceedings took part in deciding on the detention of the indicted person (paragraph 2).

39. Article 31 governs the procedure on exclusion of biased judges. If judges themselves declare that they are biased, the question of their exclusion is to be resolved by a chamber of a superior court (paragraph 1). In other situations the question of exclusion is to be decided by the body concerned (paragraph 2). If a Regional Court sits as a court of appeal, the exclusion of its judges is to be determined by a different chamber of the same court (paragraph 5).

40. Detention on remand is governed by the provisions of Articles 67 *et seq.* A person charged with a criminal offence (*obvinený*) can be detained *inter alia* when there are reasonable grounds for believing that he or she would continue criminal activity, complete an attempted offence or commit

an offence which he or she prepared or threatened to commit (Article 67 § 1 (c)).

41. Article 68 § 1 provides that a person can be remanded in custody only after he or she has been charged. The detention order has to be based also on the factual circumstances of the case.

42. Under Article 72 § 1 an investigator, a prosecutor or a judge has to examine at every stage of the criminal proceedings whether the reasons for detention persist. When the reasons for detention fall away, the detainee has to be released immediately.

43. Private sessions (*neverejné zasadnutie*) of courts in criminal matters are governed by the provisions of Chapter 15. Article 240 stipulates that decisions are to be taken in private if the law does not envisage their being taken at a hearing (*hlavné pojednávanie*) or in a public session (*verejné zasadnutie*).

44. Pursuant to Article 241 the president of the chamber notifies the public prosecutor that the court is to hold a private session as a rule at least three days in advance.

45. Under Article 242 a private session requires the permanent presence of all members of the court's chamber and of a minutes recorder (paragraph 1).

46. Until 1 October 2002, unless the law provided otherwise, the presence of the public prosecutor at a private session was possible but not obligatory (paragraph 2). As from 1 October 2002 this provision was abolished by virtue of Act No. 422/2002 Coll.

47. The presence of any other person at a private session is excluded (former paragraph 3, now paragraph 2).

D. Civil Code (Law no. 40/1964)

48. Under Article 11, natural persons have the right to protection of their personality rights (personal integrity), in particular their life and health, civil and human dignity, privacy, name and personal characteristics.

49. Under Article 13 § 1, natural persons have the right to request that unjustified infringements of their personality rights be discontinued and that the consequences of such infringements be eliminated. They also have the right to appropriate just satisfaction.

50. Article 13 § 2 provides that, in cases where the satisfaction obtained under Article 13 § 1 is insufficient, in particular because the injured party's dignity or social standing has been considerably diminished, the injured party is also entitled to financial compensation for non-pecuniary damage.

51. In an action of 26 June 2002 a married couple asserted a claim against the Ministry of Justice for financial compensation for non-pecuniary damage caused to them by detention on remand and criminal proceedings against them, which ended with their acquittal. The principal thrust of the

claim was that their prosecution and the whole trial had been unlawful and arbitrary.

The action was examined on appeal by the Banská Bystrica Regional Court under file number 16Co 256/05. In its judgment of 7 July 2006 the court interpreted the claim as a claim for protection of personal integrity under Article 11 of the Civil Code. It reviewed briefly the course of the criminal proceedings against the plaintiffs and concluded that they had failed to establish that there had been any unlawfulness. Relying on the judgment of the Supreme Court of 20 October 2005 file number 5Cdo 150/03, the court held that criminal proceedings which were conducted in compliance with the applicable laws could not constitute an unjustified interference with personal integrity even if they ended with an acquittal. The court also addressed briefly the length of the plaintiffs' detention and concluded that it had not been excessive. The above claim was thus not accepted, unlike other claims made in the same action (compensation for lost profit, legal costs and infringement of the presumption of innocence).

52. Further details concerning protection of personal integrity under Articles 11 *et seq.* of the Civil Code are summarised in *Kontrová v. Slovakia* ((dec.), no. 7510/04, 13 June 2006).

E. Code of Civil Procedure (Law no. 99/1963 Coll.)

53. Article 8 defines the jurisdiction of the ordinary courts. Pursuant to its first paragraph, unless jurisdiction is conferred by statute on other authorities, the ordinary courts examine and decide upon matters stemming from relations under civil law, labour law, family law, the law of co-operatives, and commercial law. Under paragraph 2, other matters may be examined and decided upon by the ordinary courts only if a statute so provides.

54. Under the terms of Article 135 civil courts are bound, *inter alia*, by the decisions of the competent authorities that a criminal offence has been committed and by whom (paragraph 1). Other questions which normally fall to be decided by other authorities can be decided by a civil court. However, if the competent authorities decided upon such a question, the civil court will adopt their decision (*vychádza z ich rozhodnutia*).

