

## PREVENTIVE DETENTION ON REMAND IN PRE-TRIAL PROCEEDINGS FROM THE POINT OF VIEW OF THEORY AND PRACTICE / Jozef Čentéš, Andrej Beleš

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**Abstract:** *In the article the authors pay attention to the detention on remand, which is the most serious procedural interference in the system of criminal law means to the personal liberty of an individual, accused of a crime. This institute is characterised in terms of national and international aspects of protection of the individual who has been taken into detention on remand. The authors pay special attention to the reasons for the so-called preventive detention on remand in pre-trial proceedings from the point of view of theory and application practice of courts.*

**Key words:** *Personal Liberty; Restriction; Detention on Remand; Reason for Detention; Preventive Detention; Nature of Crime*

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## 1. INTRODUCTION

Deprivation of liberty by detention on remand constitutes the most serious interference with an individual's personal liberty in criminal proceedings. The legislator is aware of this situation when it establishes in the legal order the constitutional framework and the framework of "basic laws" for the application of detention on remand based on it. The relevant legal framework is laid down in particular in the Criminal Procedure Code, which is an integral part of the constitutional framework of guaranteed personal liberty,

guaranteed in particular in Article 17 of the Constitution of the Slovak Republic (hereinafter referred to as "**the Constitution**").

The legal regulation also reflects the wording of Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "**the Convention**"), which requires that deprivation of liberty must be "in accordance with the *procedure laid down by law*" and that any deprivation of liberty (Article 5(1)(a) to (f)) permissible under the Convention must be "*lawful*". The guarantees of personal liberty at the constitutional level are identical in content to those under Article 5 of the Convention, which are further developed in the case-law of the European Court of Human Rights (ECtHR). The Convention is an international treaty with primacy over the law under Article 154c of the Constitution of the Slovak Republic with regard to the guarantee of a wider range of constitutional rights and freedoms. The Convention is part of the legal order of the Slovak Republic, thus forming a single entity, the Convention is thus "*domesticated*" (Drgonec, 2015, pp. 1589–1590).

Detention on remand as an exceptional criminal remedy may be applied only if the facts required by law are established, which justify the necessity of its use in the interests of timely and proper clarification of the offence and fair punishment of the offender. Since it is a temporary deprivation of an individual's liberty, there must be a necessity to impose detention on remand and to keep him in detention on remand only for a certain legitimate purpose and for the time for which he or she may be taken into detention on remand.<sup>1</sup> It is clear from the provisions of Article 17(5) of the Constitution that the phrase '*the time for which detention on remand may be taken*', together with the concepts of '*decision*' and '*grounds*', form a single entity.

Any deprivation of liberty by detention on remand must also comply with **Article 5 of the Convention, the purpose of which is to protect the individual against arbitrary interference by a public authority** with personal liberty. As noted above, the basis for the guarantee of personal liberty is the imperative of the lawfulness of deprivation of liberty in custodial prosecutions, which is even mentioned twice in Article 5(1)(c) of the Convention. The requirement of lawfulness and the protection against arbitrariness are mutually reinforcing: a deprivation of liberty based on arbitrariness can never be lawful.<sup>2</sup> This provision also explicitly lists the material conditions for the restriction of personal liberty (material conditions of detention on remand), which:

- there are reasonable grounds to suspect that a criminal offence has been committed,
- deprivation of liberty is reasonably considered necessary for the purpose of preventing the commission of the offence or escape after its commission.

Moreover, this provision, in conjunction with Article 5(3) of the Convention, includes the requirement of immediate and prompt judicial review of the restriction of personal liberty, i.e. the detained person must be brought promptly before a court which decides on the detention on remand.<sup>3</sup> At the same time, under Article 5(3) and (4), the Convention provides:

- protection of the right to a speedy trial (trial within a reasonable time) of a criminal case in which the accused is remanded in detention,

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<sup>1</sup> Resolution of the Supreme Court of the Slovak Republic of 18 May 2023, Case No. 5 Tostš 9/2023.

<sup>2</sup> The ECtHR has long held that this circumstance is a matter of long-standing consistency, see in particular the judgment of 24 October 1979 in *Winterwerp v. the Netherlands*, no. 6301/73, paragraph 39, and the decisions cited therein. See also the interpretation on this point by Repik (2002, pp. 213 et seq.).

<sup>3</sup> See the interpretation of Article 5(1)(c) of the Convention under the judgment of the Grand Chamber of the ECtHR of 3.10.2006 in *McKay v. the United Kingdom*, no. 543/03, para. 30.

