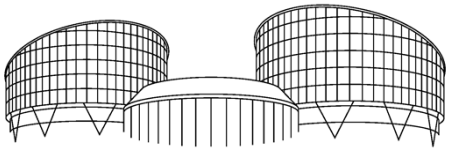

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MAASSEN v. THE NETHERLANDS

(Application no. 10982/15)

JUDGMENT

Art 5 § 3 • Reasonableness of pre-trial detention • Relevant but insufficient reasons provided by domestic courts in justifying continued pre-trial detention of applicant • Depth of courtroom discussions, reflected in official records of hearings, not compensating for lack of detail in written decisions

STRASBOURG

9 February 2021

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

In the case of Maassen v. the Netherlands,

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

Yonko Grozev, *President,*
Tim Eicke,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 10982/15) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr Marlon Maassen ("the applicant"), on 24 February 2015;

the decision to give notice to the Dutch Government ("the Government") of the complaints concerning the applicant's pre-trial detention;

the parties' observations;

the submissions of the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*), which was invited to intervene by the President of the Section, in accordance with Article 36 § 2 of the Rules of Court;

the decision to uphold the Government's objection to examination of the application by a Committee;

Having deliberated in private on 19 January 2021,

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

INTRODUCTION

1. The applicant complained under Article 5 §§ 1 and 3 of the Convention that his pre-trial detention from 19 December 2014 onwards had lacked adequate justification, or in the alternative, that the respective decisions taken by the domestic courts had lacked sufficient reasons.

THE FACTS

2. The applicant was born in 1991. At the time of the introduction of the application he was detained in Baarn. The applicant was represented by Mr J.C. Reisinger, a lawyer practising in Utrecht.

3. The Government were represented by their Agents, initially Mr R. Böcker and subsequently Ms B. Koopman, both of the Netherlands Ministry of Foreign Affairs.

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

5. In July 2014 the television programme *Undercover in Nederland* ("Undercover in the Netherlands"), presented by the journalist A. S., conducted an investigation into abuse in prostitution, focusing on sex advertisements featuring young women. Suspecting that someone was helping a 15-year-old girl to sell sexual services over the Internet, the relevant footage was passed on to the police.

6. The ensuing criminal investigation resulted in a number of persons, the applicant among them, being suspected of human trafficking (*mensenhandel*; see paragraph 26 below), and in particular the exploitation of an underage prostitute. The applicant was arrested and placed in police custody (*inverzekeringstelling*) on 2 December 2014 and on 5 December 2014 he was taken into initial detention on remand (*bewaring*) for fourteen days by order of an investigating judge (*rechter-commissaris*) of the Central Netherlands Regional Court (*rechtbank Midden-Nederland*). The order included the following grounds:

> "It appears that there is a serious public-safety reason requiring the immediate deprivation of liberty, namely:
>
> there is a suspicion of a [criminal] act which, under the law, carries a maximum sentence of imprisonment of twelve years or more and that act has caused serious upset to the legal order [*een feit waarop naar de wettelijke omschrijving een gevangenisstraf van 12 jaren of meer is gesteld en waardoor de rechtsorde ernstig is geschokt*];
>
> there is a serious likelihood [*er moet ernstig rekening mee worden gehouden*] that the suspect will commit a crime [*misdrijf*] which, according to the law, carries a maximum sentence of imprisonment of six years or more;
>
> there is a serious likelihood that the suspect will commit a crime [*misdrijf*] by which the health or safety of individuals will be endangered;
>
> detention on remand is in all reasonability necessary in order to discover the truth [*is in redelijkheid noodzakelijk voor het aan de dag brengen van de waarheid*] by means other than through the suspect's statements. Witnesses/co-suspects need to be heard without the suspect having the possibility to influence the content of their statements. ..."

7. On 18 December 2014 a hearing *in camera* (*raadkamer*) took place before the Central Netherlands Regional Court sitting in Utrecht on the applicant's placement in extended detention on remand (*gevangenhouding*). During this hearing, the applicant argued through counsel that the extended detention on remand sought be refused or, in the alternative, that his detention on remand be suspended (*schorsing*). He asserted, relying on *Geisterfer v. the Netherlands* (no. 15911/08, 9 December 2014), that the mere seriousness of the criminal act of which he was suspected was, as such and in the abstract, insufficient to justify a continuation of his deprivation of liberty whereas there were no specific concerns that his release would cause upset to the legal order. He further argued that there were no indications of a risk of

reoffending, taking into account that his only previous conviction was of the theft of a bicycle and that he had been acquitted in a different case. Lastly, the applicant contended that his detention on remand was no longer justified for the purpose of the investigation, since the most important witnesses had already been heard and had given their statements.

