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EGMR Nr. 11364/03 - Urteil vom 9. Juli 2009 (Mooren v. Germany)

Rechtmäßigkeit der Untersuchungshaft (rechtsfehlerhafter Haftbefehl; Recht auf eine zügige Entscheidung über die Rechtmäßigkeit; Bedingungen einer Heilung; Prinzip der Rechtssicherheit: Ausnahmen gegenüber dem Wortlaut einer prozessrechtlichen Norm; willkürliche Zurückweisung der Entscheidung im Rahmen der Beschwerde; abweichendes Sondervotum Rozakis u.a.); Recht auf Akteneinsicht (Waffengleichheit in der Haftprüfung, Haftbeschwerde: Ungenügen einer mündlichen oder schriftlichen Zusammenfassung; Anforderungen an eine Heilung; Gefährdung des Untersuchungserfolges) und Recht auf ein faires Verfahren; Zulässigkeit der Individualbeschwerde (Ausschöpfung nationaler Rechtsbehelfe: Präklusion des Einwandes der Regierung; Effektivität nationaler Rechtsbehelfe; Verlust der Opferstellung).

Art. 5 Abs. 1, Abs. 2, Abs. 4, Abs. 5 EMRK; Art. 6 Abs. 1, Abs. 3 lit. b, lit. c EMRK; Art. 34 EMRK; Art. 35 EMRK; § 147 StPO; § 114 Abs. 2 StPO; § 117 Abs. 1 StPO; § 309 Abs. 2 StPO

Leitsätze des Bearbeiters

1. Nicht jeder formelle Fehler in einem nationalen Haftbefehl macht eine vollzogene Untersuchungshaft im Sinne des Art. 5 Abs. 1 EMRK rechtswidrig (Verneinung einer rechtswidrig bzw. willkürlich vollzogenen Untersuchungshaft gemäß Art. 5 Abs. 1 lit. c EMRK bei einem national als fehlerhaft aber wirksam betrachteten Haftbefehl mit neun zu acht Stimmen).

2. Zum Begriff der „willkürlichen Freiheitsentziehung" gemäß Art. 5 Abs. 1 lit. c EMRK.

3. Das von Art. 5 Abs. 4 EMRK gewährte Haftprüfungsverfahren muss dem Recht auf Gehör entsprechen und die Waffengleichheit unter den Beteiligten wahren. Die Waffengleichheit ist nicht gewährleistet, wenn dem Verteidiger des Inhaftierten der Zugang zu den Dokumenten der Verfahrensakte verweigert wird, die für eine effektive Verteidigung gegen die Inhaftierung erforderlich sind. Das Bedürfnis zu einer effektiven Strafverfolgung darf auch im Ermittlungsverfahren nicht um den Preis erheblicher Einschränkungen der Verteidigungsrechte verfolgt werden. Informationen, die für die Beurteilung der Rechtmäßigkeit einer Inhaftierung erforderlich, sind dem Verteidiger des Beschuldigten auf eine angemessene Art und Weise zugänglich zu machen.

4. Diesen Anforderungen genügt es auch in Steuerstrafverfahren nicht, wenn dem Verteidiger eine schriftliche Zusammenfassung der für die Beurteilung der Rechtmäßigkeit wesentlichen Informationen aus der Verfahrensakte vorgelegt wird, die von der Staatsanwaltschaft (BuStra/StraBu) verfasst worden ist und die zugrunde liegenden Beweismittel nicht angibt. Dies gilt selbst dann, wenn dem Beschuldigten - nicht aber zugleich dem Verteidiger - Teile der zugrunde liegenden Beweismittel bekannt sein dürften. Auch mündliche Zusammenfassungen zu den angenommenen Fakten und Beweismitteln seitens des Gerichts genügen den Anforderungen nicht.

5. Eine spätere Anerkennung durch ein Gericht, dass das Recht auf Akteneinsicht zunächst verletzt wurde, auf Grund derer die Akteneinsicht nachträglich gewährt wurde, heilt den Verstoß jedenfalls dann nicht, wenn sie selbst nicht zügig erfolgt: Der Schutz der Rechte des Art. 5 EMRK kann nur effektiv sein, wenn seinen Garantien zügig entsprochen wird.

6. Art. 5 Abs. 4 EMRK garantiert ein Recht auf eine zügige Entscheidung über die Rechtmäßigkeit einer Inhaftierung und eine zügige Anordnung der Freilassung, wenn sich die Inhaftierung als rechtswidrig erweist. Die Frage, wann das Recht auf eine zügige Entscheidung respektiert worden ist, muss unter Einbeziehung der gesamten Umstände des einzelnen Falles beantworten werden und anhand eines Standards entschieden werden, der angesichts der Betroffenheit der persönlichen Freiheit strikt sein muss. Zum Einzelfall einer Verletzung, die wesentlich durch eine verzögerte Rückverweisung an das zuständige Gericht entstanden ist.

7. Beruft sich eine Regierung auf die Nichtausschöpfung nationaler Rechtsmittel hat sie den EGMR zu überzeugen, dass die betroffenen Rechtsmittel zur fraglichen Zeit theoretisch und praktisch zugänglich waren, realistische Erfolgsaussichten hatten und hinsichtlich der Beschwerden des Beschwerdeführers Abhilfe hätten schaffen können. Zum Ungenügen des Verfahrens nach § 147 Abs. 5 StPO hinsichtlich einer Beschwerde wegen der Rechtswidrigkeit einer Untersuchungshaft.

Entscheidungstenor

Die Revision des Angeklagten gegen das Urteil des Landgerichts Stuttgart vom 14. November 2008 wird als unbegründet verworfen.

Der Beschwerdeführer hat die Kosten des Rechtsmittels zu tragen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1963. At the date the application was lodged, he was living in Mönchengladbach. 1

A. The District Court's detention order

10. On 25 July 2002 the applicant was arrested. 2

11. On the same day the Mönchengladbach District Court ordered his detention on remand after hearing representations from him. The applicant was assisted from this point on by counsel. In a detention order running to some one and a half pages, the District Court found that there was a strong suspicion that the applicant had evaded taxes on some twenty occasions between 1996 and June 2002, an offence punishable under various provisions (which were specified in detail) of the Tax Code, the Turnover Tax Code, the Income Tax Code and the Regulations on Trade Taxes. He had been working as a self-employed commercial agent for fifteen different firms in Germany (whose names were listed in detail in the order) since 1994. He had also been running a telephone service since 2000; in 2001 a company, TMA Aachen, had paid him commission amounting to 124,926.22 Deutschmarks (DEM). The court found on the basis of the documents before it that there were grounds for suspecting the applicant of having evaded turnover taxes of 57,374 euros (EUR), income taxes of EUR 133,279 and trade taxes of EUR 20,266. 3

12. Noting that the applicant, who had availed himself of the right to remain silent, was strongly suspected of tax evasion on the basis of business records that had been seized when his home was searched, the District Court decided that he had to be placed in pre-trial detention because of the danger of collusion (Verdunkelungsgefahr - see Article 112 § 2 no. 3 of the Code of Criminal Procedure, cited in paragraph 45 below). It also noted that the documents seized were incomplete, so that there was a risk that the applicant, if released, might destroy the missing documents or conceal further business transactions and accounts. 4

B. The District Court's review of the detention order

13. On 7 August 2002 the applicant, represented by counsel, lodged an application for review of his detention order (Haftprüfung) with the Mönchengladbach District Court. His counsel also requested access to the case file, which he argued he had a right to inspect in order to apprise himself of all the facts and evidence on which the detention order and, in particular, the strong suspicion that an offence had been committed were based. He also pointed out that domestic law prohibited the District Court from considering facts and evidence to which defence counsel had been refused access pursuant to Article 147 § 2 of the Code of Criminal Procedure (see paragraph 52 below). 5

14. On 12 August 2002 the Mönchengladbach Public Prosecutor's Office informed the applicant's counsel that he was being refused access to the case file pursuant to Article 147 § 2 of the Code of Criminal Procedure as it would jeopardise the purpose of the investigation. It added, however, that the public prosecutor in charge of the case was prepared to inform counsel orally about the facts and evidence at issue. The applicant's counsel did not take up that offer. 6

15. On 16 August 2002 the Mönchengladbach District Court heard representations from the applicant and his defence counsel. The applicant argued that there was no risk of collusion or of his absconding. Should the court nevertheless consider that he might abscond if released he was ready to comply with any conditions imposed by the court, such as handing over his identity papers. The applicant's counsel complained that he had still not had access to the case file. 7

16. By an order of the same day, the Mönchengladbach District Court, which had before it the case file of the proceedings, upheld the detention order. It found that there was still a risk that, if released, the applicant would tamper with factual evidence or interfere with witnesses. The applicant had consistently sought to conceal his true place of residence and other personal details from the authorities and had acted with intent to mislead which, in the particular circumstances of the case, proved that there was a danger of collusion. 8

C. The Regional Court's review of the detention order

17. Following the applicant's appeal, which was lodged on 16 August 2002 and was followed up by detailed reasons on 19 August 2002, the Mönchengladbach Regional Court informed the applicant in a letter dated 27 August 2002 that it considered that the risk of his absconding could serve as a ground for his continued detention. As to his counsel's request for access to the case file, it stated that he should be informed orally about the content of the file in the first instance. 9

18. In a letter dated 2 September 2002, the applicant contested that view. He claimed, in particular, that in his case mere oral information about the content of the case file would not be sufficient. 10

19. On 9 September 2002, after hearing representations from the Public Prosecutor's Office and considering the case file, the Mönchengladbach Regional Court dismissed the applicant's appeal against the District Court's decision dated 16 August 2002. It found that there was a strong suspicion that the applicant had evaded income, turnover and trade taxes. Furthermore, there was a danger of his absconding within the meaning of Article 112 § 2 no. 2 of the Code of Criminal Procedure (see paragraph 45 below), as the applicant had connections in foreign countries and faced a heavy sentence. 11

