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Grote Kamer, Vrijheidsbeneming en voorlopige hechtenis, Striktheid toetsingskader bij huisarrest

GEGEVENS

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SAMENVATTING

Klager is een zakenman die verdacht wordt van fraude en die in verband daarmee op 2 mei 2007 in voorarrest wordt genomen. Deze hechtenis wordt telkens verlengd, volgens klager op abstracte en incorrecte gronden. Na tweeëneenhalve maand wordt aangeboden de voorlopige hechtenis om te zetten in huisarrest. Klager komt niet op tegen dat aanbod. Ook het huisarrest wordt na de eerste oplegging verschillende malen verlengd, met als gevolg dat klager in totaal ruim tien maanden van zijn vrijheid is beroofd, waarna hij wordt vrijgesproken van vrijwel alle hem ten laste gelegde feiten. Een kamer van het Hof heeft eerder al een schending van art. 5 lid 3 EVRM in deze zaak vastgesteld. Voor de Grote Kamer betoogt Moldavië dat de zaak eigenlijk niet-ontvankelijk is, nu klager geen rechtsmiddelen tegen de oplegging van het huisarrest heeft benut. De overheid had daarover niet eerder bezwaar gemaakt, omdat de feitenweergave door de Kamer alleen de periode van detentie tot aan het huisarrest betrof en de overheid argumenten op die weergave had gebaseerd. De Grote Kamer erkent dat de eerdere feitenweergave alleen feiten tot en met juni 2007 omvat, maar stelt ook dat het in dit geval gaat om een situatie van voortdurende detentie; de regering had daarom redelijkerwijze kunnen inschatten dat ook de feiten van na juni 2007 relevant waren. Dat men pas nu tot die bevinding is gekomen, is dan ook onvoldoende reden om alsnog de uitputting van rechtsmiddelen te bekijken. Een tweede ontvankelijkheidsvraag is of klager nog als slachtoffer kan worden aangemerkt nu hij inmiddels 'slechts' aan huisarrest is onderworpen. Die vraag besluit de Grote Kamer in samenhang met de inhoudelijke beoordeling van art. 5 lid 3 EVRM te beantwoorden. Ten aanzien van die bepaling merkt de Grote Kamer op dat volgens vaste rechtspraak het bestaan van een redelijke verdenking altijd een conditio sine qua non is voor het opleggen van voorarrest. 'After a certain lapse of time', is deze voorwaarde echter niet meer voldoende als rechtvaardiging: er moeten dan bijkomende, relevante en voldoende redenen zijn die rechtvaardigen dat het voorarrest wordt verlengd. De Grote Kamer constateert echter dat het nooit duidelijk heeft gemaakt wanneer 'a certain lapse of time' nu eigenlijk is verstreken en er extra gronden moeten worden genoemd. Gelet daarop acht de Grote Kamer het nuttig om zijn rechtspraak hierover verder te ontwikkelen. Daarbij merkt het op dat het eerste vereiste van een redelijke verdenking meteen al relevant is zodra sprake is van vrijheidsbeneming, nu op dat moment is vereist dat een verdachte 'promptly' voor een rechter wordt gebracht die kan vaststellen of er voldoende gronden voor de vrijheidsbeneming bestaan. Of er gronden bestaan voor de aanvang van het voorarrest past daardoor binnen art. 5 lid 1 (c) EVRM, maar of er gronden zijn voor de voortzetting daarvan behoort tot de beoordeling onder art. 5 lid 3 EVRM. De beide bepalingen vormen niettemin één geheel en zijn nauw met elkaar verbonden. Bovendien geldt dat het eerste vereiste (het bestaan van een redelijke verdenking) en het tweede (het bestaan van gronden) in de praktijk kunnen overlappen. In feite vormt de eerste verschijning van de verdachte voor de rechter volgens de Grote Kamer het kruispunt waarbij de twee vereisten logisch samenkomen. Gelet daarop oordeelt de Grote Kamer dat het eenvoudiger is om het 'certain lapse of time'-criterium gelijk te schakelen met het begrip 'promptly' en te vereisen dat meteen al vanaf het moment dat de rechter de vrijheidsbeneming toetst nadere, voldoende en relevante redenen voor het voortzetten van het voorarrest moeten worden gegeven, in aanvulling op het vereiste van een redelijke verdenking. De Grote Kamer verduidelijkt verder dat deze eisen niet alleen bij klassieke detentie mogen worden gesteld, maar ook bij huisarrest; zou dit anders zijn, dan zou dit teveel ingewikkelde randgevallen opleveren. Vervolgens is nog de vraag of in het onderhavige geval klager nog slachtoffer is van verlengde detentie zonder goede gronden, omdat hij zelf ingestemd zou hebben met huisarrest. De Grote Kamer acht het echter twijfelachtig of in dit soort gevallen van daadwerkelijke vrijwilligheid sprake is ten aanzien van de vrijheidsbeneming, zeker nu in het geval van klager deze waarschijnlijk vooral met het huisarrest heeft ingestemd om niet meer in detentie te hoeven zitten. Dit verweer van de regering wijst de Grote Kamer dan ook af. De omstandigheden van klagers concrete geval beoordelend concludeert de Grote Kamer dat de redenen voor voortzetting van de detentie erg algemeen en stereotype waren, zodat niet kan worden

gezegd dat de noodzaak daarvan overtuigend is aangetoond. Schending art. 5 lid 3 EVRM.

UITSPRAAK

THE LAW

61. In his application the applicant, referring to Article 5 § 1 of the Convention, complained that the domestic courts had given insufficient reasons for their decisions to remand him in custody. The Court finds it more appropriate to examine this complaint under Article 5 § 3 of the Convention, which reads:

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

A. Non-exhaustion of domestic remedies

62. Before the Grand Chamber the Government argued for the first time in the proceedings that the applicant had failed to challenge the court decisions by which his house arrest had been ordered and had thus failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They submitted that they had not been in a position to raise this objection before the Chamber because the statement of facts prepared by the Court at the stage of communication did not refer to facts beyond the date of 29 June 2007. Therefore, they could not be considered estopped from raising this objection at the present stage.

63. The applicant argued that the Government were estopped from raising this exception before the Grand Chamber. In the alternative, he submitted that their objection was unfounded.

64. The Court reiterates that, according to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 79, ECHR 2014 (extracts)).

65. It is true that the statement of facts prepared by the Court Registry, which the Court enclosed with its letter of 18 January 2010 to the respondent Government when giving the latter notice of the application pursuant to Rule 54 § 2(b) of the Rules of Court, referred to documents which were in the Court's possession at that time and thus mentioned facts that had occurred before 29 June 2007. The Court's letter of 18 January 2010 specified that "should [the] Government decide to submit observations they should only deal with *the complaints concerning reasons for detention pending trial* (Article 5 § 3 of the Convention) [emphasis added]". When availing themselves of the possibility to file observations, the Government attempted to limit the scope of the case by submitting that the Court shall not pay attention to the facts that took place before 2 May 2007, i.e. before the applicant's arrest, and after 29 June 2007. Nevertheless, as they submitted, "...the Government consider it necessary to point out certain procedural acts that followed the above-mentioned period [2 May-29 June 2007]. Those references are indispensable for submitting the Government's position regarding the admissibility and merits of the case".

66. Thus the Court considers that, in the particular context, it ought to have been sufficiently clear from the nature and the underlying circumstances of "the complaints" that in examining these under Article 5 § 3 of the Convention the Court could not disregard the facts preceding the applicant's arrest on 2 May 2007 and that the complaints referred to a continuing situation, namely to the alleged lack of justification for the applicant's "detention pending trial" as a whole, and were not limited in the way suggested by the Government. It is reasonable to assume that, when given notice of the application, the Government were fully cognizant of the situation also after 29 June 2007 and so were in a position to make their plea of inadmissibility in accordance with the Rule 55 requirements.

67. However, the issue of non-exhaustion of domestic remedies was raised by the Government for the first time in their written submissions before the Grand Chamber. The Court sees no exceptional circumstances which could have dispensed them from the obligation to raise their preliminary objection before the adoption of the Chamber's decision on admissibility. Consequently, the Government are estopped from raising their preliminary objection of non-exhaustion of domestic remedies at this stage of the proceedings, which objection must therefore be dismissed.

B. Victim status

68. In the event of the Court rejecting their above-mentioned objection of non-exhaustion of domestic remedies, the Government argued by way of an alternative submission that the applicant could not claim to be a "victim" in the sense of Article 34 of the Convention for the purposes of his complaint under Article 5 § 3 about his house arrest. He had himself requested to be placed under house arrest, and the decision to do so had constituted compensation for any possible violation of Article 5 § 3 which had taken place prior to the measure. The measure had been equivalent to granting him release from his initial detention. That being so, it constituted a form of compensation for any possible breach of his rights guaranteed by Article 5 § 3 of the Convention.

