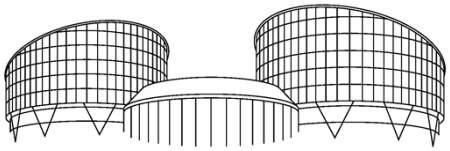

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KERESELIDZE v. GEORGIA

(Application no. 39718/09)

JUDGMENT

STRASBOURG

28 March 2019

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 Kereselidze v. Georgia,

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

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 5 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 39718/09) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Irakli Kereselidze ("the applicant"), on 27 July 2009.

2. The applicant was represented by Ms M. Japaridze and Mr D. Khachidze, lawyers practising in Tbilisi. The Georgian Government ("the Government") were represented by their Agent, Mr L. Meskhoradze, of the Ministry of Justice.

3. The applicant alleged, under Article 5 § 1 and Article 6 § 1 of the Convention, that a rectification of an appellate court's judgment in respect of the starting date of his cumulative sentence had prolonged his imprisonment, amounting to an unlawful detention, and that he had been deprived of the opportunity to make representations in respect of the rectification procedure before the appellate court. The applicant further complained, under Article 13 of the Convention, of the lack of an effective domestic remedy for his grievances.

4. On 22 September 2014 notice of the complaints concerning Article 5 § 1, Article 6 § 1 and Article 13 was given 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 1975 and, as can be seen from the case materials, is currently serving a sentence in a penal institution (see paragraph 20 below).

6. On 24 May 1996 the applicant was convicted of aggravated double murder and other offences. He was sentenced to the death penalty, which was subsequently commuted to twenty years' imprisonment in 1997 ("the first conviction"). The sentence started to run from the date of the applicant's arrest on 24 August 1995 and was due to expire on 24 August 2015.

7. On 29 March 2002 the applicant attempted to escape.

8. On 12 April 2006 after a series of decisions and the remittal of the case to the investigating authorities, the Tbilisi City Court convicted the applicant of attempted escape and the illicit procurement of an official document. He was sentenced to four years and six months' imprisonment ("the second conviction"). The first-instance court added the applicant's outstanding sentence for the first conviction to the subsequent sentence, resulting in a total cumulative sentence of thirteen years and six months. The court indicated that the cumulative sentence would start to run from 29 March 2002, the date of commission of the second offence. It was due to expire on 29 September 2015.

9. On 29 December 2006 the provision of the Criminal Code regulating the imposition of cumulative sentences was amended. Article 59 of the amended law provided that, as regards accumulated sentences, the final sentence imposed should be calculated from the imposition of the later sentence. The amended legislation did not explicitly address the question of its retroactive effect (see paragraph 21 below).

10. On 20 April 2007, in a different set of proceedings, instituted by the applicant to have legislative amendments reducing the maximum length of a sentence for aggravated murder applied to his first conviction, the Supreme Court reduced the applicant's sentence for the first conviction to fifteen years' imprisonment. When doing so, the Supreme Court did not refer either to the starting date of the sentence or the applicant's second conviction.

11. On 20 February 2008 the Supreme Court rectified its decision of 20 April 2007 based on the applicant's request to that end, stating that the outstanding sentence for the applicant's first conviction and the sentence for the second conviction were to be cumulative, and that the cumulative sentence of eight years and six months had to start running from 29 March 2002, namely the date of commission of the second offence rather than the date of the imposition of the later sentence, which was 12 April 2006. Appellate proceedings concerning the second conviction were still pending

when the Supreme Court adopted the two decisions. Based on the decision of the Supreme Court of 20 February 2008, the applicant's sentence would have expired on 29 September 2010.

12. On 3 December 2008, without taking note of the Supreme Court decisions of 20 April 2007 and 20 February 2008 (see paragraphs 10-11 above), the Tbilisi Court of Appeal upheld the applicant's second conviction and ruled that he had to serve a cumulative sentence of thirteen years and six months which had started to run on 29 March 2002 which was again, the date of the commission of the second offence. That sentence would have expired on 29 September 2015.

