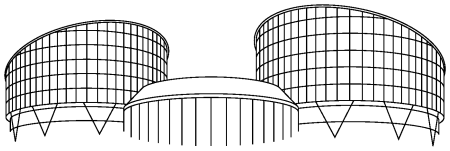

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF TIBA v. ROMANIA

(Application no. 36188/09)

JUDGMENT

STRASBOURG

13 December 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tiba v. Romania,

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

András Sajó, *President*,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 8 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 36188/09) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Tiberiu Mircea Tiba ("the applicant"), on 12 June 2009.

2. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicant complained, in particular, under Article 5 of the Convention of the lawfulness and lack of judicial review of the period he spent under the control of the police and at the prosecutor's office for questioning prior to his placement in police custody.

4. On 18 March 2014 the above-mentioned complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Oradea. He has been a lawyer since 1997.

6. On 11 December 2008 the National Anticorruption Department instituted criminal proceedings against the applicant and a police officer for traffic of influence (*trafic de influenţă*). The applicant was accused, as a

lawyer, of having requested and received money from a client in return for persuading certain judges, other than in the context of the judicial proceedings, to adopt a favourable judgment in his client's case.

7. On the same day the case prosecutor authorised several police officers to enforce a warrant to appear (*mandat de aducere*) issued in the applicant's name on the basis of Articles 183 and 184 of the Criminal Procedure Code. According to the warrant, the applicant's presence was required in order to be heard as a suspect (*învinuit*) in the criminal investigation instituted in File no. 206/P/2008. No other reasons or conditions were stated on the authorisation or the warrant itself.

8. On 12 December 2008 at 8 a.m. a police officer went to the applicant's office in the city of Oradea to enforce the warrant to appear. According to the police officer's report, the applicant was shown the warrant to appear and was escorted to the police station in the nearby town of Salonta. At 9.40 a.m. the applicant was handed over to two other police officers who escorted him to the Timişoara office of the National Anticorruption Department (T.N.A.D.). According to the escorting police officers' report, which was signed also by the applicant, he was handed over to the prosecutor at 11.40 a.m.

9. According to the record of the statements the applicant made before the prosecutor, he was heard as a suspect by the prosecutor at the T.N.A.D. from 12 noon to 4.50 p.m. After the questioning the applicant was charged with the crime of traffic of influence.

10. According to the applicant, his phone, wallet and watch had been confiscated by the police officers and were held during this entire time. Moreover, he had been constantly guarded by the police.

11. By an order issued on 12 December 2008 the applicant was placed in police custody for twenty-four hours commencing at 5.10 p.m.

12. On 13 December 2008 the prosecutor's request for the placement of the applicant in pre-trial detention for thirty days was allowed by the Timişoara Court of Appeal. The applicant complained before the court that he had been unlawfully deprived of his liberty from 8 a.m. to 5.10 p.m. on the previous day. He requested that the above-mentioned period be deducted from his time in custody. The court considered that it was not competent to decide on this complaint and suggested that the applicant should have used the procedure provided by Article 140^1 of the Criminal Procedure Code.

13. The applicant lodged an appeal on points of law (*recurs*) against that judgment, reiterating that he had been unlawfully deprived of his liberty. On 17 December 2008 the High Court of Cassation and Justice rejected the applicant's appeal on points of law as ill-founded without addressing his complaint regarding the lawfulness of his detention prior to his placement in police custody.

14. On 12 March 2010 the applicant was found guilty with final effect and given a suspended sentence of four years' imprisonment for traffic of influence.

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of the Criminal Procedure Code regarding complaints against prosecutors' decisions that were in force at the time of the events in question read as follows:

Article 140[1]
Complaint against prosecutor's order for placement in police custody

"(1) Any complaint against ... a prosecutor's order for placement in police custody must be lodged before the hierarchically superior prosecutor within twenty-four hours, reckoned from the moment the measure was taken, under the conditions set in Article 278 ...

(2) The prosecutor must take a decision before expiry of the twenty-four hour period reckoned from the moment the measure was taken.

(3) The prosecutor shall quash the measure if he decides that it was unlawful or unjustified."

Article 275
The right of complaint

"(1) Everyone has the right to complain against measures taken during the criminal investigation...

(4) The lodging of a complaint does not suspend the enforcement of the measure against which it was addressed."