8. On the same day the Regional Court sitting *in camera* ordered that the applicant be taken into extended detention on remand for ninety days, starting from 19 December 2014. The Regional Court's decision included the following:

> "The serious suspicions [*ernstige bezwaren*]
>
> The Regional Court finds that there remains a serious suspicion in respect of the [criminal] act described in the order for the initial detention on remand [*bevel bewaring*].
>
> The grounds
>
> The Regional Court is of the view that the ground(s) for pre-trial detention [*voorlopige hechtenis*] stated in the order for the initial detention on remand still exist(s). This does not apply to the grounds relating to the investigation [*onderzoeksgrond*].
>
> The defence has argued that also the grounds relating to [an offence carrying a] twelve-year [sentence] [*12-jaarsgrond*] are not applicable. The Regional Court is, however, of the opinion that those grounds are applicable in the instant case, noting the very young age of the victim and the great media attention given to this case."

The Regional Court subsequently dismissed the alternative application to suspend the applicant's detention on remand, holding that the applicant's personal interests did not outweigh the general interest of society in his detention on remand being continued.

9. The applicant appealed to the Arnhem-Leeuwarden Court of Appeal (*gerechtshof*). According to the official record (*proces-verbaal*) of the hearing held on 14 January 2015, counsel for the applicant argued that the extended detention on remand lacked sufficient justifiable grounds in that the risk of recidivism did not arise in the applicant's case and furthermore that upset to the legal order had not been shown. Counsel concluded that grounds for pre-trial detention were thus lacking and that therefore the impugned decision could not be upheld.

10. The prosecution argued that the applicant did not challenge the suspicions which concerned a serious crime, namely human trafficking. As to the upset of the legal order, the prosecutor noted that the case had attracted wide media coverage. The prosecutor lastly argued that the applicant's application to suspend his pre-trial detention should be dismissed.

11. On the same day the Court of Appeal confirmed the Regional Court's decision. The decision reads in its relevant part as follows:

> "CONSIDERATIONS
>
> After examination, the Court of Appeal finds that the grounds on which the Regional Court has ordered the suspect's extended detention on remand still exist, so that the decision of the Regional Court, in so far as appealed against, must be upheld in the light of those grounds. ...
>
> DECISION
>
> The Court of Appeal upholds the decision in so far as appealed against. ..."

12. No further appeal lay against this decision.

13. The trial proceedings against the applicant started on 17 March 2015 before the Central Netherlands Regional Court sitting in Utrecht. They were conducted simultaneously with the trial proceedings brought against two co-accused. At the public hearing held on that day, applicant's counsel applied for, *inter alia*, either the lifting of the applicant's pre-trial detention (*opheffing*) or its suspension (*schorsing*). In addition to his earlier arguments (see paragraphs 7 and 9 above), counsel submitted that just because the exploitation imputed to the applicant had been lucrative, this did not mean that the applicant would reoffend. In the context of his application to suspend the applicant's pre-trial detention, counsel further submitted medical reasons (the applicant was receiving treatment for anxiety disorders), as well as the applicant's wish to take up study and to stand by his mother during her divorce. The applicant was further prepared to respect possible conditions attached to a suspension of his pre-trial detention.

14. The prosecutor opposed the applications, submitting that the risk of recidivism could be assumed because of the nature of the evidence against the applicant, the duration of the victim's exposure to cash-paying clients for the benefit of the applicant, the fact that the actions for which the applicant was accused had only stopped after intervention by the police. It was also clear from the applicant's attitude in the proceedings that apparently he failed to appreciate what he had done. The prosecutor maintained that upset would be caused to the legal order, given that it concerned human trafficking of a minor victim which had been reported by A. S. (see paragraph 5 above) and which had triggered a wide reaction. The victim was a vulnerable 15-year-old girl and the co-accused had previously been prosecuted for offences relevant to the case in hand. The prosecutor further requested to add that to the investigation grounds (*onderzoeksgrond*, Article 67a § 1 under 5° of the Code of Criminal Procedure (*Wetboek van Strafvordering*, hereinafter "the CCP"); see paragraph 25 below), as the victim could be heard again as a witness. The prosecutor lastly emphasised that the applicant's alleged medical condition had remained unsubstantiated and that there was no declaration that the applicant was unfit for detention.