13. On an unspecified date the applicant lodged an appeal on points of law against the appellate court's judgment of 3 December 2008. He requested a reduction in the sentence imposed for his second conviction and the reduction of the cumulative sentence by five years in view of the Supreme Court's decisions of 20 April 2007 and 20 February 2008 to that end (see paragraphs 10-11 above). The case file and the applicant's appeal on points of law were sent to the Supreme Court on 21 January 2009.

14. On 3 April 2009, while the applicant's appeal on points of law was pending before the Supreme Court, the Tbilisi Court of Appeal adopted, by means of a written procedure and without the parties' involvement, a decision rectifying an error in its judgment of 3 December 2008 ("the rectified appellate decision"). Relying on Article 615 of the Code of Criminal Procedure ("the CCP" – see paragraph 24 below), the decision corrected the starting date of the cumulative sentence to 12 April 2006 – the date on which the first-instance court's decision concerning the second conviction had been adopted. The appellate court did not elaborate on its decision except for noting that the judgment of 3 December 2008 had contained "an inaccuracy" regarding the starting date of the sentence. Based on that new starting date, the applicant's sentence was due to expire on 12 October 2019. As shown by the case files, the decision of 3 April 2009 was served on the applicant on 16 April 2009.

15. On 7 April 2009 the Supreme Court issued a reasoned decision, without holding a hearing, and granted the applicant's appeal on points of law. It noted that the appellate court had failed to take account of the reduction of the applicant's first sentence by the Supreme Court on 20 April 2007 (see paragraph 10 above). The Supreme Court further reduced the sentence for the applicant's second conviction to three years. It took note of the rectified appellate decision of 3 April 2009 (see paragraph 14 above) and stated that the re-calculated cumulative sentence of seven years' imprisonment had started to run on 12 April 2006, namely the date of the imposition of the sentence for the second offence. That term was due to expire on 12 April 2013.

16. On 22 April 2009 the applicant requested the rectification of the decision of the Supreme Court of 7 April 2009 in respect of the starting date

of his cumulative sentence. He noted that it was only by means of the Supreme Court's final decision that he had learned about the rectified appellate decision of 3 April 2009. He submitted that the rectified appellate decision had been contrary to the final decision of the Supreme Court dated 20 February 2008 which had set a different starting date for his cumulative sentence, and would have resulted in a release date of 29 September 2010. He further submitted that the rectification had lacked any legal basis and had gone beyond the scope of Article 615 of the CCP, as it had substantially affected the duration of his sentence. Maintaining that his appeal had been the sole basis for the appellate court's judgment of 3 December 2008, the applicant submitted that the rectified appellate decision, made by that very court, had been in violation of Article 540 § 1 of the CCP which had provided a guarantee for an appellant against a worsening of his or her position in the proceedings in the absence of an appeal from the prosecuting authorities. The applicant further indicated that, in addition to the foregoing arguments, taking into account the reduction of his sentence by the Supreme Court on 7 April 2009, his sentence should have expired on 29 March 2009 and that accordingly he was to be released from prison immediately.

17. On 24 April 2009 the Head of the Registry of the Chamber of Criminal Cases of the Supreme Court replied to the applicant, stating that the rectified appellate decision of 3 April 2009 had constituted an integral part of the appellate judgment of 3 December 2008. Therefore, the Supreme Court was not in a position to address the applicant's complaint.

18. On 11 May 2009, relying on Article 553 of the CCP (see paragraph 22 below), the applicant lodged an interlocutory appeal on points of law against the rectified appellate decision. The applicant reiterated the arguments set out in his rectification request of 22 April 2009 (see paragraph 16 above).

