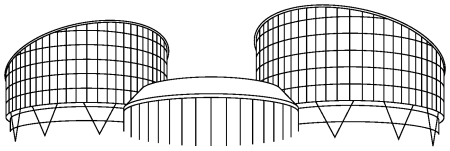

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF STOLLENWERK v. GERMANY

(Application no. 8844/12)

JUDGMENT

STRASBOURG

7 September 2017

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 Stollenwerk v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Nona Tsotsoria,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 4 July 2017,

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

PROCEDURE

1. The case originated in an application (no. 8844/12) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Christof Stollenwerk ("the applicant"), on 9 February 2012.

2. The applicant, who had been granted legal aid, was represented by Mr D. Hagmann, a lawyer practising in Mönchengladbach. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, relying on Article 5 § 4 of the Convention, that the principle of equality of arms had been violated because the Düsseldorf Court of Appeal had taken decisions on 3 and 25 February 2011 relating to the continuation of his detention and his request for a subsequent hearing without giving him the opportunity to reply to the written observations of the Düsseldorf Chief Public Prosecutor's Office.

4. On 16 March 2016 the complaint concerning Article 5 § 4 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Düren.

6. On 27 August 2010 the Krefeld District Court issued a warrant for his arrest as there was a strong suspicion that he had been trafficking drugs. Earlier that day he had been stopped with 15.8 grams of heroin, which he had allegedly intended to sell. On two previous occasions he had been stopped at the German border with 11 and 12.5 grams of heroin on him. The arrest warrant was based on the risk of him absconding as he could expect a considerable sentence for the offences in question, had no social ties, being unemployed and a drug addict, and had an unstable character. That same day he was detained on remand.

7. Between 30 August 2010 and 11 November 2010 the lawfulness of the applicant's detention on remand was examined eight times by the District Court or Regional Court.

8. In a judgment of 6 December 2010 the District Court convicted the applicant of three counts of large-scale drug trafficking – two counts of smuggling drugs into Germany and trafficking (dealt with as a single offence instead of two separate offences) and a third count of trafficking only and sentenced him to two years and six months' imprisonment. On the same day, in a separate decision, the District Court ordered the continuation of the applicant's detention.

9. On 8 December 2010 the applicant lodged an appeal against that decision. In substance he mainly referred to his previous submissions. On 13 December 2010 he lodged an appeal against the judgment.

10. The District Court did not allow the appeal of 8 December 2010 relating to the applicant's detention and referred it to the Regional Court, which dismissed it on 15 December 2010, finding that there continued to be a risk of the applicant absconding.

11. On 5 January 2011 the applicant lodged a further appeal against that decision. In substance, again, he referred to his previous submissions. He explicitly asked that the observations of the Chief Public Prosecutor's Office be sent to him so as to be able to comment on them.

12. On 28 January 2011 the Düsseldorf Chief Public Prosecutor's Office (*Generalstaatsanwaltschaft* – "the prosecution authorities") submitted written observations to the Court of Appeal, requesting the dismissal of the applicant's appeal of 5 January 2011.

13. The applicant's counsel received the observations from the prosecution authorities on 3 February 2011 and submitted a reply to the Court of Appeal on 10 February 2011.

14. Following a telephone enquiry to the Court of Appeal, the applicant's counsel learned on 10 February 2011 that on 3 February 2011 it

had already decided the applicant's appeal of 5 January 2011 and dismissed it. The applicant had therefore not been able to reply to the observations of the prosecution authorities of 28 January 2011 prior to the court taking its decision.

15. That same day the applicant's counsel requested a subsequent hearing (*Nachholung des rechtlichen Gehörs*) under Article 33a of the Code of Criminal Procedure.

16. On 14 February 2011 the Court of Appeal's decision of 3 February 2011 was served on the applicant.

17. On an unspecified date the prosecution authorities submitted written observations in relation to the applicant's request for a subsequent hearing.