- the protection of the right that the court, when considering the necessity of detention on remand, should give primary consideration to the possibility of substituting a measure which is more lenient in relation to fundamental rights and freedoms, if the purpose of detention can be fulfilled in this way,
- protection of the individual's right to seek a periodic review of the lawfulness of detention on remand and to apply for release on bail, which must be decided promptly, or the right of the accused to be released on bail if it is found that the continued detention is unlawful (Orosz, Svák et al., 2021, p. 207).

The above-mentioned attributes of the right to personal liberty under the Convention are also fully reflected in the European Commission Recommendation 2023/681,<sup>4</sup> but they are not subject to harmonisation at the level of EU law, which the Member States would be obliged to implement. However, some aspects of deciding on detention - which relate to the presumption of innocence - are covered by Directive 2016/343<sup>5</sup> (López, 2021).

The Convention makes direct reference to domestic law and therefore respect for this right is an integral part of States Parties' obligations.<sup>6</sup>

The constitutional regulation of detention on remand, which reflects Article 5 of the Convention, is *lex specialis* in relation to the general constitutional norm on the grounds (substantive level) and the manner (procedural level) of deprivation of personal liberty to the extent:

- i) grounds for deprivation of liberty (Article 5(1)(c), Article 5(2) and (3) of the Convention and Article 71 of the Code of Criminal Procedure),
- ii) special safeguards in the decision to take a person into detention on remand (Article 17(2) and (3) of the Constitution),
- iii) control of the lawfulness of deprivation of liberty in detention on remand (Article 17(5) of the Constitution, Article 5(4) of the Convention).

## 2. PREVENTIVE DETENTION ON REMAND IN CRIMINAL PROCEEDINGS

### 2.1 National Legislation

From the point of view of the established case law, we highlight the necessity of fulfilling the formal and material conditions of detention on remand. These conditions of detention on remand must be examined individually in each specific criminal case and thus avoid a blanket (inadmissible) assessment of them. For these reasons, the existence of specific facts justifying the fulfilment of these conditions is essential.

The **formal conditions of detention on remand** include in particular:

- i) the filing of the charge and its proper service on the accused (defence counsel);

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<sup>4</sup> Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (OJ L 86, 24.3.2023, pp. 44–57).

<sup>5</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, pp. 1–11).

<sup>6</sup> See, e.g., ECtHR, *de Wilde v. Belgium*, app. nos. 2832/66; 2835/66; 2899/66, 18 June 1971, or ECtHR, *Khudoyorov v. Russia*, app. no. 6847/02, 8 November 2005.

- ii) detention on remand of the accused (suspect) within the period prescribed by law and his/her interrogation (Art.85(1) and (4), Art.86(1) of the Code of Criminal Procedure);
- iii) filing a motion by the prosecutor to take the accused into detention on remand and handing it over to the court together with the case file within the legal time limit (Art.85(4), Art.86(1) *in fine of the Code of Criminal Procedure*):
  - a. within 48 hours (general time limit) or
  - b. up to 96 hours in the case of terrorism offences, the time limit always starting from the time of arrest, detention on remand under a special law or from the time of taking charge in the case of a so-called civil restraint of liberty,
- iv) the hearing of the accused by the judge for preliminary proceedings and the decision on the motion to remand the accused in detention on remand within the legal time limit (Article 86(2) of the Code of Criminal Procedure).<sup>7</sup>

**The material conditions of detention on remand** relate to the grounds for prosecution and are laid down in Article 71(1) of the Code of Criminal Procedure, according to which „(...) *The accused may be taken into detention on remand only if the facts established so far indicate that the act for which the prosecution has been instituted has been committed, has the elements of a criminal offence, there are grounds for suspecting that the act has been committed by the accused, and that his conduct or other specific facts give rise to a well-founded apprehension*“..., of any of the grounds for detention on remand under Article 71(1) of the Code of Criminal Procedure. In the case of so-called preventive detention on remand, this ground is that “he / she **will continue criminal activity, will complete the criminal offence which he has attempted or will carry out the criminal offence which he has prepared or threatened to carry out**, and if, in view of the person of the accused, the nature or gravity of the offence for which he or she is prosecuted, it is not possible at the time of the decision on detention to substitute detention pursuant to section 80 or section 81.”

