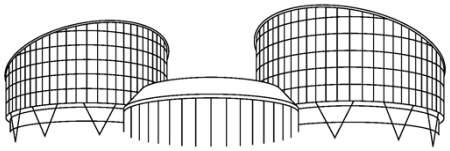

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ZOHLANDT v. THE NETHERLANDS

(Application no. 69491/16)

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 Zohlandt 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. 69491/16) 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 Ferdinand Gerardus Zohlandt ("the applicant"), on 16 November 2016;

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 the assumed risk of recidivism could not be based on facts from the case-file or circumstances of the case and formed thus no legitimate ground for justifying his extended detention on remand. More concretely, he alleged that the decision of the Court of Appeal of 18 August 2016 had lacked adequate justification or, in the alternative, that this decision had lacked sufficient reasons.

THE FACTS

2. The applicant was born in 1961 and lives in Uden. The applicant was represented by Mr A.M. Smetsers, a lawyer practising in Nijmegen.

3. The Government were represented by their Agent, Ms B. Koopman, of the Dutch Ministry of Foreign Affairs.

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

5. On 16 May 2016 Oost-Brabant police were notified that one Mr U. had been beaten up by two men who had driven away in a car. When the police arrived on the scene, they found U. bruised. There were bloodstains in different places in his home. The next day U. lodged a criminal complaint against the applicant, whom he accused of attempted murder/homicide, aggravated assault and destruction of property.

6. On 13 June 2016 the applicant was arrested and placed in police custody (*inverzekeringsstelling*) on suspicion of attempted premeditated aggravated assault (*poging tot zware mishandeling*) and illegal possession of a firearm, ammunition and a knuckleduster, which had been found in his home (see paragraph 23 below).

7. On 16 June 2016 the applicant was taken into initial detention on remand (*bewaring*) for fourteen days by order of an investigating judge (*rechter-commissaris*) of the Oost-Brabant Regional Court (*rechtbank*). The order included the following:

> "Considering that serious suspicions [*ernstige bezwaren*] have arisen against the suspect,
>
> Considering that (a) serious public-safety reason(s) exist(s) requiring the immediate deprivation of liberty of the suspect,
>
> because there is a serious likelihood [*dat er ernstig rekening mee moet worden gehouden*] that the suspect will commit a crime [*misdrijf*]:
>
> - which, according to law, carries a prison sentence of six years or more;
>
> - by which the health or safety of individuals can be endangered [*waardoor de gezondheid of veiligheid van personen in gevaar kan worden gebracht*];
>
> which follows from the circumstance(s) that:
>
> - the suspect is suspected of one or more [criminal] acts which only came to an end after intervention by the police/criminal justice authorities;
>
> - the suspect is suspected of one or more [criminal] act(s) whilst the circumstances of the suspect and/or the conditions under which those acts have been committed have remained unchanged [*terwijl de omstandigheden van verdachte en/of de omstandigheden waaronder deze feiten zijn gepleegd, ongewijzigd zijn gebleven*];
>
> - the suspect has already previously come into contact with the police and criminal-justice authorities for similar acts [*is al eerder in aanraking geweest met politie en justitie voor soorgelijke feiten*]."

8. On 29 June 2016 a hearing in chambers (*raadkamer*) took place before the Oost-Brabant Regional Court, pertaining to the applicant's placement in extended detention on remand (*gevangenhouding*) following an application by the prosecution service on the basis of the existence of serious suspicions against the applicant and a risk of reoffending in view of the circumstances

of offence committed and the ongoing conflict. During this hearing, the applicant requested through counsel that the demanded extended detention on remand be refused or, in the alternative, that his detention on remand be suspended (*schorsing*). He noted that the grounds relating to the (ongoing) investigation (*onderzoeksgrond*, Article 67a § 1 under 5º of the Code of Criminal Procedure (*Wetboek van Strafvordering*, hereinafter, "the CCP"); see paragraph 22 below) had not been advanced by the prosecution service and that the investigation had finished. Arguing that he had acted in self-defence, he requested that the requested extension of his pre-trial detention be refused. In support of his alternative request to suspend his pre-trial detention, he pointed out that he was the breadwinner of his family, that his wife was terrified and that he wished to protect his family. The prosecution service submitted that it was expected that the investigation would be finished within a couple of weeks and that trial proceedings were envisaged. It further opposed suspension of the pre-trial detention.