20. In view of defence counsel's refusal to accept the offer made by the Public Prosecutor's Office to explain the content of the case file orally, the Regional Court found that it was impossible to assess whether the information given in this manner would be sufficient. At that stage of the proceedings, however, counsel for the defence could not claim to be entitled to unlimited access to the complete case file. 12

21. The Regional Court's decision was served on the applicant's counsel on 16 September 2002. 13

D. The Court of Appeal's review of the detention order

22. On 16 September 2002 the applicant, represented by counsel, lodged a further appeal against the detention order. He again claimed that he had a constitutional right to be given access to the facts and evidence on which the detention order was based. 14

23. On 17 September 2002 the Mönchengladbach Regional Court decided, without giving further reasons, not to vary its decision of 9 September 2002. On 18 September 2002 the Mönchengladbach Public Prosecutor's Office, which was in possession of the case file, drafted a report which was sent to the Düsseldorf Chief Public Prosecutor's Office with the file the next day. 15

24. On 26 September 2002 the Chief Public Prosecutor's Office, in its submissions to the Düsseldorf Court of Appeal, stated that it was not prepared to give the applicant access to the case file as it was sufficient for the applicant to be notified of the Düsseldorf Tax Fraud Office's overview of the amount of his income and amount of the taxes evaded in the years in question. The submissions and the case file reached the Düsseldorf Court of Appeal on 2 October 2002. 16

25. On 2 October 2002 the applicant sent further observations to the Düsseldorf Court of Appeal. 17

26. On 9 October 2002 the applicant, who had been sent the submissions of the Chief Public Prosecutor's Office on 7 October 2002, contested its arguments. He stated that the overview in question was merely a conclusion of the Tax Fraud Office the merits of which he could not examine without having access to the documents and records on which it was based. 18

27. On 14 October 2002 the Düsseldorf Court of Appeal, on the applicant's further appeal, quashed the District Court's decision dated 16 August 2002 and the Regional Court's decision dated 9 September 2002 upholding the applicant's detention and remitted the case to the District Court. 19

28. The Court of Appeal, which had the investigation file before it, found that the detention order issued by the District Court on 25 July 2002 did not comply with the statutory requirements and that the decisions taken in the judicial review 20

proceedings by the District Court on 16 August 2002 and by the Regional Court on 9 September 2002 (but not the detention order of 25 July 2002 itself) therefore had to be quashed. It noted that Article 114 § 2 no. 4 of the Code of Criminal Procedure (see paragraph 46 below) required the facts that established strong suspicion that the accused had committed an offence and that formed the basis for his detention to be set out in the detention order. Moreover, in order to comply with the constitutional rights to be heard and to a fair trial, the facts and evidence on which the suspicion and the reasons for the defendant's detention on remand were based had to be described in sufficient detail to enable the accused to comment on them and defend himself effectively. The facts and evidence had to be set out in greater detail in the detention order in cases in which defence counsel had been denied access to the case file under Article 147 § 2 of the Code of Criminal Procedure.

29. The Court of Appeal noted, however, that in its decisions on the applicant's detention the District Court had confined itself to noting that the applicant was strongly suspected of tax evasion “on the basis of the business records seized when his home was searched” when it should, at minimum, have summarised the results of the evaluation of those records in order to enable the accused to oppose the decision on detention by making his own submissions or presenting evidence. This defect had not been remedied in the course of the subsequent decisions on the applicant's continued detention. As counsel for the defence had also been refused access to the case file under Article 147 § 2 of the Code of Criminal Procedure, these defects amounted to a denial of the right of the accused to be heard. 21

30. The Court of Appeal declined to take its own decision on the applicant's detention under Article 309 § 2 of the Code of Criminal Procedure (see paragraph 50 below) or to quash the detention order of 25 July 2002. Referring to the civil courts' case-law on that issue (namely, two decisions of the Karlsruhe Court of Appeal, no. 3 Ws 196/00 and no. 3 Ws 252/85, and to a decision of the Berlin Court of Appeal, no. 5 Ws 344/93 - see paragraph 48 below) it considered that the District Court's detention order was defective in law (rechtsfehlerhaft), but not void (unwirksam). The defect could be remedied in the course of the judicial review proceedings (see Hamburg Court of Appeal, no. 2 Ws 124/92, and Berlin Court of Appeal, no. 5 Ws 344/93 - paragraph 48 below). It stated that it would only quash a detention order if it was obvious that there was either no strong suspicion that the accused had committed an offence or that there were no reasons for the arrest, but that that was not the position in the applicant's case. It was for the District Court to inform the accused of the grounds on which he was suspected of having committed an offence and to hear representations from him on that issue (see also Berlin Court of Appeal, no. 5 Ws 344/93, cited at paragraph 51 below). Should the Public Prosecutor's Office persist, in the interest of its investigations, in not informing the accused of the reasons for his detention, the detention order would have to be quashed. 22

31. As a consequence, the applicant remained in custody. 23

E. Fresh proceedings before the District Court

32. On 17 October 2002 the Mönchengladbach Public Prosecutor's Office requested the District Court to issue a fresh, amended detention order against the applicant. 24

33. On 29 October 2002 the Mönchengladbach District Court again heard representations from the applicant, his defence counsel, the Public Prosecutor's Office and an official in charge of investigations at the Düsseldorf Tax Fraud Office on the applicant's application for judicial review of the detention order. The applicant's counsel was given copies of four pages of the voluminous case file containing the overview by the Düsseldorf Tax Fraud Office of the amount of the applicant's income and of the taxes he was alleged to have evaded between 1991 and 2002. Relying on the applicant's rights to be heard and to a fair trial, the applicant's counsel complained that he had not been granted access to the case file before the hearing. 25

34. The Mönchengladbach District Court then issued a fresh order, running to four pages, for the applicant's detention. It stated that there was a strong suspicion that the applicant had evaded taxes on some twenty occasions between 1991 and June 2002. Listing in detail the applicant's income from his various activities as a self-employed commercial agent for six different firms and as marketing director of the TMA Aachen company and the amounts of tax payable in each of the years in question, the District Court found that there was a strong suspicion that he had evaded turnover taxes of DEM 125,231.79, income taxes of DEM 260,025, solidarity taxes of DEM 15,240.11 and trade taxes of DEM 36,930. It based its suspicion on documents whose content was explained by a tax official present at the hearing, witness statements of the owners of the firms the applicant was working for, the applicant's contracts of employment and wage slips and commission statements that had been issued by the firms. 26

35. The District Court further found that there was a risk of the applicant's absconding (a ground for detention under Article 112 § 2 no. 2 of the Code of Criminal Procedure) as he faced a lengthy prison sentence which could possibly no longer be suspended on probation, had not notified the authorities of his place of residence for a number of years and 27

had claimed that he was living in the Netherlands.

36. By an order of the same day, the Mönchengladbach District Court decided to suspend the execution of the detention order on condition that the applicant (who in the meantime had complied with his duty to inform the authorities of his address) informed the court of every change of address, complied with all summonses issued by the court, the Public Prosecutor's Office and the police, and reported to the police three times a week. However, the district court did not order the applicant's immediate release as the Public Prosecutor's Office had immediately lodged an appeal. 28

F. Renewed proceedings before the Regional Court and further developments

37. On 7 November 2002, after hearing representations from the applicant and the Public Prosecutor's Office, the Mönchengladbach Regional Court dismissed the applicant's appeal against the detention order. It likewise dismissed the appeal lodged by the Public Prosecutor's Office against the decision to suspend the execution of the detention order on the additional conditions that the applicant hand over his identity papers to the Public Prosecutor's Office and deposit EUR 40,000 as security. 29

38. Having deposited the security, the applicant was released from prison on 7 November 2002. 30

39. On 8 November 2002 the applicant lodged a further appeal against the Regional Court's decision, complaining that his counsel had still not been granted access to the case file. 31

40. By a letter dated 18 November 2002, the Mönchengladbach Public Prosecutor's Office granted the applicant's counsel access to the case file. It stated that it had intended to send the file to him at an earlier date, but that this had not been possible as the file had been at the Regional Court and had only recently been returned to the Public Prosecutor's Office. The applicant's counsel received the file for inspection on 20 November 2002. The applicant withdrew his further appeal on 10 December 2002. 32

G. Proceedings before the Federal Constitutional Court

41. On 23 October 2002 the applicant lodged a complaint with the Federal Constitutional Court against the decision of the Düsseldorf Court of Appeal dated 14 October 2002 and the detention order issued by the Mönchengladbach District Court on 25 July 2002. In his submission, his rights to liberty, to be heard in court and to be informed promptly by a judge of the reasons for his detention on remand as well as his rights to be heard within a reasonable time and to a fair trial as guaranteed by the Basic Law had been violated. He argued in particular that his right to liberty, the deprivation of which was only constitutional if it was in accordance with the law, had been breached by his illegal detention on the basis of a void detention order. The complete refusal to allow his defence counsel access to the case file pursuant to Article 147 § 2 of the Code of Criminal Procedure had violated his right to be heard in court, as guaranteed by Article 103 § 1 of the Basic Law (see paragraph 53 below), and his right to liberty under Article 104 § 3 of the Basic Law (see paragraph 54 below). The impugned decisions disregarded both the case-law of the Federal Constitutional Court and the Court's case-law as laid down in its judgments of 13 February 2001 in the cases of Garcia Alva, Lietzow v. Germany and Schöps v. Germany. The Court of Appeal's refusal to quash the detention order and its decision to remit the case to the District Court instead had also breached his right to a fair hearing within a reasonable time. 33

42. On 4 and 11 November 2002 the applicant extended his constitutional complaint to include the decisions of the Mönchengladbach District Court dated 29 October 2002 and the decision of the Mönchengladbach Regional Court dated 7 November 2002. 34

43. On 22 November 2002 the Federal Constitutional Court, without giving further reasons, declined to consider the applicant's constitutional complaint against the detention orders issued by the Mönchengladbach District Court on 25 July 2002 and 29 October 2002, the decision of the Mönchengladbach Regional Court dated 7 November 2002 and the decision of the Düsseldorf Court of Appeal dated 14 October 2002. 35