15. After having deliberated, on 17 March 2015 the Regional Court dismissed the applicant's applications to lift or suspend his pre-trial detention. It held as follows:

> "The application to lift and the application to suspend, the pre-trial-detention order are dismissed. The suspicions, objections and grounds which have led to the issuance of the pre-trial-detention order are still pertinent. The investigation grounds will not be added to anew as the risk of collusion has not been sufficiently substantiated.
>
> The situation of Article 67a § 3 of the CCP [that is to say the duration of pre-trial detention exceeding the possible custodial sentence] has not, noting the habitual sentences for the facts as charged, (yet) arisen. The Regional Court also considers there are no reasons for suspending the pre-trial-detention order. The suspect's interest does not outweigh the public interest in his continued pre-trial detention."

16. The Regional Court further adjourned the trial proceedings until 9 June 2015 and instructed the investigating judge to take evidence from the victim.

17. On 22 April 2015, following the applicant's appeal against the decision of 17 March 2015 in respect of his pre-trial detention, the Court of Appeal upheld that decision. In its relevant part, this decision reads:

> "CONSIDERATIONS
>
> After examination, the Court of Appeal finds that the grounds on which the suspect's pre-trial detention are based still exist, on the understanding that the recidivism grounds no longer apply, so that the decision of the Regional Court is to be upheld on those grounds. ...
>
> DECISION
>
> The Court of Appeal confirms the decision appealed against, on the understanding that the recidivism grounds no longer apply. ..."

18. At the public trial hearing of 9 June 2015, counsel for the applicant again requested that the applicant's pre-trial detention be either lifted or suspended. He argued that there was no question of upset being caused to the legal order or – after six months during which he had been in pre-trial detention – still being caused. He pointed out that, although he might have committed a crime in the eyes of the law, the girl had gone into prostitution of her own volition, and the applicant, believing that she was of age, had only aided her out of friendship. He also argued that public interest did not outweigh his personal interest in being released. He had made good use of his time in pre-trial detention by following a personal development course. He would respect all conditions attached to a release from pre-trial detention and submitted that his continued detention would not benefit the victim or society.

19. The prosecutor opposed the applicant's application, arguing, *inter alia*, that the grounds relating to the upset caused to the legal order remained pertinent. Although time had passed since the offence, in particular a minor in prostitution, caused enormous upset in society and, if it concerned a minor of the age of the victim in the case at hand, the maximum custodial sentence

was fifteen years and the public considered this a very serious offence. The prosecutor further saw no pressing personal circumstances on the basis of which the applicant's pre-trial detention should be suspended.

20. On the same day, after having deliberated, the Regional Court dismissed the applicant's application to lift or suspend his pre-trial detention, holding as follows:

> "The application to lift or suspend the pre-trial-detention order is dismissed. The suspicion, objections and grounds which have led to the issuance of the pre-trial-detention order are also now still pertinent.
>
> The situation of Article 67a § 3 of the CCP has not, noting the habitual sentences for the facts as charged, (yet) arisen.
>
> The Regional Court considers there are no reasons for suspending the pre-trial-detention order. The suspect's interest does not outweigh the public interest in continuing the [applicant's] pre-trial detention, also noting the upset caused to the legal order."

21. In a judgment of 15 September 2015 the Regional Court convicted the applicant of human-trafficking for having brought a 15-year-old girl into prostitution for a period of about three weeks and profiting therefrom, and sentenced him to eighteen months' imprisonment less the time spent in pre-trial detention and six months of which were suspended pending a probation period of two years. This conviction obtained the force of *res iudicata* on 29 September 2015.

22. The story of the applicant's victim featured in two episodes of *Undercover in Nederland* and was later told on the website of PowNed (a multimedia broadcaster aimed at the "network generation"), on Dichtbij.nl (a local-news Internet portal), and in the *IJmuider Courant* (a regional newspaper). In March 2015 *De Gooi- en Eemlander* (a regional newspaper) reported on the extension of the applicant's pre-trial detention and, in September 2015, NU.nl (an online newspaper), RTV Utrecht and RTV NH (regional television channels) reported on the applicant's conviction.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

23. Article 24 § 1 of the CCP provides that a decision (*beschikking*) given in chambers (*raadkamer*) must be reasoned.

24. Article 133 of the CCP defines pre-trial detention (*voorlopige hechtenis*) as deprivation of liberty pursuant to an order for detention on remand (*inbewaringstelling*), a warrant for the taking into pre-trial detention (*gevangenneming*) or an order for extended detention on remand (*gevangenhouding*). The statutory rules governing pre-trial detention are set out in Articles 63 to 88 of the CCP.

25. The provisions of the CCP as relevant for the present case are the following:

Article 67

"1. An order for detention on remand can be issued in cases of suspicion of:

a. an offence which, according to its legal definition, carries a sentence of imprisonment of four years or more; ...

3. The previous paragraphs are only applied when it appears from the facts or circumstances that there are serious suspicions against the suspect. ..."