19. On 15 June 2009 an assistant to the Chairman of the Tbilisi Court of Appeal replied to the applicant's appeal of 11 May 2009 (see paragraph 18 above), noting that the Tbilisi Court of Appeal had adopted a judgment on 3 December 2008 and subsequently rectified on 3 April 2009 an error regarding the starting date of the sentence. It was further noted that, in its decision of 7 April 2009, the Supreme Court had accepted the rectification of the inaccuracy by the appellate court regarding the starting date of the sentence and that the rectified appellate decision had therefore been left unchanged. Accordingly, the response concluded, the interlocutory appeal on points of law against the decision of 3 April 2009 could not be accepted for consideration.

20. The applicant was released from prison on 27 January 2013 – earlier than the anticipated release date of 12 April 2013 – based on an Amnesty Act. As the applicant's submissions before the Court show, on 6 February 2017 he was arrested on charges of aggravated fraud and repeated forgery of official documents. On 18 October 2017 the applicant was sentenced, at first

instance, to eight years' imprisonment. This set of proceedings against the applicant is not the subject of the present application**.**

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Article 60 of the Criminal Code (1999), as it stood when the first-instance court initially applied the sentence in the context of the applicant's second conviction and in so far as relevant, provided as follows:

> "1. In the case of cumulative sentences, the sentencing court shall add to the latest sentence the outstanding prior sentence in part or in its totality ..."

As of 29 December 2006, Article 59 of the Criminal Code regulated the imposition of cumulative sentences. That provision provided as follows:

> "... 2. In the case of cumulative sentences, the sentencing court shall add to the latest sentence the outstanding prior sentence in its totality ...
>
> 5. The final sentence imposed as a result of the accumulation of sentences shall be calculated from the date of the [imposition of the] later sentence ..."

22. Under Article 553 of the Code of Criminal Procedure (1998) ("the CCP"), in force at the material time, an interlocutory appeal on points of law could be lodged against any final decision of an appellate court, except for a conviction, if the appellant regarded it as having been taken in violation of the law.

23. Article 540 § 1 of the CCP provided for a prohibition of any change to an appellant's circumstances for the worse (*reformatio in peius*) in the following terms:

> "an appellate court may not deliver a judgment of conviction instead of a judgment of acquittal, apply a stricter provision of the Criminal Code, impose a heavier penalty, increase the value of a civil claim, or adopt any other decision that is more unfavourable to the accused if a review of the case is carried out based on an appeal lodged by an accused, his or her lawyer or legal representative, by a civil respondent or his or her representative, in the absence of an appeal lodged by a prosecutor, a victim, or any other person representing the prosecution."

24. Article 615 of the CCP, in so far as relevant, provided as follows:

> "The adjudicating court may rectify an ambiguity [or] inaccuracy present in a decision which shall not result in the decision being overturned or changed; in particular [it may]:
>
> ...
>
> e) make other clarifications to a decision that do not affect the court's conclusion regarding the classification of the action of the convicted person, the sentencing measure, or the civil action and the determination of its value."

25. According to the Supreme Court, in a judgment handed down over two years after the relevant amendment of the Criminal Code, Article 59 of the Criminal Code provided for cumulative sentencing, and could have

retroactive effect to apply to circumstances that had arisen before the amendments of 29 December 2006 (see Case no. 2ვ-27-I-08, Chamber of Criminal Cases, 20 January 2009). It noted that "while Article 60 of the Criminal Code was removed from the Code as a result of the legislative amendments of 29 December 2006, its provisions were not abolished, but integrated under Article 59 of the Code which, prior to those amendments, had regulated the imposition of a sentence in relation to cumulative crimes". The Supreme Court further specified that at the time of imposing a new sentence "the sentencing court shall add to the latest sentence the outstanding prior sentence in its totality. In such cases, the cumulative sentence will start to run from the date of the imposition of the latest sentence" (ibid).