18. On 25 February 2011 the Court of Appeal dismissed the request for a subsequent hearing as inadmissible, finding that the applicant's right to be heard had not been violated, that the prosecution authorities' observations of 28 January 2011 had not contained any facts unknown to him and there had therefore been no need to serve them on him. In so far as his submission of 10 February 2011 was to be classified as an objection (*Gegenvorstellung*), the court rejected it because its decision of 3 February 2011 had not been based on incorrect factual or procedural considerations. Prior to the decision of 25 February 2011, the observations of the prosecution authorities relating to the request for a subsequent hearing had not been served on the applicant, who had thus had no opportunity to reply to them. The Court of Appeal nevertheless quoted and endorsed those observations in its decision.

19. On 7 April 2011 the applicant lodged a complaint with the Federal Constitutional Court. He alleged, in particular, that his right to be heard, as guaranteed by Article 103 § 1 of the Basic Law (*Grundgesetz*), had been violated, because the Court of Appeal had taken its decisions of 3 and 25 February 2011 without giving him the opportunity to reply to the observations of the prosecution authorities.

20. On 28 July 2011 the Federal Constitutional Court declined to accept the applicant's constitutional complaint without providing reasons (2 BvR 805/11). Its decision was served on him on 10 August 2011.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Under domestic law, a person is detained on remand, rather than after conviction, until his or her conviction becomes final, including during appeal procedures. Remand prisoners may, under Article 117 § 1 of the Code of Criminal Procedure, at any time seek a review (*Haftprüfung*) of their detention or ask for a stay of execution. They may lodge an appeal under Article 304 of the Code of Criminal Procedure (*Haftbeschwerde*) against a decision ordering their (continued) detention with the court that took it. If the court does not allow the appeal, it refers it to a higher court. A

further appeal may be lodged against the decision of that court (*weitere Beschwerde*) under Article 310 § 1 of the Code of Criminal Procedure.

22. According to the case-law of the domestic courts, only the most recent detention order can be subject to a review (see, among many other authorities, Federal Constitutional Court, 2 BvR 332/05, decision of 12 May 2005, paragraph 14, and Düsseldorf Court of Appeal, MDR 1969, 779).

23. Article 33a of the Code of Criminal Procedure, which governs subsequent hearings, provides:

> "If, in a ruling, the court violates the right of a participant to be heard in a manner which might affect the outcome of the case and if the participant has no right to lodge a complaint or any other legal remedy against the ruling, then as far as the detriment still exists the court shall make an order either *proprio motu* or on application reverting the proceedings to the situation before the decision in question was given. Article 47 shall apply *mutatis mutandis*."

THE LAW

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

24. The applicant complained, under Article 5 § 4 of the Convention, that the principle of equality of arms had been violated because the Court of Appeal had taken its decisions of 3 and 25 February 2011 relating to the continuation of his detention and his request for a subsequent hearing without giving him the opportunity to reply to the written observations of the prosecution authorities. Article 5 § 4 of the Convention reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

25. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

27. The applicant submitted that, according to the case-law of the Court, proceedings under Article 5 § 4 of the Convention must be adversarial and always ensure equality of arms between the parties. Relying on *Lanz v. Austria* (no. 24430/94, §§ 40-42, 31 January 2002), he argued that the prosecutor and the detainee must always be given the opportunity to note observations filed by the other party and comment on them, including on appeal. Where observations were not served on the other party, the proceedings were not truly adversarial. In that regard it was irrelevant that, in the opinion of the courts concerned, the observations had not contained any new facts or arguments and whether the observations had actually had an effect on the decision of the court. It was for the parties to the dispute to decide whether or not to comment on the submission of the other party. Therefore, in the proceedings before the Court of Appeal resulting in the decision of 3 February 2011 the principle of equality of arms required by Article 5 § 4 of the Convention had been violated.

28. The applicant emphasised that the case-law of the domestic courts provided that only the most recent detention order could be subject to a review. It was therefore irrelevant that the lawfulness of his detention had been reviewed a number of times before the Court of Appeal had taken the decision in question. The passage of time constituted a relevant element for the assessment of the lawfulness of his detention. Moreover, he pointed out that it was the first time that the Court of Appeal, rather than the District Court or Regional Court, had decided the lawfulness of his detention and the first time that the Chief Public Prosecutor's Office had been part of the proceedings. The applicant could thus not have known their position regarding his detention. Furthermore, he had explicitly relied on Article 5 § 4 of the Convention for the first time in his further appeal of 5 January 2011 and had asked that the observations of the Chief Public Prosecutor's Office be sent to him so as to be able to comment on them.