Article 277
Deadline for resolving the complaint

"The prosecutor must resolve the complaint within a maximum of 20 days from its receipt..."

Article 278
Complaint against the investigative measures taken by the prosecutor

"(1) A complaint against the investigative measures taken by the prosecutor shall be resolved by the hierarchically superior prosecutor..."

16. The provisions of the Criminal Procedure Code concerning police custody and warrants to appear, as in force at the relevant time, read as follows in their relevant parts:

Article 144
Duration of police custody

"1. Police custody may last for a maximum of twenty-four hours. The period during which the person was deprived of liberty pursuant to the administrative measure of

being taken to the police premises, as provided by Law no. 218/2002 on the organisation and functioning of the police, must be deducted from the duration of the police custody."

Article 183
Warrants to appear

"(1) A person may be brought before [a] criminal-investigation body or [a] court on the basis of a warrant to appear,..., if, having been previously summoned, he/she has not appeared, and his/her hearing or presence is necessary.

(2) The suspect (*învinuitul*) or accused (*inculpatul*) may be brought [before the authorities] on the basis of a warrant to appear even before being summoned if the criminal-investigation body or the court provides reasons demonstrating that this measure is necessary in the interest of solving the case.

(3) Any person appearing by virtue of the warrant referred to in paragraphs 1 and 2 of this Article shall be available to the judicial or non-judicial authorities for only such time as is required to question them, save where an order has been made for them to be placed in police custody or pre-trial detention.

(4) A person brought before a judicial or non-judicial body on the basis of a warrant to appear shall be heard immediately."

Article 184
Enforcement of the warrant to appear

"(1) The warrant to appear is enforced by the police, gendarmerie or by community officers. ...

(3^1) If the suspect or the accused refuses to obey the warrant or tries to run away, he/she shall be taken by force."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

17. The applicant complained under Article 5 § 1 of the Convention that he had been unlawfully deprived of his liberty for the period he spent under the police officers' control and at the T.N.A.D. prior to his placement in police custody.

He further complained of the absence of a remedy in the form of judicial review of his deprivation of liberty. The Court, being the master of the characterisation to be given in law to the facts of the case, will examine this complaint under Article 5 § 4 of the Convention.

The relevant parts of Article 5 read:

"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:

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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 shell be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

18. The Government argued that the applicant had failed to exhaust the domestic remedies available in his situation. More specifically, the applicant could have lodged a complaint with the hierarchically superior prosecutor, as provided by Articles 278 or 140^1 of the Criminal Procedure Code. In addition, they argued that the applicant had not lodged a civil action for damages on the basis of the general tort law.

19. The Government also maintained that the applicant had wrongfully asked the domestic courts to deduct from the twenty-four hours' police custody the period spent under the scope of the warrant to appear. Such deduction was permitted by law only in respect of the administrative measure of being taken to police premises, as provided by Law no. 218/2002 on the organisation and functioning of the police.

20. The applicant contested those arguments.

21. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus exempting States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic legislative system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available both in theory and practice at the relevant time, that is to say that the remedy was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, 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, amongst many others, *Akdivar and Others v. Turkey*, 16 September

1996, § 68, *Reports of Judgments and Decisions 1996-IV*, and *Parrillo v. Italy* [GC], no. 46470/11, § 87, 27 August 2015).

22. That said, the Court emphasises that the application of the rule must make due allowance for the fact that it is being applied in the context of the machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to take into account the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 121, 11 January 2007; and *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13, 74569/13 and 7157/14, § 45, 3 November 2015).

23. Turning to the present case, the Court notes that Article 278 of the Criminal Procedure Code provides for a general procedure of complaints to the hierarchically superior prosecutor against the investigative acts and measures ordered by the case prosecutor. These complaints must be resolved within a period of twenty days and do not trigger the suspension of the measure complained about (see paragraph 15 above).

24. As regards the second possible remedy suggested by the Government, the Court notes that Article 140^1 of the Criminal Procedure Code strictly refers to complaints against a prosecutor's order for placement in police custody and therefore does not appear to provide any basis for a complaint in connection with an alleged deprivation of liberty under the scope of the warrant to appear, such as the one raised by the applicant.