9. On the same day the Regional Court in chambers ordered that the applicant be taken into extended detention on remand for ninety days.

10. In a separate decision taken on the same day, the Regional Court dismissed the alternative request to suspend the applicant's pre-trial detention. Having noted the content of the case file and the formal record of the hearing held in chambers, it found that the interests of criminal justice (*strafvorderlijk belang*) outweighed the applicant's personal interests.

11. Although possible, the applicant did not appeal against those two decisions.

12. On 29 July 2016 the applicant, through counsel, lodged an application for release from pre-trial detention or, in the alternative, to have his pre-trial detention suspended. He submitted *inter alia* that a first trial hearing had been scheduled for 23 September 2016, and that the pre-trial-detention order given on 29 June 2016 (see paragraph 9 above) had only been based on the supposed danger of recidivism which was unlikely as the violent crimes (*geweldsdelicten*) in which he had been involved and convicted of all dated back to the period between 2000 and 2004, whereas the present suspicions concerned acts which could be regarded as committed in legitimate self-defence. Furthermore, in the context of Article 67a § 3 of the CCP (see paragraph 22 below), it was possible that the pre-trial detention would last longer than the possible sentence as the acts held against the applicant could be regarded as having been committed in self-defence. The applicant further argued that his release was also warranted by his personal circumstances, in particular the financial consequences of his detention for his family as well as their security as he had to protect them against those who falsely believed that in 2003 he had reported an illegal cannabis nursery to the police.

13. The applications were examined by the Regional Court on 3 August 2016 in a hearing held in chambers. The applicant's lawyer added that nothing

criminal had happened in the month between the altercation and the applicant's arrest. The prosecutor opposed bail, submitting that the grounds for the applicant's pre-trial detention had been determined by the investigating judge and the Regional Court and that the applicant could have appealed to the Court of Appeal (*gerechtshof*).

14. Having heard the parties' arguments and having noted the contents of the case file, the Regional Court in chambers dismissed the applicant's applications, holding as follows:

> "In the opinion of the Regional Court, the reasons which have led to the issuance of an order for the applicant's placement in extended detention on remand remain pertinent.
>
> The application to lift [*opheffing*] the pre-trial-detention order (*bevel tot voorlopige hechtenis*) is therefore dismissed.
>
> The application to suspend [*schorsing*] the pre-trial-detention order must be dismissed. The Regional Court finds that in the given situation the interests of criminal justice prevail over [the applicant's] personal interest."

15. The applicant, through counsel, appealed to the 's-Hertogenbosch Court of Appeal (*gerechtshof*). In addition to his earlier arguments, hecontested the assessment of the risk of reoffending made in the pre-trial-detention order of 29 June 2016 (see paragraph 9 above). He claimed that the police had played no role in stopping the altercation. They had not caught him in the act but had arrested him one month later in his home. He explained that he had had a conflict with U. on the basis of which he had claimed financial compensation from U., who had invited the applicant to his home to talk about the conflict. There had been an altercation in U.'s home in the course of which U. had stabbed the applicant in the face. In the month following this incident, the applicant had not sought to contact U., which would justify the thesis that the conflict as such had not been resolved but that the applicant had decided to drop the matter, to cut his losses and to confront U. no longer. Furthermore, although the applicant had committed other offences (menace, drink-driving), he had not committed any violent crimes during the previous twelve years.

16. On 18 August 2016 the Court of Appeal dismissed the appeal and upheld the impugned decision. In its relevant part, its decision reads as follows:

> "The Court of Appeal has noted the impugned decision.
>
> The Court of Appeal has heard the advocate-general [*advocaat-generaal*] and the lawyer of the suspect.
>
> The Court of Appeal has noted a written statement of the suspect in which he waives the possibility of being heard [in person] in chambers.
>
> Unlike the lawyer, the Court of Appeal is of the opinion that serious objections and grounds, as found by the Regional Court, can indeed be derived from the case file, which fully justify the continuation of the pre-trial detention.