H. Further developments

44. On 9 March 2005 the Mönchengladbach District Court convicted the applicant on eight counts of tax evasion and sentenced him to a total of one year and eight months' imprisonment suspended on probation. It found that the applicant, who had confessed to the offences, had evaded turnover taxes of DEM 129,795, income taxes of DEM 344,802 and trade taxes of DEM 55,165. 36

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure

1. The detention order

45. Articles 112 et seq. of the Code of Criminal Procedure (Strafprozessordnung) concern detention on remand. Pursuant to Article 112 § 1 of the Code, a defendant may be detained on remand if there is a strong suspicion that he has committed a criminal offence and if there are grounds for arresting him. Grounds for arrest will exist where certain facts warrant the conclusion that there is a risk of his absconding (Article 112 § 2 no. 2) or of collusion (Article 112 § 2 no. 3). 37

46. According to Article 114 §§ 1 and 2 of the Code of Criminal Procedure, detention on remand is ordered by a judge in a written detention order. The detention order identifies the accused, the offence of which he is strongly suspected, including the time and place of its commission, and the grounds for the arrest (nos. 1-3 of Article 114 § 2). Moreover, the facts establishing the grounds for the strong suspicion that an offence has been committed and for the arrest must be set out in the detention order unless national security would thereby be endangered (Article 114 § 2 no. 4). 38

2. Judicial review of a detention order

47. Under Article 117 § 1 of the Code of Criminal Procedure, remand prisoners may at any time seek judicial review (Haftprüfung) of a decision to issue a detention order or ask for the order to be suspended. They may lodge an appeal under Article 304 of the Code of Criminal Procedure (Haftbeschwerde) against a decision ordering their (continued) detention and a further appeal (weitere Beschwerde) against the Regional Court's decision on the appeal (Article 310 § 1 of the Code of Criminal Procedure). Decisions on a person's pre-trial detention have to be taken speedily (compare, among many others, Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, Strafverteidiger (StV) 1994, p. 319). As a rule, pre-trial detention must not continue for more than six months (see Article 121 § 1 of the Code of Criminal Procedure; compare Federal Constitutional Court, no. 2 BvR 558/73, decision of 12 December 1973). 39

(a) Consequences of defects in the detention order

48. The consequences of a court's finding in the course of judicial review proceedings that a detention order is flawed will depend on the nature of the defect found. Certain formal defects, in particular a failure to set out in sufficient detail in the order the facts establishing the grounds for strong suspicion that an offence has been committed and for the arrest, as required by Article 114 § 2 no. 4 of the Code of Criminal Procedure, will make the order defective in law (rechtsfehlerhaft), but not void (unwirksam / nichtig) (see, inter alia, Karlsruhe Court of Appeal, no. 3 Ws 252/85, decision of 28 November 1985, Neue Zeitschrift für Strafrecht (NStZ) 1986, pp. 134-35; and Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, StV 1994, p. 318). Such defects may therefore be remedied by the appeal courts in the course of the judicial review proceedings by either quashing the defective order or replacing it with a fresh, duly reasoned order (compare, inter alia, Karlsruhe Court of Appeal, no. 3 Ws 252/85, decision of 28 November 1985, NStZ 1986, pp. 134-35 with further references; Hamburg Court of Appeal, no. 2 Ws 124/92, decision of 23 March 1992, Monatsschrift für Deutsches Recht (MDR) 1992, p. 694; Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, StV 1994, pp. 318-319; and Karlsruhe Court of Appeal, no. 3 Ws 196/00, decision of 26 September 2000, StV 2001, p. 118). A defective detention order thus remains a valid basis for detention until the defect is remedied. On the contrary, detention on the basis of a detention order which is void owing to a serious and obvious defect is unlawful (see paragraph 49). 40

49. The Federal Court of Justice gave the following reasons for the distinction between void and defective court decisions: 41

“Only in rare, exceptional cases can a court decision be considered void in its entirety, with the consequence that it is legally irrelevant (see ...). This is a consequence of the requirements of legal certainty and its corollary, the authority of court decisions, as well as of the overall structure of criminal proceedings with its system of legal remedies designed to correct defective decisions. Considering a court decision ... as legally irrelevant means that anyone may claim that it is null and void at any stage of the proceedings, even after it has become final... In the case of decisions which can be challenged by an appeal, the statutory rules - formalities and time-limits - become inoperative if the decisions are deemed legally irrelevant. Such consequences, which run counter to the overall order of the law of criminal procedure, may be drawn from the defectiveness of a court decision only, if at all, where it would be unthinkable for the legal community to recognise (at least provisionally) its validity. This will occur if the extent and gravity of the defect are such that the decision blatantly contradicts the spirit of the Code of Criminal Procedure and key principles of our legal order (see ...). From the perspective of legal certainty, the assumption that a decision is null and void presupposes, in addition, that the serious defect is obvious” (see Federal Court of Justice, no. 1 BJs 80/78, decision of 16 October 1980, Neue Juristische Wochenschrift (NJW) 1981, p. 133 with further references; compare also Federal Court of Justice, no. 1 StR 874/83, decision of 24 January 1984, NStZ 1984, p. 279)

(b) Consequences of a court of appeal's finding of a defect in the detention order

50. As regards the consequences of a finding by a court of appeal, on a further appeal by the detainee, that a detention order is flawed, Article 309 § 2 of the Code of Criminal Procedure lays down that if the appeal court considers the appeal against the (continued) detention well-founded, it must take the necessary decision in the case at the same time. The court of appeal thus decides the merits of the case in the lower courts' stead (see, for instance, Düsseldorf Court of Appeal, no. 4 Ws 222/02, decision of 18 June 2002, NJW 2002, p. 2964). 42

51. However, the courts of appeal have developed exceptions to the rule laid down in Article 309 § 2 of the Code of Criminal Procedure. In certain limited circumstances, a case may exceptionally be remitted to the court of first instance if there has been a procedural defect which the court of appeal cannot properly remedy itself (see Brandenburg Court of Appeal, no. 2 Ws 50/96, decision of 17 April 1996, NStZ 1996, pp. 406-07; and Düsseldorf Court of Appeal, no. 4 Ws 222/02, decision of 18 June 2002, NJW 2002, pp. 2964-65). In particular, a court of appeal may remit the case to the district court instead of taking its own decision on the merits if a detention order does not comply with the duty to set out the grounds for suspecting the accused of an offence and if, in addition, the prosecution refused access to the case file. The explanation for this is that, in such cases, the defective reasoning effectively amounts to a breach of the duty to hear representations from the defendant. It was the district court which had jurisdiction to inform the accused for the first time of the grounds for suspecting him of an offence and to hear representations from him (see Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, StV 1994, pp. 318-19). The duty to expedite proceedings in which the suspect is in detention does not warrant a different conclusion as only a remittal of the case will enable him to avail himself effectively of his right to be heard (see Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, StV 1994, p. 319). 43

3. Access to the case-file

52. Article 147 § 1 of the Code of Criminal Procedure provides that defence counsel is entitled to consult the file which has been or will be presented to the trial court, and to inspect the exhibits. Paragraph 2 of this provision allows access to part or all of the file or to the exhibits to be refused until the preliminary investigation has ended if the investigation might otherwise be at risk. At no stage of the proceedings may defence counsel be refused access to records concerning the examination of the accused, acts in the judicial investigation at which defence counsel was or should have been allowed to be present or expert reports (Article 147 § 3 of the said Code). Pending the termination of the preliminary investigation, it is for the Public Prosecutor's Office to decide whether to grant access to the file or not; thereafter it is for the president of the trial court (Article 147 § 5). An accused who is in detention is entitled by virtue of Article 161a § 3 of the Code of Criminal Procedure to seek judicial review of a decision of the Public Prosecutor's Office to refuse access to the file. Pursuant to that provision, the regional court for the district where the Public Prosecutor's Office is located has jurisdiction to hear applications for judicial review; its decisions are not subject to appeal. 44

B. Provisions of the Basic Law

53. According to Article 103 § 1 of the Basic Law every person involved in proceedings before a court is entitled to be heard by that court (Anspruch auf rechtliches Gehör). 45

54. Article 104 § 3 of the Basic Law provides that every person provisionally detained on suspicion of having committed a criminal offence must be brought before a judge no later than the day following his arrest; the judge must inform him of the reasons for the arrest, hear representations from him and give him an opportunity to raise objections. The judge must then, without delay, either issue a written detention order setting out the grounds therefor or order the detainee's release. 46

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION RELATING TO ALL COMPLAINTS

A. The parties' submissions

55. The Government claimed that the applicant had failed to exhaust domestic remedies in respect of all his complaints to the Court. They submitted that, prior to lodging his application with the Court, he should have brought an action in the civil courts against the Land of North Rhine-Westphalia based on Article 5 § 5 of the Convention for compensation for the damage caused by the alleged breaches of Article 5 §§ 1 and 4. They conceded that in their non-exhaustion plea before the Chamber they had not claimed that the applicant should have availed himself of that remedy, but argued that they were not estopped from raising such a plea on different grounds before the Grand Chamber. In their view, the applicant should have made such a compensation claim, which was a long-established and effective remedy, in addition to his request for judicial review of his detention. As he had been released and his counsel had been granted access to the case file when the proceedings were still pending in the domestic courts, the aim of his 47

application to the Court could only be to obtain a finding of a Convention breach and the payment of adequate compensation and should therefore have been pursued in the first instance by a compensation claim in the domestic courts.