THE LAW

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

26. The applicant complained that he had been denied access to a court as the rectification procedure regarding the starting date of his cumulative sentence had been conducted without his participation. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

27. The Government contested that argument.

A. The parties' submissions

28. The Government submitted that the rectification procedure had been limited in scope and had not concerned the determination of the applicant's criminal responsibility or his sentence. It had been aimed merely at correcting an obvious error in the respective judgments regarding the starting date of the applicant's cumulative sentence. Therefore, the applicant's arguments could not have influenced the decision on rectification.

29. The applicant submitted that, considering the substantial impact the change to the starting date had had upon the duration of his sentence, the appellate court's decision of 3 April 2009 went beyond the formal scope of a rectification. He further submitted that, taking into account the existence of earlier court decisions specifically setting the starting date of his cumulative sentence as the date of the commission of the latest crime, the rectification had not concerned obvious errors in those decisions and had

accordingly required an adversarial argument before a court. Therefore, the lack of an opportunity for the applicant to make representations in respect of the rectification procedure before the appellate court had been in violation of Article 6 § 1 of the Convention.

B. The Court's assessment

1. Admissibility

30. The Court reiterates that in criminal matters Article 6 § 1 of the Convention covers the whole of the proceedings in question, including any appeal proceedings and the determination of sentence (see, among other authorities, *Eckle v. Germany*, 15 July 1982, §§ 76-77, Series A no. 51; *T. v. the United Kingdom* [GC], no. 24724/94, § 108, 16 December 1999, and *Aleksandr Dementyev v. Russia*, no. 43095/05, § 23, 28 November 2013).

31. In the instant case the rectification procedure as set out in the domestic legislation was explicitly limited in scope, did not envisage the participation of the parties through adversarial argument, and aimed at correcting ambiguities and inaccuracies in judgments that would not affect the relevant court's conclusion regarding the classification of the action of the convicted person or the sentencing measure (see paragraph 24 above). Therefore, the rectification procedure, as set out in the law, was of an explicitly limited nature (see, *mutatis mutandis*, *Nurmagomedov v. Russia*, no. 30138/02, § 48, 7 June 2007).

32. Nevertheless, the Court is mindful that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory, and that in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation (see, among other authorities, *Dvorski v. Croatia* [GC], no. 25703/11, § 82, ECHR 2015, with further references). In this connection the Court cannot overlook the fact that the rectification of the applicant's conviction by the appellate court, in respect of the starting date of his cumulative sentence, had an impact on the applicant's anticipated release date. Furthermore, considering the applicant's reasoned arguments raised at domestic level (see paragraph 16 above), the question of whether the error made in the earlier judgments and decisions had been sufficiently obvious and had been capable of being remedied by means of the rectification procedure appears, at the very least, to have been open to interpretation. Therefore, the rectification procedure, as applied in the applicant's case, was of such a nature as to affect the determination of the applicant's sentence as part of the criminal proceedings pending against him (contrast, *Nurmagomedov*, cited above, §§ 44-51).

33. It follows, in the specific circumstances of the present case, that Article 6 § 1 of the Convention is applicable under its criminal head to the rectification procedure in so far as it changed the starting date of the applicant's cumulative sentence and thereby affected the overall length of his imprisonment.

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

2. Merits

35. The Court takes note of the applicant's complaint that he had been denied access to a court by not being able to have his position against the rectification procedure, as implemented in his case, considered by domestic courts (see paragraphs 26 and 29 above). The question put by the Court to the Government in that respect was whether the manner in which the second set of proceedings had been conducted against the applicant had rendered those proceedings unfair within the meaning of Article 6 § 1 of the Convention. In that connection, the applicant's complaint may be approached from the angle of the right of access to a court (see paragraph 36 below) or from the perspective of the right to an oral hearing (see paragraph 37 below), the former being a precondition and the latter an inherent aspect of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.