29. He submitted that all of the different guarantees of Article 5 § 4 of the Convention – notably that the lawfulness of the detention be decided "speedily" and that the respective proceedings be adversarial – had to be respected. Considering the overall length of the proceedings concerning the review of the lawfulness of his detention, allowing him a few days to comment on the observations of the prosecution authorities would not have been problematic with regard to the speediness requirement. The Court of Appeal could, at the very least, have informed him that the prosecution authorities had submitted observations, which would have enabled his

counsel to obtain a copy and comment on them within a short period of time.

30. The applicant argued that Article 5 § 4 of the Convention had also been violated in the proceedings concerning his request for a subsequent hearing, as they had been decided by the Court of Appeal on 25 February 2011 without him having the opportunity to reply to the written observations of the prosecution authorities. He asserted that the observations had been relevant, as evidenced by the fact that in its own decision the Court of Appeal had reproduced their content, which had run to more than a page and had concerned the right to be heard, which had not been the subject of the proceedings up until that point.

(b) The Government

31. The Government submitted that the Court had, in the case of *Lanz* (cited above, § 41), stated that proceedings conducted under Article 5 § 4 of the Convention should "in principle" also meet, "to the largest extent possible" under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. It was not always necessary that the proceedings under Article 5 § 4 of the Convention be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation. Emphasising that the lawfulness of the applicant's detention had been reviewed by the domestic courts eleven times prior to the Court of Appeal's decision of 3 February 2011, including by the District Court and the Regional Court in the set of proceedings at issue, they submitted that all relevant arguments had been exchanged by the time the Court of Appeal had been asked to review the lawfulness of the applicant's detention. The applicant, who had initiated the review proceedings, had had ample opportunity to make submissions about why his detention was unlawful. Since November 2010 he had made scarce use of these opportunities, mainly relying on his previous submissions. He had been well aware of the position of the public prosecutor as regards the continuation of his detention. The statement of the Chief Public Prosecutor of 28 January 2011 had not contained any new facts or arguments of which he had been unaware. The principle of equality of arms had not been violated. It was telling that the applicant's submission of 10 February 2011 had not contained any factual or legal arguments that he could not have already submitted in his appeal to the Court of Appeal on 5 January 2011.

32. The present case thus differed significantly from those of *Lanz* (cited above), *Migón v. Poland* (no. 24244/94, 25 June 2002) and *Fodale v. Italy* (no. 70148/01, ECHR 2006-VII), in which violations of Article 5 § 4 of the Convention had been found due to a failure to meet the requirements of adversarial proceedings and equality of arms in proceedings concerning the review of the lawfulness of detention because the detainee or his or her

counsel had not, or had not in time, been made aware of observations by the prosecution and were unable to respond to them. The case of *Lanz* (cited above) had concerned the first review of the lawfulness of applicant's detention by the Court of Appeal and both the applicant and the public prosecutor, who had sought recognition of further grounds for detention, had lodged appeals against the Review Chamber's decision. In *Migón* (cited above), neither the applicant nor his counsel had been allowed to attend court hearings concerning the continuation of his detention on remand and the review of the lawfulness of his detention, whereas the prosecutor had been able to do so and to make submissions in support of the extension of the detention order, while neither the applicant nor his lawyers had had any opportunity to be acquainted with them or formulate any objections, or comment thereon. In *Fodale* (cited above), the applicant, who had not been in custody at the time, had not been summoned to appear at the hearing before the Court of Cassation, which had been set following an appeal on points of law by the public prosecutor and which had concerned the question of whether his release from detention would become final or whether the decision ordering his release would be quashed. The applicant had thus been unable to file pleadings or present oral arguments at the hearing in response to the submissions of the public prosecutor.

33. The Government further pointed out that the aim of Article 5 § 4 of the Convention were to offer protection against arbitrary deprivations of liberty by means of speedily reviewing the lawfulness of the detention. The Court of Appeal had taken this aim, which conflicted with the procedural approach in proceedings falling under Article 6 § 1 of the Convention to send every submission to the other party for comment, thereby prolonging the duration of the proceedings, into due consideration when it had decided on the lawfulness of the applicant's detention on 3 February 2011. The decision had been taken four working days after the prosecution authorities had sent their written observations directly to the applicant's counsel. Considering that they had not contained any new arguments and that the applicant had confined himself on several occasions to simply referring to his previous submissions, the Court of Appeal could legitimately assume that the applicant had already been aware of the observations and had chosen not to respond by the time it had taken its decision.