56. The applicant took the view that since the Government had not objected at the admissibility stage of the proceedings before the Chamber that he should have brought a compensation claim in the domestic courts, they could not do so for the first time before the Grand Chamber. 48

B. The Court's assessment

57. The Court reiterates that the Grand Chamber is not precluded from examining, where appropriate, issues relating to the admissibility of an application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings" (see Odièvre v. France [GC], no. 42326/98, § 22, ECHR 2003-III; Azinas v. Cyprus [GC], no. 56679/00, § 32, ECHR 2004-III; and Yumak and Sadak v. Turkey [GC], no. 10226/03, § 72, 8 July 2008). According to Rule 55 of the Rules of Court, any plea of inadmissibility must, however, in so far as its character and the circumstances permit, have been raised by the respondent Contracting Party in its observations on the admissibility of the application submitted as provided in Rule 54 (compare N.C. v. Italy [GC], no. 24952/94, § 44, ECHR 2002-X; Azinas, cited above, §§ 32 and 37; and Sejdovic v. Italy [GC], no. 56581/00, § 41, ECHR 2006-II). Only exceptional circumstances, in particular the fact that the reason prompting an objection to admissibility became known only at a later stage, could dispense a Government from the obligation to raise their objection in their said observations before the adoption of the Chamber's admissibility decision (see N.C. v. Italy, cited above, § 44; Sejdovic, cited above, § 41; and Lebedev v. Russia, no. 4493/04, §§ 39-40, 25 October 2007). 49

58. The Court notes that in their written observations on the admissibility of the application before the Chamber, the Government did not argue that the applicant should have brought a compensation claim in the civil courts prior to lodging his application with the Court, but based their plea of non-exhaustion on several different grounds. This is indeed uncontested by the Government. However, the respondent Government's duty under Rule 55 to raise pleas of inadmissibility in their observations before the adoption of the Chamber's admissibility decision relates to a specific plea of, for instance, non-exhaustion, including the reasons given for the plea. It does not, therefore, suffice for the Government to have pleaded non-exhaustion on different grounds within the prescribed time-limit (compare, in particular, Sejdovic, cited above, §§ 40-42). Moreover, as a compensation claim based on Article 5 § 5, in the Government's submission, was a long-established remedy, the Court cannot discern any exceptional circumstances which could have released the Government from the obligation to raise their preliminary objection of non-exhaustion with reference to that remedy in their observations on admissibility before the Chamber. 50

59. Consequently, the Government are estopped from raising a preliminary objection of non-exhaustion of domestic remedies for failure to bring a compensation claim at this stage of the proceedings. Their objection must therefore be dismissed. 51

II. COMPLAINTS CONCERNING THE REMITTAL PROCEDURE

60. The applicant complained that, in the proceedings for the review of his pre-trial detention, the Court of Appeal had failed to quash the District Court's initial detention order of 25 July 2002 and to release him from prison even though it had found the detention order defective. In his submission, by remitting the case to the District Court the Court of Appeal had unlawfully deprived him of his liberty and unnecessarily delayed his application for judicial review of his detention order, which thus had not been heard within a reasonable time. He relied on Articles 5 and 6 of the Convention. 52

61. The Chamber considered that the applicant's complaints fell to be examined under Article 5 §§ 1 (c) and 4 of the Convention alone. The parties did not challenge that conclusion and the Grand Chamber, for its part, sees no reason to adopt a different stance. Article 5 §§ 1 (c) and 4 provide: 53

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the

lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Complaint concerning the lawfulness of the detention

1. Ground for detention

62. The Chamber found that the applicant's pre-trial detention fell under paragraph 1 (c) of Article 5 of the Convention, as it had been ordered for the purpose of bringing the applicant before the competent legal authority on reasonable suspicion that he was guilty of tax evasion. The parties accepted that finding and the Grand Chamber equally shares this view. 54

2. "Lawful" detention "in accordance with a procedure prescribed by law"

(a) The Chamber judgment

63. The Chamber considered that the applicant's detention had not violated Article 5 § 1, as it had been "lawful" and "in accordance with a procedure prescribed by law". It noted that the Court of Appeal had found in its decision of 14 October 2002 that although the detention order of 25 July 2002 had failed to comply with the formal requirements of Article 114 § 2 of the Code of Criminal Procedure, it had complied with the substantive requirements of the provisions on pre-trial detention. Accordingly, referring to the established case-law of the criminal courts on that point, the Court of Appeal considered that the order was defective on formal grounds only and therefore not void. Under domestic law, it thus remained a valid basis for the applicant's detention until it was replaced. In view of this, the Chamber concluded that the applicant's detention from 25 July 2002 to 29 October 2002, when a fresh detention order was issued in compliance with the formal requirements of Article 114 § 2 of the Code of Criminal Procedure, remained lawful under domestic law and was in accordance with a procedure prescribed by law, as it continued to be based on the initial detention order of 25 July 2002. 55

64. The Chamber further found that the applicant's detention had not been arbitrary. While accepting that the Court of Appeal's decision to remit the case to the court of first instance contrary to the wording of Article 309 § 2 of the Code of Criminal Procedure had led to uncertainty, it noted that practical arrangements had to be made before a detention order complying with the formal requirements of domestic law could be issued so that the lapse of time between the Court of Appeal's remittal decision of 14 October 2002 and the issuing of the new detention order on 29 October 2002 could not be considered to have rendered the applicant's detention arbitrary. 56

(b) The parties' submissions

(i) The applicant

65. In the applicant's submission, his detention had violated Article 5 § 1, at least from 14 October 2002 onwards when the Court of Appeal had remitted the case to the court of first instance, despite being aware that the detention order did not comply with domestic law as insufficient reasons had been given and defence counsel had been denied access to the case file. The applicant argued that the distinction made by the domestic courts between "defective" and "void" detention orders had no basis in the provisions of the Code of Criminal Procedure. In any event, detention orders that were "defective" for lack of compliance with formal requirements could not be regarded as being in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1, any more than void detention orders could be. Furthermore, since the formal requirements of Article 114 of the Code of Criminal Procedure, which were protected by Article 104 of the Basic Law, could not be dissociated from the substantive right to liberty, their breach, which could not be cured retrospectively, had also rendered his detention unlawful. 57

66. Moreover, in the applicant's view, the Court of Appeal's decision to remit his case to the court of first instance was arbitrary. In particular, in view of its familiarity with the case file and of the time the proceedings had already lasted, the Court of Appeal's refusal to take the necessary decision on the merits itself in accordance with its obligation under Article 309 § 2 of the Code of Criminal Procedure and its decision to allow the applicant's detention to continue were wholly unreasonable. 58

67. The applicant also claimed that his detention had been unlawful, contrary to Article 5 § 1, on other grounds. As the Chamber had rightly found in its judgment, the Court of Appeal had failed to comply with the fairness and speed requirements of Article 5 § 4. As the latter provision was directly applicable in Germany, his detention had not complied with domestic law as required by Article 5 § 1. In any event, the combination of the breaches of domestic law taken together had led to a violation of Article 5 § 1. 59

(ii) The Government

68. The Government agreed with the Chamber's finding that the applicant's detention had been "lawful" and "in 60

accordance with a procedure prescribed by law" within the meaning of Article 5 § 1.

69. In their submission, the applicant's detention had complied with Article 5 § 1 in the period from 25 July 2002 to 13 October 2002. In its decision of 14 October 2002, the Court of Appeal had found that the detention order issued by the District Court was defective, but not void as, although it failed to comply with the formal requirements of Article 114 § 2 of the Code of Criminal Procedure, the substantive conditions for detention were met. That finding was consistent with the well-established case-law of the criminal courts (compare the cases cited at paragraphs 48-49 above) that, for reasons of legal certainty, incorrect court decisions could only be considered void ab initio in exceptional circumstances in which the recognition of their at least provisional validity pending the issue of a replacement order would manifestly fly in the face of fundamental principles of the constitutional order. In all other cases, defective court decisions, such as the detention order in the applicant's case, were considered valid until replaced in the course of proceedings for judicial review. Thus, notably formal defects in court decisions, such as the insufficient statement of reasons in the detention order in the instant case, could be cured in judicial review proceedings, which served precisely to correct mistakes. 61

70. The Government further argued that the applicant's detention from 14 October 2002 until 29 October 2002 also complied with Article 5 § 1. When remitting the case to the District Court, the Court of Appeal had expressly relied on an exception established by the criminal courts (compare the cases cited at paragraph 51 above) to the rule laid down in Article 309 § 2 of the Code of Criminal Procedure that it should take a decision on the merits of the lawfulness of the applicant's detention itself. Its finding that there had been a procedural defect that warranted the remittal of the case had not been arbitrary. Remittal to allow a lower court to correct a mistake found by a higher court was a recognised technique of legal protection applied by domestic courts, which were free to organise their review procedure in that way. 62

71. Moreover, as the Chamber had rightly found, the time taken by the remittal did not, in view of the practical arrangements that had had to be made, render the applicant's detention arbitrary. The remittal to the District Court, which was familiar with the case, had not necessarily delayed the proceedings as the Court of Appeal would have had to acquaint itself with the case before taking a decision on the merits. 63

(c) The Court's assessment

(i) Recapitulation of the relevant principles

72. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, inter alia, Erkalo v. the Netherlands, 2 September 1998, § 52, Reports of Judgments and Decisions 1998VI; Steel and Others v. the United Kingdom, 23 September 1998, § 54, Reports 1998VII; and Saadi v. the United Kingdom [GC], no. 13229/03, § 67, ECHR 2008...). The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty (compare Baranowski v. Poland, no. 28358/95, §§ 51-52, ECHR 2000III; Je?ius v. Lithuania, no. 34578/97, § 56, ECHR 2000IX; and Nasrulloyev v. Russia, no. 656/06, § 71, 11 October 2007). 64

(α) Principles governing the examination of compliance with domestic law

73. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with (see, inter alia, Benham v. the United Kingdom, 10 June 1996, § 41, Reports 1996III; Baranowski, cited above, § 50; Je?ius, cited above, § 68; and Ladent v. Poland, no. 11036/03, § 47, ECHR 2008... (extracts)). 65

74. However, the Court has clarified, particularly in its more recent case-law, that not every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of Article 5 § 1. A period of detention is, in principle, "lawful" if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (see, inter alia, Benham, cited above, § 42; Douiyeb v. the Netherlands [GC], no. 31464/96, § 45, 4 August 1999; Minjat v. Switzerland, no. 38223/97, § 41, 28 October 2003; and Khudoyorov v. Russia, no. 6847/02, § 128, ECHR 2005X (extracts)). 66

75. In its more recent case-law, the Court, referring to a comparable distinction made under English law (compare 67

Benham, cited above, §§ 43-46; and Lloyd and Others v. the United Kingdom, nos. 29798/96 and others, §§ 102, 105 et seq., 1 March 2005), further specified the circumstances under which the detention remained lawful in the said underlying period for the purposes of Article 5 § 1: For the assessment of compliance with Article 5 § 1 of the Convention a basic distinction has to be made between ex facie invalid detention orders - for example, given by a court in excess of jurisdiction (see Marturana v. Italy, no. 63154/00, § 78, 4 March 2008) or where the interested party did not have proper notice of the hearing (see Khudoyorov, cited above, § 129; and Liu v. Russia, no. 42086/05, § 79, 6 December 2007) - and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court (ibid.). A detention order must be considered as ex facie invalid if the flaw in the order amounted to a “gross and obvious irregularity” in the exceptional sense indicated by the Court's case-law (compare Liu, cited above, § 81; Garabayev v. Russia, no. 38411/02, § 89, 7 June 2007, ECHR 2007... (extracts); and Marturana, cited above, § 79). Accordingly, unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings.