> The court agrees with the [impugned] decision and the grounds on which it is based.
>
> The appeal must therefore be dismissed.
>
> On behalf of the suspect, an oral application has been made in chambers to have his detention on remand suspended. Having weighed the interests of criminal justice against the suspect's personal interests, the Court of Appeal finds no reasons warranting suspension, so that this application must be dismissed."

17. No further appeal lay against that decision.

18. On 23 September 2016 the trial proceedings against the applicant commenced before the Oost-Brabant Regional Court. In the course of the hearing held on that day, the court considered an application by U., who had joined the criminal proceedings as a civil injured party (*benadeelde partij*) and who had filed a claim for compensation, to adjourn the proceedings as he had been admitted to hospital but wished to use his right to be heard. The public prosecution service had no objection, but the applicant opposed the application. After having deliberated and having consulted the applicant, the Regional Court decided – having balanced the applicant's weighty interest in proceeding with his trial against the interest of U. in attending and addressing the court – to adjourn the trial proceedings and to suspend the applicant's pre-trial detention under the condition that the applicant respect a restraining order (*contactverbod*) in respect of U. It held:

> "The Regional Court will suspend the pre-trial detention of the suspect. The Regional Court finds that the interest of the suspect in suspending the pre-trial detention must prevail over the interest of criminal justice and the interest of society in the continuation of the pre-trial detention of the suspect."

19. In a judgment of 3 March 2017, the Regional Court convicted the applicant of attempted premeditated aggravated assault and several offences under the Weapons and Ammunition Act (*Wet wapens en munitie*) and sentenced him to ten months' imprisonment less the time spent in pre-trial detention. It further ordered the enforcement of a fourteen-day prison sentence imposed on 2 March 2016 of which thirteen days had been suspended. No information has been submitted as to whether the applicant has appealed against this judgment.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

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

21. 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.

22. 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:

1°. 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;

2°. 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; ...

5°. 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 80

1. The court may – *ex proprio motu* or following an application by the Public Prosecution Service or the suspect – order that the pre-trial detention be suspended as soon as the suspect has stated, whether or not subject to the provision of security in the form to be designated by the court, that she or he is prepared to comply with the conditions to be attached to the suspension. Such an application or request shall be reasoned.

2. The following conditions for suspension apply in all cases:

1. should termination of the suspension be ordered, the suspect may not seek to evade execution of the pre-trial-detention order;

2. should the suspect be given a custodial sentence other than detention in lieu of payment of a fine for the offence for which pre-trial detention was ordered, she he may not seek to evade its execution; ...”

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.”

23. Premeditated aggravated assault is a crime punishable by a prison sentence of up to twelve years (Article 303 of the Criminal Code (*Wetboek van Strafrecht*); in case of an attempt to commit this crime, the maximum sentence is reduced by one-third (Article 45 of that Code), i.e. to eight years. According to the Arms and Ammunition Act, the unlicensed possession of a pistol or a revolver (a category III weapon, section 2 of the Act) or its ammunition is a crime punishable by a term of imprisonment of up to four years (sections 26 and 55 of the Act).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

24. Relying on Article 5 §§ 1 and 3 of the Convention, the applicant complained that his pre-trial detention had lacked adequate justification, or in the alternative, that the Court of Appeals’ decision had lacked sufficient reasons.

25. 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. ..."

26. 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

1. Submissions by the parties

(a) The Government

27. The Government argued, relying on *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014) that the application was inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention as, for reasons unknown, the applicant had failed to appeal against the pre-trial-detention order given on 29 June 2016 by the Oost-Brabant Regional Court (see paragraph 11 above).

(b) The applicant

28. The applicant submitted that he had exhausted domestic remedies as his application was not directed against the pre-trial order of 29 June 2016 (see paragraph 9 above) but against the ruling of the Court of Appeal of 18 August 2016 (see paragraph 16 above), against which no appeal lay (see paragraph 17 above).