Article 67a

"1. An order based on Article 67 can only be issued:

a. if it is apparent from particular behaviour displayed by the suspect, or from particular circumstances concerning him personally, that there is a serious danger of absconding;

b. if it is apparent from particular circumstances that there is a serious public-safety reason requiring the immediate deprivation of liberty.

2. For the application of the preceding paragraph, only the following can be considered as a serious public-safety reason:

1º. if it concerns suspicion of commission of an act which, according to its legal definition, carries a sentence of imprisonment of twelve years or more and that act has caused serious upset to the legal order;

2º. if there is a serious risk the suspect will commit an offence which, under the law, carries a prison sentence of six years or more or whereby the security of the State or the health or safety of persons may be endangered, or give rise to a general danger to goods; ...

5º. if detention on remand is necessary in order to discover the truth otherwise than through statements of the suspect.

3. An order for detention on remand shall not be issued if there are serious prospects that, in the event of a conviction, no irrevocable custodial sentence or a measure entailing deprivation of liberty will be imposed on the suspect, or that she or he, by the enforcement of the order, would be deprived of her or his liberty for a longer period than the duration of the custodial sentence or measure."

Article 78

"1. The pre-trial-detention order or the order for extension of its term of validity shall be dated and signed.

2. It shall specify as precisely as possible the criminal offence in regard of which the suspicion has arisen and the facts or circumstances on which the serious suspicions against the suspect are based, as well as the conduct, facts or circumstances which show that the conditions set down in article 67a have been met. ..."

Article 87

" ...

2. A suspect who has applied to the Regional Court to suspend or lift his detention on remand can appeal against a refusal of that application to the Court of Appeal once only, no later than three days after notification. The suspect who has appealed against the refusal of a suspension request cannot afterwards appeal against the refusal of a request to lift his detention on remand. The suspect who has appealed against the refusal to lift his detention on remand cannot afterwards appeal against the refusal of a suspension request.

3. The appeal shall be decided as speedily as possible."

26. Article 273f of the Criminal Code (*Wetboek van Strafrecht*) reads in its relevant part:

"1. Any person who:

: ...

5°. induces another person to make her- or himself available for the performance of sexual acts with or for a third party for remuneration or makes her or his organs available for remuneration or takes any action in regard of another person which she or he knows or has reasonable cause to suspect will lead that other person making her or himself available for the performance of these acts or services or making her or his organs available, whereas this person is under the age of 18 years; ...

8°. intentionally profits from the sexual acts of another person with or for a third party for remuneration or the removal of her or his organs for remuneration, whereas this other person is under the age of 18 years; ...

shall be guilty of human trafficking and as such shall be liable to a term of imprisonment not exceeding 8 years or a fine of the fifth category.

3. The offender shall be liable to a term of imprisonment not exceeding 15 years or a fine of the fifth category, if: ...

2°. the offences defined in subsection (1) have been committed against a person who is under the age of 16 years. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

27. The applicant complained under Article 5 §§ 1 and 3 of the Convention that his pre-trial detention from 19 December 2014 onwards had been without adequate justification, or in the alternative, that the respective decisions taken by the domestic courts had lacked sufficient reasons.

28. Article 5 §§ 1 and 3 of the Convention reads in so far as relevant 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;

...

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

29. The Court takes the view that the complaint should be examined under Article 5 § 3 alone (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 61, 5 July 2016).

A. Admissibility

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

B. Merits

1. Submissions by the parties

(a) The applicant

31. The applicant argued that as from 19 December 2014 onwards his pre-trial detention had had no valid grounds or that the respective decisions on his continued detention had been insufficiently reasoned.

32. The applicant considered that there had been nothing to suggest that he might reoffend if released from pre-trial detention given that his criminal record had contained only a conviction dating back to 15 January 2008 for bicycle theft (see paragraph 7 above). He submitted that, unlike his co-suspect, he had not been previously convicted of any sexual offence.

33. The applicant conceded that a high risk of "public disorder" or "the grave affront to the legal order" could constitute grounds for pre-trial detention, but considered that in his case release from pre-trial detention would not have given rise to public disorder. The Government had exaggerated the media attention. The two episodes of *Undercover in Nederland* had made no mention of the girl having been exploited by anyone and the publications on PowNed, and Dichtbij.nl and in the *IJmuider Courant* (see paragraph 22 above) had appeared only in September 2015, that is to say after the applicant had been convicted, and had been mainly focused on his co-suspect and not on the applicant. Between December 2014 and March 2015 there had been no media attention.

34. The sole ground for his extended detention on remand had been that the offence of which he had been suspected had attracted a maximum penalty of fifteen years' imprisonment and thus had been enough to satisfy the "twelve-year criterion" referred to in Article 67a § 2-1 of the CCP (see paragraph 25 above). However this, by itself, could not be regarded as amounting to a threat of public disorder in the applicant's case.