F. State Liability Act of 1969 (Law no. 58/1969 Coll.)

55. The Act lays down rules for State liability for damage caused by unlawful decisions (Part (*Časť*) One) and wrongful official conduct (Part Two).

56. The general scope of State liability for damage caused by unlawful decisions is defined in section 1 (1). Pursuant to this provision the State is

liable for damage caused by unlawful decisions by its bodies and agencies *inter alia* in criminal proceedings. However, decisions concerning detention and sentencing are excluded.

57. Special rules concerning State liability for damage caused by decisions on detention are embodied in sections 5 *et seq*. The State is liable for damage caused by such decisions only in respect of persons against whom the proceedings have been discontinued or who have been acquitted (section 5 (1)).

58. Section 18 (1) renders the State liable for damage caused by wrongful official conduct on the part of its bodies and authorities in carrying out their functions.

A claim for compensation may be allowed where the claimant shows that he or she suffered damage as a result of a wrongful act of a public authority, quantifies its amount, and shows that there is a causal link between the damage and the wrongful act in question.

The Act does not allow for compensation for non-pecuniary damage unless it is related to a deterioration in a person's health (for further details, see *Havala v. Slovaki*a (dec.), no. 47804/99, 13 September 2001).

THE LAW

I. THE GOVERNMENT'S OBJECTION AS TO EXHAUSTION OF DOMESTIC REMEDIES IN RESPECT OF THE ARTICLE 5 COMPLAINTS

59. The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 in respect of his complaints under Article 5 §§ 1 (c) and 4 of the Convention. In particular, they argued that as regards these complaints he had failed to seek damages under the State Liability Act of 1969 and/or protection of his personal integrity under Articles 11 *et seq.* of the Civil Code.

They submitted that in determining such claims the courts would not only be bound by the provisions of the State Liability Act of 1969 and the Civil Code but would also be obliged to take due account of the provisions of relevant international instruments. They would thus be obliged to consider not only the pecuniary aspect of the damage but to decide also on compensation for any possible non-pecuniary damage.

In that connection the Government contested the Court's conclusions as to the ineffectiveness of the said remedies in the cases against Slovakia of *Tám* ((dec.), no. 50213/99, 1 July 2003) *Kučera* ((dec.), no. 48666/99, 4 November 2003), *König* ((dec.), no. 39753/98, 13 May 2003) and *Pavletič*

((dec.), no. 39359/98, 13 May 2003). It was true that there were no final domestic decisions proving that these remedies offered good prospects of success in the circumstances of the present case. This was however mainly due to the fact that the present situation was rather exceptional and the remedies in question had not yet been tested in this context. Nevertheless, there were no domestic decisions showing that these remedies were *a priori* bound to fail in the applicant's case.

60. The applicant disagreed and submitted that the use of the remedies advanced by the Government had no basis in law and judicial practice, that the remedies fell outside the jurisdiction of the civil courts and that they clearly had no chances of success.

61. The Court recalls that it has previously addressed the question of the effectiveness of the remedies referred to by the Government in similar cases (see *Tám*, *Kučera, König and Pavletič,* cited above). It did not find it established that the possibility of obtaining appropriate redress by making use of these remedies was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law. The Court finds no reasons to depart from this conclusion. Moreover, and in any event, the Court finds it appropriate to note the following.

62. The scope of jurisdiction of the civil courts is defined in Article 8 of the Code of Civil Procedure which is the *lex generalis* in the matter. From this provision it follows that matters of criminal law can be examined and decided upon by a civil court only if a statute so provides. Under Article 135 § 1 of this Code if a certain question has been determined by a criminal court, civil courts would adopt the criminal court's decision.

63. In the present case the applicant's liberty was restricted by decisions of the criminal courts. The general rules do not seem to provide any basis on which civil courts could reconsider their decisions.

64. Damage caused by decisions taken in criminal proceedings is regulated by the provisions of Part One of the State Liability Act of 1969 which is the *lex specialis* in the matter. Under its sections 5 *et seq.* damage caused by decisions concerning detention can be compensated only if the criminal proceedings were discontinued or resulted in an acquittal, neither of which is the applicant's case.

65. The Court finally observes that the case underlying the judgment of the Banská Bystrica Regional Court of 7 July 2006 file no. 16Co 256/05 (see paragraph 51 in section "Relevant domestic law and practice" above) was substantially different from the present in that there the plaintiffs had been acquitted. It should also be taken into account that the events of the present case occurred well before the judgment of 7 July 2006, which appears unprecedented.