## 2.2 Requirements under Articles 5(1)(c) and 5(3) of the Convention

The essence of the protection under Article 5 of the Convention is to provide strong guarantees that act as a safeguard against arbitrary (capricious) restrictions on personal liberty (Schabas, 2015, p. 220). As mentioned above, the existence of material grounds for detention on remand is also part of the guarantees of personal liberty under Article 5(1)(c) of the Convention.

In addition to the fact that this provision explicitly enumerates the material conditions of detention on remand as circumstances *conditio sine qua non* for the restriction of personal liberty, the existence of material conditions *also follows per se* from the requirement of the lawfulness of the restriction of personal liberty. The procedure laid down by law is **not only a formal requirement** for legal regulation at the level of a statute (not a sub-legislative regulation), but also includes a **material requirement for the quality of the legal regulation of detention on remand**, as well as a requirement for the consistent application of that regulation. This also applies to the material conditions of detention on remand – the grounds for prosecution and the grounds for detention on remand.

<sup>7</sup> Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.

Qualitative requirements in legislative terms mean that legislation should be precise, accurate, clear, predictable (Kmec et al., 2012, p. 476). On the application level, this means that the court shall carefully weigh the public interest in clarifying the crime, the fulfilment of the right of victims to an effective investigation on the one hand, and the proportionality of the interference with the fundamental rights and freedoms of the accused, while interpreting the grounds for detention **reasonably (not extensively)** and duly justifying the existence of grounds for prosecution and grounds for detention **in the light of the specific factual circumstances**. Such qualitative requirements of legality form part of the principle of legal certainty under the rule of law.

The existence of reasonable suspicion of the commission of a crime is a necessary condition for the duration of detention on remand. **Reasonable suspicion** of the commission of a criminal offence means that there is information that the person concerned has committed a criminal offence and that the information is of such quality as to satisfy an objective and impartial observer; the reasonableness of the suspicion shall be based on all the circumstances of the case. However, this information may not be of the extent and quality necessary to bring an indictment or convict the offender.<sup>8</sup> In assessing the existence of reasonable suspicion under Article 5 of the Convention, it is necessary to take a holistic approach and to interpret this Article in the context of other fundamental rights: e.g. political speech exercising freedom of expression under Article 10 of the Convention cannot give rise to reasonable suspicion of the commission of a criminal offence (Çali, 2020). Accordingly, if no indictment is subsequently brought in the case (or no conviction of the accused is obtained), that fact does not *per se* give rise to a violation of Article 5 of the Convention (Schabas, 2015, p. 238).

For a long time, the case law of the ECtHR has initially accepted that this condition is initially sufficient for detention on remand in view of the guarantees under Article 5(1)(c) in conjunction with Article 5(3) of the Convention, without examining the other material conditions, i.e. the grounds for detention on remand. This case law – in line with the doctrine of aggravated grounds of detention on remand – has further held that after a certain period of time, this condition is not sufficient (nor is the high societal gravity of the offence) and the court must examine the existence of grounds for detention on remand.<sup>9</sup>

However, the ECtHR's jurisprudence has been subject to a certain evolutionary development, with the Court gradually raising the standards of protection of fundamental rights and freedoms, including the right to personal liberty in custodial decision-making as the Convention is a "living instrument" (Mowbray, 2009). This is because the Convention is interpreted and applied in terms of societal developments and increasing societal expectations for the protection of fundamental rights and on the part of states may create room for tightening the conditions for the protection of personal liberty and the possibilities for limiting it. However, this evolution must be proportionate, reflecting the rising standards in the States Parties (as the Convention sets only a minimum standard which national legislation may exceed), or, in the context of detention on remand, must not unduly restrict the fulfilment of the public interest, i.e. the State's ability to clarify criminal activity or the right of victims to an effective investigation.

The Grand Chamber of the ECtHR, in the Buzadji judgment, proceeded to such an evolution, stating that the doctrine that the existence of reasonable suspicion of the

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<sup>8</sup> ECtHR, *Selahattin Demirtaş v. Turkey* [GC] (No. 2), app. no. 14305/17, 22 December 2020, paras. 314-315.

<sup>9</sup> ECtHR, *Letellier v. France*, app. no. 12369/86, 26 June 1991, para. 34 (according to this judgment, the case-law refers to the so-called *Letellier*-standards). See also ECtHR, *Tomasi v. France*, app. no. 12850/87, 27 August 1992, paras. 82 and 89, and other judgments.

commission of an offence is the sole decisive material criterion for taking a detainee into detention on remand in the initial decision to detain him or her, and **that the existence of a ground for detention (as a second material criterion) should only be examined after a certain lapse of time, needs to be reconsidered.**<sup>10</sup> The Court derived this fact from the right of the accused to have a custodial criminal case heard within a reasonable time under Article 5(3) of the Convention.

