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**ANALYSIS OF THE
CASE OF KALASHNIKOV v. RUSSIA
JUDGMENT OF THE EUROPEAN COURT OF
HUMAN RIGHTS
ISSUED ON 15 JULY 2002**

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Legal Guide

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Introduction

This Analysis considers the judgment of 15 July 2002 of the European Court of Human Rights (hereinafter referred to as the “Court”) on the case of Kalashnikov v. Russia. The case concerns lengthy pre-trial and trial proceedings during which the Applicant was kept under detention on remand. The Applicant disputes the conditions of detention facility under Article 3 of the Convention, including the “reasonable period” of pre-trial and trial detentions under Articles 5(3) and 6(1) of the Convention.

This Analysis aims to study the facts of the case, including a thorough examination of the applicant’s complaints and the Russian Government’s arguments. The Analysis will also provide an overview of the specific approaches of the European Commission on Human Rights (hereinafter referred to as “European Commission” or “Commission”) and the European Court regarding the interpretation of the rights and freedoms in question. However, the Analysis will not specifically address the issue of just satisfaction. The analysis will be carried out by applying a checklist which the Court uses when examining violations of each ECHR right and freedom. The Analysis will also highlight the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the Convention.

This Analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights - including law students - to identify the criteria and the standards that the European Court follows when interpreting the rights and freedoms guaranteed by the European Convention

1. ANALYSES OF THE CASE

1.1. Country Profile

The government of Russia first time applied the Council of Europe for accession to this organization in May 7, 1992. In January 14, 1992 the Russian Duma (Parliament) was given the status of the guest of honor at the Parliamentary Assembly of the Council of Europe.¹ The procedure of examining Russia's request for membership of the Council of Europe was suspended in January 1995 following Russia's intervention in Chechnya. In 26 September 1995 with Resolution 1065 (1995) the membership procedure was reopened. In the end, the PACE gave its special opinion (PACE Opinion No.193(1996) by recommending before the Committee of Ministers that Russia be accepted as the full member of the Council of Europe.² However, along with the recommendation the same documents included in 12 paragraphs the obligations and commitments of Russia against CoE. The paragraph 9 of the obligations states about obligation "improve conditions of criminal detention".

On 5 May 1998, Russia ratified the European Convention on Human Rights as well as its Protocols Nos. 1, 2, 4, 7 and 11, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. On 22 November 2001 Russia adopted a new Code of Criminal Procedure and a number of bills of the judicial reform package.

At the opening of the first 2001 part-session on Monday 22 January 2001, the credentials of the delegation of the Russian Federation were challenged in relation with the conflict in the Chechen Republic. However, by Resolution 1241 the Assembly decided to ratify the credentials of the new Russian delegation.

The Monitoring Commission of PACE has prepared several Resolutions and reports about Russia's fulfillment of its obligations and commitments. In 1998 report, before the judgment on Kalashnikov was made by ECHR, the Monitoring Commission stated the following.

"...the lawmaking process in general, though sometimes sluggish, seems to be progressing relatively well...on the negative side, the Russian authorities have made few attempts to reform the prosecutor's office...Conditions in pre-trial detention centers and prisons have deteriorated since Russia's accession to the Council of Europe, due mainly to lack of funds, but also to mentalities yet unchanged, such as the over-free recourse to pre-trial detention and custodial sentences".

During 20-24 June 2005 Parliamentary Assembly summer session the PACE will consider the latest report of the Monitoring Committee on honoring by Russia of its commitments and obligations as the member state of the Council of Europe. i

1.2. Impact of the Kalashnikov case on domestic practice and legislation

The Kalashnikov case was the second judgment of the European Court against Russia and the first judgment where the public hearings took place. Consequently, the consequence of this case on domestic practice and legislation was enormous. Even before and particularly after

¹ See the Opinion No. 193 of the Parliamentary Assembly, par.1-2

² Russia became the member of the Council of Europe in February 28, 1998

delivery of the Kalashnikov judgment of 15 July 2002 the Government started taking measures for improving the conditions in pre-trial detention facilities. According to the report of the Government to the Committee, it carried out two major reforms for improvement of conditions in the mentioned facilities:

1. Under new Code of Criminal Procedure, the power to order detention was transferred from the prosecutor office to the courts (supervisory power of courts over pre-trial detention as preventive measure). Thus, the prosecutor office was no longer empowered for taking decisions of putting the defendants under detention on remand. This was one of the most significant Soviet legacy giving the prosecutor office outright discretionary power without any public scrutiny on due process and substantive law violations by this body. Russia, as the strongest supporter of the Soviet legal tradition, had long kept one of the key elements of the “general supervisory role” of the prosecutor office in its criminal justice system until the time when it had to stop this practice from its criminal justice system under the pressure of the very first judgment of the European Court.

As indicated by the Government, because of the mentioned amendments in the Criminal Procedure Code, the number of accused persons detained pending trial significantly decreased. The second reason for decrease of detained persons were the strict (higher) standards introduced for allowing pre-trial detentions or detentions on remand.

According to statistics, the average number of persons committed to detention on remand per month decreased from 10,000 in 2001 to 3,700 in September-October 2002. As a result, the overall number of pre-trial detainees decreased from 199,000 in October 2001 to 137,000 in October 2002.

2. In August 29, 2002 the Government adopted Federal Program for reforming the Ministry of Justice’s penitentiary system for 2002-2006. Under this Program, the Federal Directorate for Execution of Punishment created a whole system of measures to improve the conditions for persons under arrest. In particular, the federal government is planning to build new pre-trial detention facilities for 10,130 places, including renovation of a number of existing detention facilities. The renovation projects are oriented first of all in improvement of sanitary conditions of detention.

During the time of submitting the report to the Council of Ministers in 2002, the Government had already created around 828 new places. In the result of measures taken during 2002 the living space per detainee was increased to 3,46sq/m by 1 January 2003.. As a comparison, in Kalashnikov case 0.9-1,9 m² per inmate living space was provided during the period under consideration (see par. 97 of the judgment). In addition, in 32 of 89 Russian regions the number of persons held in pre-trial detention no longer exceeds the limits set for detention facilities

In its further reporting to the Council of Ministers, the Government informed that the new Criminal Procedure Code (Articles 109, 162, 255) was expected to be an effective legal instrument to prevent lengthy pre-trial detentions as it imposes stricter time-limits on investigation and trial. In addition, as indicated above, the courts have the sole competence to order and extend the pre-trial detentions, which undoubtedly provides better remedies against due process violations and better procedural safeguards for observing the principle of equality of parties.