35. The applicant further argued that it followed from the Court's case-law and other international instruments that, no matter how complete the case file, pre-trial-detention orders had to contain specific facts and individual circumstances that could be regarded as relevant and sufficient justification for pre-trial detention. In the applicant's opinion, merely paraphrasing the formal grounds for pre-trial detention under domestic law was not enough. Moreover, the Government's analogy with Article 6 of the Convention (see paragraph 45 below) was misguided.

36. The decisions of 18 December 2014, 14 January 2015, and 17 March 2015 suggested that the applicant might reoffend without explaining why. As to the upset caused to the legal order, only the decision of 18 December 2014 (see paragraph 8 above) was not limited to a standard reasoning. The other decisions limited themselves to saying that "the grounds still existed". The courts had also failed to give reasons for refusing the applicant's reasoned request to suspend his pre-trial detention.

37. The applicant considered that, contrary to what had been argued by the Government (see paragraph 44 below), prosecutors' oral pleadings in court could not be a substitute for a reasoned decision by the courts which had the exclusive competence under domestic law to issue pre-trial-detention orders. All the more so, since the courts' duty was to weigh the competing interests and, by giving a reasoned decision, to allow public scrutiny. Without any insight into the reasons of a judge to extend pre-trial detention, the rights provided under Article 5 were not guaranteed in a practical and effective manner.

38. The applicant emphasised that pre-trial detention had to be justified in a convincing manner by the authorities no matter how brief and how often it was to be reviewed. The Court had found violations in cases where detention periods had been even shorter than the applicant's.

(b) The Government

39. The Government submitted that the grounds for the applicant's pre-trial detention had been legitimate, that the reasons cited by the domestic courts had been sufficient, and that his detention had in general been lawful.

40. In compliance with the Court's case-law, the general principle in the Netherlands pertaining to pre-trial detention was that the suspect could remain at liberty while awaiting trial. An exhaustive list of exceptions to this general rule was set out in Article 67a of the CCP (see paragraph 25 above) and Dutch legislation specified the grounds for pre-trial detention recognised

by the Court, namely 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); commit further offences (see *Matznetter v. Austria*, 10 November 1969, § 9, Series A no. 10); or cause public disorder (see *Letellier v. France*, 26 June 1991, § 51, Series A no. 207).

41. The Government pointed out that Article 67a § 1 referred to "a serious public-safety reason" which, in accordance with its second paragraph, could only be assumed in cases concerning a suspicion of commission of an act which, according to its legal definition, carried a sentence of imprisonment of twelve years or more and an act which had caused "serious upset to the legal order" (*geschokte rechtsorde*). In determining whether the offence for which pre-trial detention was being sought constituted a serious upset to the legal order, the penalty applicable to that offence was not the sole decisive factor. As held by the Netherlands Supreme Court (*Hoge Raad*) in a ruling given on 21 March 2006 (ECLI:NL:HR:2006:AU8131), an equally important factor was whether the seriousness of the offence was such that allowing the suspect to remain at liberty while awaiting trial would be met with widespread incredulity and be considered unacceptable by society.

42. According to the Government, the applicant's pre-trial detention had been justified by concerns about him reoffending and – noting that both the applicant and the prosecutor had mainly focussed on those grounds – especially by the upset caused to the legal order by the offence of which the applicant had been suspected.

43. The Government submitted that pre-trial detention could be justified by, among other things, a need to preserve public order from social disturbance caused by the public reaction to serious crimes (they referred to *Letellier*, cited above) and that "public order" in the Court's case-law may be regarded as synonymous with "legal order" in domestic law (*Geisterfer v. the Netherlands*, no. 15911/08, § 39, 9 December 2014). Under domestic case-law, serious upset to the legal order is considered to have been caused where the suspicion concerns a serious offence attracting a lengthy prison sentence taken together with the public reaction to that offence. The Government pointed out that the Court had accepted that offence to the public sense of justice could legitimise pre-trial detention (see *J.M. v. Denmark*, no. 34421/09, § 62, 13 November 2012). Sexual exploitation of a minor was a serious offence, and the harrowing personal story of the applicant's victim had attracted attention in the media, as had the applicant's pre-trial detention and conviction. A decision to release the applicant from pre-trial detention would have caused an outcry, also bearing in mind that the case had been found so shocking by the investigating journalists concerned that they had taken the unusual step of reporting it to the police.

44. According to the Government, the reasons given in the pre-trial-detention decisions had been relatively brief but not so as to breach Article 5. Not only had the decisions themselves to be considered, but also the preceding courtroom discussions, reflected in the hearing records, during which the Public Prosecution Service had given a reasoned explanation for its position that the criterion of "serious upset to the legal order" had been applicable.