2. The Court's assessment

29. The general principles concerning exhaustion of domestic remedies are resumed in *Vučković and Others* (cited above, §§ 69-77). The Court reiterates, in particular, that States do not have to answer for their acts before an international body until they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory

jurisdiction of the Court in respect of their complaints against a State are thus obliged to first use the remedies provided by the national legal system (see *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 115, 23 February 2016).

30. Turning to the circumstances of the present case, the Court notes that it is true that the applicant has failed to appeal against the pre-trial-detention order of 29 June 2016 (see paragraph 11 above).

31. However, the Court notes that the applicant, in reply to the Government's observations, explicitly submitted that his application was directed only against the Court of Appeal's decision of 18 August 2016 (see paragraph 28 above).

32. Since the applicant lodged his appeal against the Regional Court's ruling of 3 August 2016 in time and submitted concrete arguments (see paragraph 15 above), the Court accepts that the applicant has given the State sufficient opportunity to provide a domestic judicial review of the grounds for his pre-trial detention in those domestic proceedings.

33. The Court furthermore notes that the complaint under Article 5 § 3 of the Convention in respect of this part of the application is neither manifestly ill‑founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

34. The applicant essentially repeated his arguments as raised in the domestic proceedings. He added, relying on the Court's consideration in the case of *Vosgien v. France* (no. 12430/11, § 52, 3 October 2013), that the likelihood of reoffending could not be solely based on a suspect's criminal record. His pre-trial detention was only based on the risk of recidivism on account of his criminal record, his presumed pro-criminal attitude and on the assumption that his financial dispute with U. was still ongoing.

35. However, that justification had ignored the fact that, according to his criminal record, he had not committed any violent crimes since 2004. Since then, he had changed his life for the better and no longer tried to solve his disputes through violence, as illustrated by the fact that he had not approached U. in any way between 16 May 2016, when he had had an altercation with him, and 13 June 2016, when the applicant had been arrested by the police. According to the applicant, this further indicated that he was convinced that his (financial) dispute with U. could not be resolved by revisiting him to confront him again with his claim.

36. According to the applicant this meant that it had not been possible to base the assumed risk of recidivism on his criminal record, the facts from the

criminal file or the circumstances of the case to justify his pre-trial detention after 18 August 2016 and that therefore the decision concerned had lacked adequate justification or, alternatively, had lacked sufficient reasoning.

(b) The Government

37. The Government submitted that under domestic law and the Convention pre-trial detention was permitted if there was a serious risk that a suspect would commit further offences. In the applicant's case that risk had been real because his conflict with U. had remained unresolved; because of incriminating witness statements according to which the applicant had not acted in self-defence but had in fact been the aggressor; because of the weapons found in the applicant's home and his prior convictions, the most recent one of 2 March 2016 of threatening a person with homicide.

38. The Government therefore asserted that the applicant's pre-trial detention had been justified.

39. Pointing out that the Court had held that national courts must indicate with sufficient clarity the grounds on which they base their decisions (they referred to *Hadjianastassiou v. Greece*, 16 December 1992, § 33, Series A no. 252) but that the extent of the duty to give reasons varied according to the nature of the decision and must be determined in the light of the circumstances of the case (*Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303 A), the Government argued that the pre-trial-detention orders had been reasoned adequately. In their opinion, it was important to consider not only the judicial decisions as such, but also the discussions during the courts' examination as reflected in the official records. There had been no need for the Court of Appeal to provide more detailed reasons than it had done in its ruling of 18 August 2016 as it had been unconvinced by the applicant's repetitive arguments. A brief statement of reasons contravened the Convention only in exceptional circumstances. In another case against the Netherlands (*Kanzi v. the Netherlands* (dec.), no. 28831/04, 5 July 2007) the Court had found no fault with the detention decisions though they had been of a similar level of detail.