Finally, the Vice-Chairman of the Supreme Court sent a circular letter in September 5, 2002 to all Russian and republican by stressing that the Kalashnikov case “has a precedent value and entails very serious consequences in as much as it reflects the Court’s position on important questions relating to fundamental rights of individuals subject to criminal prosecution, including the right to a reasonable length of judicial proceedings”. Further, the Circular requests all courts to ensure that the length of proceedings meet the test of “reasonableness” and the times limits set by the Criminal Procedure Code, as well as to take measures to prevent unduly delays in proceedings.

The Kalashnikov judgment had such impact on the Government, that it decided to publish it in Russian language in Russian daily Rossijskaia Gazeta (editions of 17 and 19 October 2002). This daily newspaper publishes all laws and regulations of the Russian Federation. The judgment was also published in many other legal journals, including in the Internet.

1.3. Interim Resolution ResDH(2003)123 of the Council of Ministers

Under impact of the ECHR judgment, the Council of Minister issued Resolution H(2003)123 on 4 June 2003 at the 842st meeting of the Minister’s Deputies. The Committee understood that simply providing compensation to the Applicant would not be sufficient in order to prevent similar violations that occurred in Kalashnikov case. The Committee decided that structural improvements were also needed. It therefore went beyond of simply demanding the timely compensation of the established amount (5,000 euros in respect of non-pecuniary damage and 3,000 euros in respect of costs and expenses with interest rate) and urged the Government to carry on certain reforms to improve the conditions in pre-trial detention facilities in Russia. By noting that the Government had already took measures to decrease the overcrowding in pre-trial detention facilities, improved the sanitary conditions (according to the statistics provided by the Government), the Committee however urged Russia “to continue and enhance the ongoing reforms with view to aligning the conditions of all pre-trial detention on the requirements of the Convention” in order to prevent new violations similar to Kalashnikov case.

It also requested the government of Russia to keep the Committee informed of the concrete improvement of the situation in detention facilities, in particular by providing relevant statistics relating to the overcrowding and sanitary and health conditions in pre-trial detention facilities. And the final point of the Resolution was that the Committee took decision to examine at one of its meetings not later that October 2004 (in fact on year and four months was given to Russia to fulfill the obligations under this document), further progress achieved in the adoption of the general measures necessary to effectively prevent similar violations of the Convention.

1.4. The legal issue

The parties disputed mainly three issues; the conditions of detention under Article 3 of the European Convention, the “reasonable” time period of keeping the Applicant under detention on remand under Article 5 part 3 of the Convention and the “reasonable” time period of trial proceedings under Article 6 part 1 of the Convention.

1.5. Regarding Article 3 of the Convention

1.5.1. Established principles and standards

The Applicant contended that he had been under lengthy detention, the conditions of which were “inhuman and degrading”. The conditions of detention are described in detail between paragraphs 13-30 of the judgment.

The Article 3 provides one of the most protected rights under the Convention in a sense that this right is presented in absolute form. No exceptions or derogations are allowed from this article under any conditions or circumstances. In comparison, the rights under Article 8-11 of the Convention, the privacy right, the right to religion and belief, the freedom of expression and the right to public gatherings and freedom of assembly can be limited. The conditions of limitations are expressly prescribed under paragraphs 2 of the above articles. Even the right to life can be limited under Convention, which is expressly provided by the text of this articles

The Article 3 prohibits three types of treatment or conduct; 1) torture, 2) inhuman treatment or punishment, or 3) degrading treatment and punishment. In each case the conduct must reach to the “minimum level of severity” in order to be admitted and declared by Court a violation. The assessment of the minimum level of severity is conditional and it depends on many factor, circumstances and characteristics of the given case. Those are, as usual, the length of the treatment, the physical and moral effect and consequences. In some cases the age, sex, the health conditions of the victim can also be taken into account by Court in assessing the minimum level of severity.

In the judgment of the Ireland v. UK case the Court defined a set of important standards and legal propositions that are widely used as legal guidance in order to define whether the treatment in a specific case amount to “minimum level of severity”. According to the mentioned definitions, the three categories of prohibited conducts are defined in the following way:

- a) Torture – means deliberate inhuman treatment, which may cause serious and severe sufferings. The deliberate nature of the treatment presumes that it was done for the purpose of causing sufferings.
- b) Inhuman treatment or punishment – means such a treatment or punishment that cause strong physical or mental sufferings
- c) Degrading treatment or punishment – such treatment or punishment which cause the feeling of fear, suffering and degradation for the victim which may humiliate him/her and may possibly break his/her physical or moral resistance.³

Even though its is clear that the torture and inhuman treatment cannot be justified under any circumstances, but as to the degrading or humiliating treatment such treatment can be justified under only exception circumstances. If we admit that all forms of punishment are humiliating, in that case it is necessary to differentiate between the usual conditions of detention and prison from those conditions which are below the accepted standards. It means, the prison conditions under accepted standards are also in general considered to be humiliating. However, it cannot be concluded in an absolute form that they amount to “humiliating” under Article 3 of the Convention. The reason is that the purpose and object of

³ Ennslin, Baader and Raspe v Germany Appl 7572/76 14 DR 64 (1978) 14 DR 112

the Article 3 supposes that bad treatment means such actions, which “*in each case must be more than the inherent element of humiliation, which usually exists where the person is convicted from criminal offense*”⁴

It derives from the above that if the person complains from such actions, which are applied solely for the purpose of security and safety or for the purpose of defense, the Court may consider that such actions do not raise the violation of the Article 3; regardless of the consequences that they left on the victim.

The following actions have been considered as violation of Article 3 by its previous judgments; physical assault (especially under detention)⁵, physiological pressure techniques for questioning during interrogation⁶, prison conditions⁷, rape⁸, corporal punishment⁹, the threat of torture, if the victim can show that such actions are “sufficiently real and immediate to cause mental anguish”¹⁰.

1.5.2. Qualification of the conduct

In order to successfully demonstrate the violation of the Article 3, it is sufficient to show that at least one of the prohibited treatments mentioned above was applied. This is clearly seen from the context of the article. The word “or” used in the text and thus separating each of the three actions demonstrates that the prohibited actions appear separate from each other and therefore, each of them may raise the violation of Article 3. This was the reason why the respondent party insisted from the very beginning of its arguments that none of the actions of domestic authorities, the prison conditions, could raise the violation of any of the prohibited actions of the Article 3.

