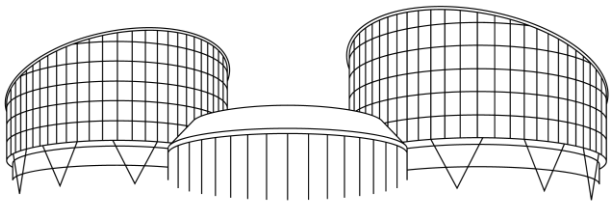

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CREANGĂ v. ROMANIA

(Application no. 29226/03)

JUDGMENT

STRASBOURG

15 June 2010

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 13/12/2012

This judgment may be subject to editorial revision.

In the case of Creangă v. Romania,

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 25 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 29226/03) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Sorin Creangă ("the applicant"), on 4 September 2003.

2. The applicant was represented by Mr Septimiu Sorin Cus, a lawyer practicing in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Mr Răzvan-Horaţiu Radu, from the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had been unlawfully placed in detention.

4. On 19 February 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided that the Chamber would rule on the admissibility and merits of the application at the same time (Article 29 § 3 of the Convention).

FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Bucharest.

6. From 1995 the applicant was a junior police officer in Section No. 5 of the Bucharest Police.

A. The applicant's placement in pre-trial detention

7. On 16 July 2003 the applicant was informed by his hierarchical superior that he was required to go to the National Anti-Corruption Prosecution Service ("the NAP") for questioning, without being given any further information on the subject of the interview.

8. At 9 a.m. on the same day the applicant went to the headquarters of the NAP. At 10 a.m. he was questioned by a prosecutor in the presence of an officially-assigned lawyer. The time of the interview was noted on his statement. The applicant was questioned about thefts of fuel by third persons from pipelines belonging to the company P., his relations with the individuals implicated in these thefts and his participation in the investigations concerning those persons.

9. The applicant was kept at the NAP headquarters until 8 p.m., when he was given permission to contact a lawyer of his own choosing. At that point he was informed that he was suspected of taking bribes, aiding and abetting aggravated theft and criminal conspiracy.

10. By an order of 16 July 2003, the NAP ordered that the applicant be charged. By an order of the same date, the NAP ordered that he be remanded in custody (*detenţie preventivă provizorie*) for three days, on the basis of Article 148 § 1 (h) of the Code of Criminal Procedure ("CCP"). Referring to the relevant statutory provisions, the prosecutor indicated that the acts imputed to the applicant contained the constitutive elements of the offences of criminal conspiracy, taking bribes and aiding and abetting aggravated theft. The relevant part of the order was worded as follows:

> "On an unspecified date in 1999 or 2000, a date that will be determined precisely [at a later date], [the applicant], along with several colleagues from Police Section No. 5, caught in the act several persons who were transporting in a Dacia hatchback two tons of petrol that had been siphoned from pipelines in the Bucureştii Noi district, in which circumstances they requested and received the sum of 20,000,000 lei from B.S. and I.M. in exchange for refraining from opening a criminal investigation against them and allowing them to continue the unlawful activity.
>
> The fact that the defendant/accused committed the criminal acts is shown by the following evidence:
>
> - witness statements;
>
> - records of the confrontation;
>
> - statements by the accused persons;
>
> - audio recordings;
>
> - photographs;
>
> - records of photo-based identification procedures.
>
> Given that the conditions laid down in Article 148 § 1 (h) of the CCP have been met in this case, namely that the offence committed is punishable by between four and eighteen years' imprisonment and that [the applicant's] release represents a danger for

public order and could hinder the investigation in this case, since the accused is a police officer and could use this fact to influence the persons who are to be questioned;

On the basis of Articles 136 § 5, 146 § 1, 148 § 1 (h), 149/1 and 151 of the CCP [the prosecutor] decides:

(1) The defendant/accused is to be remanded in custody ... for a period of three days;

(2) Pursuant to Articles 146 § 3 and 149/1 § 3 of the CCP, the period mentioned in the first paragraph is to run from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003.

(3) A warrant for remanding in custody is to be drawn up ... from 16 July 2003 ..."