(β) The required quality of domestic law

76. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied (see Baranowski, cited above, §§ 51-52; Je?ius, cited above, § 56; and Khudoyorov, cited above, § 125). In laying down that any deprivation of liberty must be “lawful” and be effected “in accordance with a procedure prescribed by law”, Article 5 § 1 does not merely refer back to domestic law; like the expressions “in accordance with the law” and “prescribed by law” in the second paragraphs of Articles 8 to 11, it also relates to the “quality of the law”, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. “Quality of the law” in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see Amuur v. France, 25 June 1996, § 50, Reports 1996III; and Nasrulloyev, cited above, § 71). 68

(γ) Principles governing the notion of arbitrary detention

77. No detention which is arbitrary can be compatible with Article 5 § 1, the notion of “arbitrariness” in this context extending beyond the lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute “arbitrariness” for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see Saadi, cited above, §§ 67-68). 69

78. One general principle established in the case-law is that detention will be “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (compare Bozano v. France, 18 December 1986, § 59, Series A no. 111; and Saadi, cited above, § 69) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see Benham, cited above, § 47; Liu, cited above, § 82; and Marturana, cited above, § 80). 70

79. Furthermore, in the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering detention is a relevant factor in determining whether a person's detention must be considered as arbitrary. The Court has considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see Stašaitis v. Lithuania, no. 47679/99, § 67, 21 March 2002; Nakhmanovich v. Russia, no. 55669/00, § 70, 2 March 2006; and Belevitskiy v. Russia, no. 72967/01, § 91, 1 March 2007). Conversely, it has found that an applicant's detention could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention on remand (compare Khudoyorov, cited above, § 131), unless the reasons given are extremely laconic and without reference to any legal provision which would have permitted the applicant's detention (compare Khudoyorov, cited above, § 157). 71

80. Moreover, the Court has acknowledged notably in the context of sub-paragraphs (c) and (e) of Article 5 § 1 that the speed with which the domestic courts replaced a detention order which had either expired or had been found to be defective is a further relevant element in assessing whether a person's detention must be considered arbitrary. Thus, the Court considered in the context of sub-paragraph (c) that a period of less than a month between the expiry of the initial detention order and the issuing of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant's detention arbitrary (see Minjat, cited above, §§ 46 and 48). In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance, in which 72

the applicant remained in a state of uncertainty as to the grounds for his detention on remand, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant's detention arbitrary (see Khudoyorov, cited above, §§ 136-37).

81. In the context of sub-paragraph (e) of Article 5 § 1, the Court considered that an interval of two weeks between the expiry of the earlier order of detention in a psychiatric hospital and the making of the succeeding renewal order could in no way be regarded as unreasonable or excessive so that this delay did not involve an arbitrary deprivation of liberty (see Winterwerp v. the Netherlands, 24 October 1979, § 49, Series A no. 33). In contrast, a delay of eighty-two days between the expiry of the initial order of detention in a psychiatric institution and its renewal and the lack of adequate safeguards to ensure that the applicant's detention would not be unreasonably delayed was found to be inconsistent with the purpose of Article 5 § 1 to protect individuals from arbitrary detention (see Erkalo, cited above, §§ 57-60 in respect of both sub-paragraphs (a) and (e) of Article 5 § 1). 73

(ii) Application of these principles to the present case

82. In examining whether the applicant's detention was “lawful” within the meaning of Article 5 § 1, including the issue whether “a procedure prescribed by law” was followed, the Court will first review whether the applicant's detention complied with German law. 74

83. It notes in this connection that on 14 October 2002 the Düsseldorf Court of Appeal found that the detention order issued by the District Court on 25 July 2002 failed to comply with the formal requirements of domestic law laid down in Article 114 § 2 no. 4 of the Code of Criminal Procedure, as it did not describe in sufficient detail the facts and evidence establishing the grounds for the strong suspicion that the applicant was guilty of tax evasion or for the arrest (see paragraphs 28-29 above). The detention order thus suffered from a formal defect. 75

84. However, as it is recognised in the Court's case-law (see paragraphs 74 and 75 above) that defects in a detention order do not necessarily render the underlying detention as such “unlawful” for the purposes of Article 5 § 1, the Court has to examine whether the flaw in the order against the applicant amounted to a “gross and obvious irregularity” so as to render the underlying period of his detention unlawful. 76

85. In the present case, it has to be noted at the outset that the applicant's detention in the period in question (25 July 2002 until 29 October 2002) was based on the detention order issued on 25 July 2002 by the Mönchengladbach District Court. That order remained in force even after it was found to be flawed on formal grounds on 14 October 2002 as, in the judicial review proceedings, the Court of Appeal only quashed the decisions taken on 16 August 2002 and on 9 September 2002, not the detention order of 25 July 2002 (see paragraph 28 above). On 29 October 2002 the order of 25 July 2002 was replaced by a fresh detention order which contained more detailed reasoning; the applicant has not contested the compliance of that new order with Article 114 § 2 of the Code of Criminal Procedure. 77

86. In determining whether the detention order of 25 July 2002 suffered from a “gross and obvious irregularity” so as to be ex facie invalid, which would in turn render the applicant's detention based on that order unlawful for the purposes of Article 5 § 1, the Court will have regard to all the circumstances of the case, including, in particular, the assessment made by the domestic courts. It observes that according to the findings of the German courts, the order in question did not suffer from a serious and obvious defect which rendered it null and void. In fact, the German legal system, like the Convention system, distinguishes between detention orders which are null and void and those which remain valid until overturned by a higher court (see paragraphs 48-49 above). This distinction can equally be found in the legal systems of other Convention States (compare, for instance, the principles of English law laid down in Benham, cited above, §§ 24-26 and 43-46, the Netherlands' legal system as described in Erkalo, cited above, §§ 31-33 and 53-55, and the Swiss legal system explained in Minjat, cited above, §§ 21 and 42-44). In the present case, the Court of Appeal considered that the substantive conditions of the applicant's detention were met and that while the formal defects in the detention order of 25 July 2002 - namely the failure to describe in sufficient detail the facts and evidence on which the suspicion and the reasons for the defendant's detention on remand were based as required by Article 114 § 2 no. 4 of the Code of Criminal Procedure - made the order defective in law, they were not so serious as to render it null and void. 78

87. The Court further notes that the District Court had jurisdiction to issue the detention order of 25 July 2002 against the applicant and heard representations from the applicant at a hearing before issuing the order and notifying him that it had done so. Furthermore, on the basis of the material before them, all the domestic courts agreed throughout the judicial review proceedings that the substantive conditions for the applicant's detention - a strong suspicion that he had evaded turnover, income and trade taxes and the danger of collusion or of his absconding - were met. 79

88. It is true that throughout his detention on the basis of the detention order of 25 July 2002 the applicant's counsel did 80

not have access to the case file and that the Chamber found a violation of Article 5 § 4 of the Convention on that account. However, contrary to the applicant's submission, neither that nor any other breach of Article 5 § 4 - even though that provision is part of domestic law - automatically entails a breach of Article 5 § 1. Paragraphs 1 and 4 of Article 5 are separate provisions and the non-observance of the latter thus does not necessarily entail also the non-observance of the former (compare, for instance, Winterwerp, cited above, § 53, and Douiyeb, cited above, § 57). Even assuming that a refusal to grant counsel access to the case file in proceedings for the review of his or her client's detention could, when combined with other procedural flaws, lead to a detention order suffering from a “gross and obvious irregularity” within the meaning of the Court's case-law, the Court considers that this was not the position in the applicant's case. Even though the detention order of 25 July 2002 should have been based on more detailed facts according to the provisions of domestic law, the District Court still specified the charges against the applicant. In doing so, it listed the names of the firms that had paid the commission which the applicant had allegedly failed to declare to the tax authorities. It was moreover, clear that the suspicions against the applicant were based on the business records which had been seized at the applicant's home. Therefore, despite the fact that his counsel was not granted access to the case file, the applicant cannot in the circumstances complain that he was not informed at all or was unaware of the basis of the suspicions against him.