69. The applicant's position in respect of this objection was similar to that expressed in respect of the objection concerning non-exhaustion of domestic remedies (see paragraph 63 above).

70. The Court sees no need to examine whether the Government are estopped from making the above objection since it finds in any event that it concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see, for instance, *R.P. and Others v. the United Kingdom* , no. 38245/08, § 47, 9 October 2012). It considers that, in the particular circumstances of the present case, the argument is so closely linked to the substance of the applicant's complaint that it should be joined to the merits (see paragraphs 106-111 below).

C. Conclusions

71. The Government are estopped from raising their preliminary objection concerning non-exhaustion of domestic remedies. The Court therefore dismisses that preliminary objection. On the other hand, it decides to join the objection concerning the applicant's lack of victim status to the merits.

A. The Chamber judgment

72. Relying on the applicable case-law concerning the obligation to give "relevant and sufficient reasons" for detention, the Chamber found a breach of Article 5 § 3 of the Convention owing to the insufficient reasons given by the courts when ordering the applicant's detention. In so doing it relied on the Court's case-law establishing that house arrest constituted deprivation of liberty.

73. The Chamber noted that while the domestic courts were obliged under domestic law to verify a number of circumstances, they had in fact not done so but had limited themselves to repeating in their decisions in an abstract and stereotyped manner the formal grounds for detention provided by law without explaining how they had been applicable *in concreto* to the applicant's situation. Moreover, while examining essentially the same case file, they had reached opposite conclusions

on various occasions (§§ 35-38 of the Chamber judgment).

74. The Chamber, lastly, referred to the prosecutor's inertia in obtaining certain documents for over a year, even though the lack of those documents was relied on by the courts to extend the applicant's detention, as well as to the fact that after the applicant's placement under house arrest during three days after 26 June 2007 he had had three days during which to collude with his sons had he so wished (§§ 40-41 of the Chamber judgment).

B. The parties' submissions

1. The applicant

75. The applicant maintained that at the time of the events there had been a practice of placing accused persons in pre-trial detention automatically, without any justification and solely on the basis of stereotyped and repetitive reasons. He also cited the then Government Agent who had admitted that pre-trial detention was a rule rather than an exception.

76. Referring to the reasons required to justify house arrest, the applicant submitted that domestic law did not provide that a less stringent requirement to give reasons ought to apply for decisions imposing house arrest and stressed that the courts were bound to apply exactly the same rules and provide the same reasons for both house arrest and detention in custody. Accepting the Government's position according to which a less strict requirement to provide reasons ought to be permissible in respect of house arrest raised the risk of abuse on the part of the State, which might consider itself free to apply house arrest arbitrarily. Moreover, accepting such a position in the present case would amount to disregarding the domestic law.

77. The applicant contended that there were no arguments in favour of his deprivation of liberty and that neither the detention in custody nor the house arrest had been based on relevant and sufficient reasons. He submitted that the absence of reasons for his deprivation of liberty was confirmed by his subsequent acquittal and by the fact that the Prosecutor's Office had not challenged the court judgment by which he had been acquitted.

78. As to the Government's contention that the applicant himself asked to be placed under house arrest, the applicant argued that the domestic courts were still under an obligation to verify whether there were sufficient reasons for ordering house arrest. He also submitted that the State had alternative means of ensuring his appearance at trial and of securing the integrity of the evidence.

2. The Government

79. In the Government's view, the applicant failed to sufficiently substantiate his *habeas corpus* requests both in the domestic proceedings and in the proceedings before the Court. They referred to the applicant's reliance on his health problems and submitted that there was no general obligation under the Court's case-law to release detainees on health grounds. The domestic courts had ignored the reasons adduced by the applicant because they lacked pertinence.

80. The Government also contended that the decisions to detain the applicant in custody and to prolong his detention were based on relevant and sufficient reasons. Even though those reasons might seem vague and abstract, in fact they were concrete and succinct. The decisions were based on such reasons as the complexity of the case and the risk of the applicant's interfering with the criminal investigation and colluding with his sons. In the Government's view, the fact that the applicant and his sons were accomplices in itself constituted interference in the normal course of the investigation and required their isolation from one another.

81. The Government expressed the view that the present case was similar to *W. v. Switzerland* (26 January 1993, Series A no. 254-A) and contended that the Court should reach in the present case the same finding of non-violation as in that case.

82. The Government emphasised the fact that it was the applicant himself who had asked to be placed under house arrest and that he did not challenge the court decisions granting his request or prolonging the house arrest.

83. The Government agreed that house arrest constituted deprivation of liberty for the purposes of Article 5 of the Convention. Nevertheless, they considered that lesser reasons were required in order to justify house arrest because this measure was milder than detention in custody. That was moreover so in the instant case where the applicant had himself requested placement under house arrest.

C. The Court's assessment

1. General principles

84. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual (see, for example, its link with Articles 2 and 3 in disappearance cases such as *Kurt v. Turkey*, 25 May 1998, § 123, *Reports of Judgments and Decisions* 1998-III), and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see, for example, *Lukanov v. Bulgaria*, 20 March 1997, § 41, *Reports* 1997-II; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II; and *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII). Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly (see *Ciulla v. Italy*, 22 February 1989, § 41, Series A no. 148) and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law (see *Winterwerp v. the Netherlands* , 24 October 1979, § 39, Series A no. 33); and the importance of the promptness or speediness of the requisite judicial controls (under Article 5 §§ 3 and 4) (see *McKay v. the United Kingdom* [GC], no. 543/03, § 34, ECHR 2006-X).

85. One of the most common types of deprivation of liberty in connection with criminal proceedings is detention pending trial. Such detention constitutes one of the exceptions to the general rule stipulated in Article 5 § 1 that everyone has the right to liberty and is provided for in sub-paragraph (c) of Article 5 § 1 of the Convention. The period to be taken into consideration starts when the person is arrested (see *Tomasi v. France*, 27 August 1992, § 83, Series A no. 241-A) or remanded in custody (see *Letellier v. France*, 26 June 1991, § 34, Series A no. 207), and ends when he or she is released and/or the charge is determined, even if only by a court of first instance (see, among other authorities, *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7; *Labita v. Italy* [GC], no. 26772/95, § 147, ECHR 2000-IV; *Kalashnikov v. Russia*, no. 47095/99, § 110, ECHR 2002-VI; and *Solmaz v. Turkey*, no. 27561/02, §§ 23-24, 16 January 2007).

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

87. According to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings (see, among many other authorities, *Letellier*, cited above, § 35, and *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May

2012). The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial (ibid.).

88. Justifications which have been deemed "relevant" and "sufficient" reasons (in addition to the existence of reasonable suspicion) in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee (see, for instance, *Stögmüller v. Austria*, 10 November 1969, § 15, Series A no. 9; *Wemhoff*, cited above, § 14; *Tomasi*, cited above, § 95; *Toth v. Austria*, 12 December 1991, § 70, Series A no. 224; *Letellier*, cited above, § 51; and *I.A. v. France*, 23 September 1998, § 108, *Reports of Judgments and Decisions* 1998-VII).

89. The presumption is always in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p. 37, § 4), the second limb of Article 5 § 3 – that is release pending trial – does not give the judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. It is the provisional detention of the accused which must not be prolonged beyond a reasonable time (see *Wemhoff*, cited above, § 5); even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time (see *Stögmüller*, cited above, § 5). Until conviction, he or she must be presumed innocent, and the purpose of the provision under consideration is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable (see *McKay*, cited above, § 41).

90. The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Labita*, cited above, § 152, and *Kudla v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI). With particular regard to the risk of absconding, consideration must be given to the character of the person involved, his or her morals, assets, links with the State in which he or she is being prosecuted and the person's international contacts (see, *Neumeister* cited above, § 10).

91. It primarily falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. Accordingly, they must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule in Article 5, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, among other authorities, *Kudla*, cited above, § 110, and *Idalov*, cited above, § 141).