In the light of the above the Court concludes that the Government's objection of non-exhaustion of domestic remedies must be dismissed.

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

66. The applicant complained that his detention on remand had been unlawful and arbitrary in violation of Article 5 § 1 (c) of the Convention, which 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;
>
> ..."

67. The Government pointed out that there had been a well-founded suspicion against the applicant that he had committed a criminal offence and that, in the circumstances, there had been the risk that he would carry on his criminal activities if released. The detention had had an unequivocal legal basis in Article 67 § 1 (c) of the CCP, there was no indication of any procedural irregularity and the term of the detention for the purposes of Article 5 § 1 (c) of the Convention had been less than 7 months.

The Government concluded that the applicant's detention had been fully in compliance with the terms of the provision relied on and proposed that the relevant part of the application be rejected as manifestly ill-founded.

68. The applicant submitted that the authorities had based their decisions concerning his detention on nothing but the preconceived conviction that he had committed the offence in question and on the mistaken reliance on a criminal conviction in another trial which did not concern him. These reasons were neither sufficient nor relevant for detaining him.

69. The Court must first determine whether the detention was "lawful", including whether it complied with "a procedure prescribed by law". The Convention here refers back to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, the *Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 850, § 50).

It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see, among many other authorities, the *Scott v. Spain* judgment of 18 December 1996, *Reports* 1996, p. § 57).

70. In the present case the applicant was charged on 6 April 2000 with armed robbery and he did not appeal against the charge. The suspicion against him was that he had committed the robbery or, at least, that he had aided and abetted its commission. Both robbery and aiding and abetting constitute criminal offences in Slovakian criminal law. The suspicion was based on the applicant's own statements, on depositions of R. and of a witness and on other evidence. The Court finds that the "reasonableness" of this suspicion raises no issue under Article 5 of the Convention (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, § 155, ECHR 2000-IV).

71. The Court further observes that the applicant was remanded in detention by the decision of the District Court of 7 April 2000 which was upheld on the applicant's complaint by the Regional Court on 16 May 2000.

The applicant then petitioned for release three times and his petitions were dismissed by the District Court on 17 July, 25 September and 7 November 2000 and, upon his complaints, by the Regional Court on 16 August and 11 October 2000 and 10 January 2001, respectively.

72. Throughout its duration the applicant's detention was legally based on Article 67 § 1 (c) of the CCP which allows for the detention of persons charged with criminal offences where there are reasonable grounds for believing that they would continue to engage in criminal activities if released.

73. In so far as the complaint has been substantiated and given its limited power to review questions of compliance with domestic law, the Court has found no indication of substantive or procedural unlawfulness of the applicant's detention under the domestic law.

74. However, it does not suffice that the deprivation of liberty is executed in conformity with national law; it must also be necessary in the circumstances. Article 5 thus also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *K.-F. v. Germany*, judgment of 27 November 1997, *Reports* 1997-VII, p. 2674, § 63).

75. The domestic courts considered that it was necessary to detain the applicant as there was a suspicion that, if left at liberty, he would continue to engage in criminal activities with a view to obtaining money to pay off his debt. They based this suspicion on the applicant's own statements that it was he who had initiated the attempts to obtain money by unlawful means, that prior to the robbery the applicant and R. had set out to burgle a holiday cottage and that his actions had been motivated by his desire to settle his debt.

76. The Court observes that the applicant had no previous convictions and, given that, considers that the domestic courts' assessment of the situation is not entirely free from criticism. However, considering the

applicant's detention as a whole and taking into account its length, the Court finds that there are insufficient grounds for holding it to be "arbitrary" within the meaning of Article 5 of the Convention (see, for example, *Ambruszkiewicz v. Poland*, no. 38797/03, §§ 32 and 33, 4 May 2006).

It follows that the applicant's complaint under Article 5 § 1 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

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

77. The applicant also complained that except for the decisions of 7 April and 25 September 2000 the decisions concerning his detention had been taken in private sessions which neither he nor his lawyer could attend but which were attended by the public prosecutor. The Court considers that this complaint should be examined under Article 5 § 4 of the Convention which reads as follows:

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

78. The Government accepted that the complaint was not manifestly ill-founded. They acknowledged that the domestic court's private sessions concerning the applicant's detention had been attended by the public prosecutor but submitted that his participation had been merely passive and had had no effect on the outcome. They further submitted that, as from 1 October 2002, the relevant legislation had been changed and under the new rules neither the prosecution nor the accused and his defence were allowed to take part in courts' private sessions concerning detention.