11. The applicant stated that he was informed towards midnight that an interim arrest warrant had been issued against him. The arrest warrant issued by virtue of the order of 16 July 2003 (see paragraph 10 above), mentioned that the measure of interim preventive detention had been ordered against the applicant for three days, namely from 16 to 18 July 2003. During the night the applicant was placed in Rahova Prison.

12. At the same time thirteen other persons were charged in the same case and remanded in custody.

B. The applicant's release

13. On 17 July 2003, on the basis of Article 148 § 1 (c), (d) and (h) of the CCP, the NAP asked the Bucharest Military Court to extend by twenty-seven days the pre-trial detention of the applicant and his thirteen co-accused, starting from 19 July 2003.

14. At 10 a.m. on 18 July 2003 the applicant was taken to court. He alleged that his lawyer was given access to the case file only while the prosecution was presenting its request for an extension of the detention on remand. The military court ordered that the case be remitted to the military appeal court, which, in view of the military rank of one of the co-accused, had jurisdiction.

15. By an interlocutory judgment delivered in private on the same date, the military court of appeal, ruling as a single judge, granted the prosecution's request and extended the pre-trial detention of the applicant and the other co-accused by twenty-seven days.

16. The military appeal court held that the materials in the case file indicated the existence of evidence that the accused had committed the offences of criminal conspiracy, taking bribes, aiding and abetting aggravated theft and inciting others to give false evidence. The military appeal court held that it was necessary to place the accused in pre-trial detention on the grounds of public order, and noted that they could influence witnesses and had taken steps to evade criminal proceedings and execution of the sentence. Finally, it noted that the complexity of the case,

the large number of defendants and the difficulty in obtaining evidence were also to be taken into account.

17. On the same date an arrest warrant was issued against the applicant, with the same content as that of 16 July 2003.

18. The applicant and his co-accused lodged an appeal, arguing that the tribunal which had delivered the interlocutory judgment had not been legally constituted. The prosecution service also referred to the incorrect constitution of the court.

19. By a final judgment of 21 July 2003, the Supreme Court of Justice upheld the appeal, set aside the first-instance judgment and ordered that the applicant and his co-accused be released. The Supreme Court of Justice held that, in order to ensure better transparency in the fight against corruption, Law No. 161 of 21 April 2003 had amended, with immediate effect, the procedural provisions set out in Law No. 78/2000. Thus, section 29 §§ 1 and 2 of Law No. 78/2000 provided that a court ruling at first instance on the offences set out in that Law had to be composed of two judges.

20. The applicant was not informed of the reasoning in this judgment.

21. The applicant was released on the same day.

C. Application submitted by the Procurator-General to have quashed the decision ordering the release of the accused

22. On an unspecified date the Procurator-General of Romania lodged an application the Supreme Court of Justice to have the final judgment of 21 July 2003 quashed. He considered that the Supreme Court had committed serious errors of law in its interpretation of the domestic legislation, resulting in an unsatisfactory solution to the matter.

23. The applicant stated that he learned of the existence of the application to have the judgment quashed, and of the fact that the hearing had been scheduled for 25 July 2003, only on 24 July 2003, through the media.

24. At 9.30 a.m. on 25 July he went to the hearing with his lawyer, who requested that the case be adjourned on the ground that neither the reasoning of the judgment of 21 July 2003 nor an application to have that judgment quashed had been communicated to him. The Supreme Court of Justice granted this request and, referring to the urgent nature of the case, adjourned the hearing until 12.30 p.m.

25. When the proceedings resumed the applicant submitted that the final judgment of 21 July 2003 could only be challenged through an appeal in the interests of the law and not by an application to have it quashed, and that there were no plausible reasons to justify his placement in detention on remand.

26. By a final judgment of 25 July 2003, the Supreme Court of Justice, sitting as a bench of nine judges, upheld the application for judicial review,

set aside the judgment of 21 July 2003 and, on the merits, dismissed the applicant's appeal. In so doing, it held that that the Supreme Court had incorrectly interpreted section 29 §§ 1 and 2 of Law No. 78/2000. It considered that the previous application of the amendments to Law No. 78/2000 and to the CCP led to the conclusion that the legislature's wish had been to ensure a single set of rules concerning detention on remand, namely that it was to be ordered in private by a single-judge bench, whatever the nature of the offence.