2. Whether there is a need to develop the Court's case-law

(a) The initial period of detention and the problem concerning the "certain lapse of time"

92. As mentioned above (see paragraph 87), the persistence of reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but does not suffice to justify the prolongation of the detention after a certain lapse of time. This dictum was enunciated for the first time in *Stögmüller* (cited above, § 4). It later became better known as one of the more comprehensive "*Letellier* principles", which were reaffirmed in a number of successive Grand Chamber judgments (see notably *Labita*, cited above, § 153; *Kudla*, cited above, § 111; *McKay*, cited above, § 44; *Bykov v. Russia* [GC], no. 4378/02, § 64, 10 March 2009; and most recently in *Idalov*, cited above, § 140). The said principle enabled a distinction to be drawn between a first phase, when the existence of reasonable suspicion is a sufficient ground for detention, and the phase coming after a "certain lapse of time", where reasonable suspicion alone no longer suffices and other "relevant and sufficient" reasons to detain the suspect are required.

93. Since the applicant did not claim in the proceedings before the Court that there was no reasonable suspicion that he had committed an offence, the Court does not consider it necessary to examine this issue. However, in view of the weaknesses of the additional reasons (other than reasonableness of suspicion) relied on by the domestic courts, the question arises as to the point in time from which such additional reasons were required. An answer to this question would depend on the meaning of the expression "certain lapse of time".

94. The Court has hitherto not defined in its case-law the scope of the expression "certain lapse of time" or laid down any general criteria in this regard. In the recent case of *Magee and Others v. the United Kingdom*, nos. 26289/12, 29062/12 and 29891/12, 12 May 2015, the Court recognised that there was no fixed time-frame applicable to the "certain lapse of time". It observed:

" 88. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this will no longer be enough to justify continued detention. The Court has not attempted to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence (*Stögmüller v. Austria*, no. 1602/62, § 4, 10 November 1969)."

95. It nonetheless transpires that in a number of cases (see, for instance, *Ţurcan and Ţurcan v. Moldova*, no. 39835/05, § 54, 23 October 2007; *Patsuria v. Georgia*, no. 30779/04, § 67, 6 November 2007; *Osmanovic v. Croatia*, no. 67604/10, §§ 40-41, 6 November 2012; and *Zayidov v. Azerbaijan*, no. 11948/08, § 62, 20 February 2014) the Court has taken the view that even after a relatively short period of a few days, the existence of reasonable suspicion cannot on its own justify pre-trial detention and must be supported by additional grounds.

96. In the light of the above, the Court considers that it would be useful to further develop its case-law as to the requirement on national judicial authorities to justify continued detention for the purposes of the second limb of Article 5 § 3.

97. As a starting point, it should be reiterated that, as has already been mentioned in paragraph 85 above, the period to be taken into consideration for the assessment of the reasonableness of the detention under the *second* limb begins when the person is deprived of his or her liberty.

98. As from that same moment, the person concerned also has a right under the *first* limb of paragraph 3 to be brought "promptly before a judge or other officer authorised by law to exercise judicial power" offering the requisite guarantees of independence from the executive and the parties. The provision includes a procedural requirement on the "judge or other officer authorised by law" to hear the individual brought before him or her in person, and a substantive requirement on the same officer to review the circumstances militating for or against detention, i.e. whether there are reasons to justify detention and of ordering release if there are no such reasons (see *Ireland v. the United Kingdom*, 18 January 1978, § 199, Series A no. 25; *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34; and *McKay*, cited above, § 35). In other words Article 5 § 3 requires the judicial officer to consider the merits of the detention (see *T.W. v. Malta* [GC], no. 25644/94, § 41, 29 April 1999; *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III; and *McKay*, cited above, § 35).

99. The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not the reasonable suspicion that the arrested person has committed an offence persists, or in other words, ascertaining that detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention is considered not to fall under the above permitted exception the judicial officer must have the power to release (*McKay*, cited above, § 40). Whether the mere persistence of suspicion suffices to warrant the prolongation of a lawfully ordered detention on remand is covered, not by paragraph 1 (c) as such, but by paragraph 3: it is essentially the object of the latter, which forms a whole with the former, to require provisional release once detention ceases to be

reasonable (see *De Jong, Baljet and Van den Brink*, cited above, § 44, with further references).

100. The need to further elaborate the case-law appears to stem from the fact that the period during which the persistence of reasonable suspicion may suffice as a ground for continued detention under the second limb is subject to a different and far less precise temporal requirement – "a certain lapse of time" (as developed in the Court's case-law) – than under the first limb – "promptly" (as provided in the text of the Convention) – and that it is only after that "certain lapse of time" that the detention has to be justified by additional relevant and sufficient reasons. It is true that in some instances the Court has held that "[t]hese two limbs confer distinct rights and are not on their face logically or temporally linked" (see, most notably, *McKay*, cited above, § 31; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 119, ECHR 2010 – the latter being concerned only with the first limb). However, it should be noted that in each context the period will start to run from the time of arrest, and that the judicial authority authorising the detention is required to determine whether there are reasons to justify detention and to order release if there are no such reasons. Thus, in practice, it would often be the case that the application of the guarantees under the second limb would to some extent overlap with those of the first limb, typically in situations where the judicial authority which authorises detention under the first limb at the same time orders detention on remand subject to the guarantees of the second limb. In such situations, the first appearance of the suspect before the judge constitutes the "crossroads" where the two sets of guarantees meet and where the second set succeeds the first. And yet, the question of when the second applies to its full extent, in the sense that further relevant and sufficient reasons additional to reasonable suspicion are required, is left to depend on the rather vague notion of "a certain lapse of time".

101. The Court further notes that, according to the domestic laws of the great majority of the thirty-one High Contracting Parties to the Convention covered by the comparative law survey referred to in paragraph 54 above, the relevant judicial authorities are obliged to give "relevant and sufficient" reasons for continued detention if not immediately then only a few days after the arrest, namely when a judge examines for the first time the necessity of placing the suspect in pre-trial detention. Such an approach, if transposed to Article 5 § 3 of the Convention, would not only simplify and bring more clarity and certainty into the Convention case-law in this area, but would also enhance the protection against detention beyond a reasonable time.

102. In the light of all of the above considerations, the Court finds compelling arguments for "synchronising" the second limb of guarantees with the first one. This implies that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest.

(b) Particular problems concerning house arrest

(i) Whether house arrest is deprivation of liberty and whether the applicant had waived his right to liberty

103. As it does in many other areas, the Court insists in its case-law on an autonomous interpretation of the notion of deprivation of liberty. A systematic reading of the Convention shows that mere restrictions on the liberty of movement are not covered by Article 5 but fall under Article 2 § 1 of Protocol No. 4. However, the distinction between the restriction of movement and the deprivation of liberty is merely one of degree or intensity, and not one of nature or substance. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be the 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, §§ 92-93, Series A no. 39).

104. According to the Court's case-law (see, among many others, *Mancini v. Italy*, no. 44955/98, §17, ECHR 2001-IX; *Lavents v. Latvia*, no. 58442/00, §§ 64-66, 28 November 2002; *Nikolova v. Bulgaria (no. 2)*, no. 40896/98, § 60, 30 September 2004; *Ninescu v. the Republic of Moldova*, no. 47306/07, § 53, 15 July 2014; and *Delijorgji v. Albania*, no. 6858/11, § 75, 28 April 2015), house arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 of the Convention.

105. The Court sees no reason to depart from this case-law. Having regard to the modalities of the applicant's house arrest as described in paragraphs 30 and 36-40 above, it considers that subjecting him to this measure between 26 and 29 June 2007 and between 20 July 2007 and 12 March 2008, i.e. for a period of seven months and a half, constituted deprivation of liberty in the sense of Article 5 of the Convention. In this connection, it is of interest to note that, in the instant case, house arrest is also considered as deprivation of liberty under the relevant national law and that the Government themselves accepted that the applicant's house arrest constituted deprivation of liberty (see paragraphs 43, 44 and 83 above).

106. One issue raised by the Government (and which has been joined to the merits, see paragraph 71 above) was the fact that the applicant himself had asked to be placed under house arrest and had not challenged the court decisions ordering this measure. This raises an important question, namely whether the applicant had waived his right to liberty.

107. In *Storck v. Germany* (no. 61603/00, § 75, ECHR 2005-V) the Court held that the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the sole reason that he gives himself up to be taken into detention. Detention might violate Article 5 even though the person concerned might have agreed to it (see *De Wilde, Ooms and Versyp v. Belgium* , 18 June 1971, § 65, Series A no. 12).