45. Furthermore, in the context of Article 6 of the Convention, the Court had held that national courts had had to indicate with sufficient clarity the grounds on which they had based their decisions (see *Hadjianastassiou v. Greece*, 16 December 1992, § 33, Series A no. 252). However, the extent of the duty to give reasons varied according to the nature of the decision and had to be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A). The Court had taken issue with the reasoning of domestic courts only if the conclusions had been arbitrary, which in the present case they had not been.

46. The Government emphasised that the applicant's pre-trial detention had lasted a little over nine months, which – in view of the seriousness of the offences concerned, the seriousness of the suspicions and the other reasons that existed – could not be regarded as incompatible with the Convention (see, for instance, *W.B. v. Poland*, no. 34090/96, § 66, 10 January 2006). By reviewing the applicant's detention six times within that period, the authorities had displayed a sufficient degree of diligence. The applicant had had full access to the case file which constituted a significant safeguard against arbitrary pre-trial detention (see *Van Thuil v. the Netherlands* (dec.), no. 20510/02, 9 December 2004).

2. Submissions by the third-party intervener

47. The Netherlands Institute for Human Rights presented an overview of the domestic rules on pre-trial detention and of the Court's case-law on the subject.

48. The Institute made reference to a research study published in 2012 that had shown that most of the 28 domestic judges that were interviewed often derived the element of "serious disturbance to the legal order" from the seriousness of the offence. The assessment of the risk of offending while on bail was also based on the seriousness of the crime being tried.

49. The Institute further noted that when extending pre-trial detention, the domestic courts usually gave few reasons for their decisions and resorted to standard phrasing with little reference to the circumstances of individual cases. Often the courts would just echo earlier decisions or quote the corresponding statutory provisions. This practice could be partly explained by the courts' high caseload, with one court having to examine up to twenty-five cases in one session.

50. That limited reasoning was a symptom of a larger issue: a near-automatic withholding of bail. A study published in 2010 into the length of pre-trial detention and the subsequent sanction imposed on the defendant showed that in 27% of all cases in which pre-trial detention had been ordered, no penalty restricting the liberty of the defendant was imposed, and that in 24% of all cases, the defendants were sentenced to terms equal to or shorter than the time spent in pre-trial detention. As confirmed by judges, the duration of pre-trial detention was a compelling factor for determining the duration of a prison sentence.

51. The third-party intervener further stated that the lack of reasoning appeared to be a symptom of another larger issue concerning pre-trial detention in the Netherlands, namely its application in a near-automatic fashion. Whilst the Dutch domestic legislation set out guarantees in line with Article 5 of the Convention, its application in practice had led to a tendency of "extension of pre-trial detention, unless", rather than as an *ultimum remedium*.

52. The Netherlands Institute for Human Rights stressed that the reasoning in pre-trial-detention orders formed the topic of much discussion, not only amongst academics and criminal defence lawyers but also within the judiciary. Recently, a number of courts had initiated pilots aiming at improving the reasoning of pre-trial detention orders, which the Institute highlighted as a positive development.

3. The Court's assessment

(a) General principles

53. The applicable general principles concerning the length and the justification of pre-trial detention are set out in *Buzadji* (cited above, §§ 84‑91).

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

55. According to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the pre-trial detention but after a certain lapse of time – that is to say as from the first judicial decision ordering detention on remand (see *Buzadji*, cited above, § 102) – it no longer suffices. The Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty, and (2) where such grounds were "relevant" and "sufficient", whether the national authorities displayed

"special diligence" in the conduct of the proceedings. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see, among many other authorities, *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012; and *Buzadji*, cited above, § 87). Justifications which have been deemed "relevant" and "sufficient" reasons – in addition to the existence of reasonable suspicion – in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee (see *Buzadji*, cited above, § 88, with further references). Until conviction, an accused must be presumed innocent and the purpose of the provision under consideration is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable (see *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006‑X, and *Buzadji*, cited above, § 89).

56. The question of whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, for instance, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000‑IV, and *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI; see also *Buzadji*, cited above, § 90).

57. It primarily falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. Accordingly, they must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above mentioned requirement of public interest or justifying a departure from the rule in Article 5, and must set them out in their decisions on applications for release (see *Buzadji*, cited above, § 91). With particular regard to the risk of "public disorder", consideration must be given to the question whether the offences concerned, by reason of their particular gravity and public reaction to them, may give rise to a social disturbance capable of justifying pre-trial detention. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises – as in Article 67a of the CCP – the notion of disturbance to public order caused by an offence (see *Letellier*, cited above, § 51, and *J.M. v. Denmark*, cited above, § 62).