Related to this is the fact that the legitimacy and proportionality of the continued detention on remand must be supported by other sufficient and relevant circumstances, and the national authorities (law enforcement authorities and courts) are obliged to make special efforts to ensure that the custodial criminal case is decided on the merits as soon as possible, or that the accused is released on bail. The ECtHR has not defined (in years, months, weeks, days) in its case-law exactly what is meant by the phrase "*after a certain period of time*". However, in a number of judgments<sup>11</sup> the Court has held that after a relatively short period of time (counted in the order of days), the mere existence of reasonable suspicion of the commission of a crime is not sufficient to justify detention on remand (in pre-trial proceedings) *per se*.

In Buzadji,<sup>12</sup> the Court "*shifted*" the above guarantees of protection against unjustified detention on remand, i.e., it proceeded to develop its previous constant jurisprudence. In the present case, the Grand Chamber of the ECtHR concluded that in the initial decision of the court to remand a detainee in detention on remand, it is not sufficient only to have a reasonable suspicion that a crime has been committed, but it is also necessary from the outset to examine the existence of one of the grounds for detention on remand. In the Court's view, it was necessary to develop the case law to the effect that it was not necessary to distinguish, in terms of the examination of the material conditions of detention on remand, between:

- the obligation to bring the detainee "*promptly*" before a judge whose task it is to examine the merits of the criminal charge,
- and the duty of the judge to examine other material conditions - the grounds for detention on remand "*after a certain lapse of time*" since the arrest ("*after a certain lapse of time*").

The examination of all the material conditions – the grounds for the charge as well as the grounds for detention on remand – are thus brought together in a single point, in a single moment, when the detainee is brought immediately ("*promptly*") before the judge who decides whether to take the detainee into detention or release him or her.

The ECtHR's jurisprudence on the second material condition of detention, i.e. the specific grounds for detention on remand, has long been settled. The Grand Chamber of the ECtHR has repeatedly confirmed that the grounds for detention on remand must be relevant and sufficient. The existence of grounds for detention on remand reflects the **real existence of a public interest** in restricting the personal liberty of the accused. Against this background, the ECtHR's jurisprudence has in principle established four grounds for detention on remand, although Article 5(1)(c) of the Convention directly lists only two grounds: prevention of the commission of the offence and escape after the

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<sup>10</sup> E.g. ECtHR, Kudła v. Poland [GC], app. no. 30210/96, 26 October 2000, para. 111; or ECtHR, McKay v. the United Kingdom, app. no. 543/03, 3 October 2006, para. 44.

<sup>11</sup> E.g. ECtHR, Zayidov v. Azerbaijan, app. no. 11948/08, 20 February 2014, para. 62.

<sup>12</sup> ECtHR, Buzadji v. Moldova [GC], app. no. 23755/07, 5 July 2016, para. 100 et seq.

commission of the offence.<sup>13</sup> The four grounds of detention on remand arising from the ECtHR's case-law are as follows:<sup>14</sup>

- a) **the risk that the accused will be unavailable for the purposes of the criminal proceedings**, namely that he or she will be unavailable or fail to appear at the main hearing (i.e. the risk of absconding) – the high seriousness of the offence and the threat of a heavy sentence may be aspects that support or increase the risk of the accused absconding, but other circumstances, in particular those relating to the person of the accused, must also be examined;<sup>15</sup> these circumstances may relate to the nature of the accused, his or her property, possession of travel documents, or contacts abroad. If the risk of absconding is the only reason for detention and the presence of the accused for the purposes of criminal proceedings can be secured by means other than detention (substitution of detention on remand by a monetary guarantee, supervision by a probation officer together with electronic monitoring means), the accused must be released from detention on bail;<sup>16</sup>
- b) **risk of obstruction of justice** by the accused (i.e. in particular the risk of collusion with witnesses) – the need to carry out further acts *per se* is not an independent ground for detention on remand,<sup>17</sup> but there must be a risk that the accused will, by his or her conduct, obstruct the proper performance of the proceedings, in particular by influencing witnesses;
- c) **the risk of continued criminal activity** (preventive detention on remand ground) – as this detention on remand ground forms the subject of our examination, it will be further discussed in the following text – and
- d) **breach of public order** (e.g. risk of social disorder after the release of the accused due to the extreme seriousness of the offence<sup>18</sup>), including the protection of the life and health of the accused himself.