27. The Supreme Court of Justice also held that the evidence in the case file indicated that it was justified to remand the accused in custody, in view of sufficient information implying that each of the accused could have committed the offences in question.

28. On 25 July 2003 the applicant was placed in pre-trial detention.

29. On 2 July 2004, by an interlocutory judgment of 29 June 2004, upheld on 2 July 2004 by the military appeal court, the territorial military court ordered that the applicant be released, and replaced the remand measure by a measure prohibiting him from leaving the country.

30. The documents in the case file indicate that the criminal proceedings against the applicant are currently pending before the domestic courts.

II. RELEVANT DOMESTIC LAW

31. The relevant provisions of the Code of Criminal Procedure ("the CCP") in force at the material time are described in the case of *Calmanovici v. Romania*, (no. 42250/02, §§ 40-41, 1 July 2008).

32. Article 136 of the CCP, as in force at the material time, provided for police custody and detention on remand as preventive measures involving a deprivation of liberty. Under Article 144 of the CCP, police custody was to be imposed by an order and could not exceed twenty-four hours.

33. The following legal provisions are also relevant:

Article 137

"The legal instrument by which an interim measure is adopted must list the facts which gave rise to the charges, their legal basis, the sentence provided for in the legislation concerning the offence in question and the specific reasons which determined the adoption of the interim measure."

Article 143

"(1) The authority responsible for criminal proceedings may detain a person in police custody if there is cogent direct or indirect evidence that he or she has committed an offence prohibited by the criminal law..."

(3) Cogent evidence exists where, in the circumstances of the case at issue, the person who is subject to criminal proceedings may be suspected of having committed the alleged offences."

Article 146

"(1) Where the requirements of Article 143 are met and where there is proof of the existence of one of the cases provided for in Article 148, the prosecutor..., after having heard the person concerned ... shall order that the defendant be placed in pre-trial detention, by a reasoned order indicating the legal grounds for such detention, for a period not exceeding three days.

(2) At the same time, the prosecutor shall draw up an interim arrest warrant against the defendant. The warrant must state... the length of time for which the detention has been ordered..."

34. It should be noted that under domestic law no appeal lay against an order for the detention of an accused pending trial, provided for by the above-cited Article 146 § 1. By virtue of the legal provisions in force at the time, within a period of 24 hours of having detention on remand, the prosecution service had to submit to the relevant court a request seeking a committal warrant. If the court accepted that request, it ordered an extension of the pre-trial detention for a new period of twenty-seven days, by an interlocutory judgment delivered in private. An appeal could be lodged against the latter judgment.

Article 148

"Pre-trial detention of the accused may be ordered [by the prosecutor] where the requirements set out in Article 143 are met [that Article requires cogent direct or indirect evidence that an offence has been committed] and if one of the following conditions is satisfied: ...

(d) the existence of sufficient information to the effect that the accused has attempted to impede the discovery of the truth by corrupting a witness or an expert, by destroying or altering evidence...

(h) the accused has committed an offence for which the law prescribes a prison sentence of more than two years and his or her continued liberty would constitute a threat to public order."

Article 409

"The Procurator-General may, of his own motion or on an application by the Minster of Justice, apply to the Supreme Court of Justice for any final judicial decision to be quashed."

Article 410 § 2

"Final decisions ... may only be contested by an application to have them quashed if they are contrary to the law."

35. The Articles of the Code of Criminal Procedure governing applications to have judicial decisions quashed were repealed by Law No. 576 of 14 December 2004, which was published in Official Gazette No. 1223 of 20 December 2004 and entered into force on 23 December 2004.

LAW

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

36. Relying on Article 5 § 1 of the Convention, the applicant complained that there had been no legal basis for his detention from 10 a.m. to 10 p.m. on 16 July 2003. Under the same provision, he complained that no tangible reasoning had been given in the order for his detention on remand issued on 16 July 2003 and that there had not been sufficient reasonable suspicions that he had committed the acts of which he was accused to justify the pre-trial detention.