25. The Court reiterates that in general a hierarchical remedy cannot be regarded as effective, because litigants are unable to participate in such proceedings (see *Baisuev and Anzorov v. Georgia*, no. 39804/04, § 35, 18 December 2012). Moreover, from the text of the above-mentioned legal provisions it is not apparent how complaints based on these articles of the criminal procedure code could have offered redress in the applicant's situation, especially given that the Court is not convinced that the domestic authorities perceived the restriction of the applicant's liberty prior to 5.10 p.m. on 12 December 2008 as a deprivation of liberty and would have been prepared to pursue any complaints opened by the applicant in that regard (see similarly *Iustin Robertino Micu v. Romania*, no. 41040/11, § 109, 13 January 2015). In addition, the Government did not submit any examples of complaints against a warrant to appear before a prosecutor resolved by the hierarchically superior prosecutor.

26. The Court further notes that no remedy was available to the applicant before the domestic courts either, since the Timişoara Court of Appeal considered on 13 December 2008 that it lacked competence to deal with the applicant's complaint.

27. With regard to the civil claim for damages, the Court notes that the Government did not submit in support of their allegations any examples of relevant domestic case-law. In any event, the Court has already found that in a situation of allegations of abuse against State agents, a civil action for damages based on the general tort law would in theory have been available to the applicant but unlikely to have had any prospects of success since it requires proof of negligence on the part of the person complained against – which cannot be the case in the current applicant's situation (see *Lazariu v. Romania*, no. 31973/03, §§ 88 and 89, 13 November 2014; see also, *mutatis mutandis*, *Eugenia Lazăr v. Romania*, no. 32146/05, § 90, 16 February 2010; and *Kilyen v. Romania*, no. 44817/04, § 26, 25 February 2014).

28. The Court therefore finds that, in the particular circumstances of the case, the Government did not establish that a civil action for damages was an effective remedy.

29. It follows that the Government's preliminary objection as to the exhaustion of domestic remedies must be rejected. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Alleged violation of Article 5 § 1 of the Convention*

(a) The parties' submissions

30. The applicant submitted that on 12 December 2008 he had been unlawfully deprived of his liberty from 8 a.m. to 5.10 p.m. He further contended that he had never been summoned to appear before the prosecutor investigating the case and that the measure to bring him by force had not been justified, as required by law.

31. The Government contended that the domestic legislation allowed for a person to be brought before a prosecutor on the basis of a warrant to appear, particularly in circumstances where – as in the applicant's case – his presence was necessary in order for him to be questioned for the first time as a suspect. The criminal procedure rules did not make the issuance of a warrant to appear conditional on a previous refusal to appear and to cooperate with the investigating authorities.

32. The duration of the measure had not been excessive and had been justified by the crime for which the applicant was being investigated, as

well as by the police-officer status of the co-suspect. As regards the fact that the reasons for this measure had not been mentioned in writing on the warrant, the applicant could have asked for this information once he found himself in front of the prosecutor.

33. The Government also contended that no force had been exerted on the applicant by the police officers in order to make him accompany them and that, once on the premises of the prosecutor's office, he could have refused to give statements and asked to leave.

34. The Government concluded that – even if the Court were to consider that the applicant had been deprived of his liberty – the warrant to appear before the criminal-investigation authority had been issued in compliance with national law, had been justified, and had been proportionate in its scope.

(b) The Court's assessment

35. The Court points out that in proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion (see *Vittorio and Luigi Mancini v. Italy*, no. 44955/98, § 16, 2 August 2001). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty, and no deprivation of liberty will be lawful unless it is justified on one of those grounds (see *Iustin Robertino Micu*, cited above, § 85).

36. The Court also reiterates that, in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between the deprivation of liberty and the restriction thereof is merely one of degree or intensity, and not one of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012). Moreover, the characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty (see *Creangă v. Romania* [GC], no. 29226/03, § 92, 23 February 2012).

37. In the instant case the Court considers, along with both parties, that the measure complained of started at 8.00 a.m. on 12 December 2008 and ended at 5.10 p.m. on the same day, therefore lasting for nine hours and ten minutes.