89. Having regard to all the circumstances of the case, the Court therefore considers that the detention order of 25 July 2002 did not suffer from a “gross and obvious irregularity” within the meaning of its case-law so as to be ex facie invalid (compare for a like finding on comparable facts, in particular, Minjat, cited above, §§ 37-44). 81

90. The Court will now examine whether the applicable domestic law was of the quality required to satisfy the general principle of legal certainty. The applicant contested this, in substance, on two grounds. Firstly, he argued that the distinction made by the domestic courts between “defective” and “void” detention orders had no basis in the provisions of the Code of Criminal Procedure. Secondly, he stressed that the Court of Appeal's refusal to take the necessary decision on the merits itself contradicted the clear wording of Article 309 § 2 of the Code of Criminal Procedure. 82

91. As regards the question whether the applicant could have foreseen that the domestic courts would consider the detention order as merely “defective” so that it would remain a valid basis for his detention until it was quashed or replaced, the Court notes that the distinction made under German law between “defective” and “void” detention orders is well-established in the domestic courts' case-law. In particular, detention orders which do not set out in sufficient detail the facts establishing the grounds for strong suspicion that an offence has been committed and for the arrest have repeatedly been considered by the domestic courts to be “defective”, but not “void” (see paragraphs 48-49 above). Therefore, the applicant, if necessary with the advice of his counsel, could have foreseen the Court of Appeal's finding on this point. 83

92. As regards the Court of Appeal's decision after finding the order to be defective to remit the case to the court of first instance, the Court agrees that this procedure ran counter to the wording of Article 309 § 2 of the Code of Criminal Procedure, which prescribes that the appeal courts shall take the necessary decision on the merits themselves (see paragraph 50 above). However, in their case-law, the courts of appeal introduced exceptions to that rule in certain limited circumstances. In particular, in cases - like the present one - in which they considered that the facts on which the suspicion of an offence was based should have been set out in more detail in the detention order and in which the prosecution had refused access to the case file, they decided that exceptionally it would be legitimate and would best serve the interests of justice to remit the case to the district court instead of taking their own decision on the merits (see paragraph 51 above). 84

93. The Court considers that, in general, the principle of legal certainty may be compromised if domestic courts introduce exceptions in their case-law which run counter to the wording of the applicable statutory provisions. Such interpretations should thus be kept to a minimum. However, in the present case, the Court of Appeal, in remitting the case to the District Court, expressly referred to previous decisions of other courts of appeal which concerned cases comparable to the applicant's (compare paragraphs 30 and 51 above). In these circumstances, the Court is satisfied that the remittal of his case to the court of first instance and his continuous detention at least up to that court's decision was sufficiently foreseeable for the applicant. The applicable provisions of domestic law, as interpreted by the domestic courts, thus complied with the requirement of legal certainty. 85

94. The Court has to satisfy itself, lastly, that the applicant's detention, despite its compliance with domestic law, was not arbitrary and thus contrary to the Convention. It notes in this connection that the domestic courts applied the relevant legislative provisions in accordance with the established case-law. Moreover, even though the detention order of 25 July 2002 should, according to the provisions of domestic law, have been based on more detailed facts, it set out, by reference to the applicable provisions, the offence of which the applicant was strongly suspected, including the time and place of its commission, and the grounds for the arrest. It was further clear that the suspicions against the 86

applicant were based on documents that had been seized at the applicant's home so that the applicant was not wholly unaware of the evidence relied upon by the courts (see paragraph 88 above). The District Court thus gave some grounds going beyond a bare outline for the applicant's detention from the outset.

95. The Court has further acknowledged in previous cases that the speed with which the domestic courts replace a detention order which has either expired or been found to be defective is a further relevant factor in assessing whether a person's detention must be considered arbitrary (see paragraphs 80-81 above). It observes that in the present case, following the Court of Appeal's decision of 14 October 2002 to remit the case to the District Court, the applicant remained in custody on the basis of the initial detention order of 25 July 2002 - despite the fact that it had been considered defective by the Court of Appeal - until 29 October 2002, when the District Court issued a fresh detention order which was based on more detailed facts. Thus, for a period of fifteen days the applicant was detained while being only partly, but not fully, aware of the facts on which the strong suspicion of his involvement in tax evasion and his arrest were based, although the Court of Appeal had made it clear that it considered his detention to be justified in substance. 87

96. Despite the reservations it has expressed above (see paragraph 93), the Court considers that remitting a case to a lower court is a recognised technique for establishing in detail the facts and for assessing the evidence relevant to a court's decision and cannot as such be considered arbitrary (compare also Minjat, cited above, §§ 47-48). In circumstances such as those obtaining in the present case, the benefits of remitting the case to a lower court may outweigh the inconvenience caused by the delay and may even serve to avoid unnecessary delays. Thus, firstly, remittal can enable the defects of the initial decision to be remedied while taking advantage of the lower court's full command of the case-file along with its more precise knowledge of the suspect's personal situation and of the state of the investigations against him. Moreover, in the case at hand the Court of Appeal did not confine itself to overturning the District Court's decision but instructed it how to avoid defective decisions in the future. This served the purpose of improving the administration of justice in the long run. Secondly, it was necessary to schedule a hearing attended by the applicant (represented by counsel), the Public Prosecutor's Office and a tax official in order to enable the applicant to be informed at least orally of the evidence against him and to make representations, and this required practical arrangements to be made. In these circumstances, the decision to remit the case may have actually avoided delays because, from the procedural perspective, it may well have proved quicker for the case to be remitted and for the District Court to decide whether a new detention order should be issued than for the Court of Appeal to decide that issue. Finally, under the domestic law, the District Court's fresh decision was subject to time constraints in that it had to be taken speedily (see paragraph 47 above) and it was that court which, following the remittal, had to arrange for a renewed hearing of the parties. Having regard to its case-law (see, in particular, that cited in paragraph 80 above, and, mutatis mutandis, in paragraph 81), the Court finds that in these circumstances, the time that elapsed between the Court of Appeal's finding that the detention order was defective and the issuing of a fresh detention order by the District Court did not render the applicant's detention arbitrary either. 88

97. Having regard to the foregoing, the Court concludes that the applicant's detention was “lawful” and “in accordance with a procedure prescribed by law” for the purposes of paragraph 1 of Article 5. 89

98. There has therefore been no violation of Article 5 § 1 of the Convention. 90

B. Alleged lack of a speedy judicial review

1. Scope of the Grand Chamber's jurisdiction

99. In his request for the referral of his case to the Grand Chamber, the applicant did not contest the Chamber's finding of a violation of Article 5 § 4 for lack of a speedy review of the lawfulness of his detention. In his submission, that finding was therefore final and the Grand Chamber did not have jurisdiction to reopen that complaint. 91

100. The Government contested that view. 92

101. According to the Court's settled case-law, the wording of Article 43 of the Convention makes it clear that, whilst the existence of “a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance” (paragraph 2) is a prerequisite for acceptance of a party's referral request, the consequence of acceptance is that the whole “case” is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). That being so, the “case” referred to the Grand Chamber necessarily embraces all aspects of the application as declared admissible and as previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case (compare, inter alia, K. and T. v. Finland [GC], no. 25702/94, §§ 140-41, ECHR 2001VII; Göç v. Turkey [GC], no. 36590/97, § 36, ECHR 2002V; and Cump?n? and Maz?re v. Romania [GC], no. 33348/96, § 66, ECHR 2004XI). 93

102. As the applicant's complaint under Article 5 § 4 concerning the lack of a speedy review of the lawfulness of his detention has been declared admissible by the Chamber (see paragraph 56 of the Chamber judgment), the Grand Chamber has jurisdiction and is called upon to examine it. 94

2. The Chamber judgment

103. In its judgment of 13 December 2007 the Chamber found that the Court of Appeal's decision of 14 October 2002 to remit the case to the District Court instead of taking its own decision on the merits had caused an unjustified delay in the judicial review proceedings in the circumstances of the case. The Chamber observed that there had been no substantial periods of inactivity in the review proceedings. However, at the time the Court of Appeal took its decision, these proceedings had already been pending for two months and seven days before the domestic courts, including the period of twenty-eight days the proceedings had stood pending before the Court of Appeal itself. Moreover, as the Court of Appeal had quashed all the decisions taken in the judicial review proceedings up to that point, two months and twenty-two days had elapsed between the applicant's request for judicial review of his detention order filed on 7 August 2002 and the District Court's decision on the merits of his request following the remittal on 29 October 2002. The Chamber therefore concluded that there had been a violation of Article 5 § 4 (see paragraphs 70-74 of the Chamber judgment). 95

3. The parties' submissions to the Grand Chamber

104. Should the Grand Chamber examine this complaint (paragraph 99 above), the applicant invited it to endorse the Chamber's finding that Article 5 § 4 had been violated. 96

105. Contrary to the submissions they had made to the Chamber, the Government conceded with reference to the Chamber's findings in its judgment (paragraphs 69 et seq.) that the duration of the judicial review proceedings had failed to comply with the speed requirement under Article 5 § 4 as defined in the Court's case-law. 97

4. The Court's assessment

106. The Court reiterates that Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see Baranowski, cited above, § 68; Jablonski v. Poland, no. 33492/96, § 91, 21 December 2000; and Sarban v. Moldova, no. 3456/05, § 118, 4 October 2005). In order to determine whether the requirement that a decision be given “speedily” has been complied with, it is necessary to effect an overall assessment where the proceedings were conducted at more than one level of jurisdiction (compare Navarra v. France, 23 November 1993, § 28, Series A no. 273B). The question whether the right to a speedy decision has been respected must - as is the case for the “reasonable time” stipulation in Articles 5 § 3 and 6 § 1 of the Convention - be determined in the light of the circumstances of each case (see Rehbock v. Slovenia, no. 29462/95, § 84, ECHR 2000-XII; G.B. v. Switzerland, no. 27426/95, § 33, 30 November 2000; and M.B. v. Switzerland, no. 28256/95, § 37, 30 November 2000), including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (compare G.B. v. Switzerland, cited above, §§ 34-39, and M.B. v. Switzerland, cited above, §§ 38-43). 98

107. Having regard to the strict standards the Court has laid down in its case-law concerning the question of State compliance with the speed requirement (see, in particular, the G.B. v. Switzerland, M.B. v. Switzerland, Rehbock and Sarban cases, all cited above), the Grand Chamber considers, for the reasons set out by the Chamber, that the German courts, and in particular the Court of Appeal, failed to decide the lawfulness of the applicant's detention on remand “speedily”. There has therefore been a violation of Article 5 § 4 of the Convention in this respect. 99