79. The applicant submitted that the principle of equality of arms had not been observed in the proceedings concerning his detention and that, consequently, the proceedings had been unfair as a whole.

A. Admissibility

80. 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

81. The Court reiterates that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are

essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention" (see, among many other authorities, the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65). A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person (see, among many other authorities, the *Sanchez-Reisse v. Switzerland* judgment of 21 October 1986, Series A no. 107, p. 19, § 51). In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among many other authorities, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3302, § 162). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see, among many other authorities, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-...).

82. In the present case questions of the applicant's detention were decided in private sessions by the District Court on 17 July and 7 November 2000 and by the Regional Court on 16 May, 16 August and 11 October 2000 and 10 January 2001.

It is not in dispute that the law, as it stood at that time, did not entitle either the applicant or his lawyer to attend these private sessions. At the same time the Court notes that under the applicable provisions it was open to the prosecution service to be present at any of these sessions and that they in fact availed themselves of this opportunity whereas neither the applicant nor his counsel were present (see also *Kawka v. Poland*, no. 25874/94, §§ 60 and 61, 9 January 2001). In this connection the Court would reiterate that even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see, *mutatis mutandis*, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26).

83. The foregoing considerations are sufficient for the Court to find that there has been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

84. The applicant further complained that in the judicial decisions relating to his detention on remand and, in particular, in the Regional Court's decisions of 16 August and 11 October 2000 it had been taken as established that he had committed the offence imputed to him, that he had had a tendency to commit offences and that his motive had been the need to obtain money to settle his debt. As these conclusions had been reached before he had been proved guilty according to law, the applicant alleged a violation of his right to be presumed innocent. He relied on Article 6 § 2 of the Convention which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

85. The Government contested that argument. They submitted that neither in the statements challenged by the applicant nor elsewhere had the authorities implied or stated that he had been guilty of a criminal offence. The statements in question had been made in connection with the applicant's detention and they referred to his motive for the acts of which he had been accused. The motive had been relevant for the assessment of the likelihood of the applicant continuing to engage in criminal activities. The independent final assessment of the applicant's criminal guilt had in no way been prejudiced.

86. The applicant disagreed and reiterated his complaint.

A. Admissibility

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

B. Merits

88. The Court reiterates that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption (see, among many other authorities, *Deweer v. Belgium*, judgment of

27 February 1980, Series A no. 35, p. 30, § 56 and 37; *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36). Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see, among many other authorities, *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, §§ 27, 30).

89. In its decision of 11 October 2000 the Regional Court stated that it had been proved that the applicant had committed the offence of which he had been charged, that his motive had been the need for money and that the way in which the offence had been committed indicated the extent to which the applicant was corrupt. The Court emphasises that a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that an individual has committed the crime in question (see *Matijašević v. Serbia*, no. 23037/04, § 48, 19 September 2006). The Court finds that the statements impugned in the present case implied the applicant's guilt before it was proved according to law.

90. The fact that the applicant was ultimately found guilty and sentenced to a term of imprisonment cannot vacate his initial right to be presumed innocent until proved guilty according to law (see *Matijašević*, cited above, § 49).

91. There has accordingly been a violation of Article 6 § 2 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

92. Lastly, the applicant complained that his right to a fair hearing by an impartial tribunal had been violated in (i) the proceedings concerning his detention on remand, (ii) the proceedings concerning his challenge of the Regional Court's judges for bias and (iii) the criminal proceedings against him as a whole. He relied on Article 6 § 1 of the Convention, the relevant part of which provides that:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law."

A. Admissibility

1. Proceedings concerning the applicant's detention on remand and the exclusion of the Regional Court's judges

93. The Court observes that the proceedings concerning the applicant's detention and the impartiality of the Regional Court's judges did not involve a "determination" of the applicant's "civil rights and obligations" or of

a "criminal charge" against him within the meaning of Article 6 § 1 of the Convention.

It follows that the complaint of the unfairness of those proceedings is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. Criminal proceedings as such

94. The applicant submitted that he had been found guilty by the same chamber of the Regional Court which had concluded earlier, in the decision of 11 October 2000, that the applicant had committed the offence imputed to him. That chamber therefore could not be considered impartial. The applicant further submitted that the proceedings leading to his conviction had been unfair as the courts had failed to establish adequately the facts, to address sufficiently his arguments and to take due account of inconsistencies in the submissions of R. These deficiencies made the proceedings unfair as a whole.