58. In exercising its function on this point, the Court has to ensure that the domestic courts' arguments for and against release must not be "general and abstract" (see, for example, *Smirnova v. Russia*, nos. 46133/99 and 48183/99,

§ 63, ECHR 2003‑IX (extracts)), but contain references to specific facts and the personal circumstances justifying an applicant's detention (see, *mutatis mutandis*, *Panchenko v. Russia*, no. 45100/98, § 107, 8 February 2005). For example, the Court found no violation of Article 5 § 3 in a case concerning a pre-trial detention period of more than four years (see *Lisovskij* v. *Lithuania*, no. 36249/14, § 77, 2 May 2017, in which it considered that the Lithuanian courts thoroughly evaluated all the relevant factors and based their decisions on the particular circumstances of the case), in a case concerning a pre-trial detention period of more than three years and eight months (see *Štvrtecký v. Slovakia*, no. 55844/12, § 65, 5 June 2018, in which the Court observed that the judicial authorities referred to specific facts of the case and did not use a pre-existing template or formalistic and abstract language and noted that, with the passing of time, the court's reasoning evolved to reflect the state of the investigations) and in a case concerning a pre-trial detention period of one year, three months and twenty-three days (see *Podeschi v. San Marino*, no. 66357/14, § 153, 13 April 2017, in which the Court observed that while the various jurisdictions referred to the previous decisions refusing bail, they gave details of the grounds for the decisions in view of the developing situation and whether the original grounds remained valid despite the passage of time), whereas the Court did find a violation of this provision in a case in which the pre-trial detention lasted three months (*Sinkova v. Ukraine*, no. 39496/11, § 74, 27 February 2018, in which the Court observed that, in extending the applicant's detention and rejection her applications for release, the domestic courts mainly referred to the reasoning for her initial placement in detention, without any updated details); in a case concerning a period of pre-trial detention of forty-three days (*Krivolapov v. Ukraine*, no. 5406/07, §§ 105-108, 2 October 2018, for which the Court noted the absence from the relevant decision of any justification other than the fact that criminal proceedings were pending against the applicant); and in a case in which the pre-trial detention lasted slightly less than two months (*Cîrstea v. Romania* [Committee], no. 10626/11, §§ 54-59, 23 July 2019, in which the Court found that the domestic courts failed to adduce a proper substantiation for the alleged risks in case of a discontinuation of the applicant's pre-trial detention).

59. Where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and take the place of the national authorities which ruled on the applicant's detention (see *Bykov v. Russia* [GC], no. 4378/02, § 66, 10 March 2009, and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 77, 13 January 2009).

(b) Application of those principles in the present case

60. The Court observes that the applicant does not contest before this Court that there was a reasonable suspicion that he had committed an offence

and it has no reason to hold otherwise. It further notes that at the trial hearing of 9 June 2015, the applicant's lawyer admitted that his client might have committed a crime in the eyes of the law (see paragraph 18 above).

61. Next, the Court observes that in the applicant's period of pre-trial detention, which lasted nine months and thirteen days, namely from 2 December 2014 (see paragraph 6 above) to 15 September 2015 (see paragraph 21 above), the applicant's initial detention was based on several grounds: that of a "suspicion of a crime attracting a prison sentence of twelve years or more and which [had] caused serious upset to the legal order"; the risk of reoffending; and the risk of influencing the witnesses and the co-suspects. However, the latter ground was dropped as early as 18 December 2014, when the Regional Court extended the applicant's pre-trial detention but held that the needs of the investigation no longer obtained (see paragraph 8 above).

62. As to the "suspicion of a serious crime which has seriously upset the legal order", the Court reiterates that the notion of "legal order", contained in Article 67a of the CCP, is synonymous with the "public order" in the Court's case-law (see *Geisterfer*, cited above, § 39). A "serious upset" to that order arising from the gravity of the crime may justify detention (see *Kanzi v. the Netherlands* (dec.), no. 28831/04, 5 July 2007). The preservation of a threat to public order is commonly seen as a legitimate ground for detention and is as such accepted in the Court's case-law (see, *Merčep v. Croatia*, no. 12301/12, § 104, 26 April 2016, with references to *Peša v. Croatia*, no. 40523/08, § 101, 8 April 2010 and *J.M. v. Denmark*, cited above § 62, as examples of cases where the preservation of the public's sense of justice was in issue). However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually upset public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence. More generally, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the seriousness of the offence (see *Tiron v. Romania*, no. 17689/03, § 42, 7 April 2009, and *Geisterfer*, cited above, § 39, with further references). It is further to be reiterated that the assessment of the relevant and sufficient reasons for pre-trial detention cannot be separated from the actual duration thereof. Article 5 § 3 of the Convention cannot be seen as allowing pre-trial detention unconditionally provided that it lasts no longer than a certain period (see, among many other authorities, *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)). The longer pre-trial detention lasts, the more substantiation is required for convincingly demonstrating the alleged risk or risks in case of the suspect's release from pre-trial detention.