34. With regard to the applicant's request for a subsequent hearing, the Government noted that his submission of 10 February 2011 had not contained any factual or legal arguments that he could not have already submitted in his appeal on 5 January 2011 and that the Court of Appeal, in its decision of 3 February 2011, had not relied on facts unknown to him. Its decision of 25 February 2011 to dismiss the applicant's request for a subsequent hearing had not therefore infringed his rights under Article 5 § 4 of the Convention.

2. The Court's assessment

35. The Court notes that the set of proceedings concerning the lawfulness of the applicant's detention which led to the Court of Appeal's decision of 3 February 2011 commenced on 8 December 2010 (see paragraphs 9 to 11 above), that is, after the District Court's judgment of 6 December 2010 convicting him (see paragraph 8 above). Article 5 § 1 (c) and 5 § 3 of the Convention were thus no longer applicable to the applicant's detention (*Wemhoff v. Germany*, 27 June 1968, § 9, Series A no. 7). The domestic courts' assessment whether there was a risk of the applicant absconding to justify his continued detention (see paragraph 10 above) was thus owed to the fact that the applicable domestic law provided that a person was detained on remand, rather than after conviction, until his or her conviction became final, including during appeal procedures (see paragraph 21 above). Under the Court's case-law, no such assessment of a risk of absconding would have been required, as the applicant's detention was governed by Article 5 § 1 (a) of the Convention, despite the pending appeal proceedings (*Belevitskiy v. Russia*, no. 72967/01, § 99, 1 March 2007). Nothing indicates that the applicant's detention under Article 5 § 1 (a) of the Convention was *per se* arbitrary.

36. The Court reiterates that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012). Article 5 § 4 of the Convention does not normally come into play as regards detention governed by Article 5 § 1 (a) of the Convention, save where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time (see *Kafkaris v. Cyprus* (dec.), no. 9644/09, § 58, 21 June 2011) or where fresh issues affecting the lawfulness of such detention arise (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 57, 6 November 2008). In the present case, Article 5 § 4 of the Convention is applicable because domestic law provided that a person is detained on remand until his or her conviction becomes final, including during appeal proceedings, and accorded the same procedural rights to all remand prisoners (see paragraph 21 above). Where the Contracting States provide for procedures which go beyond the requirements of Article 5 § 4 of the Convention, the provision's guarantees, nevertheless, have to be respected in these procedures. The Court observes that, prior to the Court of Appeal's decision of 3 February 2011, the lawfulness of the applicant's detention had previously been assessed eleven times by the domestic authorities since 27 August 2010. This frequency of reviews was more than satisfactory in terms of the Convention's standards.

37. Although it is not always necessary for the procedure under Article 5 § 4 to be attended by the same guarantees as those required under Article 6

§ 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (ibid.). The proceedings must be adversarial and must always ensure "equality of arms" between the parties, that is, the prosecutor and the detainee (see *Lanz*, cited above, § 44, and *Graužinis v. Lithuania*, no. 37975/97, § 31, 10 October 2000). A party must be informed whenever observations are filed by another party and must be given a real opportunity to comment thereon (see *Lanz*, cited above, § 41). Lastly, the Court reiterates that, although Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (ibid., § 42).

38. It is not disputed that the Court of Appeal took its decisions of 3 and 25 February 2011 relating to the continuation of the applicant's detention and his request for a subsequent hearing without informing him of the written observations of the prosecution authorities and giving him the opportunity to comment on them.

39. The Court further notes that, according to the case-law of the domestic courts, only the most recent detention order could be subject to a review (see paragraph 22 above) and that the proceedings at issue were the first proceedings concerning the lawfulness of the applicant's detention before the Court of Appeal. It was also the first time that the Chief Public Prosecutor's Office was part of the proceedings. This constituted a new situation compared to the previous reviews of the applicant's detention by the District Court or Regional Court. The applicant could not have known the positions of either the Chief Public Prosecutor's Office or the Court of Appeal regarding his detention. In this regard, it cannot be ignored that the applicant, in his submission of 5 January 2011, had explicitly asked that the observations of the Chief Public Prosecutor's Office be sent to him so as to be able to comment on them.