The distinction between the four grounds for detention has also been adopted by the European Commission in its Recommendation 2023/681.<sup>19</sup>

The condition of the existence of a ground or reason for detention on remand reflects the principle of the legitimacy of the interference with the right to personal liberty. Consequently, the assessment of the existence of a reason for detention on remand must reflect the principle of proportionality (Schabas, 2015, p. 239). The assessment of the existence of grounds for detention on remand (other than reasonable suspicion of the commission of a criminal offence) must be strict precisely with regard to the attributes

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<sup>13</sup> On the one hand, such an interpretation should be considered controversial, as the case law of the ECtHR often reminds that the grounds for restricting the right to personal liberty are to be interpreted restrictively, not extensively. This is countered by the counter-argument that a limitation to only two grounds of detention on remand could paralyse the criminal justice system. On the other hand, that provision does not mention reasonable suspicion and two grounds for detention on remand as cumulative conditions, so it could also be seen as a restrictive interpretation of the requirement that reasonable suspicion and grounds for detention on remand must be met cumulatively (Kmec et al., 2012, p. 515).

<sup>14</sup> ECtHR, *Buzadjı v. Moldova* [GC], app. no. 23755/07, 5 July 2016, para. 88 and other judgments cited therein. See also ECtHR, *Merabishvili v. Georgia* [GC], app. no. 72508/13, 28 November 2017, para. 222.

<sup>15</sup> Among the earlier decisions, see, for example, the judgment of 27 June 1968 in *Neumeister v. Austria*, no. 1936/63, paragraph 10.

<sup>16</sup> ECtHR, *Merabishvili v. Georgia* [GC], app. no. 72508/13, 28 November 2017, para 223.

<sup>17</sup> ECtHR, *Azizov and Novruzlu v. Azerbaijan*, app. nos. 65583/13, 70106/13, 18 February 2021, para. 59, and other decisions cited therein.

<sup>18</sup> ECtHR, *Letellier v. France*, app. no. 12369/86, 26 June 1991, para. 51.

<sup>19</sup> See point 19 of the European Commission's Recommendation, cited above.

of *relevance* and *sufficiency*. In principle, these circumstances are assessed by the court as a whole, but it is also possible to conclude in a particular case that the grounds are relevant but not sufficient.

The existence of relevant and sufficient grounds for detention on remand must be adequately explained in the reasoning of the detention on remand decision, i.e. the reasoning must not be merely abstract, general or schematic.<sup>20</sup> Schematic or stereotyped reasoning may be manifested, for example, by the use of formulaic models for judicial decisions on detention on remand.<sup>21</sup> Beyond the examination of these material conditions, the national court is – in line with the ECtHR's jurisprudence<sup>22</sup> – also obliged to consider, when deciding on detention on remand, whether the law enforcement authorities, and subsequently the court, have taken '*special care*' to ensure that the proceedings are conducted in a particularly expeditious manner [in accordance with Article 5(3) of the Convention].

As regards the special **ground of preventive detention on remand**, which is based on the risk of continuing to commit criminal offences, it is true in this context that detention must not be exclusively preventive in nature in order to prevent the commission of criminal offences in general. This is true from the point of view of general prevention, i.e. preventing the commission of criminal offences in general, but also from the point of view of individual prevention in relation to a specific person – detention cannot be based solely on the general assumption that he or she could potentially commit a criminal offence in the future (because of certain characteristics, previous life, membership of a particular social group).

On the contrary, two aspects must be met in order for the ground of preventive detention on remand to be satisfied: there is a reasonable suspicion that the accused has committed a criminal offence and there is a serious risk that he or she will go on to commit a particular and specific criminal offence, i.e. that he or she will continue to commit criminal offences. The purpose of preventive detention on remand is to prevent the commission of that specific offence which is imminent. The threat to commit the offence must be given in the near term, on the order of hours.<sup>23</sup>

Thus, the risk of committing a crime is not just in the abstract but is a concrete danger that may arise from various aspects of the case. In accordance with the judgment of the Grand Chamber of the ECtHR in *Kurt v. Austria* – cited above – this danger may relate to previous statements and threats made by the accused or by witnesses, the established preparation for the commission of the offence, the **seriousness or sophistication of the offence charged (reasonable suspicion), as well as to the person of the accused**. The European Commission also recommends (2023/681) taking such aspects into account.<sup>24</sup>

As regards the person of the accused, the reason for preventive detention on remand may also be based on his or her "*personal history*", namely the previous criminal offences for which he or she has been convicted (the nature and seriousness of which

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<sup>20</sup> ECtHR, *Merabishvili v. Georgia* [GC], app. no. 72508/13, 28 November 2017, para. 222.