In response to the above standing of the Government, the Applicant to emphasized that the conditions of detention were humiliating and degrading. The Applicant understood quite well that the conditions of detention could not be classified as torture. Even the interpretation of this word in its ordinary meaning is enough to conclude that the prison conditions could not be qualified as torture. In addition, in order the treatment to be qualified as torture, as mentioned above, the conduct must be deliberate and intended to cause severe sufferings to the victim. There is no fact in the case based on which the Applicant could prove convincingly that the administration of the detention facility intentionally set up such conditions in order to cause him very serious and cruel sufferings. In addition, the Government was successfully disputing the existence of any such intent by arguing that the conditions of the Applicant in no way differed from the conditions of most of the detainees in Russian Federation. The Government also pointed on the facts that where necessary the prison administration rendered medical assistance to the Applicant during his detention and the facts of provision of medical assistance are well documented and provided to the Court. The Respondent Government went even further in his contentions by stating, and thus even widening arguments that the Government of Russian Federation had already started the big

⁴ Tyrer v United Kingdom (1979-80) 2 EHRR 1

⁵ Thomasi v United Kingdom (1993) 15 EHRR

⁶ Cyprus v Turkey (1982) 4 EHRR 482, pg. 541

⁷ Kalashnikov v Russia 2002

⁸ Aksoy v Turkey (1997) 23 EHRR 553. See also

⁹ Cambell and Cosans v United Kingdom (1982) 4 EHRR 293

¹⁰ Ibid

project of reforms in improving the conditions of detention facilities in the whole territory of Russia. According to this project, the Government is intended to build new detention facilities and to renovate the existing ones, to increase the amount of designated space to each prisoner, to improve the sanitary conditions etc. These arguments in full exclude chances of the Applicant to argue successfully that the prison administration was acting with intent of causing serious and cruel sufferings by making the detention conditions worse.

It would be also very hard for the Applicant to demonstrate that the conditions of detention were “inhuman”, since in that case the Applicant would have to successfully argue and demonstrate by facts that the conditions caused intense physical suffering. There are no such facts in the case to support such contentions. As to the mental suffering, it could possibly have some success if the Applicant argued this treatment in the context of the conditions and especially the length of time for living under such conditions. Indeed, by reading the facts of the case in full, one may conclude that those conditions and the time length (more than five years) could possibly cause intense mental and moral sufferings. However, in paragraph 102 of the judgment, where the Court took decision on Article 3, the Court referred only to the last element of the Article 3 as basis for violation and therefore it qualified the prison conditions as “degrading treatment”. However, even this was sufficient for declaring the violation of the Article 3.

1.5.3. Ratione temporis

In paragraph 95 of the judgment the Court mentioned that in assessing the conditions of detention one has to take into account “*the cumulative effect of those conditions on the victim*”. Immediately after this note the Court started to discuss the issue of the length of time that the Applicant was kept under detention from the Convention terms. It was also mentioned above that in determining the “minimum level of severity”, the Court, among other things, considers also the length of the treatment as one of the main factors and that this approach of the Court was established by its case-law. Thus, the length of the detention under Convention terms became very important factor in this case. However, the issue of the length of detention became a point of hard dispute between the Court and the Government.

It is widely known that according to universally recognized international norms, the Convention becomes binding after its ratification by the member state. It follows from here, and it is established by Court’s case-law, that the Court may consider only those facts of the case that occurred after the ratification of the Convention. It is also widely known that this principle is one of the admissibility standards by the Court of the cases from the member states.¹¹ The Russian Federation ratified the Convention in May 5, 1998. In this sense, the

¹¹ Among cases submitted to Court from Armenia it is important to mention the case of Petros Makeyan v. Armenia (application number 37783/02) and Noyan Tapan v Armenia (application number 37784/02). The first case was refused while on admissibility early stage by a three-judge Committee in November 2003. The complaint was refused on the basis of *ratione temporis*. The victim was detained and subjected to administrative detention for participation in an unsanctioned demonstration. The Committee found that the detention and arrest occurred before ratification of the Convention by Armenia in 26 April 2002. It is to mention that the Committee did not consider the fact that Article 6 fair trial violations in this case, disputed by Applicant in his claim, occurred after ratification of the Convention.

The application of Noyan Tapan is in the final admissibility stage. Here the Court united the hearings of the case on admissibility and in merits. The partial admissibility decision was taken in 21 October 2004 by which it found inadmissible the part of the case for failure to exhaust all domestic remedies. The Government in submitting its Observations on the issue of admissibility of the case put the emphasize on the fact that the disputed licensing competition for TV companies took place in 2 April 2002; i.e. 14 days before ratification of

Government contended that the term of detention in this case must be counted not from June 29, 1995, the date when the Applicant was put under detention, but from the date when the Convention was ratified by the Government of Russia. In bringing this argument the Stated tried to reduce the length of the detention in question by understanding quite well that it could have significant effect on the outcome of the judgment. In addition, the same contentions in a stronger form were made in its arguments regarding reasonable period of time of detention under Article 5(3) and reasonable trial period under Article 6(1); especially in considering them under the reservation of the Russian government made in ratifying the Convention. More detailed reference on this issue will be made below. It is important to mention that judge Kovler made the similar comments in his Concurring Separate Opinion attached to the judgment.¹²

Despite the above arguments of the Government, the Court took decision to include the time period before the ratification of the Convention. The Court founded this decision on the judgment of Dugoz case (Dugoz v. Greece 40907/98, par 46, ECHR 2001-II). This judgment defines the principle of “cumulative effect” of the whole period of detention on the victim. However, such definition was given under factual circumstances which differ from Kalashnikov case. In this case the term of detention is disputed not in the context of the period of time that extends before and after ratification of the Convention. In this connection, the mentioned judgment concerns to the disputed issue in Kalashnikov case only partially. It is to presume that the decision set forth in paragraph 96 of the judgment was made by Court by its discretion. This is very typical to European Court. One should not think that in case of providing new definition or declaring a new legal preposition the Court has to make reference on its previous judgment. The rule of precedence as it does not exist in this Court. The Court may always deviate from its past decisions. That’s why the Convention is considered as “living legal instrument” which is developed and improved by the decisions of the Court to meet the demands of changing circumstances and contemporary developments of life. Therefore, in this case we see how the Court develops a new approach which can be cited by the judgments that will be made after it in the context of disputes of the issue of “cumulative effect” of the conditions of detention where the time period of detention starts before ratification of the Convention and ends after ratification of the Convention.

1.5.4. Analyses of the facts and arguments of the case

The Court starts with describing the legal issue, (paragraphs 92 – 94), then declares under which principles it was going to make the judgment (paragraphs 95-96) and then follows to the assessment of the submissions of the parties (paragraphs 97-100).

In assessing the facts of the conditions of detention, the Court focused on the overcrowding of the cell by other inmates. The Applicant contended that during the time in question the number of inmates in the cell reached to 18-24. In considering that the overall space of the cell was 17sq/m, each inmate used 09-07sq/m of space. The Government submitted other facts, in particular, that the number of inmates in the cell was 11-14. However, the Government provided to evidence to support its contentions. The Government admitted that the overcrowding was a general problem in Russia and the fact that the Applicant shared his

the Convention. Therefore, it demands the Court to declare the case inadmissible. No final decision has been taken by Court yet.