37. Relying on Article 6 § 3 of the Convention, he alleged that his placement in detention following the Procurator-General's intervention in the proceedings on 25 July 2003, by means of an application for judicial review of the final judgment of 21 July 2003, had been unlawful, and had infringed the principle of equality of arms and the adversarial principle. Although the applicant relied on Article 6 § 3 of the Convention, the Court notes that the proceedings complained of concerned the legality of the detention on remand and considers that this complaint falls to be examined under Article 5 § 1 of the Convention (see *Berdji v. France* (dec.), no. 74184/01, 23 March 2004).

38. The Court will examine the applicant's complaints under Article 5 § 1 and, if necessary, Article 5 § 1 (c), the relevant part of which provides:

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

A. Admissibility

39. The Court finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

40. The Court notes that this part of the application under Article 5 § 1 comprises several limbs, which it will examine in turn.

1. Deprivation of the applicant's liberty from 10 a.m. to 10 p.m. on 16 July 2003

(a) Arguments of the parties

41. The applicant considered that, during the day of 16 July 2003, he had been deprived of his liberty without any legal basis, in so far as no order for his placement in police custody had been issued. He did not lodge any observations in response to the Government's submissions.

42. The Government accepted that on 16 July 2003 the applicant had gone to the prosecution service's headquarters, where he had made two statements. However, they considered that there was no evidence that the applicant had remained inside the prosecution service's headquarters until 8 p.m., when he made his second statement, or that he had been kept there against his will. They argued that the applicant could have referred to being detained or to his dissatisfaction in his statement, which he had failed to do.

(b) The Court's assessment

43. The Court notes that the parties did not dispute that on 16 July 2003 the applicant had gone the prosecution service's headquarters to make a statement. However, they are in dispute as to whether the applicant was deprived of his liberty from 10 a.m. to 10 p.m. during the day of 16 July 2003. The Court's task is therefore to form an opinion on the events complained of by the applicant, by assessing the evidence available to it with particular care.

(i) The existence of a deprivation of liberty in the present case

44. The Court reiterates that in proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A No. 39, and *Mogoş v. Romania* (dec.), no. 20420/02, 6 May 2004).

45. Having regard to the particular vulnerability of persons who find themselves under the exclusive control of State agents, the Court reiterates that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) (see, *mutatis mutandis*, *Khudoyorov v. Russia*, no. 6847/02, § 113, ECHR 2005-X (extracts)). Where an individual applicant accuses State agents of violating his rights

under the Convention, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, *mutatis mutandis*, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

46. The Court notes that in the instant case it is not disputed that the applicant went to the prosecution service's headquarters on 16 July 2003 and that he made statements at about 10 a.m. and again about 8 p.m. The Court notes that although the first statement did not contain any information as to whether the applicant had been heard as a person subject to criminal proceedings, he was informed at the time of the second statement that he was suspected of having committed several offences (see paragraph 9 above).

47. The Court observes that the Government has submitted no tangible information on the authorities' attitude with regard to the applicant's situation during the day of 16 July 2003. Thus, the Court received no information to the effect that the applicant had left the prosecution service's premises, in the form, for instance, of the log-book recording access to those premises, or about any steps taken by the authorities to inform the applicant that he was entitled to leave the prosecution service's headquarters.

48. The Court further notes that, during the day of 16 July 2003, the prosecution service charged the applicant with various offences and that, in the evening, it ordered that he be placed in pre-trial detention. The sequence of the day's events as they appear in the case file – interview, inculpation, a second interview as a suspect, placement in pre-trial detention – suggests that the applicant remained all day in the prosecution service's headquarters and that he was not free to leave these premises.

49. In the light of the foregoing, the Court concludes that the applicant was deprived of his liberty from 10 a.m. to 10 p.m. on 16 July 2003.

(ii) the compatibility of this deprivation of liberty with Article 5 § 1 of the Convention

50. The Court must now determine whether the applicant was deprived of his liberty from 10 a.m. to 10 p.m. on 16 July 2003 "in accordance with a procedure prescribed by law" with the meaning of Article 5 § 1 of the Convention.

51. The Court reiterates in the first place that Article 5 of the Convention guarantees the fundamental right to liberty and security. This right is of great importance in a "democratic society" with the meaning of the Convention (see *Assanidze v. Georgia* [GC], no. 71503/01, § 69, ECHR 2004-II).