63. In the case in hand, the Court observes that the Regional Court in its decision of 18 December 2014 did not only rely on the gravity of the charge

against the applicant, but also on the public reaction. More concretely, it referred to the young age of the victim and the great media attention (see paragraph 8 above). Taking into account the fact that the applicant's pre-trial detention was still in its early stages, the Court finds that it cannot be said that this decision lacked relevant and sufficient reasons.

64. However, the Court considers that the domestic judicial authorities in their subsequent decisions on the applicant's pre-trial detention – the Court of Appeal's decision of 14 January 2015 (see paragraph 11 above), the Regional Court's decision of 17 March 2015 (see paragraph 15 above), the Court of Appeal's decision of 22 April 2015 (see paragraph 17 above) and the Regional Court's decision of 9 June 2015 (see paragraph 20 above) –, fell short of the above requirements. In particular, they did not show that public order would have been upset if the applicant had been released from pre-trial detention or if a preventive measure less compelling than detention had been imposed on him. Indeed, those subsequent decisions confirmed, in a relatively stereotyped way, without addressing the applicant's and the prosecutor's arguments and without any further explanation, the validity of the assessment previously made; they constituted little more than a chain of references leading back to the investigating judge's order of 5 December 2014 (see paragraph 6 above).

65. In this context, it should be reiterated that it is essentially on the basis of the reasons given by the national judicial authorities in their decisions on applications for release and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Buzadji*, cited above, § 91). The Court cannot therefore accept the Government's contention that the depth of the courtroom discussions, reflected into the official records of the hearings concerned, compensated for the lack of detail in the written decisions (see paragraph 44 above). Indeed, the discussion at the hearing reflects the arguments put forward by the parties, but does not indicate what were the grounds justifying the pre-trial detention in the eyes of the judicial authority competent to order or extend a deprivation of liberty. Only a reasoned decision by those authorities can effectively demonstrate to the parties that they have been heard, and make appeals and public scrutiny of the administration of justice possible (see *Ignatenco v. Moldova*, no. 36988/07, § 77, 8 February 2011). In this respect it is moreover noted that national-law provisions – Articles 24(1) and 78(2) of the CCP (see paragraphs 23 and 25 above) – stipulate that decisions on pre-trial detention should be duly reasoned.

(c) Conclusion

66. In the light of the above, the Court considers that, by failing to address specific facts and individual circumstances, the judicial authorities extended the applicant's detention on grounds which, although "relevant", cannot be

regarded as "sufficient" to justify his continued detention. This conclusion dispenses the Court from ascertaining whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see the case-law quoted in paragraph 55 above, and *Qing v. Portugal*, no. 69861/11, § 69, 5 November 2015).

67. It follows that there has been a violation of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed – on the basis of the fixed compensation amount under the domestic guidelines for compensation for unlawful detention (*Oriëntatiepunten voor straftoemeting en LOVS-afspraken*) of November 2013 – 80 euros (EUR) per day for 269 days of "unlawful" detention from 19 December 2014 to 29 September 2015. This amount covered both pecuniary and non-pecuniary damage.

70. The Government submitted that this claim was disproportionate. The applicant's detention would remain lawful even if the Court found a violation of Article 5. Moreover, the time the applicant had spent in pre-trial detention had been deducted from his prison sentence.

71. The Court finds no evidence of any pecuniary damage and therefore rejects this claim. On the other hand, it accepts that the applicant suffered non‑pecuniary damage – such as distress and frustration – which is not sufficiently compensated by the finding of a violation of Article 5 § 3 of the Convention. Having regard to the nature of the breach and making its assessment on an equitable basis, the Court awards the applicant EUR 1,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

72. The applicant claimed EUR 4,440.70 for the costs and expenses incurred before the Court.

73. The Government left the question to the Court's discretion.

74. Later, the Court was informed by the applicant that those costs and expenses were covered by legal aid provided by the respondent Party.

75. 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 were actually and necessarily incurred and are reasonable as to quantum (see, as a recent authority, *Mugemangango v. Belgium* [GC], no. 310/15, § 149, 10 July 2020). As it turns out that no costs and expenses were "actually incurred", the Court rejects the corresponding claim.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *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 1,600 (one thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 9 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President