¹² Under rule 74(2) of the Rule of Court, the judge who has taken part in the consideration of the case, shall be entitled to attach to the judgment either a separate opinion, which could be concurring or dissenting from the judgment, or just a statement of his dissent.

bed with 2-3 inmates during the period in question. In making its conclusions, the Court refrained from resolving the dispute between the Government and the Applicant as to the real number of prisoners in the cell, its space and the designated space for each prisoner. Rather, it ruled that according to the data presented by both parties, the average designated space to each prisoner ranges from 0,9 to 1,9 sq/m. In order to determine whether this space is more or less than the established general standards, the Court referred to the standards established by the European Committee of Prevention of Torture and Inhuman Treatment. According to the principles established by this Committee, the desired amount of space for a single prisoner must be 7sq/m. This figure was accepted by international community as an established standard and guidance in prison condition disputes. This figure became decisive, according to which the Court declared that “the given situation itself raises the issue of violation of the Article 3 of the Convention (par.97).

Other information about detention conditions submitted by Applicant only confirm the finding of the Court. Such information is, for example, the constant electric lighting of the cell, the noise in the cell caused by overcrowding of the cell, the absence of air conditioning and ventilation, conditions of the bathroom (it had no partitions and no door so that the Applicant had to use the bathroom in the presence of other inmates), other facts of infectious diseases by Applicant. The Government did not refute any of the mentioned facts. In addition, the Court took view of the decisions of Magadan City Court of April and June of 1999 by which this Court ordered to carry out medical examination of the Applicant in order to find out the effect of four year imprisonment on the Applicant and his ability to attend trial and to give testimonies. The Court also considered that even though the report of the medical examination indicated that the Applicant was in position to attend hearings and give testimonies and that there was no need for hospitalization, however, it indicated that the Applicant suffered with various medical diseases whereas at the time when he was detained such he did not have such illnesses. As a counter argument, the Government could only submit that whenever necessary the Applicant was provided medical assistance, that the conditions of detention facility of Magadan were improved and that the Government had already started a huge project of improvement of the conditions of detentions in all detention facilities in Russia. However, the Court stated that the measures of the Government could not “*detract from the wholly unacceptable conditions which the applicant clearly had to endure at the material time*” (par 99). In conclusion, the Court stated that the conditions of detention “*could cause the Applicant intense physical and mental sufferings*” (par101).

And the final question that the Court had to resolve was the issue whether the absence of deliberateness of actions could be basis for deciding the violation under Article 3. The Court referred to the judgment of *Peers v. Greece*, where the Court defined in paragraph 74, by making reference on other case, that the absence of intent could not be basis for not finding violations under Article 3 of Convention. If we compare the facts in these two cases, the conditions in *Peers* case are better than in the case of *Kalashnikov*. However, the Court stated in *Peers* case that “*the competent bodies took no measures for improving objectively unacceptable conditions of the Applicant’s detention. This omission means absence of respect towards the Applicant*” (par 75).

In considering the above-mentioned, the Court ruled that applicant's conditions of detention, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, could cause the Applicant such physical and mental severe sufferings that could amount to degrading treatment.

1.6. About the Article 5(3)

Under Article 5(3) the Applicant disputes the “reasonable” time period of detention on remand under pre-trial and trial proceedings.

The Court uses the following three-part test to assess the reasonable periods of pre-trial detentions under Article 5(3) and Article 6(1); whether the lengthy investigation of the case was caused by 1) behaviour of Applicant, 2) behaviour of the Government or 3) the complexity of the case.

In assessing the facts of the case and submissions of the Applicant and the Government, the Court decided that the Government failed to act with “due expedition”; in this context it means the pre-trial investigation was not done during reasonable time period and it was caused by the behaviour of domestic authorities – the second test above. The Court’s assessment was based on the following important circumstances of the case

1.6.1. The “reasonable” period of detention

The Article 5(3) provides guarantees to each individual be brought to trial within reasonable period of time. The Article 6(1) guarantees everyone to have the trials held within reasonable period of time. It means, the former follows the purpose to ensure that the individual won’t be kept under detention for very long period of time, while the latter ensures that person’s won’t be kept for long time under uncertainty in connection with the judgment and their fate.

The Applicant complained that the pre-trial proceedings were delayed for unduly reasons and therefore the proceedings were not conducted within reasonable time period. The Government objected by contending that the issue of the reasonable period of time must be examined in light of the reservation made by the Government of the Russian Federation at the time of ratification of the Convention. The Article 57 of the Convention gives the member state the right to make reservation to the certain provision of the Convention in a sense that specific provisions of the domestic legislation do not comply with the certain Convention norm. In this case, the point of discussion are the several provisions of the Russian Criminal Procedure Code, which provide the procedures of making decision by courts on applying the detention as a preventive measure, including determination of the time limits of the detention. For this case the most important are the reservations of the Articles 11, 89, 92 and 101 of the Criminal Procedure Code that give the courts the power to apply preventive custody measures at the trial stage up until the delivery of a judgment. Thus, the domestic law, on which the Convention does not apply, does not provide time limits on detention on remand during trial proceedings.

. However, the Court did not accept the argument of the Government by mentioning that the reservations concern the procedural norms of applying detention, as the preventive measure, while the Applicant’s dispute concern the length of proceedings.

The judge Kovler disagreed to the above finding of the Court in his Concurring Opinion. He was of the opinion that as long as the text of the reservation made express reference on Article 97 of the Criminal Procedure Code along with other articles of the same code that do not come under effect of the Article 5(3) of the Convention, then it means that the reservation is made in connection with the detention applied at pre-trial investigation period, therefore, it is applicable in this case (Article 97 provides that under special circumstances the detention

may be extended for up to 18 months). He made a remote comment that if the Court considered the text of the reservation in whole, it would most possibly come to the conclusion that the extension of the detention beyond time limits provided in Article 97 was lawful, because in the delays in proceedings were caused in several occasions by the behavior of the Applicant and his attorney. For example, in circumstances where the Applicant and his attorney stated that they were not able to examine the case materials before expiration of detention period, or where the Applicant and his attorney requested to send the case for reinvestigation and, finally, when the court took decision to send the case to reinvestigation under circumstances where the term of the detention had already expired. In this sense he found that the reservation was applicable both on the procedures of extension of detention and on the pre-trial detention.

However, as mentioned above, the Court founded that even though the Article 97 of the Criminal Procedure Code was expressly mentioned in the text of the Reservation and the context of the Article was about the time-limits of the detention, the reservation covered the procedures of application of the detention as preventive measure, while the Applicant was disputing not the procedure or its lawfulness, but just the issue of extension of the term of detention and the length of the detention.