52. The expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities,

notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where failure to comply with that law entails a breach of the Convention. This is the case, in particular, in cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed (see *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III). In particular, it is essential, in matters of deprivation of liberty, that the domestic law define clearly the conditions for detention and that the law be foreseeable in its application (see *Zervudacki v. France*, no. 73947/01, § 43, 27 July 2006).

53. The Court notes that at the material time Romanian law provided for two interim measures depriving a person of his or her liberty, namely police custody for a period of 24 hours and detention on remand (see paragraph 33 above).

54. In the instant case, no order for placement in police custody was issued against the applicant. In the order of 16 July 2003 the prosecutor ordered that the applicant be placed in pre-trial detention for three days. Yet the period specifically indicated in that order, namely from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003, corresponds in reality to only two days of interim detention.

55. In this regard, the Court notes that, under domestic law, the arrest warrant was issued by virtue of the prosecutor's order and could cover only the same period as that specified in the order. In the instant case, even if the committal warrant did not indicate the time from which the measure took effect, it could not constitute a legal basis for the preceding period, which was not mentioned in the order.

56. In the light of the foregoing, the Court therefore considers that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had no legal basis under domestic law.

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

2. The applicant's pre-trial detention from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003

(a) Arguments of the parties

57. The applicant complained that there had been no tangible reasoning for the committal warrant issued on 16 July 2003, particularly with regard to the threat that his release would allegedly pose to public order. He considered that there was not sufficient reasonable suspicion that he had committed the offences in question to justify the measure of pre-trial detention. He did not submit observations in response to the Government's observations.

58. The Government argued that the applicant's placement in detention occurred in compliance with the relevant legal provisions, which were clear and foreseeable. The applicant's placement in pre-trial detention had been

justified by a reasonable suspicion, supported by sufficient evidence to persuade an objective observer that the applicant could have committed the offence of corruption. As to the reasoning in the committal warrant, the requirements of Article 148 (h) of the CCP had been met in this case; the threat to public order was indisputably clear from the specific circumstances in which the applicant had acted.

59. The Government also noted that possible shortcomings in the reasoning of the committal warrant did not necessarily affect the lawfulness of the detention. In this respect, they emphasised that the national courts to which the prosecution service had applied for an extension of the interim detention measure had examined the evidence and had ruled that the deprivation of the applicant's liberty was necessary.

(b) The Court's assessment

60. The Court reiterates that sub-paragraph (c) of Article 5 § 1 permits deprivation of liberty only in connection with criminal proceedings. In addition, substantial grounds must exist in order for deprivation of liberty to be imposed for that purpose (see *Ciulla v. Italy*, 22 February 1989, § 38, Series A, No. 148). The Court further accepts that possible flaws in the committal warrant do not necessarily render the detention unlawful within the meaning of Article 5 § 1 (see *Jėčius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX and *Svipsta v. Latvia*, no. 66820/01, § 79, ECHR 2006-III (extracts)). Moreover, a subsequent finding that the court erred under domestic law in issuing the warrant will not necessarily retrospectively affect the validity of the intervening period of detention (see *Benham v. the United Kingdom*, 10 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III).

61. The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary detention laid down in Article 5 § 1 (c). Having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. However, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage of the process of criminal investigation (see, among other authorities, *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A, No. 300-A, and *K.-F. v. Germany*, 27 November 1997, § 57, *Reports* 1997-VII).

62. The Court considers from the outset that, with regard to the applicant's placement in pre-trial detention at 10 p.m. on 16 July 2003, the suspicion with regard to the applicant reached the required level of reasonableness. This suspicion was based on a series of specific acts and evidence contained in the case file and presented to the applicant (see paragraph 10 above), evidence which suggested that he could have

committed the offences of taking bribes, aiding and abetting aggravated theft and criminal conspiracy. While it is true that the exact date of the offences was not given, the prosecution service nonetheless based its decision on sufficient evidence to persuade a neutral and objective observer that the individual in question could have committed the offence (see, *a contrario*, *Stepuleac v. Moldova*, no. 8207/06, §§ 70-73, 6 November 2007, and *Musuc v. Moldova*, no. 42440/06, § 32, 6 November 2007).