38. The Court further observes that the Government contended that the applicant had willingly accompanied the police officers to the prosecutor's office and that they had not used force against him. The Government also alleged that, once on the premises of the T.N.A.D., the applicant could have refused to give statements and could have asked to leave. In this connection,

the Court notes that the warrant to appear was shown to the applicant (see paragraph 8 above) and also that the applicant's allegation that he was guarded by police officers continuously was not contradicted by the Government. In addition, had the applicant refused to accompany them, the police officers escorting him would have been authorised by law to take him by force (see paragraph 15 above). Furthermore, in accordance with the provisions of article 183 § 2 of the Criminal Procedure Code, the applicant was obliged to remain available to the prosecutor for the time required for his questioning. The applicant's questioning started at 12 noon and lasted until 4.50 p.m. and, according to his allegations, he was constantly under the control of the police officers who were also holding his phone and wallet (see paragraph 10 above). Under these circumstances the Court notes that there is no evidence in the file to suggest that the applicant would have been allowed to leave of his own free will or that he had been notified by the police officers or the prosecutor that he could do so.

39. According to the Court's established case-law, coercion is a crucial element in its examination of whether or not someone has been deprived of his or her liberty within the meaning of Article 5 § 1 of the Convention (see, for example, *Foka v. Turkey*, no. 28940/95, §§ 74-79, 24 June 2008, and *M.A. v. Cyprus*, no. 41872/10, §§ 186-193, ECHR 2013 (extracts)). The Court therefore considers that the applicant was under the authorities' control throughout the entire period, and concludes that, despite the relatively short period of time in question (compare *Tomaszewscy v. Poland*, no. 8933/05, § 130, 15 April 2014; and *Baisuiev and Anzorov*, cited above, § 55, where the applicants were held for even shorter periods of time of two and three hours respectively) he was deprived of his liberty within the meaning of Article 5 § 1 of the Convention.

40. The Court must now determine whether the applicant was deprived of his liberty "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention. The words "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally, first and foremost, up to the national authorities, especially the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with the law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at issue and the Court must then exercise a certain power to review whether national law has been observed (see *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III). In particular, it is essential, in matters concerning deprivation of liberty, that the domestic law clearly defines the conditions for detention and that the law be foreseeable in its application (see *Zervudacki v. France*, no. 73947/01, § 43, 27 July 2006, and *Creangă*, cited above, § 101).

41. The Court notes that, in the present case, the legal basis for depriving the applicant of his liberty was Article 183 of the former Romanian Code of Criminal Procedure.

42. According to paragraph 1 of that Article, an individual could be brought before a criminal-investigation body or a court on the basis of a warrant to appear if, having been previously summoned, he or she had not appeared and his or her questioning or presence was required. In this connection, the Court notes that the parties agreed that the applicant had never been summoned to appear before the T.N.A.D.'s prosecutors in connection with criminal proceedings against him.

43. The Court further notes that, pursuant to paragraph 2 of the same Article, a suspect or an accused could exceptionally be brought before the authorities on the basis of a warrant to appear even before being summoned if the criminal-investigation body or the court provided reasons explaining why this measure was necessary in the interest of solving the case.

44. In this respect the Court observes that the prosecutor's warrant of 11 December 2008 issued on the basis of Article 183 paragraph 2 of the former Romanian Code of Criminal Procedure did not provide any reasons as to why this measure was necessary for the questioning of the applicant as an accused. While the Government contended that the measure had been justified by the type of crime and the status of the other person accused in the file, those reasons were not included in the warrant presented to the applicant. Moreover, the Court considers that the fact that the co-suspect was a police officer could have constituted a reason justifying that person's warrant, but not the applicant's. The Government also alleged that the applicant, when appearing before the investigating prosecutor, could have asked the latter what the reasons were for the warrant issued in his name. On this point the Court considers that the purpose of the requirement to provide reasons for a warrant to appear issued directly – without summoning the accused – is not only of a purely informative nature but also serves the purpose of avoiding abuse of this legal provision. The Court therefore concludes that by omitting to specify the reasons on which it was based, the prosecutor's warrant failed to conform to the rules applicable to domestic criminal procedure (see *Ghiurău v. Romania*, no. 55421/10, § 85, 20 November 2012, and *Iustin Robertino Micu*, cited above, § 94).

45. The Court considers that the above circumstances prove that the applicant was not deprived of his liberty in accordance with a procedure prescribed by domestic law, thereby rendering the deprivation of the applicant's liberty from 8.00 a.m. to 5.10 p.m. on 12 December 2008 incompatible with the requirements of Article 5 § 1 of the Convention.