III. ALLEGED REFUSAL OF ACCESS TO THE CASE FILE

108. The applicant further complained that in the proceedings for the review of his detention pending trial his counsel was refused access to the case file, which made it impossible for him to defend himself effectively. He relied on Articles 5 and 6 of the Convention. 100

109. The Court considers that this complaint falls to be examined under Article 5 of the Convention alone which, in so far as relevant, provides: 101

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

A. Scope of the Grand Chamber's jurisdiction

110. The applicant stressed that in his request for referral of the case to the Grand Chamber, he had not contested the Chamber's finding of a violation of Article 5 § 4 due to the refusal to grant his counsel access to the case file. He took the view that the Grand Chamber therefore did not have jurisdiction to reconsider this complaint. 102

111. The Government contested that view. 103

112. The Grand Chamber notes that the applicant's complaint under Article 5 § 4 on this point has been declared admissible by the Chamber (see paragraph 87 of the Chamber judgment). Having regard to the Court's case-law (cited above at paragraph 101), it therefore has jurisdiction to examine it. 104

B. The Government's preliminary objection

113. The Government objected that the applicant had failed to exhaust domestic remedies in respect of this complaint under Article 5 § 4. He had not lodged a separate request for judicial review of the prosecution's decision not to grant his counsel access to the case file under Article 147 § 5 of the Code of Criminal Procedure. 105

1. The Chamber judgment

114. In its judgment of 13 December 2007 the Chamber dismissed the Government's objection. It considered that the applicant's complaint about the failure to grant his counsel access to the case file was only one aspect of his more comprehensive complaint about the lawfulness of his detention order. Additional proceedings for judicial review of the decision not to grant the applicant's counsel access to the case file under Article 147 § 5 of the Code of Criminal Procedure would not therefore have been capable of providing redress in respect of the alleged unlawfulness of the detention order, but only in respect of one aspect of the violation the applicant had complained of. Moreover, the Regional Court, which would have had jurisdiction to hear an application under Article 147 § 5 of the Code of Criminal Procedure, had in fact dealt with the applicant's complaint about the refusal of access to the file, and the applicant had also raised this issue before the Federal Constitutional Court in the course of the proceedings for judicial review of the detention order, which he had pursued to a conclusion. The Chamber concluded that in these circumstances, an additional application for judicial review under Article 147 § 5 of the Code of Criminal Procedure would not have been an effective remedy offering reasonable prospects of success which the applicant was required to exhaust (see paragraphs 83-84 of the Chamber judgment). 106

2. The parties' submissions

115. The Government, referring to their submissions to the Chamber on the non-exhaustion of domestic remedies, argued that the applicant, who had been represented by counsel, should have lodged a separate application for judicial review with the Mönchengladbach Regional Court of the Public Prosecutor's decision not to grant his counsel access to the case file under Article 147 § 5 of the Code of Criminal Procedure. The application should have been made expressly and in addition to his request for judicial review of the detention order, as a request under Article 147 § 5 was the only remedy under German law in respect of a prosecution refusal to grant the defence access to the case file. In the Government's view, when examining the application for judicial review of the detention order, the Mönchengladbach Regional Court had not considered that it was called upon also to examine the question whether the refusal to grant the defence access to the case file was lawful. 107

116. Referring to his submissions to the Chamber, the applicant argued that the Chamber had been right to consider that a separate application for judicial review under Article 147 § 5 of the Code of Criminal Procedure was not an effective remedy he was required to exhaust. 108

3. The Court's assessment

117. The Court notes that the Government raised their plea of non-exhaustion on the grounds of the applicant's failure to lodge an application for judicial review under Article 147 § 5 of the Code of Criminal Procedure in their observations on the admissibility of the application in the Chamber proceedings, in accordance with Rules 55 and 54 of the Rules of Court (see paragraph 78 of the Chamber judgment). Having regard to the Court's case-law (cited above at paragraph 57), the Grand Chamber therefore should examine their objection. 109

118. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are available and sufficient in the domestic legal system to afford redress for the violation complained of (compare Airey v. Ireland, 9 October 1979, § 19, Series A no. 32; Iatridis v. Greece [GC], no. 31107/96, § 47, ECHR 1999-II; and ?lhan v. Turkey [GC], no. 22277/93, § 58, ECHR 2000-VII). It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing 110

redress directly in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see Akdivar and Others v. Turkey, 16 September 1996, § 68, Reports 1996-IV, and Kleyn and Others v. the Netherlands [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI). Thus, an applicant cannot be criticised for not having made use of a legal remedy which would have been directed to essentially the same end as the proceedings the applicant pursued to a conclusion and which moreover would not have had a better prospect of success (compare Iatridis, cited above, § 47, and Miailhe v. France (no. 1), 25 February 1993, § 27, Series A no. 256-C).

119. The Court notes that the applicant sought judicial review of the lawfulness of his detention order, inter alia, on the grounds that his counsel had not been granted access to the case file. In the course of the judicial review proceedings, the Mönchengladbach Regional Court - which, according to Article 161a § 3 of the Code of Criminal Procedure, would have had sole jurisdiction to decide any separate request under Article 147 § 5 of that Code - expressly addressed counsel's request for access to the file. In its decision of 9 September 2002, the Regional Court suggested that counsel for the applicant should be informed orally of the content of the case file in the first instance and could not claim unlimited access at that stage of the proceedings (see paragraph 20 above). The Federal Constitutional Court, which would also have had jurisdiction to review a dismissal by the Regional Court of any separate application expressly made by the applicant under Article 147 § 5, declined to consider the applicant's constitutional complaint about the detention order, in which he had raised the issue of lack of access to the file. In view of this, the Court considers that it can leave open the question whether a separate request under Article 147 § 5 could in general be considered an effective remedy capable of providing redress in cases in which a detainee contests the lawfulness of his detention in the first place. It finds that, in any event, in the particular circumstances of the case, in which the Regional Court expressly addressed and rejected the request for access to the case file in a decision that was upheld by the Federal Constitutional Court, any further, separate application under Article 147 § 5 to those same courts would have been bound to fail. 111

120. It follows that the Government's preliminary objection must be dismissed. 112

C. Compliance with Article 5 § 4 of the Convention

1. The Chamber judgment

121. The Chamber found that the applicant had not had an opportunity adequately to challenge the findings of the domestic courts in their decisions ordering his detention as required by the principle of “equality of arms”. His defence counsel had not been given access to those parts of the case file, submitted by the prosecution and referred to by the courts, on which the suspicion against the applicant had essentially been based. It had not been sufficient to provide the applicant's counsel with copies of four pages of the voluminous case file containing an overview by the Tax Fraud Office on the amount of the taxes the applicant was suspected of having evaded. Likewise, the authorities' proposal to give the applicant's counsel merely an oral account of the facts and of the evidence in the case file had failed to comply with the requirements of “equality of arms”. The fact that the Court of Appeal had later acknowledged that the applicant's procedural rights had been curtailed by the failure to grant his counsel access to the case file and that the domestic authorities had allowed his counsel to inspect the file after his conditional release were incapable of remedying in an effective manner the procedural shortcomings that had occurred in the earlier stages of the proceedings. Therefore, the proceedings for review of the applicant's detention had failed to comply with Article 5 § 4 (see paragraphs 93-99 of the Chamber judgment). 113

2. The parties' submissions

122. The applicant invited the Grand Chamber to endorse the Chamber's finding of a violation of Article 5 § 4. 114

123. Before the Grand Chamber, the Government conceded that the refusal to grant the applicant's counsel access to the case file had not complied with the fairness requirements under Article 5 § 4 as defined, in particular, in the Court's judgments in the cases of Schöps v. Germany (no. 25116/94), Lietzow v. Germany (no. 24479/94) and Garcia Alva v. Germany (no. 23541/94). 115

3. The Court's assessment

124. Proceedings conducted under Article 5 § 4 of the Convention before the court examining an appeal against detention must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person (compare, in particular, Schöps v. Germany, no. 25116/94, § 44, ECHR 2001-I; Lietzow v. Germany, no. 24479/94, § 44, ECHR 2001-I; Garcia Alva v. Germany, no. 23541/94, § 39, 13 February 2001; and Svipsta v. Latvia, 116

no. 66820/01, § 129, ECHR 2006-...). Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see, among other authorities, Lamy v. Belgium, 30 March 1989, § 29, Series A no. 151; Nikolova v. Bulgaria [GC], no. 31195/96, § 58, ECHR 1999-II; Schöps, cited above, § 44; Shishkov v. Bulgaria, no. 38822/97, § 77, ECHR 2003-I; and Svipsta, cited above, § 129).