40. Reiterating that a detainee must in principle be accorded the same guarantees on appeal as at first instance (see *Lanz*, cited above, § 42), the Court considers that the requirement that the proceedings under Article 5 § 4 of the Convention must be truly adversarial and always ensure equality of arms cannot be modified depending on who initiated the review proceedings. It is true that a detainee who has brought review proceedings or lodged an appeal has an opportunity to make a substantive submission at that stage, whereas he or she does not have an opportunity to do so where the proceedings have been initiated or the appeal has been lodged by the prosecutor or where the review is periodic. However, for the review proceedings to be "truly adversarial" and for equality of arms to be ensured, a party must be informed whenever observations are filed by another party and be given a real opportunity to comment (ibid., § 41).

41. Regarding the Government's submission that the statement of the Chief Public Prosecutor of 28 January 2011 had not contained any new facts or arguments of which the applicant had been unaware, the Court considers that it is neither for the domestic court competent for the proceedings, nor for this Court, to assess the substance of submissions made by either one of the parties to the proceedings and to make the exchange of observations conditional on the outcome of such an assessment. Rather, it is a matter for the detainee, or his or her counsel, to assess whether or not a submission by the prosecutor deserves a reaction (ibid., § 44). Only this approach can ensure, with legal certainty, that the proceedings are truly adversarial and guarantee equality of arms.

42. While it is true, as the Government submitted, that the Court of Appeal was obliged to decide the lawfulness of the applicant's detention speedily, the Court emphasises that all of the guarantees of Article 5 § 4 of the Convention must be respected and considers that the obligation to decide the lawfulness speedily cannot justify a decision being taken without the applicant even being aware that the prosecution authorities had submitted observations, let alone having a real opportunity to comment on them. The applicant's counsel received the observations of the prosecution authorities of 28 January 2011 only on 3 February 2011 (see paragraphs 12-13 above), that is, the day on which the Court of Appeal took its decision on the applicant's appeal of 5 January 2011. To ensure respect for both the speediness requirement and the principle of equality of arms, the Court of Appeal could, at the very least, have informed the applicant, or his counsel, as soon as it had received the prosecution authorities' observations, about this submission and given him sufficient time to comment on these observations.

43. The Court notes the diligence displayed by the District Court and the Regional Court when considering the proceedings as a whole, notably by examining the lawfulness of the applicant's detention eleven times within a relatively short time span. It also notes that the applicant's detention was governed by Article 5 § 1 (a) of the Convention and that there were no indications that his detention was *per se* arbitrary. Nevertheless, the Court cannot speculate as to the outcome of the proceedings before the Court of Appeal and considers that, even in such circumstances as in the present case, the principle of equality of arms, as guaranteed by Article 5 § 4 of the Convention, requires that a party must be informed whenever observations are filed by another party and must be given a real opportunity to comment thereon.

44. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings before the Court of Appeal, which had to decide for the first time on the lawfulness of the applicant's detention, were not truly adversarial and that the principle of equality of arms was violated. The applicant did not have the opportunity to comment on the written

observations of the newly involved Chief Public Prosecutor's Office before the Court of Appeal prior to that court's decision of 3 February 2011 concerning the lawfulness of his detention and prior to its decision of 25 February 2011 concerning his request for a subsequent hearing. In relation to this latter decision, the Court reiterates that the Court of Appeal reproduced and endorsed the content of the prosecution authorities' observations in its decision, which indicates that they were not irrelevant.

45. There has accordingly been a violation of Article 5 § 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage. He argued that as a consequence of the breaches of the Convention he had suffered pain and distress, not least because he, a drug addict, had been forced to go "cold turkey" in detention.

48. The Government argued that it was speculative whether the applicant would have been released from detention if the procedural guarantees of Article 5 § 4 of the Convention had been respected in his case. Consequently, the non-pecuniary damage claimed was adequately compensated by the finding of a violation of this provision. In any event, the applicant's claim for the alleged non-pecuniary damage was excessive and his suffering related to going "cold turkey" in detention had not been directly caused by the violation in question.