46. There has therefore been a violation of Article 5 § 1 of the Convention.

2. Alleged violation of Article 5 § 4 of the Convention

47. The applicant claimed that the domestic legislation did not provide for judicial review or any other remedy for his complaint concerning the breach of his right to liberty as guaranteed by Article 5 of the Convention.

48. The Government argued that the rather short duration of the applicant's alleged deprivation of liberty rendered impossible its review by a court. In addition they contended that the applicant could have lodged complaints with the hierarchically superior prosecutor as provided by Articles 278 or 1401 of the Criminal Procedure Code.

49. The Court observes from the outset that the substance of the applicant's complaint under Article 5 § 4 is the absence of judicial review for the period of nine hours and ten minutes in which he had been deprived of his liberty under the scope of the warrant to appear. At the end of the above-mentioned period, the applicant was officially placed under police custody (see paragraph 11 above), a measure which he did not contest before the Court.

50. The Court observes in this context that Article 5 § 4 of the Convention deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The provision does not deal with other remedies which may serve to review the lawfulness of a period of detention which has already ended, including, in particular, a short-term detention such as in the present case (see *Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003‑X).

51. Accordingly, the Court does not find it necessary to examine the merits of the applicant's complaint under Article 5 § 4 of the Convention (see *Tomaszewscy*, cited above, §§ 146-147; and *Baisuiev and Anzorov*, cited above, §§ 69-70).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage on account of the physical and psychological suffering to which he had been subjected.

54. The Government argued that the sum claimed by the applicant was excessive.

55. The Court considers that the applicant must have suffered distress as a result of the treatment he was subjected to by the authorities on 12 December 2008 prior to his placement in police custody. Consequently, making an assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant did not claim any costs or expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

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

2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*, by six votes to one, that it is not required to deal with the merits of the applicant's complaint under Article 5 § 4 of the Convention;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 December 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	András Sajó President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Marko Bošnjak is annexed to this judgment.

A.S.
M.T.

PARTLY DISSENTING OPINION OF JUDGE BOŠNJAK

58. I respectfully disagree with the majority that the Court is not required to deal with the merits of the applicant's complaint under Article 5 § 4 of the Convention.

59. The applicant *inter alia* claimed that the domestic legislation did not provide for judicial review or any other remedy for his complaint concerning the breach of his right to liberty as guaranteed by Article 5 of the Convention. This complaint is to be separated from his claim that he had been unlawfully deprived of his liberty for the period he spent under police officers' control and at the T.N.A.D. prior to his placement in police custody. The Convention specifically empowers our Court not only to review whether, in a particular case, the conditions of Article 5 § 1 were met, but also and independently whether the person deprived of his or her liberty was entitled to challenge the lawfulness of the deprivation of liberty before a national court in conformity with the requirements of Article 5 § 4 of the Convention.

60. The wording of Article 5 § 4 indicates that it becomes operative immediately after arrest or detention and is applicable to everyone who is deprived of his liberty. Accordingly, in the case at hand this required that a judicial remedy be available whereby the applicant could have challenged his detention and obtained release (see *Petkov and Profirov v. Bulgaria*, nos. 50027/08 and 50781/09, §§ 66-67, 24 June 2014). If an appropriate remedy is not available, this in itself is a violation of the Convention, more precisely of Article 5 § 4. Such an eventual violation is independent from the question whether a particular case of deprivation of liberty met the substantive criteria outlined in Article 5 § 1 of the Convention.

61. In our present case, the Chamber has rightfully ruled that there has been a violation of Article 5 § 1 of the Convention. In examining that part of the complaint, it has dismissed the Government's preliminary objection as to the applicability of the Articles 278 or 140 of the Romanian Code of Criminal Procedure in the instant case. In addition, the Court has already established the absence of an effective domestic remedy in a similar case where the applicant was deprived of his liberty for twelve hours on the basis of a warrant to appear (see *Iustin Robertino Micu,* cited in the judgment, §§ 109-110). Moreover, the applicant in the present case had raised before the domestic courts his complaint concerning unlawful deprivation of liberty prior to his placement in police custody, but the courts had considered that they were not competent to decide on this complaint. Therefore, the Court should conclude that the applicant's deprivation of liberty from 8.00 a.m. to 5.10 p.m. on 12 December 2008 was not subject to any judicial review and that there has accordingly been a breach of Article 5 § 4 of the Convention.