The Court decided that the Applicant's period of detention was four years, one month and four days; from June 29, 1995 when he was put under custody until the first judgment by Magadan City Court in August 3, 1999. The Court counts the period of "right to trial" from the moment of putting the person under custody until the moment of proving his/her guilt, i.e. until the first judgment. From the context of Article 5(3) one may get impression that the expression of "reasonable period of time" applies until the moment when the pre-trial investigation is finished and the case is transferred to court for trial investigation, i.e. until the trial proceedings. Such was the position of the Court until the judgment on Wemhoff case was made in 1968. In this case the pre-trial investigation lasted from November 9, 1961 until November 9 of 1964. The victim appeared before judge first time in November 9, 1964. But the trial continued until April 7, 1965 during which the applicant continued to stay under detention. The European Commission of Human Rights (hereafter Commission)¹³ found that the "reasonable period of time" of detention should have been counted from the moment of putting the person under custody until the moment when the person first appeared before the court for trial; i.e. in this case from November 9, 1961 until November 9, 1964. To receive clarification, the Commission applied the Court asking for interpretation of the lawfulness of the detention during the above period. The judge representing Germany submitted to Court his observations that the date indicated by the Commission should have been assumed as the date when the period protected under Article 5(3) ends. The Court declared it could not accept such "restrictive" interpretation. According to Court, the term "trial" used in Article 5(3), which is indicated in the article two times, "...refers to the whole of the proceedings before the court, not just their beginning; the words "entitled to trial" are not necessarily to be equated with "entitled to be brought to trial", although in the context "pending trial"¹⁴ seems to require release before the trial considered as a whole, that is, before its opening. "concerns to the proceeding in whole" (Wemhoff v. Germany, June 27, 1968, ECHR A7, par

¹³ Before the Court's reforms of 1998 the European Court was two-level. The complaints were received first by the European Commission on Human Rights, which was taking decision on admissibility. When the complaint was declared admissible, the case was then transferred to the Court, which was examining the merits of the case and was taking a judgment.

¹⁴ The expression «before trial» mentioned in the Armenian text of the Convention in the English text appears as "pending trial"

7). (It is important to mention that in Armenian text of the Convention the term “until trial” appears in the English text literally as “pending trial). Since the English version of the expression may be interpreted with two meanings, the Court relied on the French text, where the used wording leaves no room for dualistic interpretation. According to the French text, the obligation imposed on domestic bodies to release the accused after reasonable period of detention extends up to the moment when the court makes “jugee” (judgment), by which the trial is considered finished. In addition, according to the French text, an individual must be released “pendant la procedure”, which is an expression with wider meaning and which extends both on pre-trial and trial proceedings.

In giving above interpretation, the Court relied on the principle according to which it was necessary

“...to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties” (paragraph 8). For this reason the Court stated that *“It is impossible to see why the protection against unduly long detention on remand which Article 5 (art. 5) seeks to ensure for persons suspected of offences should not continue up to delivery of judgment rather than cease at the moment the trial opens”*(same paragraph).

The Court however refrained from establishing universal principles in assessing the reasonable time period. Rather, it limited itself by stating that in each case the issue of the reasonable time period has to be decided on the basis of the facts and specifics of the given case. This is normal for Court as it states repeatedly in its decisions that its rulings are never made in abstract but on the facts of circumstances of the specific case.

1.6.2. The necessity to keep under detention on remand

The Government failed to convincingly establish that there were reasonable basis for keeping the Applicant under detention for four years, one month and four days. First, the above period was established by Court, to which the Government filed its strong objections. As in the case of the Article 3, here too the Government contended that the period of detention must be counted from the date of the ratification of the Convention. However, this objection was turned down by Court by reference made on *Mansur v Turkey* (see par 51).

The court established higher standards to determine whether reasonable basis existed for keeping the Applicant under detention on remand. This is a wide-spread approach by Court wherever the issue at stake is deprivation of liberty. The Court demanded the State to demonstrate convincingly, and based on the facts and documents of the case rather than in abstract that in this case the public interest prevailed over the right to liberty and personal immunity of the Applicant. The public interest test is a higher standard applied by Court wherever the disputed issue is of particular importance, including where at stake is deprivation of liberty by continued detention. As the Court ruled in *Jecius* case:

Continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty (par. 93)

Wherever the public of interest test applies, the burden of proof of the necessity of applying detention on remand is put on the Government. In addition, it was required to demonstrate the existence of such necessity on the respondent State in considering

- a) the presumption of innocence of the Applicant
- b) that the decisions of the pre-trial bodies in response to various motions of the Applicant to change the detention with other preventive measure (according to the Respondent, they comprised 30% of the Applicant's case file) were substantiated, whereas it was demanded to demonstrate that those decisions were reasoned, in particular, that the decision making bodies indeed had examined and set forth all the facts and arguments concerning to cons and pros of existence or absence of public interest "...justifying the departure from the rule in Article 5..." (par 114).
- c) If the detention on remand was indeed "relevant" and "sufficient", it was required to demonstrate that the national bodies had acted with "special diligence".

In summarizing the above, one may conclude that the Government was put under extremely heavy burden of proof. In one word it can be say that the Government as a respondent party in this case was invited to demonstrate that there had been not a single case during the pre-trial and trial proceedings of more than four years where the national bodies demonstrated arbitrariness.

According to the Government, the refusal to release from detention on remand was justified on the basis of the complexity of the case, as well as by reasonable danger that being under liberty the Applicant could obstruct the establishment of the truth. Such justification was given by investigator of the prosecutor office in June 29, 1995 in taking decision of application of detention as a preventive measure, as well as by Magadan City Court in 1996, 1997 and 1999 in denying the motions of the Applicant on changing the preventive measure. The Court admitted that only the decision of the investigator of 1996 was justified on the basis that the conclusions were grounded by factual circumstances. As to the subsequent decisions made in 1996, 1997 and 1999, they had identical justifications given without but reference on any factual circumstance, by which it could be substantiated, that during the given time the danger mentioned above still existed. Thus, the Court ruled that even though the justifications of the Government were "relevant" and "sufficient", however, it was only true for the beginning of the proceedings. As the case investigation developed and after passing of the certain period of time, the reasons for keeping under detention on remand were no longer "relevant" or "sufficient", or, as Court mentioned, they lost such "characteristics" of the relevance and sufficiency.

The Judge Kovler in his Concurring Opinion expressed the opinion that the Court had ignored the margin of appreciation (discretionary power) given to national authorities in determining the necessity of applying detention on remand. The margin of appreciation proceeds from generally recognized international rules, according to which the role of domestic bodies for the protection of human rights differs from the role of international bodies. The protection and enforcement of norms guaranteed under Convention is first imposed on national authorities. The European Court adopted the same principles stipulated by its previous decisions. According to this principle, in choosing the manners and methods of limiting certain rights of individuals, the member states is given discretionary power, which operates along with the supervision exercised by Court. Or, as Court used to mention,

the margin of appreciation “*goes hand in hand with European supervision*”.¹⁵ In the present case, according to judge Kovler, the Court looked at the pre-trial and trial detentions as one general process, whereas it was necessary to see them as two different processes. If the Court exercised such approach, it would come to conclusion that the time of detentions were justified. In particular, in the pre-trial period the detention lasted eleven months and twenty two days, which does not exceed the maximum 18 months provided under Article 97 of the Criminal Procedure Code. As to the period of detention during trial proceedings, the length of this process was partially caused by the behavior of the Applicant.