49. The Court considers that, in the circumstances of the present case, the finding of a violation constitutes in itself sufficient just satisfaction.

B. Costs and expenses

50. The applicant also claimed EUR 8,925 (including VAT) for costs and expenses incurred before the Federal Constitutional Court and EUR 8,925 (including VAT) for those incurred before the Court. He submitted copies of the fee agreements between him and his lawyer concerning these proceedings.

51. The Government disputed that the costs and expenses had actually been incurred. They submitted that the copies of the fee agreements had

been signed by the applicant but not his lawyer, and did not specify the date and place of signature. In any event, the applicant's claim was excessive as the overall sum was several times higher than the amount of statutory reimbursement.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and to the fact that the applicant had been granted legal for the Convention proceedings, the Court considers it reasonable to award the sum of EUR 4,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

53. 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,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by four votes to three, that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds*, by four votes to three, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*, by four votes to three,
   (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 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 7 September 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Nußberger, Møse and Hüseynov is annexed to this judgment.

E.M.
M.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES NUSSBERGER, MØSE AND HÜSEYNOV

We have voted against finding a violation of Article 5 § 4 of the Convention. In our view the majority have based their reasoning on a formalistic interpretation of the Court's case-law and have not sufficiently taken into account the specific circumstances of the present case.

I. Formalistic versus substantive interpretation of Article 5 § 4 of the Convention

Article 5 § 4 of the Convention grants a very important right, the right to judicial control of the lawfulness of detention. In the present case two different courts, the District Court and the Regional Court, ruled ten times within four months on the lawfulness of the applicant's detention order before and after the first-instance court's judgment[1], and extensively discussed all the relevant arguments. As acknowledged by the majority, "this frequency ... was more than satisfactory in terms of the Convention's standards" (see paragraph 36 of the judgment). Nevertheless, the majority found a violation of Article 5 § 4 due to a failure to meet the requirements of adversarial procedure and equality of arms in the eleventh and final round of supervision before the Court of Appeal, even though the applicant did not advance any new arguments at this stage but simply referred to his previous submissions (see paragraph 11 of the judgment). The critique is focused exclusively on the fact that the Court of Appeal's decision was taken before the defence had seen the observations of the prosecution, and that the request for a subsequent hearing was dismissed, again without the observations of the prosecution being sent to the defence lawyer.

In our view this formalistic interpretation of Article 5 § 4 of the Convention loses sight of the substance of this Convention guarantee. The purpose of Article 5 § 4 of the Convention is to prevent arbitrariness. The idea is not to monitor compliance with the formalities of the review procedure, but to ensure the separation of powers between the executive and the judiciary in ordering detention and to guarantee thorough judicial control of the lawfulness of detention orders. In the present case, there cannot be any doubt that the judicial control was thorough.

We accept that there was a formal mistake in the present case (see point III (1) below) but argue that this formal mistake did not impact on

[1] Between 30 August 2010 and 11 November 2010 the applicant's detention was examined eight times (see paragraph 7 of the judgment). The ninth decision was taken on 6 December 2010, the same day on which the judgment had been adopted (see paragraph 8). The tenth decision was taken on 8 December by the District Court, which did not allow the appeal (see paragraph 10).

either the fairness (point III (2)) or the effectiveness (point III (3)) of the review procedure, which has to be seen as a whole (point III (4)). Before discussing these issues we have some comments to make on the Court's case-law under Article 5 § 4 (see point II below).

II. The Court's case-law

It is common ground that although it is not always necessary for the procedure under Article 5 § 4 to be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have "a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question" (see paragraphs 36 and 37 of the judgment, with reference to *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012, which related to the applicant's absence from appeal hearings). As regards specifically the requirements that the proceedings "must be adversarial and must always ensure equality of arms between the parties", the majority refer to *Lanz v. Austria* (no. 24430/94, 31 January 2002), and *Grauzinis v. Lithuania* (no. 37975/97, 10 October 2000).

In *Lanz* the Chamber explained (§ 41) that these requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention. Referring to previous case-law, it stated that Article 6 had "some application to pre-trial proceedings". In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should "in principle" also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.