108. In view of the Government's submission to the effect that it was the applicant himself who had asked to be placed under house arrest (see paragraph 82 above), the Court notes that in the present case there was a clear element of coercion in the application of this type of measure. In particular, it appears clearly from the facts of the case that the idea behind the applicant's seeking to be placed in house arrest was to avoid the continuation of his detention in custody after the courts had dismissed his *habeas corpus* requests on numerous occasions. It also transpires that his state of health considerably deteriorated during his remand in custody and that he was ready to make concessions in order to put an end to it (see paragraphs 14, 24 and 29 above). This is understandable behaviour for a person who had previously suffered a heart attack and a cerebral stroke and who was seeing his health deteriorating. In the Court's view, the applicant was under a clear state of duress when he was placed under house arrest. In such circumstances, one could not reasonably expect the applicant to challenge the court decisions ordering his house arrest.

109. In view of the above, the Court is not prepared to accept that the applicant's attitude to his house arrest and omission to challenge the measure amounted to a waiver of his right to liberty.

110. This state of affairs, even assuming that the applicant may be considered to have consented to be placed under house arrest, cannot be equated to release from detention, as argued by the Government. Nor could it, as the Government appear to suggest, be viewed as a form of reparation complying with the requirement under Article 5 § 5 to afford a right to compensation. The Government's objection concerning the applicant's lack of victim status must therefore be dismissed.

(ii) Reasons for ordering house arrest

111. The Government submitted that lesser reasons were required in order to justify house arrest than detention in an ordinary remand facility because the former measure was more lenient than the latter.

112. It is true that in most cases house arrest implies fewer restrictions and a lesser degree of suffering or inconvenience for the detainee than ordinary detention in prison. That is the case because detention in custody requires integrating the individual into a new and sometimes hostile environment, sharing of activities and

resources with other inmates, observing discipline and being subjected to supervision of varying degrees by the authorities twenty-four hours a day. For example, detainees cannot freely choose when to go to sleep, when to take their meals, when to attend to their personal hygiene needs or when to perform outdoor exercise or other activities. Therefore, when faced with a choice between imprisonment in a detention facility and house arrest, as in the present case, most individuals would normally opt for the latter.

113. However, the Court notes that no distinction of regime between different types of detention was made in the *Letellier* principles (see paragraph 92 above). It further reiterates that in *Lavents* (cited above), where the Court was called upon to examine the relevance and sufficiency of reasons for depriving the applicant of liberty pending trial for a considerable period of time, the respondent Government had unsuccessfully argued that different criteria ought to apply to the assessment of the reasons for the impugned restriction on liberty as the applicant had been detained not only in prison but also been held in house arrest and in hospital. The Court dismissed the argument, stating that Article 5 did not regulate the conditions of detention, referring to the approach previously adopted in *Mancini* (cited above) and other cases cited therein. The Court went on to specify that the notions of "degree" and "intensity" in the case-law, as criteria for the applicability of Article 5, referred only to the degree of restrictions to the liberty of movement, not to the differences in comfort or in the internal regime in different places of detention. Thus, the Court proceeded to apply the same criteria for the entire period of deprivation of liberty, irrespective of the place where the applicant was detained.

114. The Court finds no reason to adopt a different approach in the present case. In its view, it would hardly be workable in practice were one to assess the justifications for pre-trial detention according to different criteria depending on differences in the conditions of detention and the level of (dis)comfort experienced by the detainee. Such justifications should, on the contrary, be assessed according to criteria that are practical and effective in maintaining an adequate level of protection under the Article 5 without running a risk of diluting that protection. In short, the Court finds it appropriate to follow the same approach as in *Lavents* for its examination of the present case.

3. Whether there were relevant and sufficient reasons in the present case

115. Turning to the justifications provided for the applicant's provisional detention in the present case, the Court observes that the domestic court, which on 5 May 2007 issued the initial order to detain the applicant on remand, relied only on the risk of his collusion with his sons and on the seriousness of the offence imputed to him. While the latter reason is normally invoked in the context of the risk of absconding, the national court considered that the danger of absconding along with the risk of influencing witnesses and the risk of the applicant's tampering with evidence had not been substantiated by the prosecutor and were implausible.

116. The applicant appealed and argued, *inter alia*, that the risk of collusion had not been invoked by the prosecutor and that, in any event, he had had plenty of time to collude with his sons, had he had such an intention. However, his appeal was dismissed by the Court of Appeal, without any answer to his objections.

117. In this connection the Court notes, as the applicant pointed out, that the prosecutor had not relied on such a reason as the danger of collusion with his sons. Moreover, it follows clearly from the facts of the case that the investigation against the applicant and his sons was initiated in July 2006, i.e. some ten months before the applicant's arrest and that he would indeed have had enough time to collude with them had he had such an intention (see paragraphs 9-12 above). In such circumstances, the Court sees no merit whatsoever in this argument. Furthermore, it notes that the Court of Appeal failed to give an answer to this objection raised by the applicant. There is no indication in the judgments that the courts took into account such an important factor as the applicant's behaviour, between the beginning of the investigation in July 2006 and the moment when first ordering his remand in custody.

118. When prolonging the applicant's detention for the first and second times, on 16 May and 5 June 2007 respectively, the courts no longer relied on the risk of collusion, which was, in essence, the only supplementary reason relied upon by the courts to order his remand in the first place. This time the courts invoked other reasons, namely the danger of absconding and the risk of influencing witnesses and tampering with evidence (see paragraphs 20 and 25 above). In this regard, the Court notes that these were the same reasons as had been invoked by the prosecutor in the initial application for placing the applicant in detention on remand but which both the first-instance court and the Court of Appeal had dismissed as being unsubstantiated and improbable (see paragraphs 15 and 17 above). There is no explanation in the court decisions prolonging the applicant's detention as to why those reasons became relevant and sufficient only later (see, for instance, *Koutalidis v. Greece*, no. 18785/13, § 51, 27 November 2014), for instance whether anything in the applicant's behaviour had prompted the change. As in the case of the initial detention order, no assessment was made by the courts of the applicant's character, his morals, his assets and links with the country and his behaviour during the first ten months of the criminal investigation.

119. When examining the prosecutor's application for the third prolongation, on 26 June 2007, the first-instance court dismissed the prosecutor's arguments in favour of detention and found in essence that there were no grounds militating for his continued detention. Nevertheless, the court ordered the applicant's continued detention under house arrest (see paragraph 30 above).

120. After three days of house arrest, the Court of Appeal quashed that detention order on 29 June 2007, while finding again that the applicant could abscond, influence witnesses, tamper with evidence and collude with his sons if kept under house arrest. It therefore ordered that his continued detention take place in a remand facility. The court did not explain the reasons why it disagreed with the first-instance court as to the absence of reasons to detain him, nor did it explain the basis for its fear that he might abscond, influence witnesses and tamper with evidence (see paragraph 32 above).

121. When examining the prosecutor's fourth application for prolongation, the Court of Appeal dismissed all the reasons invoked by the prosecutor and stated that there were no reasons to believe that the applicant would abscond or interfere with the investigation. Nevertheless, in spite of the absence of such reasons, the court ordered his house arrest, which was later prolonged until March 2008 (see paragraph 36 above). The decisions ordering and prolonging house arrest did not rely on any reasons in support of such a measure other than the seriousness of the offence imputed to him (see paragraphs 37 and 38 above).

122. In addition to the above-mentioned problems, the Court considers that the reasons invoked by the domestic courts for ordering and prolonging the applicant's detention were stereotyped and abstract. Their decisions cited the grounds for detention without any attempt to show how they applied concretely to the specific circumstances of the applicant's case. Moreover, the domestic courts cannot be said to have acted consistently. In particular, on some occasions they dismissed as unsubstantiated and implausible the prosecutor's allegations about the danger of the applicant's absconding, interfering with witnesses and tampering with evidence. On other occasions they accepted the same reasons without there being any apparent change in the circumstances and without explanation. The Court considers that where such an important issue as the right to liberty is at stake, it is incumbent on the domestic authorities to convincingly demonstrate that the detention is necessary. That was certainly not the case here.

123. In the light of all of the above factors, the Court considers that there were no relevant and sufficient reasons to order and prolong the applicant's detention pending trial. It follows that in the present case there has been a violation of Article 5 § 3 of the Convention.

III. Application of Article 41 of the Convention

124. 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

125. The applicant claimed EUR 50,000 in respect of non-pecuniary damage. He submitted that he had suffered considerable stress and that his reputation had been considerably damaged as a result of his unjustified detention. He also argued that the detention had adversely affected his health.

126. The Government did not submit any comment regarding the non-pecuniary damage claimed by the applicant.

127. The Court considers that the applicant must have been caused a certain amount of stress and anxiety as a result of the violation of his rights under Article 5 § 3 of the Convention. Deciding on an equitable basis, it awards the applicant EUR 3,000.