36. The Court reiterates that the "right to a tribunal" under Article 6 § 1 of the Convention, of which the right of access is one aspect (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18), is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic rules of a procedural nature. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Majski v. Croatia (no. 2)*, no. 16924/08, § 68, 19 July 2011). However, limitations to a person's access to court must pursue a legitimate aim and be proportionate and must not restrict access to court in such a way or to such an extent that the very essence of the right is impaired (see *Marc Brauer v. Germany*, no. 24062/13, § 34, 1 September 2016, with further references).

37. The Court further notes that an oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1 (see *Jussila v. Finland* [GC], no. 73053/01, § 40, ECHR 2006-XIV). The obligation to hold a hearing is not absolute, and the attendance of the defendant in person does not necessarily take on the same significance for the appeal hearing (see *Timergaliyev v. Russia*, no. 40631/02, § 50, 14 October 2008). In assessing the matter, regard must be had to, *inter alia*, the special features of the

proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant (see *Timergaliyev*, cited above, § 50, with further references; see also *Jussila*, cited above, § 41).

38. Turning to the circumstances of the present case, the Court has already found that the rectification of the applicant's conviction in respect of the starting date of his cumulative sentence had an impact on the applicant's release date (see paragraph 32 above). In that connection, the applicant's arguments regarding the particular circumstances of his case – such as the existence of an earlier decision of the Supreme Court, concerning the starting date of his cumulative sentence (a decision which had never been explicitly set aside), whether the appellate court had exceeded the scope of Article 615 of the CCP (which regulated the scope of rectifications), and whether the rectified appellate decision had amounted to a worsening of his legal situation in breach of Article 540 of the CCP (see paragraph 16 above) – rendered the applicant's case against the rectification at least arguable and called for it to be considered by the domestic courts as part of adversarial proceedings.

39. Against this background, the Court notes that the rectified appellate decision did not involve the applicant and was served on him only on 16 April 2009, after the Supreme Court had already reached a final decision on the applicant's case on 7 April 2009 (see paragraph 14 above). It is true that the Supreme Court had been aware of the rectified appellate decision and appears to have endorsed it when expressly taking note of the corrected starting date of the applicant's cumulative sentence (see paragraph 15 above). However, at the time that the rectified appellate decision was delivered by the appellate court, the applicant's appeal on points of law had already been sent to the Supreme Court (see paragraphs 13-14 above). Furthermore, considering that the Supreme Court had decided the matter without holding an oral hearing (see paragraph 15 above), the applicant had effectively been precluded from becoming aware of the rectified appellate decision and from presenting his arguments, as part of his appeal or separately, regarding the revised starting date of his cumulative sentence and its compliance with domestic law. When becoming aware of it and requesting the rectification of the decision of the Supreme Court of 7 April 2009 he was not heard by a judge. His request was first rejected by the Head of the Registry of the Chamber of Criminal Cases of the Supreme Court on 24 April 2009 with the argument that the Supreme Court was not in a position to address the applicant's complaint (see paragraph 17 above) and then by the assistant to the Chairman of the Tbilisi Court of Appeal on 15 June 2009 with the argument that the interlocutory appeal on points of law could not be accepted for consideration (see paragraph 19 above).

40. In the light of the foregoing, the Court considers that whether the matter is considered from the perspective of the right of access to a court or the right to an oral hearing, the crux of the matter, in any event, is that the manner in which the rectification procedure was implemented in respect of the applicant, depriving him of the opportunity to present his arguments regarding the alteration of the starting date of his cumulative sentence, either orally or in writing, rendered the criminal proceedings against him unfair within the meaning of Article 6 § 1 of the Convention.

The above considerations are sufficient for the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

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

41. The applicant complained that the rectification of the appellate court's judgment had unduly prolonged his imprisonment, amounting to an unlawful detention. He relied on Article 5 § 1 (a) of the Convention which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court; ..."