Besides noting the flexible formulation "in principle", we would point out that, whereas *Lanz* related to pre-trial detention under Article 5 § 1 (c) of the Convention, the decisions to extend the applicant's detention in the present case were made after the applicant's conviction and hence under Article 5 § 1 (a).

The Chamber in *Lanz* further observed (§ 42) that Article 5 § 4 guarantees no right, as such, to appeal against decisions ordering or extending detention. The intervention of one organ satisfies Article 5 § 4, on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. Nevertheless, a State which sets up a second level of jurisdiction for the examination of applications for release from detention – as in the present case – must "in principle" accord to the detainee the same guarantees on appeal as at first instance.

Again, it is worth noting the flexible formulation "in principle", not only as regards the extent to which the guarantees developed under Article 6

apply under Article 5 § 4 (see above), but also as to whether they apply fully at the appellate level in detention proceedings, as in the present case.

Grauzinis too differs from the present case. It related to pre-trial detention and the applicant had, repeatedly, not been brought before a judge. Unsurprisingly, the Court found a violation of Article 5 § 4 because the applicant had not been present during pre-trial remand hearings where his presence was required so that he could give satisfactory information and instructions to his counsel (§§ 28, 33 and 34). Furthermore, we also consider it important that the Court assessed the overall fairness of the proceedings. Before concluding it stated as follows (§ 34):

> "Furthermore, viewed as a whole, these and the subsequent proceedings failed to afford the applicant an effective control of the lawfulness of his detention, as required by Article 5 § 4 of the Convention."

III. Fairness and effectiveness of the review procedure in the present case

We would accept that there was a formal mistake in the present case (1), but argue that this formal mistake did not impact on either the fairness (2) or the effectiveness (3) of the review procedure, which has to be seen as a whole (4).

(1) Extent of the deficiencies in the procedure

It is not disputed that the Court of Appeal took its decision of 3 February 2011 relating to the continuation of the applicant's detention without informing the defence of the written observations of the prosecution authorities. The defence had no opportunity to comment on them. This specific part of the proceedings was thus not adversarial; equality of arms was not guaranteed. Nevertheless, the defence had a remedy against this deficiency in the procedure and could request a subsequent hearing. This request was declared inadmissible as the court held that the observations of the prosecution had not contained any new information and the court's decision had not been based on any incorrect factual or procedural considerations (see paragraph 18 of the judgment). That means that the national courts analysed the substance of the complaint, that is to say, whether the formal mistake had any negative consequences for the applicant. This second procedure was however also problematic as, again, the observations of the prosecution were not sent to the defence. The applicant did have another remedy, as he was able to bring his complaint before the Constitutional Court (where he was, however, unsuccessful). Thus, the deficiency in the procedure was reviewed in substance, but part of the review procedure was open to criticism as well.

Not every formal mistake is, however, a human rights violation.

(2) Fairness of the procedure

According to the long-standing case-law of the Court, the control mechanism in respect of the lawfulness of detention as such does not fall under Article 6 § 1 of the Convention as it does not concern "the determination of a criminal charge". Nevertheless, and rightly so, the Court has transposed the guarantees of a fair trial, especially the right to an adversarial procedure and equality of arms, to proceedings under Article 5 § 4 of the Convention. In this context it seems not to be entirely clear whether the adversarial character of the procedure and equality of arms should be understood as formal or substantive guarantees.

In the view of the majority these guarantees are purely formal. The majority rely on a narrow reading of *Lanz* and stress legal certainty, stating that "the Court considers that it is neither for the domestic court competent for the proceedings, nor for this Court, to assess the substance of submissions made by either one of the parties to the proceedings and to make the exchange of observations conditional on the outcome of such an assessment" (see paragraph 41 of the judgment). While we agree with this statement, we think that, if a formal mistake has been made and a review procedure is granted to correct it, it is acceptable for this procedure to focus on the substantive question of real disadvantage. This is in line with the Court's case-law, which interprets the principle of equality of arms in the light of what is essential in challenging a detention order (see, among other authorities and *mutatis mutandis*, *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009).