One should mention that the objections of the Government, including those of judge Kovler were not made in the context of the three conditions proposed by Court to the Government and mentioned above. The question that the Court gave to the Government was made very clear; it was necessary to show that the necessity of extension of the detention was caused by prevailing public interest and that all the decisions of pre-trial and trial bodies about extension of detention terms were reasoned. However, the Government failed to give direct answers to these questions.

1.6.3. The behavior of the Government

The Court examined in detail all the facts of conducting the proceedings by the Government. First, the purpose of it was to find out whether the lengthy proceedings was caused by negligence to conduct the proceedings with “due expedition”. Second, as mentioned above, it was necessary to establish whether the national bodies acted with “due diligence”, because the Applicant contended that that the investigation lacked quality, that the pre-trial bodies made attempts to artificially increase the charges in the indictment and that the supervisory bodies failed to exercise proper supervision over the proceedings. In order to substantiate these contentions, the Applicant referred to the findings of Magadan City Court in the judgment of August 3, 1999. The main argument of the Government was that the lengthy proceedings were caused by complexity of the case and by the behavior of the Applicant; his numerous motions and complaints, which constituted the one third of the case file.

The decisions of Magadan City Court of January 29, 1999 and Magadan Regional Court of March 15, 1999 played essential role. These judgments confirmed that the proceedings were done with numerous violations and that the length of proceedings could not be justified by the complexity of the case. The Court took into consideration also the judgment of August 3, 1999 of Magadan City Court, by which only one out of nine charges brought against the Applicant was confirmed. This facts speaks in itself about the arbitrariness committed by pre-trial bodies.

The Court took into consideration also the gaps between the trial hearings, which are presented in detail in paragraph 120 of the judgment. In comparing the facts the Court found that only in two cases the delays in the proceedings were caused by Applicant; in the case when the Applicants lawyer had not appeared in the trial and where the case was transferred to another court by the request of the Applicant. Thus, the actions of the Applicant did not substantially delay the proceedings. In the rest of the cases the unjustified delays were caused by courts. In order to be convinced in this, it is merely enough to examine the time periods between each trial hearings, including the time periods of answering to the letters and motions of the Applicant and the transfer of the case from one judge to the other.

¹⁵ Handyside v. UK (1976) 1 EHRR 737, par. 47

In considering the above, the Court found that the pre-trial investigation and trial investigation of the case were not done with “due expedition” on the basis that the pre-trial investigation was done with substantial due process violations, while the trial examination was done with substantial delays.

1.7. About Article 6(1) of the Convention

1.7.1. The contested period of trial proceedings

As indicated above, the right to trial within reasonable period is guaranteed both by Articles 5(3) and 6(1) which overlap. Thus, the protection extends not to the end of the pre-trial proceedings and until the court trial, but to the whole period until the first judgment by court. However, the calculation of the “reasonable time” is done differently in these two cases. Under Article 5(3) in determining the reasonable period of detention the time counts from the moment of putting the person under custody until the moment when the guilt is first established or the charges acquitted – the first judgment. The detention after conviction is not covered by Article 5(3)¹⁶. Under Article 6(1), the “reasonable period” counts from the moment when the person is charged¹⁷, and ends up when convicted or the verdict of acquittal is done. In Wemhoff case it was defined that since the purpose of the article is to ensure that the person won’t stay under detention until his/her guilt is decided, then no doubt in applying this norm it is necessary to consider the period, which ends up at least until the moment when the person is conviction or acquitted. The Court provided this approach in the following way:

“There is furthermore no reason why the protection given to the person concerned against the delays of the court should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared”¹⁸

Thus, in considering the above mentioned the Court decided in Kalashnikov case that if under Article 5(3) the term of detention was four year, one month and four days, then under Article 6(1) the term of detention was five years, one month and twenty three days; from February 8, 1995 when criminal proceedings were initiated until March 31, 2000 when the Magadan City Court took the second judgment.

The Court also considered the fact that even though the Applicant’s conviction was made by the judgment of September 3, 1999, new charges were brought against him in September 30, 1999, which was done based on the same factual basis and within the frames of the same criminal case. The Court noted in this regards that the initiated new case had the same case number as the original case brought in 1995. Therefore, the Court considered the two cases as one proceeding and considered the judgment that finalized the second trial proceedings.

1.7.2. The “reasonable” period of time

In order to establish whether the trial was done within reasonable period, the Court used the above mentioned triple test, i.e. the behavior of the Applicant, the behavior of the Government and the complexity of the case. The Court had already made considerable

¹⁶ Wemhoff v. Germany (1979-80) EHRR par 55

¹⁷ Ekl v Germany (1983) 5 EHRR 1

¹⁸ Wemhoff judgment, par 18

examination of this issue under Article 5(3). The arguments of the parties were mainly the same. The Court took into consideration the fact that even though the criminal case concerned financial fraud, which in itself required a complex investigation and involved many witnesses, however, absolutely no investigation was conducted from May 7, 1997 when the case was adjourned until April 15, 1999 when the trial resumed. Here too, as in the case of Article 5(3), the Court based its decision by the findings of the national court that the case was in fact not complex and that the volume of the case could not be the reason for lengthy proceedings. And finally, in considering that the liberty of individual was at stake, the national courts must have had exercised “due diligence” to expedite the trial. In this context the surprising was that after keeping the Applicant under detention for more than four years, the pre-trial bodies suddenly decided to bring new charges against him. Moreover, the charges were brought under the same factual basis by even not caring to change the case number. All these facts speak about the absence of “due diligence” in conducting the examination. Based on the above, the Court decided that the Article 6 of the Convention was violated.

1.7.3. The compatibility of Armenian legislation and practice to the ECHR norms of “detention on remand”.

The Armenian domestic legislation does not provide guarantees to persons detained under criminal charge from violations of unreasonably lengthy proceedings in pre-trial and trial stages. Such situation may arise from the certain norms in Armenian Criminal Procedure Code that do not clearly provide whether in certain periods the detention was permitted by court or by any other body, thus amounting to “unlawful” detention in the sense of Article 5(1) of the Convention. In addition, the certain gaps in the law exclude the possibility to regulate the limits of detention during trial proceedings. The above mentioned flaws in the Criminal Procedure Code put detainees under potential risk of suffering from unreasonable periods of detention during pre-trial and trial proceedings.