B. Costs and expenses

128. The applicant also claimed EUR 4,837 for the costs and expenses incurred before the Court. The amount included the lawyer's fees before both the Chamber and the Grand Chamber, travel and subsistence expenses for his attendance of the hearing before the latter, and also certain postal expenses.

129. The Government did not make any comment regarding the costs claimed by the applicant.

130. 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 entire amount claimed for costs and expenses for the proceedings before it.

C. Default interest

131. 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

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1. *Dismisses*, by fifteen votes to two, the Government's preliminary objection concerning the non-exhaustion of domestic remedies;

2. *Joins to the merits*, unanimously, the Government's preliminary objection concerning victim status and *dismisses* it;

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

4. *Holds*, unanimously,

(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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,837 (four thousand eights hundred and thirty-seven euros), plus any tax that may be chargeable, 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;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Joint concurring opinion of Judges Nussberger and Mahoney

We share the conclusion of Judges Sajó and Wojtyczek in their joint partly dissenting opinion that the respondent Government were not estopped from raising their preliminary objection of non-exhaustion of domestic remedies as, when the application was communicated to them in January 2010, any detention beyond the date of 29 June 2007 had not been included in the statement of facts prepared by the Registry and they had not been asked to comment on this period (see paragraph 65 of the judgment). Governments should be able to rely in good faith on the Court's clear indications as to the Convention issues to be addressed by them, without fear of being estopped from raising relevant objections if and when further Convention issues, outside the Court's indications, are later introduced into the case.

At the same time, in the specific circumstances of the case, the applicant could not reasonably have been expected to challenge the court decisions ordering house arrest in place of the more severe measure of ordinary detention on remand, given that he would have exposed himself to the risk of making his situation worse. We agree with the majority that in this regard he was under a "clear state of duress" (see paragraph 108 of the judgment). Consequently, in our view, although the respondent Government should not, as a matter of fair procedure, be estopped from raising their objection of non-exhaustion of domestic remedies, that objection is not founded on its merits in the circumstances of the applicant's case and is to be rejected. We thus arrive at the same end-result as the majority on this point, but for different reasons.

Concurring opinion of Judge Spano joined by Judge Dedov

I.

1. Today's Grand Chamber judgment provides a welcome clarification of the case-law on Article 5 § 3 of the Convention concerning the requirement that deprivation of liberty must be based throughout on relevant and sufficient grounds in order to remain valid. I fully concur with the judgment.

2. However, I consider it necessary to write separately to highlight an issue dealt with in paragraphs 106-110 of the judgment, which are prompted by an argument submitted by the Government dealing with the applicant's house arrest. The Government rely on the fact that the applicant himself had asked to be placed under house arrest and had not challenged the court decisions ordering that measure. The Court proceeds by stating that this argument "raises an important question, namely whether the applicant had waived his right to liberty" and concludes in paragraph 109 that it is not prepared, on the facts, to accept that the applicant's acquiescence in his house arrest and omission to challenge the measure amounted to a waiver of his rights under Article 5 of the Convention.

3. Although the reasoning is not fully clear on this issue, it seems to suggest that the Court proceeds on the assumption that, in principle, those detained within the

meaning of Article 5 § 1 of the Convention can, by their actions, in effect waive their right to liberty. For the reasons that follow, this assumption is neither based on sound doctrinal or legal principles, nor does it have any basis in the Court's existing case-law. In other words, the nature and substance of the fundamental right to liberty is not in my view subject to limitations based on the fact that a person who has been deprived of his liberty is considered to have waived his rights under Article 5.

II.

4. To begin with, some conceptual remarks. For the question to arise whether a person can waive his right to liberty, one must exclude those situations where the person in question is not, de facto, detained within the meaning of Article 5 § 1. A homeless person or a vagrant who walks into a police station asking for a place to sleep, his wishes being met by placing him in a prison cell, is not deprived of his liberty if he can leave whenever he so chooses. Thus, by definition, deprivation of liberty arises where such a measure by a public authority, for example detention in prison or house arrest, is imposed on an unwilling person, thus limiting his or her personal autonomy and physical integrity. It is only in those situations where the question of his or her possible acquiescence arises, and consequently if and to what extent the acceptance of being detained can have a bearing on the protections afforded under Article 5 of the Convention.

5. To clarify this further, let us imagine a situation where a person suspected of a criminal offence is informed by a prosecutor that the latter considers that all legal conditions are met for detaining the suspect on remand. However, so as not to waste time, the prosecutor asks whether the suspect accepts being detained for thirty days without the prosecutor seeking confirmation by a court as required by domestic law. The suspect accepts and is detained.

6. Does the suspect's consent to the imposition of the detention measures have any bearing on his right to liberty? In other words, can the fact that the suspect, on the basis of clear and informed consent, has acquiesced in being detained limit his protections under Article 5 of the Convention, namely that the detention must be "lawful" under paragraph 1 and can only be permitted under one of the sub-para¬graphs of the same paragraph? Or does it mean that the State is no longer under an obligation to bring the suspect promptly before a judge under Article 5 § 3 or to provide the detainee with the procedural safeguards of having the detention reviewed by a court under Article 5 § 4 in order to examine whether it is still based on relevant and sufficient grounds?

7. In my view, the answer is in the negative. The nature and substance of the right to liberty under the Convention is not amenable to any kind of "waiver of rights" analysis akin to the one accepted by the Court under Article 6 of the Convention. Also, and not surprisingly, this has been the consistent position of the Court until today. In its settled case-law, the Court has proclaimed that the right to liberty is too important in a "democratic society", within the meaning of the Convention, for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention may violate Article 5 even though the person concerned has agreed to it (see *Venskute v. Lithuania*, no. 10645/08, § 72, 11 December 2012, with further references, and *Storck v. Germany*, no. 61603/00, § 75, ECHR 2005-V). Also, as to the Court's important supervisory role in this regard, the Court proclaimed as early as in the *Belgian Vagrancy Case* of 1971 (*De Wilde, Ooms and Versyp v. Belgium* , 18 June 1971, § 65, Series A no. 12) that "when the matter is one which concerns ordre public within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees are necessary in every case".

8. In conclusion, I am respectfully of the view that the Grand Chamber erred in the present case in proceeding on the assumption that a waiver of the right to liberty is, in principle, possible under Article 5 of the Convention. The Govern¬ment's arguments as to the applicant's acquiescence in his house arrest should have been dealt with as, in essence, a non-exhaustion of domestic remedies argument under Article 35 § 1 of the Convention. Taking account of the flexible concept of exhaustion of domestic remedies in the Court's case-law, that argument should then have been rejected, the Court accepting that in the light of the particular circumstances of the case the applicant was not required to challenge the court decisions ordering the measure.

Joint partly dissenting opinion of Judges Sajó and Wojtyczek

1. We respectfully disagree with the majority on the question whether the Government's objection of non-exhaustion of domestic remedies should have been dismissed.

I

2. The instant case raises a serious issue of procedural fairness. The efficient protection of Convention rights requires not only respect for the procedural rights of the parties to the proceedings before the Court but also mutual trust in relations between the Court and the parties. Therefore, if the Court gives instructions to the parties, the latter should have the certainty that if they comply in good faith with those instructions they will not find themselves in a legal trap and have their legitimate procedural interests affected as a result.

3. In the instant case, the Court, at the communication stage, prepared a statement of facts listing the developments which had taken place until the Chisinau Court of Appeal's decision of 29 June 2007. The Court also informed the parties about the applicant's grievances under Article 5 in the following way:

"The applicant complains under Article 5 §§ 1 and 4 of the Convention that the courts ordered and then extended his detention pending trial without giving relevant and sufficient reasons for doing so."

The following instruction was included in the letter of 18 January 2010 from the Registrar:

"Should your Government decide to submit observations, they should only deal with the complaints concerning reasons for detention pending trial (Article 5 § 3 of the Convention) set out in the document appended to this letter."

As noted above, the appended document presented only the facts that took place until 29 June 2007. The question of house arrest was not included in the statement of facts. The Government have never been explicitly invited to comment on this aspect of the case.

4. The Moldovan Government in their letter dated 16 June 2011 gave a detailed account of the developments which had taken place after 29 June 2007. They also stated that they would not address these developments "bearing in mind the applicant's complaints and the limits of the notification [given] by the Court". Therefore, in their submissions the Government did not address the issue whether the applicant had exhausted domestic remedies in respect of house arrest.

It is true that in a case involving a continuing situation the respondent Government should take a position on all the relevant developments occurring after the communication that form part of this continuing situation. However, the assessment of whether pre-trial detention and subsequent house arrest are elements of a continuing situation is far from obvious. That is precisely the gist of the present case.