If we consider the substantive aspect of equality of arms, it cannot be said that the applicant was not in a position to effectively challenge the lawfulness of his detention. It is not disputed by the parties that the relevant observations of the prosecution did not contain any new information or argument on this aspect. The observations of 28 January 2011 requested the dismissal of the appeal, nothing more (see paragraph 12 of the judgment). The observations on the request for a subsequent hearing, submitted on an unspecified date (see paragraph 17), did not in any way concern the lawfulness of the applicant's detention, but rather the question whether a subsequent hearing should be granted.

Thus, while there was a formal violation of equality of arms, it cannot be argued that there was a substantive violation of this guarantee.

(3) Effectiveness of the control

While the fairness of the procedure is the core of the Convention guarantee under Article 6 of the Convention, the idea behind Article 5 § 4 is to avoid arbitrariness and guarantee the effectiveness of the procedure to review the lawfulness of detention.

In the present case, there can be no doubt that all the applicant's arguments were analysed in substance. The review procedure was effective and devoid of arbitrariness.

(4) Analysis of the procedure as a whole

The majority seem to concentrate their analysis only on the eleventh set of review proceedings before the Court of Appeal (see paragraph 39 of the judgment) and do not consider the fairness and effectiveness of the procedure as a whole. We would argue that, as the principle of a fair trial enshrined in Article 6 of the Convention is transposed to Article 5 § 4 proceedings, this cannot be done without also transposing the holistic view which the Court has developed in its case-law on Article 6 of the Convention, according to which "[c]ompliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident ..." (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, ECHR 2016). As mentioned above (point II), this was done in *Grauzinis* in the context of Article 5 § 4 of the Convention; in that case the Court did transpose the holistic view.

Analysed as a whole, the procedure, involving four different courts, four levels of supervision and a comprehensive discussion of all the arguments – all within a period of four months for the ordinary courts or eight months including the Constitutional Court proceedings – cannot be seen as unfair or ineffective.

In this context it might be worth mentioning that the guarantees offered by the German Code of Criminal Procedure went beyond the Convention requirements in two important aspects.

Firstly, the applicant was already convicted and was therefore lawfully detained on the basis of Article 5 § 1 (a) of the Convention. As the supervision required by Article 5 § 4, according to the Court's case-law, is already incorporated in the sentencing court's decision (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12, and *Wynne v. the United Kingdom*, 18 July 1994, § 36, Series A no. 294-A), an assessment of the lawfulness of the applicant's detention was no longer required by the Convention. Had the German courts refused to review the detention order after the judgment of 6 December 2010 in which the applicant was sentenced to two years and six months' imprisonment, there would not have been a violation of the Convention. The majority do not give any reason why they deem it necessary to go beyond the existing case-law in this respect (see paragraph 36 of the judgment).

Secondly, Article 5 § 4 of the Convention does not compel the Contracting States to set up a second level of jurisdiction for the

examination of the lawfulness of detention. In this respect as well the control standard according to German law was higher than the Convention standard.

While, according to the Court's case-law, a State which sets up a second level of jurisdiction for the examination of applications for release from detention must in principle accord to the detainee the same guarantees on appeal as at first instance (see *Lanz*, cited above, § 42), it is important to note that the case-law in this respect is not rigid, but emphasises that the guarantees have to be applied "in principle" (see point II above).

To us it seems difficult to argue that the guarantees were not applied "in principle" in the present case.

IV. Concluding remarks

This is not a very serious case, as shown by the fact that the majority did not even choose to award compensation. Nevertheless, it raises more far-reaching problems of interpretation of the Convention. Firstly, it seems doubtful what the message should be if the Court finds violations in situations where the human rights guarantees – seen as a whole – clearly exceed the requirements of the Convention. Secondly, while legal certainty is very important, it should not be misunderstood as the reduction of substantive guarantees to formal guarantees. Form and procedure matter, but in human rights protection they are not an end in themselves. The Court should always look behind appearances and focus on the substance. Thirdly, we think that it is very important to interpret the Convention in a consistent manner. The requirements of a fair trial under Article 5 § 4 of the Convention should not exceed what is required under Article 6 of the Convention.

Based on all these reasons, we have come to the conclusion that there has been no violation of Article 5 § 4 of the Convention in the present case, as the applicant had ample opportunities to have the lawfulness of his detention reviewed.