95. The Government contested that argument. They submitted that the fact that one and the same chamber of the Regional Court had decided on both the applicant's detention and the merits of the accusation against him was not incompatible with the Convention requirements of a fair trial. The impugned statements of the Regional Court in its decision of 11 October 2000 did not concern the applicant's guilt, but his motive. They did not actually prejudice the assessment of the applicant's guilt in the judgment of 10 January 2001. There was no indication of any lack of impartiality of the tribunals deciding on the criminal charge against the applicant and the proceedings as a whole were fair.

96. 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. Hearing by impartial tribunal

97. The Court observes that on 11 October 2000 a chamber of the Regional Court decided on the applicant's complaint against the District Court's decision of 25 September 2000 to dismiss his petition for release from detention. The applicant's challenge of the Regional Court's chamber for bias was dismissed by another chamber of that court on 15 December 2000. The impugned chamber then determined the applicant's

appeal against his conviction and sentence. Its decision was subject to no appeal and was thus final.

In remains to be ascertained whether in the circumstances the Regional Court's chamber in question provided the applicant with the guarantees of impartiality as required under Article 6 § 1 of the Convention.

98. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused. To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect.

In applying the subjective test the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary

As to the objective test, it consists in determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (for a summary of the relevant principles see *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 118-121, ECHR 2005-...).

99. The main thrust of the applicant's complaint is that the judges of the Regional Court who determined his appeal had previously decided on issues concerning his detention and they had a preconceived view, which they had expressed, that he had committed the offence in question.

The Court finds no indication that the challenged judges had acted with any personal bias against the applicant.

Accordingly, the sole issue to be determined is whether in the particular circumstances of the case the applicant's concern of lack of impartiality on their part was objectively justified.

100. The Court reiterates that the mere fact that a judge has already taken pre-trial decisions in the case, including decisions relating to detention on remand, cannot in itself justify fears as to his impartiality. Only special circumstances may warrant a different conclusion (see *Hauschildt*, cited above, pp. 22-23, §§ 50-51).

101. In the instant case the impugned chamber of the Regional Court made statements implying that the applicant had committed the offence in

question before the trial was concluded. These statements were made in a decision that had been preceded by deliberations *in camera* which had been attended by the prosecution service but in which the defence had been unable to take part. The Court finds that making such statements in the given context can give rise to legitimate and objectively justified misgivings about the impartiality of that tribunal. In the present case the same chamber of the Regional Court dismissed the applicant's appeal, no further appeal was available and his conviction and sentence became final.

The Court finds that in these circumstances there has been a violation of the applicant's right under Article 6 § 1 of the Contention to a hearing by an impartial tribunal.

2. Other aspects of fair trial

102. Having regard to its finding under Article 6 § 1 of the Convention as regards the lack of impartiality of the tribunal (see the preceding paragraph), the Court considers that it is not necessary to examine separately the applicant's complaint that his trial had been unfair in other aspects (see, *mutatis mutandis*, *Findlay v. the United Kingdom*, no. 22107/93, § 80, ECHR 1997-I and *Indra v. Slovakia*, no. 46845/99, § 58, 1 February 2005).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. 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

104. The applicant claimed 10,653,850 Slovakian korunas[1] (SKK) in respect of pecuniary damage. This amount consisted of the costs of his detention and imprisonment, which he had had to pay to the State, and loss of business profit as a consequence of his detention. The applicant also claimed SKK 2,671,920[2] in respect of his non-pecuniary damage.

105. The Government contested these claims.

106. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it accepts that the applicant must have suffered some

[1] SKK 10,653,850 is equivalent to approximately 280,000 euros (EUR).
[2] SKK 2,671,920 is equivalent to approximately EUR 70,000.

non-pecuniary damage. Ruling on the equitable basis, it awards the applicant 6,000 euros (EUR) under that head.

B. Costs and expenses

107. The applicant also claimed SKK 24,057[1] for the costs and expenses incurred before the domestic courts and SKK 48,256[2] for those incurred before the Court.

108. The Government contested these claims.

109. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads.

C. Default interest

110. 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* admissible the complaints (i) under Article 5 § 4 of the Convention concerning the proceedings by which the applicant sought to have the lawfulness of his detention decided, (ii) under Article 6 § 2 of the Convention concerning the violation of the applicant's right to be presumed innocent and (iii) under Article 6 § 1 of the Convention concerning the lack of a fair hearing before an impartial tribunal in the criminal proceedings against him;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

[1] SKK 24,057 is equivalent to approximately EUR 650.
[2] SKK 48,256 is equivalent to approximately EUR 1,300.

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of impartiality of the tribunal which convicted the applicant;

6. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention concerning the alleged procedural unfairness;

7. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage and EUR 1,000 (one thousand euros) in respect of costs and expenses, the above amounts to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 27 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President