42. The Government contested that argument.

A. Admissibility

43. 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

44. The applicant submitted that his detention had been devoid of any legal basis after 29 September 2010, as the sentence imposed by the Supreme Court on 20 February 2008, providing for a starting date fixed at the date of commission of the second crime, had expired. He maintained that his detention beyond that date had been in violation of Article 540 of the CCP which had not permitted the worsening of an appellant's situation in the absence of an appeal by the prosecution. He also submitted that his detention had been extended by means of a procedure that had been in

violation of Article 6 of the Convention on account of the impossibility of having the rectified appellate decision subjected to judicial scrutiny.

45. The Government submitted that the applicant's detention had complied with Article 5 § 1 (a) of the Convention. In particular, the earlier judgments against the applicant, which had indicated a starting date for the cumulative sentence that had clearly been erroneous and had not yet been final at the material time, had been rectified by the Court of Appeal on 3 April 2009 in accordance with domestic law and procedure, a decision which had been upheld by the Supreme Court in a reasoned decision dated 7 April 2009.

2. The Court's assessment

(a) General principles

46. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016). It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question of whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 134, 23 February 2016). The "quality of the law" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of "lawfulness" set by the Convention 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 *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013).

47. Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with

national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008, with further references). The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1 (a), where in the absence of bad faith or deception, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1 (see *T. v. the United Kingdom*, cited above, § 103; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; and *Saadi*, cited above, §§ 69 and 71).

48. The requirement of Article 5 § 1 (a) that a person be lawfully detained after "conviction by a competent court" does not imply that the Court has to subject the proceedings leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with all the requirements of Article 6 of the Convention (see *Stoichkov v. Bulgaria*, no. 9808/02, § 51, 24 March 2005). However, the Court has also held that if a "conviction" is the result of proceedings which were a "flagrant denial of justice", that is to say were "manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Article 5 § 1 (a) (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 110, Series A no. 240, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII).

(b) Application of these principles to the present case

49. Turning to the circumstances of the present case, the Court observes that the applicant was deprived of his liberty after conviction by a competent court, an eventuality that is explicitly covered by Article 5 § 1 (a) of the Convention. In particular, the detention complained of was based on a final reasoned decision of the Supreme Court, which sentenced him to seven years' imprisonment and indicated that the sentence had started to run on 12 April 2006. That sentence had been due to expire on 12 April 2013 but the applicant was released earlier, on 27 January 2013 (see paragraphs 15 and 20 above). However, the Court is called upon to determine whether the earlier alteration of the starting date of the applicant's cumulative sentence by an appellate court, by means of a procedure that it has already been determined amounted to a breach of Article 6 of the Convention (see paragraphs 35-40 and 44 above), was in breach of the "lawfulness" requirement under Article 5 § 1 of the Convention.

50. While the applicant maintained that the Supreme Court decision of 20 February 2008 had set a fixed release date, the Court notes that, before the adoption of the rectified appellate decision of 3 April 2009, the

applicant's release dates had shifted, as the lengths of individual sentences had been changed several times (see paragraphs 6 and 8-12 above). The Supreme Court decision dated 20 February 2008 was adopted while the appeal in respect of the criminal proceedings leading to the applicant's second conviction was still pending (see paragraph 11 above). Additionally, the subsequent reasoned decision of the Supreme Court dated 7 April 2009 further reduced the overall length of the applicant's sentence (see paragraph 15 above).

51. What is in issue is whether the applicant's detention, which, in effect, had been extended owing to the alteration of the starting date of the applicant's cumulative sentence, was "lawful". In that connection the Court takes note of the applicant's submission that, in the absence of an appeal by the prosecution, the rectification of the appellate court's judgment in respect of the starting date of his cumulative sentence had been in breach of the principle of *reformatio in peius* set out in Article 540 of the CCP (see paragraph 23 above). However, the strength of the applicant's argument hinges on another legal issue. In particular, the question of domestic legality and the applicability of Article 540 of the CCP is linked to the question of whether the error made by the domestic courts regarding the starting date of the cumulative sentence had been obvious and the rectification therefore both expected and permitted by law and practice in force at the material time, or whether the rectification had gone beyond the confines of the law in that respect.