In the instant case, the applicant was released from detention on remand and placed under house arrest by a decision of 20 July 2007. There is no doubt that house arrest constitutes deprivation of liberty within the meaning of Article 5. At the same time, the conditions of house arrest differ substantially from remand in custody. Therefore, the question whether house arrest is part of a continuing situation which starts with remand in custody for the purpose of the assessment of exhaustion of domestic remedies is an issue on which two reasonable lawyers may disagree. There is no reason to doubt that the Government, when responding to the communication of the case by the Court, followed the Court's instructions strictly and in good faith. In this context, it is impossible to blame them for not having raised the objection of non-exhaustion of domestic remedies in respect of house arrest before the Chamber judgment was delivered. Given the content of the instructions addressed to the Government at the communication stage, the Court has been estopped from using the argument of tardiness.

5. Despite all that, the majority decided to dismiss the Government's objection of non-exhaustion as being out of time. At the stage of the Grand Chamber proceedings, it is simply unfair to blame the Government – who were merely trying to observe the instructions they had received – for not having raised the issue of exhaustion of domestic remedies earlier. In our view, dismissing the Government's objection of non-exhaustion of domestic remedies is a breach of procedural fairness.

II

6. We fully agree with the majority that the applicant's attitude to his house arrest and omission to challenge the measure did not amount to a waiver of his right to liberty (see paragraph 109 of the judgment). However, we are not persuaded that one could not reasonably have expected the applicant to challenge the court decisions ordering his house arrest (see paragraph 108). This assertion by the majority seems to be based on the assumption of a structural flaw in the Moldovan legal system and of harassment of the applicant by the competent authorities. However, there is nothing to suggest that challenging his house arrest would have placed the applicant at risk of being detained on remand again.

III

7. For the reasons set out above we have voted against dismissing the Government's objection of non-exhaustion of domestic remedies.

NOOT

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1. Het belang van de onderhavige uitspraak is gelegen in de algemene overwegingen met betrekking tot de vraag onder welke omstandigheden de toepassing van voorarrest in overeenstemming is met art. 5 lid 1 en 3 EVRM. Daarmee heeft dit arrest een belang dat uitstijgt boven de concreet voorliggende casus waarin een Moldavische zakenman ruim tien maanden van zijn vrijheid was beroofd in afwachting van zijn berechting (deels in de vorm van hechtenis, deels in de vorm van huisarrest), waarna hij vervolgens (grotendeels) werd vrijgesproken. Het Hof oordeelde dat in het onderhavige geval de gronden waarop de achtereenvolgende beslissingen tot vrijheidsbeneming berustten te algemeen waren en te weinig specifiek op de voorliggende casus waren toegesneden, hetgeen maakte dat zowel de detentie als het huisarrest in strijd met art. 5 lid 3 waren toegepast. Belangrijker voor de rechtsontwikkeling is evenwel dat het Hof in deze uitspraak duidelijk maakt vanaf welk moment het vereiste geldt dat het voorarrest niet langer enkel mag berusten op het bestaan van een verdenking maar tevens op het bestaan van een of meer van de legitieme gronden voor de toepassing van voorarrest.

2. Volgens vaste jurisprudentie van het Hof is voorlopige hechtenis ingevolge art. 5 lid 1 en 3 EVRM slechts mogelijk indien er sprake is van een verdenking alsmede het bestaan van een of meer gronden die kunnen rechtvaardigen dat een uitzondering wordt gemaakt op het uitgangspunt dat een verdachte zijn berechting in vrijheid kan afwachten. Als legitieme gronden voor voorlopige hechtenis erkent het Hof (kort gezegd) vluchtgevaar, recidivegevaar, collusiegevaar, het gevaar voor het veroorzaken van 'public disorder' en de noodzaak tot het beschermen van de verdachte (vgl. par. 88 van de onderhavige uitspraak). Tegelijkertijd is het standaardjurisprudentie van het Hof dat in de beginfase het enkele bestaan van een verdenking voldoende is voor de rechtvaardiging van de voorlopige hechtenis en het bijkomende vereiste van de aanwezigheid van (aanvullende) gronden pas geldt na 'a certain lapse of time' (vgl. onder meer par. 87 en 92 van het onderhavige arrest). De kern van deze uitspraak wordt gevormd door de beantwoording van de vraag wat in dit verband in zijn algemeenheid moet worden verstaan onder 'a certain lapse of time'. In een reeks uitspraken (zie voor verwijzingen par. 95 van het arrest) heeft het Hof weliswaar gesuggereerd dat het hier slechts om enkele dagen kan gaan, maar in 2015 oordeelde het Hof in de zaken *Magee e.a.* t. *Verenigd Koninkrijk* (EHRM 12 mei 2015, «EHRC» 2015/190 m.nt. Ölçer, par 88) in dit verband nog: 'The persistance of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but with the lapse of time this will no longer be enough to justify continued detention. The Court has not attempted to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence' (zie ook par. 94 van het onderhavige arrest). Nu acht het Hof echter toch de tijd rijp klare wijn te schenken over de vraag wat in dit verband in zijn algemeenheid onder 'a certain lapse of time' moet worden verstaan, waarbij – anders dan in het voorgaande citaat uit het *Magee*-arrest als mogelijkheid werd gesuggereerd – niet wordt gekozen voor enige vorm van differentiatie naar de ernst van de aan de orde zijnde feiten. Het Hof kiest onomwonden voor een gelijkschakeling met het begrip 'promptly' uit het eerste deel van art. 5 lid 3 EVRM, waarin wordt gegarandeerd dat elke verdachte die van zijn vrijheid is beroofd aanspraak heeft op onverwijlde voorgeleiding voor een rechterlijke autoriteit ter toetsing van de rechtmatigheid van de vrijheidsbeneming vanaf de aanhouding. Wat in dit verband onder onverwijld ('promptly') dient te worden verstaan, is in de jurisprudentie van het Hof onomstotelijk duidelijk gemaakt, te weten maximaal vier dagen (en in bijzondere omstandigheden zelfs korter; vgl. *Magee e.a.* t. *Verenigd Koninkrijk*, reeds aangehaald, par. 77 en 78 met verwijzing naar standaardjurisprudentie in dit verband, zoals *Brogan e.a.* t. *Verenigd Koninkrijk*, EHRM 29 november 1988, nrs. 11209/84, 11234/84, 11266/84, 11386/85, *NJ* 1989/815 m.nt. Alkema, par. 62 en *McKay* t. *Verenigd Koninkrijk*, EHRM 3 oktober 2006, nr. 543/03, «EHRC» 2006/131 m.nt. Van der Velde, par. 33). Tegelijkertijd constateert het Hof dat vergelijkbare duidelijkheid ontbreekt voor voornoemd begrip 'a certain lapse of time' dat samenhangt met het tweede deel van art. 5 lid 3 EVRM, waaruit voortvloeit dat voorarrest een uitzondering vormt op het uitgangspunt dat een verdachte zijn berechting in vrijheid mag afwachten en het voorarrest derhalve nooit langer dan strikt noodzakelijk is mag voortduren (zie par. 89 van het onderhavige arrest). Hoewel het hier strikt genomen om twee verschillende waarborgen gaat, realiseert het Hof zich dat de tijdstippen waarop deze beide waarborgen worden geëffectueerd in de praktijk niet zelden zullen samenvallen (par. 100 van het onderhavige arrest): "It is true that in some instances the Court has held that '[t]hese two limbs confer distinct rights and are not on their face logically or temporally linked' [...]. However, it should be noted that in each context the period will start to run from the time of arrest, and that the judicial authority authorising the detention is required to determine whether there are reasons to justify detention and to order release if there are no such reasons. Thus, in practice, it would often be the case that the application of the guarantees under the second limb would to some extent overlap with those of the first limb, typically in situations where the judicial authority which authorises detention under the first limb at the same time orders detention on remand subject to the guarantees of the second limb. In such situations, the first appearance of the suspect before the judge constitutes the 'crossroads' where the two sets of guarantees meet and where the second set succeeds the first. And yet, the question of when the second applies to its full extent, in the sense that further relevant and sufficient reasons additional to reasonable suspicion are required, is left to depend on the rather vague notion of 'a certain lapse of time'." Voorts constateert het Hof op basis van een rechtsvergelijking tussen eenendertig bij het EVRM aangesloten lidstaten dat in de overgrote meerderheid daarvan de rechterlijke autoriteit die binnen een aantal dagen na aanhouding over (verlenging van) het voorarrest oordeelt, reeds relevante gronden voor het verlengen van het voorarrest dient aan te dragen (par. 54 en 101 van de uitspraak). In het licht van deze overwegingen oordeelt het Hof dat er dwingende redenen zijn de waarborg voortvloeiende uit het tweede deel van art. 5 lid 3 EVRM te synchroniseren met de waarborg uit het eerste deel daarvan. Of meer concreet: "This implies that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say 'promptly' after the arrest."