While the Armenian Criminal Procedure Code provides time limits in putting the person under detention on remand, in his assessment of the compatibility of Armenian legislation to the norms of ECHR Article 5, the judge of Chamber of Criminal and Military Cases of the Court of Cassation of Armenia Mr. David Avetisyan provides that the Armenian legislation and practice in certain areas provide possibility to keep the person under detention on remand without the decision of the competent court in the period between the pre-trial and trial stages of the proceedings.¹⁹ According to Judge Avetisyan, the Article 138 Part 3 contradicts the Article 18 of the Constitution of Armenia and Article 11 of the Armenian Criminal Code.²⁰

The Article 18 of the Constitution provides:

Everyone has the right to freedom and inviolability. No one may be arrested or searched in any other way than as provided by law. He can be detained only by court decision through a procedure stipulated by law.

¹⁹ The Fundamental Approach of the European Court and RA Legislation to the Right to Liberty and Personal Immunity and the Trends of Development of This Right; Article 5 of the European Convention of Human Rights and Fundamental Freedoms. D.Z Avetisyan, Yerevan 2004.

²⁰ Ibid at pg. 132

Thus, the court supervision over decisions on detention is a Constitutional norm in Armenia. The Article 11 (3) of the Criminal Procedure Code provides additional guarantee that only the detentions authorized by courts are considered lawful:

Arrest, keeping in custody, or forcible placement of a person with a medical or correction institution shall be allowed only by warrant of the court. A person may not be subjected to detention for more than 72 hours unless a relevant warrant is issued by the court.

However, the Article 138(3) provides the following:

...The term of the detainment executed at the time of the pre-trial criminal case shall be terminated on the day when the prosecutor forwards the case to the court or when the accused and his attorney get familiarized with the materials of the case, or when the decision about the execution of the arrest becomes annulled.

In considering that there is a gap between the moment when the prosecutor forwards to case to the court and when the defendant and his attorney “get familiarized” with the materials of the case (or when the decision about execution of the arrest becomes annulled), and that the gap may amount to days, weeks and even months in exception cases, the Judge Avetisyan provides that during the period of introducing himself/herself to the materials of the case, the defendant still stays under defendant detention which has been initiated by the prosecutor and authorized by court but which has already suspended under the above provision. In addition, the mentioned gap may continue and get longer automatically or arbitrarily when other defendants and their defense attorneys in the same case desire to introduce themselves to the materials of the case.

As a confirmation to the incompatibility of the above practice and norm to the ECHR norms, judge Avetisyan makes reference to the ECHR judgment in Jecius case.²¹ In this case the Court examined the incompatibility of Lithuanian domestic norms and practice on making decisions on detention on remand. In particular, that from 4 June to 31 July 1996 no order was made by a judge or prosecutor authorising the applicant's detention on remand. The Courts role was, in considering all circumstances and characteristics of this case, to determine whether the applicant's detention during that period was incompatible with the domestic law then in force (Articles 10 and 104 of the Code of Criminal Procedure until 21 June 1996, and Articles 10 and 104-1 of the Code after 21 June 1996). The Government objected by providing that during the disputed period (57 days) the Applicant’s detention was “prescribed by law” under Article 226(6) of the Criminal Procedure Code of Lithuania. The Court noted the fact that three different domestic bodies – the prosecutor office, the President of the Criminal Division of the Supreme Court and the Government (with its submission to the Court) had presented three different explanations to the question as to which part of the applicant's detention was covered by the above article in order to justify that the detention was “prescribed by law”. By avoiding to be involved in the interpretation of the domestic law, which the Court always states is not the matter of its jurisdiction, the Court stated that the failure by domestic authorities to provide identical interpretation in itself demonstrates the vagueness of the above norm “...enough to cause confusion even amongst the competent State authorities” .(par 59) On this basis, the Court ruled that the norm was incompatible with the requirements of quality of law (the test of the legal norm to be “clear” and

²¹ Jecius v. Lithuania (Application 34578/97) 31 July 2000.

“accessible” enough to enable the citizens to foresee their actions to avoid liability). It therefore lacked the requirements of “lawfulness” under Article 5 § 1 of the Convention.

The Court in this case referred to Baranowski case, which provides stronger justification for the findings of the Court in Jecius case. According to paragraph 62 of the judgment,

“...a practice of keeping a person in detention without a specific legal basis, but because of a lack of clear rules governing the detainee's situation, with the result that a person may be deprived of his liberty for an unlimited period without judicial authorisation, is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see Baranowski cited above, §§ 54-57).”

On the basis of this conclusion, the Court decided that the applicant's stay under detention for the given period on the basis of the Article 226 § 6 of the Code of the Criminal Procedure was not prescribed by law within the meaning of Article 5 § 1 of the Convention.

In comparing the facts of the Jecius case and the findings of the European Court, including the above citation from Baranowski case with the legislation and practice of Armenia, one can definitely conclude that the uncertainty that the Article 138(3) of the RA Criminal Procedure Code may cause to the defendant detained under this norm clearly may arise to the violation of Article 5(3) and 5(1) of the Convention. The same situation was in Russia where under its Reservation to applicability of Article 5(3) to certain provisions of the Criminal Procedure Code, under which the courts were conferred with the power to apply preventive custody measures at the trial stage up until the delivery of a judgment without any time limits. This Reservation will be in force as long as its necessary “*to introduce amendments to the Russian federal legislation which will completely eliminate the incompatibilities between the said provisions and the provisions of the Convention*”.

However, one should never forget that the Court never makes judgments in abstract and that the facts and the specifics of the given case are very decisive. In this sense, the Convention guarantees “*...not rights that are theoretical and illusory but rights that are practical and effective...*” (Handyside judgment par. 33) Under circumstances described above when the defendant in Armenia continues to stay under detention while the case is transmitted from the pre-trial body to the court and where under Article 138(3) the pre-trial detention was supposed to have been suspended, the continued stay under detention before the trial may not necessary arise to violation if the continued detention during the mentioned “gap” is due to procedural flaws, the period is short and the competent authorities show “due diligence” and “good faith” in expediting the proceedings and the manner of conducting the proceedings. Otherwise, it would give effect to speculative claims to the Court. As the Court ruled in Jecius case,

“...A period of detention is, in principle, “lawful” if it is based on a court order. Even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see the Benham v. the United Kingdom judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, pp. 753-54, §§ 42-47;...”

On the basis of the above finding, the Court ruled in Jecius case that even though the competent court did not expressly state in its decision that it had “ordered” a new detention, including that it did not specify which type of remand it ordered but merely stated that the remand should “remain unchanged”, including also the fact that the term of the applicant's detention had already expired, in considering the whole context of the decision and specifically that it stated expressly that the Applicant “was to remain in custody”, it must have been clear to all the parties that this decision was the decision about detention on remand. Therefore, the Court found that the domestic court acted in good faith and did not fail to apply the relevant domestic legislation correctly.