52. Against this background, the Court notes, on the one hand, that the Criminal Code, as it stood at the time that the applicant committed the second offence, did not explicitly specify the starting date of a cumulative sentence. On the other hand, the subsequent rectification appears to have been based, albeit implicitly, on Article 59 of the Criminal Code as amended on 29 December 2006, which clearly set the date of the imposition of the later sentence as the starting date for any cumulative sentence (see paragraph 21 above). In that connection, the Court further takes note of the Supreme Court's decision of 20 January 2009 in a different case, clarifying that Article 59 of the Code could have retroactive effect (see paragraph 25 above). That decision predated both the rectification decision of the appellate court dated 3 April 2009 and the final decision of the Supreme Court in the applicant's case dated 7 April 2009 (compare paragraphs 14-15 and 25 above). Therefore, while the question regarding the foreseeability of the law in respect of the starting date of a cumulative sentence was not addressed by the domestic courts, the rectification appears to have followed a clarification offered by the Supreme Court in another case. In such circumstances, it is not for the Court to speculate on the legality of the applicant's detention beyond 29 September 2010, which was ordered by the Supreme Court in accordance with the law and practice in force at the

material time. Therefore, the Court does not find that the applicant's detention was *ex facie* in breach of the domestic law.

53. As concerns the applicant's additional argument that his detention had been extended through a procedure that had been in violation of Article 6 (see paragraphs 35-40 and 44 above), the Court has already rejected the argument that every Article 6 violation results in a violation of Article 5 § 1 (see *Hammerton v. the United Kingdom*, no. 6287/10, § 100, 17 March 2016). Furthermore, in so far as the applicant's argument can be understood to mean that he had been convicted and sentenced as a result of proceedings which were a "flagrant denial of justice" that had affected the lawfulness of his detention under Article 5, the Court reiterates that the "flagrant denial of justice" test is a stringent one (ibid., § 99). What is required is a breach of the principles of fair trial that is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 260, ECHR 2012 (extracts), and *Tsonyo Tsonev v. Bulgaria (no. 3)*, no. 21124/04, § 59, 16 October 2012, with further references). While the Court has found a violation of Article 6 of the Convention in the present case (see paragraphs 35-40 above), it does not consider that the violation is of such a nature as to have destroyed the very essence of the right guaranteed by that Article (contrast, *Tsonyo Tsonev*, cited above, § 59, and *Hammerton*, cited above, §§ 99 and 119). Accordingly, the Court finds that the violation of Article 6 in the present case did not amount to a flagrant denial of justice.

54. It follows, in the circumstances of the present case, that the applicant's detention was justified under Article 5 § 1 (a) of the Convention. Therefore, the Court finds that there has been no violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. The applicant complained that he had been denied an effective remedy in respect of the alleged violation of his rights under Article 6 of the Convention. He relied on Article 13 of the Convention which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

56. The Government contested that argument.

57. The Court notes that this complaint is linked to the one made under Article 6 of the Convention, as examined above, and must therefore likewise be declared admissible.

58. Having regard to the findings relating to Article 6 (see paragraphs 35-40 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

61. The Government submitted that the claim was excessive, and that an award of just satisfaction was not an automatic consequence of finding a violation.

62. The Court considers that the applicant must have suffered distress and anxiety on account of the violation which has been found. Ruling on an equitable basis, it awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

63. The applicant also claimed EUR 2,250 for legal costs and EUR 120 for expenses incurred before the Court. In support of this claim, he submitted a number of legal and financial documents (including contracts, invoices and receipts) confirming that the relevant services had actually been provided to him in relation to the present application.

64. The Government did not comment on the applicant's claims.

65. 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, the Court considers it reasonable to award the claimed amount in full, namely EUR 2,370.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,370 (two thousand three hundred and seventy 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;

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

Done in English, and notified in writing on 28 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President