3. De volgende vraag is wat de consequenties van deze uitspraak zijn voor de Nederlandse regeling en praktijk van het voorarrest. Zoals bekend bestaat in het Nederlandse Wetboek van Strafvordering het 'vrijheidsbenemende traject' voorafgaand aan de berechting uit verschillende dwangmiddelen, die alle evenzovele fasen van het voorarrest inhouden: achtereenvolgens de aanhouding (art. 53 en 54 Sv), het ophouden voor onderzoek voor maximaal zes of – indien de nacht daartussen valt – vijftien uur (art. 61-62a Sv), de inverzekeringstelling voor de duur van maximaal drie dagen met de mogelijkheid van een tweede termijn van nog eens maximaal drie dagen (art. 57-59 Sv) en de voorlopige hechtenis (deze laatste te onderscheiden in bewaring op gezag van de rechter-commissaris voor de duur van maximaal veertien dagen en gevangenhouding op gezag van de raadkamer van de rechtbank voor de duur van maximaal negentig dagen, waarna het onderzoek ter terechtzitting een aanvang dient te nemen en de gevangenhouding op gezag van de zittingsrechter in beginsel onbeperkt kan voortduren, indien en zolang aan de voorwaarden daarvoor wordt voldaan; art. 63 e.v. Sv). Al deze vormen van vrijheidsbeneming voorafgaand aan de berechting worden bestreken door art. 5 lid 1 en 3 EVRM, nu de bescherming tegen willekeurige vrijheidsbeneming door deze bepaling volgens vaste jurisprudentie vanaf het moment van aanhouding geldt (vgl. par. 85 van de onderhavige uitspraak). Vervolgens wordt de eerste fase van vrijheidsbeneming op gezag van niet-rechterlijke autoriteiten bestempeld als 'initial detention' en de daarop volgende fasen van vrijheidsbeneming op gezag van een rechterlijke autoriteit als 'detention on remand' (vgl. onder meer par. 46 en 52 van de onderhavige

uitspraak waar wordt gesproken van 'initial detention prior to judicial involvement' en 'detention on remand following judicial involvement'). Vertaald naar het Nederlands recht betekent dit dat de fasen ophouden voor onderzoek en inverzekeringstelling bevolen door de (hulp)officier van justitie hebben te gelden als 'initial detention', terwijl vanaf de fase van de bewaring bevolen door de rechter-commissaris kan worden gesproken van 'detention on remand'. Dat rechterlijke betrokkenheid in dit verband van belang is, komt ook tot uitdrukking in de Nederlandse terminologie doordat het begrip voorlopige hechtenis is gereserveerd voor de vrijheidsbeneming op bevel van een rechter (de bewaring en de gevangenhouding); het ophouden voor onderzoek en de inverzekeringstelling vallen daar dus buiten (wat niet wegneemt dat ook deze, als gezegd, onder de reikwijdte van art. 5 vallen). Voorts is van belang dat de officier van justitie – als uitvloeisel van de waarborg uit het eerste deel van art. 5 lid 3 EVRM dat de verdachte na diens aanhouding 'promptly' voor een rechterlijke autoriteit dient te worden geleid – op grond van art. 59a Sv verplicht is de verdachte die in verzekering is gesteld binnen drie dagen en vijftien uur na zijn aanhouding (welke termijn is ontleend aan de maximale termijn van het ophouden voor onderzoek plus de eerste termijn van de inverzekeringstelling) voor de rechter-commissaris te geleiden zodat hij de rechtmatigheid van de vrijheidsbeneming van de verdachte kan beoordelen en hem – indien daartoe termen aanwezig zijn – onmiddellijk in vrijheid kan stellen. In de praktijk wordt deze voorgeleiding ex art. 59a Sv ter toetsing van de rechtmatigheid van de aanhouding en inverzekeringstelling doorgaans direct gecombineerd met de behandeling van een vordering tot het in bewaring stellen van de verdachte, nu deze eveneens door de rechter-commissaris moet worden bevolen en de officier van justitie anders genoodzaakt is binnen een kort tijdsbestek de rechter-commissaris voor beide gelegenheden afzonderlijk te benaderen. Precies deze omstandigheid maakt dat de gevolgen van de onderhavige uitspraak voor de Nederlandse praktijk gering zullen zijn. De rechter-commissaris kan immers slechts de bewaring bevelen en daarmee de vrijheidsbeneming van de verdachte continueren indien hij van oordeel is dat er ernstige bezwaren jegens de verdachte bestaan (op te vatten als een zwaardere vorm van verdenking dan het redelijk vermoeden van schuld aan enig strafbaar feit) en hij voorts een van de gronden voor voorlopige hechtenis ex art. 67a Sv aanwezig acht (welke grosso modo gelijk zijn aan de legitieme gronden voor voorarrest in de jurisprudentie van het Hof). Nu hij deze beoordeling in veel gevallen reeds maakt ten tijde van de voorgeleiding ex art. 59a Sv, berust – bij een positief oordeel van de rechter-commissaris op de vordering tot bewaring – de vrijheidsbeneming daarmee tijdig mede op (aanvullende) gronden. De gelijkschakeling van de begrippen 'a certain lapse of time' en 'promptly' in de onderhavige uitspraak heeft in de geschetste praktijk waarin de voorgeleiding ex art. 59a Sv en de behandeling van de vordering tot bewaring gelijktijdig plaatsvinden dan ook geen gevolgen. Beide geschieden in dit scenario immers binnen de marges die het Hof de lidstaten geeft (een termijn van maximaal vier dagen).