40. The Government further emphasised that the applicant's pre-trial detention had been quite brief (a little over three months, similar to the circumstances in *Kanzi*). The authorities had shown themselves diligent because in that period they had reviewed the pre-trial detention no less than six times and they had eventually released the applicant pending trial considering that, although the serious grounds for suspicion had still existed, the applicant's interests in being released from pre-trial detention had had to prevail. Referring to the Court's decision in the case of *Van Thuil v. the Netherlands* (no. 20510/02, 9 December 2004), the Government further pointed out that the applicant had had access to the prosecution case file, which was a safeguard against arbitrariness.

2. Submissions by the third-party intervener

41. 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.

42. 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.

43. 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.

44. 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.

45. 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*.

46. The Institute had further conducted a research in 2016 into the manner in which the Regional Court and Courts of Appeal reasoned their decisions on pre-trial detention. Over 300 randomly selected case files from four out of eleven Regional Courts and two out of four Courts of Appeal were analysed. It appeared from this research that each court had its own working methods and practices where it concerned reasoning of pre-trial detention orders, varying from using pre-printed forms on which boxes could be ticked with no room for individual reasoning to decisions containing substantiated reasoning on all relevant elements. It further appeared that most Regional Courts only provided reasoning in the first decision on initial detention on remand and, when deciding on extended detention on remand, simply referred back to initial decision without any further information or reasoning. It further

happened frequently that arguments raised by the defence were not addressed at all in the written decision.

47. 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

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

49. 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).

50. 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 begin 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).

51. The question 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).

52. 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 that the suspect, if released, would reoffend, consideration must be given to, *inter alia*, the nature and seriousness of the charges against a defendant, his or her criminal record, and his or her character or behaviour that would indicate that he or she presented such a risk (see, for instance, *Merčep v. Croatia*, no. 12301/12, § 96, 26 April 2016, *Šoš v. Croatia*, no. 26211/13, § 95, 1 December 2015 and *Magnitskiy and Others v. Russia*, nos. 32631/09 and 53799/12, § 221, 27 August 2019).

53. 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).

54. 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

55. 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.

56. Next, the Court notes that the applicant's pre-trial detention was initially based on the risk of reoffending. In its decision of 3 August 2016 (see paragraph 14 above) the Regional Court, when rejecting the applicant's original application for release, limited itself to referring to the reasons which had led to the issuance of the original order for the applicant's placement in extended detention on remand and, on appeal, in its decision of 18 August 2016 (see paragraph 16 above), the Court of Appeal considered that it "is of the opinion that serious objections and grounds, as found by the Regional Court, can indeed be derived from the case-file, which fully justify the continuation of the pre-trial detention".

57. The Court observes that those rulings fell short of the above-mentioned criteria. In particular, they do not address the applicant's arguments contesting the risk of reoffending which he raised in the context

of his application of 26 July 2016 for release from pre-trial detention (see paragraphs 12-16 above). The reasons were stated *in abstracto* and constituted little more than a chain of references leading back to the Regional Court's order of 29 June 2016 and the investigating judge's order of 16 June 2016 (see paragraphs 9 and 7 above; compare and contrast *Lisovskij*, cited above, § 77.

58. 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 in the official records of the hearings concerned, compensated for the lack of detail in the written decisions (see paragraph 39 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 20 and 22 above) – stipulate that decisions on pre-trial detention should be duly reasoned.

(c) Conclusion

59. Having regard to the above, the Court considers that by failing to address the specific facts and individual circumstances, the Court of Appeal extended the applicant's pre-trial detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify his continued deprivation of liberty. This conclusion dispenses the Court from ascertaining whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Qing v. Portugal*, no. 69861/11, §§ 67-69, 5 November 2015).

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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."

62. The Court notes that the applicant did not submit any claims for just satisfaction. In the absence of any exceptional circumstances (see *Adilovska v. North Macedonia*, no. 42895/14, § 40, 23 January 2020, and contrast *Nagmetov v. Russia* [GC], no. 35589/08, §§ 74-92, 30 March 2017), the Court therefore makes no award.

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.

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	Yonko Grozev
Registrar	President