Judge Avetisyan goes further in his book by providing that the lack of Article 138(6) of the Criminal Procedure Code of RA to provide time limits of detention period during trial proceedings also arise violation of Convention norms of Articles 5(3) and 6(1). The Article 138(6) provides:

The maximum period of arrest during the criminal proceeding of the case in court is not limited.

Thus, under Armenian domestic law the defendant may be kept under detention until the judgment, and in case if the proceedings are unreasonably lengthy, no limitation can be put on the detention on remand. This situation contradicts the ECHR norms of “reasonable period of trial” under Article 6(1) stipulating that the criminal charges must be determined within a reasonable trial period.

In Kalashnikov case the Applicant argued the reasonable period without pointing on arguing the established practice in Russia where the pre-trial bodies make decisions on detention without specifying the time limits. From the facts of the case it appears that in least in one case “*the applicant's detention was subsequently extended by the competent prosecutor on unspecified dates*”.

1.8. About the right to just satisfaction

The compensation claim is submitted under Article 41 of the Convention, according to which if the European Court finds violation of the Convention but the domestic legislation does not provide possibility for full reparation, the Court may provide compensation to the victim. In addition to Article 41, the right to compensation is provided also by Article 5(5) for violations of the norms of Article 5. The difference between these two articles is that the Article 5(5) appears as the right given to the victim to demand compensation, while the

Court's position regarding the Article 41 is discretionary. Instead of developing specific means of calculating damages awards, for example, daily rate for unlawful detention, the Court applies general principles in assessing just satisfaction. The legal effect of the judgment is to place a duty on the respondent state to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. In some cases the Court may refuse the applicant to provide compensation by declaring that the judgment is in itself already a “just satisfaction”.

The respondent state is usually required to pay the compensation within three months of the date of the judgment. The Court usually rules to pay the compensation with interest rate on any sums not paid within that time.

The just satisfaction claim may include compensation for both pecuniary and non-pecuniary loss and legal costs and expenses. In the claim for pecuniary damage it is important to show the causal effect due to violations of the those norms which the Court admitted. The claim of Kalashnikov for pecuniary award was rejected on the basis that the Applicant failed to demonstrate that the losses occurred due to violation of the Convention rights declared by Court. For example, the Applicant requested 130,559 USD for damages against the salary that he did not received as the President of the bank while being under detention. The Court rejected this other similar claims on the basis that the claimed losses did not occur directly from the violations established by Court (length of proceedings), i.e. causal effect. Had the Applicant have disputed the lawfulness of his detention and the Court had declared violation, the compensation claim for the mentioned violation would have been approved.

Awards for non-pecuniary damages may include elements in respect of pain and suffering, anguish and distress, trauma, anxiety, frustration, feelings of isolation, helplessness and injustice and for loss of opportunity, loss of reputation or loss of relationship. The decision about the amount of non-pecuniary award is fully decided on the basis of discretion, based on its past decisions and is made on the basis of the equality. If the victim was deprived of liberty by mistake, the amount of on non-pecuniary award is much higher. In Kalashnikov case this element was missing because under domestic court decision he was imprisoned for money fraud and his guilt was established by domestic court.

For the costs and expenses in bringing the case to ECHR, the applicant must show

- a) that the costs are actually incurred, and
- b) that the costs are necessarily incurred, and
- c) that they are reasonable as to quantum

In addition, the Applicant may claim the costs and expenses for bringing the case before domestic courts. The Court in most cases rejects such claims. To be successful, the applicants must show that those expenses and costs were made in order to redress the Convention violation in domestic level.

In the present case, the Applicant submitted the following claims

1. USD 130,599 for non-receiver of his salary as the President of the bank during the period under detention
2. USD 203,000 for non-receiver of his salary from another company, which fired the Applicant upon receiving information about his arrest
3. USD 500,000 for loss of property of the company
4. USD 8,600 for his car
5. USD 11,734,376 for loss of expected income from his shares that he could not sell according to market rates in 1995
6. USD 436,226 for loss of his shares deposited in another company, which was declared bankrupt in 1997.

Thus, the total amount of pecuniary damage amounted to USD 13,012,702. It was obvious that the amount of the claim was excessive even in comparing with the past decisions of the Court on compensation claim. In addition, the claims brought under loss of “expected” profit are usually regarded by Court as “speculative”.

The Court stated that it could provide pecuniary damage award only where its convinced that the loss was caused by the declared violation. Accordingly, the Court decided that, first, the Applicant was convicted and the period of his pre-trial detention was fully deducted from his sentence term. On this basis the Court rejected the Applicant’s first claim. To the rest of the claims under pecuniary damage, the Court stated that it could not see any causal link between the claimed damages and the violations which the Court defined. Indeed, the Applicant’s detention was lawful on the basis of which the Applicant was convicted by the competent court. Not the lawfulness, but the length of the proceedings and detention was established by European Court to have been violated. Subsequently, the claimed damages did not occur due to his unreasonable periods of pre-trial and trial investigation but because of his detention at all, which was not the violation declared by court. Consequently, the causal link between the violations established by Court and the claimed damages was missing. On the basis of the above conclusions, the Court decided to reject the pecuniary damages claim of the Applicant in full.

For the non-pecuniary damage the Applicant submitted the claim of 9,636,000 French Frank. The Government objected by declaring it excessive. The Court used its discretion and significantly cut the claimed amount. It stated that the Applicant having been under lengthy detention could have been exposed to anxiety, uncertainty, which could not be compensated solely by the judgment. On the basis of the principle of equality and by its own discretion the Court decided to award the Applicant the sum of 5,000 Euro.

With respect to costs and expenses for arguing the case before domestic courts and the European Court, the Applicant provided USD 40,000. The Government objected against the this amount in stating that the requested sum is not proportional to the lawyers fees that work in remote regions of Russia. In addition, the Government was of the opinion that the Applicant could not be compensated for the expenses in connection with the investigation of the case because the Applicant was found guilty and was convicted to imprisonment. The Court relied on the above mentioned principles, in particular, that the expenses were necessarily incurred and actually incurred. The Court also stated that it will consider wither the overall amount is reasonable. It is obvious from the volume of the case materials that he Applicant had run considerable expenses and costs by submitting various motions in attempting to convince the domestic authorities to change the preventive measure and release him. However, the Court also considered that the Applicant failed to present sufficient documentary proof about this part of his claim. It is also important that the expenses “*did not exclusively relate to the breaches of Articles 3, 5 § 3 and 6 § 1 of the Convention*” (par 146). Finally, using its discretion the Court decided that the Applicant most possibly had run some expenses and decided to award him compensation in the amount of 3,000 Euro.