63. The Court observes that although only Article 148 (h) of the CCP was mentioned by the prosecution service in its order of 16 July 2003, it is nevertheless the case that the reasons provided by it to justify the applicant's placement in pre-trial detention also refer clearly to the necessity of safeguarding the proper conduct of the investigation (Article 148 (d) of the CCP). In this respect, the Court notes that the prosecution service specifically indicated that, as a police officer, the applicant could exert an influence on certain individuals who were due to be questioned during the investigation. In the Court's opinion, this was a relevant and sufficient reason to justify the applicant's placement in pre-trial detention at the outset of the investigation. Accordingly, it accepts that the applicant's deprivation of liberty during the period in question was justified under paragraph 1 (c) of Article 5.

64. Consequently, there has been no violation of Article 5 § 1 (c) of the Convention with regard to the applicant's pre-trial detention from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003.

3. The applicant's placement in pre-trial detention on 25 July 2003

(a) Arguments of the parties

65. The applicant complained of the unlawfulness of his placement in pre-trial detention following the Procurator-General's intervention in the proceedings on 25 July 2003, through an application to have the final judgment of 21 July 2003 ordering his release quashed, which was an extraordinary remedy. He also alleged that there had been a breach of the principles of equality of arms and adversarial proceedings. He did not submit observations in response to the Government's comments.

66. The Government considered that the Prosecutor-General's use of the extraordinary remedy of an appeal for judicial review had not infringed the applicant's right to freedom. They noted that the use of this remedy was primarily intended to ensure correct interpretation of binding statutory provisions. More particularly, in the instant case, the Supreme Court of Justice had ensured a coherent interpretation of the legal provisions governing the composition of courts; these were binding provisions and failure to comply with them entailed absolute nullity.

67. The Government noted that, in criminal matters, the requirement of legal certainty was not absolute. They emphasised that the question of

whether a just balance had been struck between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice depended on the circumstances of each case. In this instance, the Supreme Court had merely corrected an error of law contained in a final criminal judgment. In addition, the extraordinary remedy had been brought as rapidly as possible and in compliance with the relevant criminal-law provisions. They stressed that, following the application for judicial review, the judgment ordering the applicant's release had been quashed and, in examining for itself the lawfulness of the remand measure, the Supreme Court upheld the judgment of 18 July 2003. Finally, they informed the Court that the remedy of "application for judicial review" had been withdrawn from the Code of Criminal Procedure by Law No. 576 of 14 December 2005.

(b) The Court's assessment

68. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see *Kurt v. Turkey*, 25 May 1998, § 122, *Reports* 1998-III). It is precisely for that reason that the Court has repeatedly stressed in its case-law that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules established by pre-existing legislation (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III, and *Scott v. Spain*, 18 December 1996, § 56, *Reports* 1996-VI).

69. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports* 1998-VI).

70. The Court reiterates that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Paladi v. Moldova* [GC], no. 39806/05, § 74, ECHR 2009-...). In addition, where a national law authorises deprivation of liberty it must be sufficiently accessible and

precise, in order to avoid all risk of arbitrariness (see *Dougoz v. Greece*, no. 40907/98, § 55, ECHR 2001-II).

71. The Court notes that in the instant case, by a final judgment of 21 July 2003 and after having interpreted the statutory provisions governing the composition of courts, the Supreme Court of Justice upheld the applicant's appeal and ordered his release. This judgment was executed on the same day. The Court also notes that the Procurator-General applied to the Supreme Court of Justice to have that judgment quashed, that is, through an extraordinary remedy, invoking an incorrect interpretation of the procedural rules governing the composition of courts.

72. The Court observes, firstly, that the remedy chosen by the authorities to rectify a final decision was not one that was directly open to the parties, since only the Procurator-General could lodge such an application. Yet the latter is the hierarchical superior of the prosecutor who ordered that the applicant be placed in detention and who requested an extension of that measure from the courts. In addition, the prosecution service had had an opportunity to present its arguments on this matter during the ordinary proceedings, but had failed to do so (see paragraph 18 above). The Court notes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice's words – a judicial decision that was "irreversible" and thus *res judicata* – and which had, moreover, been executed.