125. The Grand Chamber, having regard to the Court's case-law, fully endorses the reasoning of the Chamber and finds that the procedure by which the applicant sought to challenge the lawfulness of his pre-trial detention violated the fairness requirements of Article 5 § 4 of the Convention. 117

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

126. Article 41 of the Convention provides: 118

“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

127. In its judgment, the Chamber considered that the finding of a violation constituted sufficient just satisfaction in respect of the non-pecuniary damage allegedly suffered by the applicant on account of the domestic courts' failure to comply with the fairness requirement of Article 5 § 4. Conversely, it found that the applicant must have suffered distress as a result of the breach of the speed requirement under that Article and thus awarded him EUR 1,500 in respect of non-pecuniary damage (see paragraph 103 of the Chamber judgment). 119

128. The applicant stood by the claim he had made in respect of non-pecuniary damage in the proceedings before the Chamber. He considered EUR 25,000 to be appropriate, but left it in the Court's discretion to fix an adequate amount, taking into consideration that Germany had deliberately and repeatedly breached the Convention. 120

129. The Government considered the applicant's claim to be excessive. 121

130. The Grand Chamber finds that both the violations of the fairness and of the speed requirements under Article 5 § 4 caused the applicant non-pecuniary damage, such as stress and frustration, which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, it awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable. 122

B. Costs and expenses

131. In its judgment, the Chamber was satisfied that the costs of the applicant's proceedings before the Federal Constitutional Court had been incurred in order to establish and redress a violation of his Convention rights. It further noted that the application before the Court was essentially well-founded. Making its own assessment, it considered it reasonable to award the sum of EUR 6,000 covering costs under all heads, less the sum received by way of legal aid from the Council of Europe (EUR 850), making a total of EUR 5,150, inclusive of value-added tax (VAT) (see paragraphs 106-07 of the Chamber judgment). 123

132. The applicant made the same claim in respect of costs and expenses as before the Chamber, where he had claimed a total of EUR 5,164.76 for the costs and expenses incurred before this Court (EUR 2,908.70 for drafting the observations and EUR 2,256.06 for their translation into English) and EUR 2,908.70 for those incurred before the Federal Constitutional Court. According to the invoices submitted by the applicant, these amounts include VAT. The applicant, who was granted legal aid covering his lawyers' appearance at the hearing, further requested the reimbursement of the costs of the translation of his submissions before the Grand Chamber into English, amounting to a total of EUR 670.51 including VAT. He adduced documentary evidence in support of that claim. 124

133. The Government left the amount to be awarded to the applicant for costs and expenses to the Court's discretion. 125

134. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, Beyeler v. Italy (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and Sahin v. Germany [GC], no. 30943/96, § 105, ECHR 2003VIII). 126

135. Having regard to its case-law and endorsing the grounds given by the Chamber, the Grand Chamber sees no 127

reason to depart from the Chamber's finding as to the amount to be awarded in respect of the costs and expenses incurred before the domestic courts and the Chamber.

136. As to the additional costs and expenses in the proceedings before the Grand Chamber, it considers it reasonable to award the applicant EUR 500, including VAT, in respect of the costs incurred for the requested translation of the applicant's observations into one of the Court's official languages. 128

137. The Court therefore awards the applicant a total of EUR 5,650, inclusive of VAT, in respect of all the costs incurred in the domestic and Convention proceedings, plus any tax that may be chargeable to the applicant. 129

C. Default interest

138. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points. 130

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objections;

2. Holds by nine votes to eight that there has been no violation of Article 5 § 1 of the Convention;

3. Holds unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a speedy review of the lawfulness of the applicant's detention;

4. Holds unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the refusal to grant the applicant's counsel access to the case file in the proceedings for the review of the lawfulness of the applicant's detention;

5. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

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

(ii) EUR 5,650 (five thousand six hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, CASADEVALL, GYULUMYAN, HAJIYEV, SPIELMANN, BERRO-LEFÈVRE AND BIANKU

Although we have no hesitation in finding a violation of Article 5 § 4 of the Convention for the reasons stated in the judgment, we do not share the majority's view that there has been no violation of Article 5 § 1. On the contrary, we consider that the applicant was not detained “lawfully” and was not deprived of his liberty “in accordance with a procedure prescribed by law”. 131

1. The applicant was arrested on suspicion of tax evasion and was held in detention on remand pursuant to an order of the Mönchengladbach District Court (Amtsgericht) dated 25 July 2002. He remained in custody until 29 October 2002. During that period he applied for judicial review of the lawfulness of his detention and made several unsuccessful requests for access to the case file. 132

2. In a judgment of 14 October 2002, the Düsseldorf Court of Appeal (Oberlandesgericht) found that the District Court's decision of 25 July 2002 to remand the applicant in custody had not complied with the formal requirements of domestic 133

law in that it had not described in sufficient detail the material on which the suspicion of tax evasion was based or the factual circumstances that had led it to order his detention. The Court of Appeal explained that the requirement set out in Article 114 § 2, no. 4 of the Code of Criminal Procedure for a detailed statement applied particularly to cases such as the applicant's in which defence counsel had been refused access to the case file. It also reiterated that the requirement could not be satisfied by a purely formal exposition of the requisite information. It found, however, that the impugned detention order was defective in law (rechtsfehlerhaft), but not void (unwirksam). Accordingly, without quashing the order, ordering the applicant's release or making a fresh order for his detention itself, as required by domestic law (Article 309 § 2 of the Code of Criminal Procedure), it simply remitted the case to the District Court.

3. It is not disputed that the reasoning of the Mönchengladbach District Court in its order of 25 July 2002 was deficient, as it contented itself with laconic phrases and a superficial description, by reference to the applicable statutory provisions, of the facts it considered constituted valid grounds for suspecting the applicant of tax evasion and for depriving him of his liberty. In its judgment of 14 October 2002, the Düsseldorf Court of Appeal explained this deficiency in the following terms: “The District Court did not comply in its detention order with the prescribed requirements. 134

The detention order simply states that the accused is strongly suspected of the acts he is accused of 'on account of the business documents found during the house search'. This terse explanation implies that the documentsfound had already been inspected and provisionally evaluated. It would therefore have been possible for the District Court to have set out the findings of the inspection and evaluation at least in brief in the detention order, so as to give the accused the possibility of mounting an effective defence by submitting or pointing to evidence” (see paragraph 1.b of the Court of Appeal's judgment). It is settled case-law that the absence of any grounds given by the judicial authorities in their decisions authorising detention may be incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (Stašaitis v. Lithuania, no. 47679/99, § 67, 21 March 2002). 135

4. The fact that the requirement that was disregarded in the present case was only a formal or procedural one, not a substantive one, does not make the defect any less serious. The Court's case-law makes no distinction between substantive and procedural rules of domestic law: both have to be complied with to ensure the lawfulness and legality of the detention (McKay v. the United Kingdom, [GC], no. 543/03, ECHR 2006-X). 136

5. Furthermore, in the instant case, the formal or procedural requirement for a sufficiently detailed statement of reasons for the detention order cannot, in practice, be dissociated from the substantive conditions the applicant's detention on remand had to satisfy. By failing to set out all the reasons that were considered to justify the applicant's detention, thereby depriving him of the chance to contest them, the domestic courts failed to comply not only with the formal requirements, but also with the substantive requirements, in that they did not have before them all the necessary information to enable them to determine the lawfulness of the impugned detention. The defect in the instant case must be regarded as having gone to the very essence of the right to liberty enshrined in Article 5 § 1 of the Convention. 137

6. Moreover, if this deficiency in the statement of reasons can and must be seen as serious, this is also because it was accompanied by another failing: the refusal to permit the applicant's lawyer to consult the case file. Admittedly, the distinction between detention orders that are defective but nevertheless valid and those which are void may be justified in certain cases. However, in the present case, the lack of a sufficient statement of reasons in the District Court's order, coupled with the inability of the applicant's lawyer to gain access to the case file, seriously undermined the applicant's ability to contest the well-foundedness of the impugned order and, consequently, violated his right to liberty. 138

Indeed, the Court of Appeal acknowledged in its judgment of 14 October 2002 that the failure to state reasons for the decision, combined with the applicant's lawyer's lack of access to the case file, could have led to the nullity of the detention order. In an implicit allusion to the fact that the Public Prosecutor's Office had insisted between 25 July and 20 November 2002 that the grounds should not be disclosed to the applicant, the Court of Appeal stated, in fine: “Should the Public Prosecutor's Office insist that the grounds for suspicion should still not be disclosed to the accused, in the interests of the pursuit of the investigation, the detention order will have to be lifted (cf. KG StV 1994, 318 [319]; 1994, 319 [320]).” 139

7. Lastly, the majority recognised that the Düsseldorf Court of Appeal's decision to remit the case to the court of first instance after finding the detention order of 25 July 2002 to be defective ran counter to the wording of Article 309 § 2 of the Code of Criminal Procedure (see paragraph 92 of the judgment). While the remittal procedure appears to have been in line with judicial authority that permitted exceptions to the rule in cases similar to the applicant's, it nevertheless poses serious problems as regards compliance with the requirements of Article 5 § 1 of the Convention. Article 309 § 2 of the Code of Criminal Procedure, which requires courts of appeal to decide for themselves whether contested detention orders are well-founded, appears to have been designed to protect defendants from being kept in detention on the basis of orders that do not comply with domestic law. That is exactly what happened to the applicant in the 140

instant case. After the Düsseldorf Court of Appeal declined in its judgment of 14 October 2002 to examine the well-foundedness of the impugned order itself after finding flaws in it, the applicant remained in custody until 29 October 2002, uncertain of the exact reasons why he was being deprived of his liberty and on the basis of an order that had been deemed defective.

In this connection, the Court has in a number of judgments in this sphere stressed the importance of the "quality of the law" in avoiding all risk of arbitrariness (Amuur v. France, 25 June 1996, § 50, Reports 1996-III; Erkalo v. the Netherlands, 2 September 1998, §§ 57-60, Reports 1998-VI; Steel and Others v. the United Kingdom, 23 September 1998, § 54, Reports 1998-VII; and Saadi v. the United Kingdom, no. 13229/03, § 69, [GC], ECHR 2008-...). It has also emphasised the principle of legal certainty and explained that it is essential for the conditions under which a person may be deprived of his or her liberty under domestic law to be clearly defined and for the law itself to be clearly foreseeable in its application (Ciszewski v. Poland, no. 38668/97 § 25, 13 July 2004). The Court has also repeatedly stated that no deprivation of liberty can be extended without the decision of a judge (Baranowski v. Poland, 28 March 2000, § 57, ECHR 2000-III; Goral v. Poland, no. 38654/97, §§ 57-58, 30 October 2003; and Ciszewski, cited above, § 30). 141

8. In conclusion, in view of the serious irregularities in the order for the applicant's detention and the fact that the domestic law, as interpreted by the national courts, did not sufficiently guarantee the right to liberty, we find that the applicant was not detained "lawfully" and that he was not deprived of his liberty "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1 of the Convention. There has therefore been a violation of that provision. 142