4. Het is de vraag of dit ook geldt in die gevallen waarin de voorgeleiding ex art. 59a Sv en de behandeling van de vordering tot bewaring niet gelijktijdig plaatsvinden. Als gezegd zal de officier van justitie hier in de praktijk doorgaans naar streven. Wel is dan vereist dat de officier van justitie op dat moment – uiterlijk drie dagen en vijftien uur na het moment van aanhouding, het moment waarop de voorgeleiding voor de rechter-commissaris uiterlijk moet plaatsvinden – zijn onderzoek reeds zodanig op orde heeft dat hij de verdenking heeft weten te versterken tot ernstige bezwaren, nu dit een vereiste is voor het bevelen van bewaring. Dat is in de praktijk niet altijd mogelijk, met name niet in gevallen waarin de termijn voor voorgeleiding ex art. 59a Sv gezien het moment van aanhouding (bijvoorbeeld op een donderdag) in het weekend verstrijkt en de voorgeleiding – bij gebreke aan de mogelijkheid de verdachte in het weekend voor te geleiden – dus al op vrijdag moet plaatsvinden. In een dergelijk geval zal de voorgeleiding ter toetsing van de rechtmatigheid van de aanhouding en inverzekeringstelling op een eerder moment plaatsvinden (vrijdag) dan de behandeling van de vordering bewaring (na het weekend). Het gevolg daarvan is evenwel dat de officier van justitie de inverzekeringstelling ergens in het weekend voor een tweede termijn van maximaal drie dagen zal moeten bevelen teneinde de verdachte vast te kunnen houden tot het moment dat de vordering bewaring door de rechter-commissaris kan worden behandeld. Probleem is dan dat de bewaring wordt bevolen op een moment waarop wellicht niet meer kan worden gesproken van 'promptly' in de zin van art. 5 lid 3 EVRM. Tot op heden was dit geen probleem, omdat het vereiste van 'promptly' slechts gold voor de voorgeleiding voor de rechter-commissaris – die in de geschetste situatie al op vrijdag is geweest en dus ruimschoots binnen de termijn van maximaal vier dagen. Nu deze eis van 'promptly' ook van belang is geworden voor het moment waarop het voorarrest mede op legitieme (aanvullende) gronden moet worden gebaseerd in plaats van enkel een verdenking, kan echter wel een probleem rijzen. In een dergelijk geval vindt de aanvulling met gronden door de rechter-commissaris immers in sommige gevallen pas plaats op een moment waarop niet meer van 'promptly' kan worden gesproken, met name niet wanneer de vordering tot bewaring pas wordt behandeld aan het einde van de tweede termijn van inverzekeringstelling wanneer al bijna zes dagen zijn verstreken sinds de aanhouding (bijvoorbeeld – in het geschetste voorbeeld – op dinsdag of woensdag). Dit kan problematisch zijn in het licht van de onderhavige uitspraak. Tegelijkertijd kan dit probleem worden gerelativeerd. Ten eerste is de uiterste termijn waarbinnen nog van 'promptly' kan worden gesproken (te weten maximaal vier dagen) iets ruimer dan de termijn waarbinnen een verdachte op grond van art. 59a Sv moet worden voorgeleid ter toetsing van de rechtmatigheid van diens vrijheidsbeneming (te weten drie dagen en vijftien uur). Dit laat enige ruimte de rechter-commissaris na de voorgeleiding een tweede maal te benaderen met een vordering tot bewaring (bijvoorbeeld in het geschetste voorbeeld waarin de verdachte op donderdag wordt aangehouden, (vroeg) op de maandag), waarmee – indien de rechter-commissaris positief beslist op deze vordering tot bewaring – de aanvulling met gronden alsnog plaatsvindt voordat de termijn van 'promptly' verstrijkt. In die gevallen waarin dit niet lukt – bijvoorbeeld omdat de verdachte pas op dinsdag of woensdag voor een tweede maal bij de rechter-commissaris komt – kan, ten tweede, worden betoogd dat ook dan de vrijheidsbeneming op grond van de verlengde inverzekeringstelling niet louter op het bestaan van een verdenking berust, aangezien de inverzekeringstelling ook aan een grond is gebonden, te weten het belang van het onderzoek, waaronder mede wordt begrepen het belang van het in persoon uitreiken van gerechtelijke mededelingen aan de verdachte (art. 57 lid 1 Sv). Voorts voegt art. 58 lid 2 Sv daar voor de verlenging van de inverzekeringstelling nog het criterium van de dringende noodzakelijkheid aan toe. Het gaat hier weliswaar niet om de klassieke legitieme gronden voor het voorarrest zoals het Hof die volgens zijn standaardjurisprudentie erkent – te weten het vluchtgevaar, het recidivegevaar, het collusiegevaar, het gevaar voor het veroorzaken van 'public disorder' en de noodzaak tot het beschermen van de verdachte – maar niet is uitgesloten dat het Hof ook de genoemde gronden voor (de verlengde) inverzekeringstelling in deze vroege fase van het voorarrest zal willen erkennen als legitieme aanvullende gronden naast het bestaan van een verdenking. Dat dit niet denkbeeldig is, kan onder meer worden ontleend aan het feit dat het Hof in zijn rechtsvergelijking (waarin ook Nederland participeert, zie par. 45 van de uitspraak) mede heeft gekeken naar de vraag in welke landen de 'initial detention prior to judicial involvement' (waartoe in ieder geval ook de eerste termijn van de inverzekeringstelling kan worden gerekend) enkel kan worden gebaseerd op het bestaan van een verdenking. Hierbij komt het Hof vervolgens slechts tot vijf landen, te weten Armenië, Bulgarije, Italië, Litouwen en Zwitserland. Alle overige landen – waaronder dus Nederland – worden door het Hof gerekend tot de categorie van landen waarin het voorarrest vanaf het eerste prille begin slechts kan worden bevolen op grond van een combinatie van een verdenking en (aanvullende) gronden (zie par. 47 en 48 van de uitspraak). Weliswaar ontbreekt het belang van het onderzoek (voor zover dat uit iets anders bestaat dan collusiegevaar) in de opsomming van het Hof van voorbeelden van de in de verschillende landen gehanteerde gronden, tegelijkertijd is deze opsomming breder dan enkel de vijf voornoemde klassieke legitieme gronden voor voorarrest (bijvoorbeeld ook ontdekking op heterdaad). Hieruit kan met enige voorzichtigheid worden afgeleid dat ook in de fase van de (verlengde) inverzekeringstelling al wordt voldaan aan het vereiste dat na 'a certain lapse of time' (lees: 'promptly') het voorarrest op zowel een verdenking als het bestaan van legitieme gronden moet berusten en het geschetste scenario dus niet zo problematisch is. Daar kan tegenin worden gebracht dat dit nog steeds niet wegneemt dat in het geschetste voorbeeld waarin de vordering bewaring pas op dinsdag of woensdag wordt behandeld, de rechter-commissaris de aanvulling met 'zijn' gronden bij het verlenen van het bevel bewaring pas doet op een moment dat strikt genomen niet meer van 'promptly' kan worden gesproken en hij dus naar de letter nog steeds in strijd handelt met de door het Hof in par. 102 gegeven rechtsregel dat de aanvulling met gronden 'promptly' na de aanhouding dient te geschieden. Het lijkt echter niet waarschijnlijk dat het Hof daar een punt van zal maken, nu de officier van justitie dit al gedaan heeft bij de verlenging van de inverzekeringstelling en de verdachte al is voorgeleid ter toetsing van de rechtmatigheid van de aanhouding en (de eerste fase van) de inverzekeringstelling. Deze verwachting wordt verder kracht bijgezet door het feit dat het Hof in zijn uitspraak weliswaar aangeeft dat het moment waarop de rechtmatigheid van de vrijheidsbeneming door de rechter wordt getoetst op grond van het eerste deel van art. 5 lid 3 EVRM in de tijd veelal samenvalt met het moment waarop diezelfde rechter de verlenging van de vrijheidsbeneming beveelt op grond van het tweede deel van art. 5 lid 3 EVRM (reden waarom 'a certain lapse of time' wordt gelijkgeschakeld met 'promptly'), maar hiertoe in de onderhavige uitspraak geenszins verplicht. Op basis van voornoemde argumenten – mede in onderlinge samenhang bezien – lijkt het dan ook niet waarschijnlijk dat het Hof de Nederlandse praktijk waarin onder omstandigheden het moment van voorgeleiding voor de rechter-commissaris ex art. 59a Sv noodgedwongen voor het weekend plaatsvindt en het moment waarop de vordering tot bewaring door de rechter-commissaris wordt behandeld (enige dagen) na het weekend ligt, snel in strijd met art. 5 lid 3 EVRM zal achten. Tegelijkertijd kan het geen kwaad als deze kwestie nog eens nadrukkelijk onder de loep wordt genomen in het kader van de lopende modernisering van het Wetboek van Strafvordering teneinde te bezien of de Nederlandse wetgeving op dit punt toch niet enige aanpassing behoeft. Meer praktische maatregelen zouden in dit verband ook soelaas kunnen bieden, bijvoorbeeld het creëren van de mogelijkheid de rechter-

commissaris ook in het weekend te benaderen ten behoeve van de voorgeleiding ex art. 59a Sv en/of de behandeling van een vordering tot bewaring.

5. Concluderend kunnen we stellen dat de directe gevolgen van deze uitspraak voor de Nederlandse situatie beperkt lijken te zijn, daar de Nederlandse wetgeving op dit punt – is het niet naar de letter dan toch wel naar de geest – in de pas loopt met de in het voorgaande besproken nieuwe nuance in de jurisprudentie van het Hof ten aanzien van art. 5 lid 1 en 3 EVRM. Dit neemt niet weg dat ook deze uitspraak van het Hof kan worden beschouwd als een herhaalde oproep terughoudend om te springen met de toepassing van voorarrest. Opnieuw benadrukt het Hof dat toepassing van voorarrest de uitzondering dient te zijn en dat daaraan dus in alle gevallen een legitieme en dringende reden ten grondslag moet liggen. Onze wetgeving mag dan stroken met dit uitgangspunt, de praktijk leert dat hier duidelijk nog winst kan worden geboekt door de gronden voor voorlopige hechtenis strenger te toetsen, alternatieven voor voorlopige hechtenis nadrukkelijker te overwegen en rechterlijke beslissingen met betrekking tot het voorarrest beter te motiveren (zie onder meer J.H. Crijns, B.J.G. Leeuw en H.T. Wermink, *Pre-trial detention in the Netherlands. Legal principles versus practical reality*, The Hague: Eleven International Publishing 2016). Deze uitspraak voegt daaraan toe dat dit uitgangspunt wel degelijk ook serieus dient te worden genomen in de meest vroege fase van het voorarrest. Op zichzelf doet dit niet af aan de vaste lijn binnen de EHRM-jurisprudentie dat de toets aan de voorwaarden voor toepassing van voorarrest steeds strenger wordt naarmate het arrest langer voortduurt. Wel wordt hiermee duidelijk dat deze lijn niet mag worden omgedraaid in die zin dat de eerste fase van het voorarrest ook zonder legitieme gronden voor vrijheidsbeneming zou kunnen worden gebillijkt. In die zin vormt de onderhavige uitspraak een hernieuwde waarschuwing dat voorarrest niet lichtvaardig mag worden toegepast.

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