73. The Court further notes that Article 410 of the CCP, as in force at the material time, allowed an application to have a final judicial decision quashed where the latter was "contrary to the law". The Court takes the view that, in the area of personal liberty, this ground is too vague to make intervention in the proceedings through an extraordinary remedy foreseeable.

74. Contrary to the Government's affirmations, the Court considers that the fact that the Procurator-General applied promptly for quashing of the judgment made no difference to the situation in this case, nor did it cancel out the shortcomings of this particular remedy as identified above, especially as the quashed final judgment had been executed and the applicant had been released (see, *mutatis mutandis*, *Bota v. Romania*, no. 16382/03, § 39, 4 November 2008, and *Radchikov v. Russia*, no. 65582/01, § 46, 24 May 2007).

75. Without contesting the peremptory character of the procedural rules governing the composition of courts, the Court considers that, in the instant case, the method used to correct a possible error in interpretation of the law had been neither accessible nor foreseeable for the applicant. Accordingly, in the light of the foregoing, the Court considers that the applicant's deprivation of liberty on 25 July 2003 did not have a sufficient basis in domestic law, in so far as it had not been prescribed by "a law" which

satisfied the requirements of Article 5 § 1 of the Convention.

There has therefore been a breach of that provision in respect of the applicant's placement in pre-trial detention on 25 July 2003.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

76. Relying on Article 5 § 2 of the Convention, the applicant complained that he had not been informed promptly of the reasons for his arrest. Citing Article 6 § 1 of the Convention, he complained that the prosecution service had not been impartial. He also complained that he had not had sufficient time to prepare his defence in his appeal against the judgment of 18 July 2003, that he had not been allowed contact with his lawyer without the prosecutor's agreement and that he had been denigrated in the press.

77. In the light of all the material in its possession, and to the extent that it has power to examine the allegations, the Court does not find any appearance of a violation of the rights and freedoms guaranteed by the Convention. Accordingly, the Court concludes that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicant claimed 20,375 euros ("EUR") in respect of pecuniary damage, representing loss of salary, the reduction in his pension and the subsistence costs which he had incurred during his detention. He submitted an extra-judicial expert report. He also claimed EUR 300,000 for the non-pecuniary damage which he claimed to have sustained.

80. The Government submitted that the applicant had not substantiated his claim for pecuniary damage and that there was no causal link between the alleged violations of Article 5 of the Convention and the alleged pecuniary damage. They also submitted that the amount claimed in respect of non-pecuniary damage was excessive.

81. The Court notes that the sole basis on which the applicant can be granted just satisfaction in this case is the violation of Article 5 § 1 of the Convention on account the lack of a legal basis for the applicant's placement in pre-trial detention on 16 July 2003 and his placement in pre-

trial detention on 25 July 2003 following the application to have the relevant judgment quashed. With regard to the claim in respect of pecuniary damage, the Court notes that there is no causal link between the violations found by the Court and the applicant's claim. In any event, this claim was not accompanied by relevant supporting documents, as the expert report submitted to the Court was too brief and did not cite its sources.

82. The Court considers, however, that the applicant undeniably sustained non-pecuniary damage. Ruling on an equitable basis, as provided for in Article 41 of the Convention, the Court decides to award him EUR 8,000 for non-pecuniary damage.

B. Costs and expenses

83. The applicant also claimed 890 Romanian lei (RON) and EUR 3,000 for the costs and expenses incurred before the national courts and in the proceedings before the Court. He submitted supporting documents for part of this amount.

84. The Government noted that only a part of the amount claimed was substantiated by the relevant documents and that it was not established that the entirety of the amount claimed had a link with the present case.

85. In accordance with the Court's case-law, an award can be made to an applicant in respect of costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the aggregate amount of EUR 500 to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY,

1. *Declares* the application admissible in respect of the complaints under Article 5 § 1 of the Convention, and inadmissible for the remainder;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention as regards the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003;

3. *Holds* that there has not been a violation of Article 5 § 1 of the Convention as regards the lack of reasoning for his placement in pre-trial detention from 16 to 18 July 2003;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention as regards his placement in detention on 25 July 2003 following the application to have the judgment of 21 July 2003 quashed;

5. *Holds*
(a) that the respondent State is to pay the applicant party, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage and EUR 500 (five hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in French, and notified in writing on 15 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President