<sup>21</sup> ECtHR, *Sardar Babayev v. Azerbaijan*, app. nos. 34015/17, 26896/18, 1 February 2024, para. 50.

<sup>22</sup> ECtHR, *Buzadji v. Moldova* [GC], app. no. 23755/07, 5 July 2016, para. 87.

<sup>23</sup> See ECtHR, *Kurt v. Austria* [GC], app. no. 62903/15, 15 June 2021, para. 188.

<sup>24</sup> Point 20 of the European Commission's Recommendation „(a) *the nature and seriousness of the alleged offence; (b) the penalty likely to be incurred in the event of conviction; (c) the age, health, character, previous convictions and personal and social circumstances of the suspect, and in particular their community ties [...]*”



must be assessed accordingly).<sup>25</sup> On the other hand, the absence of employment or family background *per se* is not an indicator of a direct threat of further criminal activity.<sup>26</sup>

The circumstances of the commission of the offence as well as the characteristics of the person of the accused may give rise to any of the four grounds for detention on remand (and conversely may justify the necessity of the release of the accused in the absence of a ground for detention on remand<sup>27</sup>), and it is therefore not possible to disregard these circumstances precisely when assessing the risk of continued criminal activity. Although the reason for preventive detention on remand may be based on the defendant's previous threats or attempts or preparation, the preparation or attempt of a crime (i.e. the threat that the offender will complete a crime which he has attempted or prepared) are not the only cases where preventive detention on remand may be applied.

### 2.3 Fulfilment of the Above Conditions in National Court Decisions

The theses on the interpretation of the material conditions of detention on remand, namely the grounds for detention on remand, which we have analysed in the previous text on the basis of the ECtHR's jurisprudence, have been reflected in the jurisprudence of the Slovak and Czech national courts since the 1990s until the present day. As regards the very nature of preventive detention on remand, from the point of view of constitutional law, detention on remand is not predominantly preventive in nature (and certainly not punitive or satisfactory in nature), but is characterised as a precautionary measure designed to enable proper and fair criminal proceedings to take place.<sup>28</sup>

On the question of establishing the existence of detentional grounds, the Czech Constitutional Court ruled in 1996 that the fear that gives rise to one of the three grounds for detention on remand (escape, collusion or preventive detention) may arise from essentially two sources:

- from the particular conduct of the accused (i.e. the accused himself gives cause for concern that he or she will continue to commit a crime or influence witnesses, etc.); or
- from an objective constellation of circumstances which includes not only the person of the offender but also all the elements of the offence and the stage of the criminal proceedings (i.e. it is an objective constellation of circumstances which arise from the characteristics of the accused but also the type of criminal activity).<sup>29</sup>

Thus, the facts that establish the reason for the link may come from a variety of sources, but they must never be too abstract or "vague". The Slovak Constitutional Court has pointed out that an indication of insufficient examination of concrete facts may be

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<sup>25</sup> ECtHR, *Clooth v. Belgium*, app. no. 12718/87, 12 December 1991, para. 40; see also ECtHR, *Selçuk v. Turkey*, app. no. 21768/02, 10 January 2006, para. 34, as well as Schabas (2015, p. 252).

<sup>26</sup> ECtHR, *Sulaoja v. Estonia*, app. no. 55939/00, 15 February 2005, para. 64.

<sup>27</sup> In the context of the substitution of detention on remand (with a cash bond), the ECtHR has held that even in pre-trial proceedings there must be such a possibility of release from detention on remand if the nature of the offence or the personal circumstances of the accused are such that detention on remand is disproportionate or not supported by relevant or sufficient reasons. ECtHR, *McKay v. the United Kingdom*, app. no. 543/03, 3 October 2006, para. 46.

<sup>28</sup> Ruling of the Constitutional Court of the Czech Republic of 11 April 2007, Case No. I. ÚS 695/06, Collection of findings and resolutions of the Constitutional Court, 63/2007.

<sup>29</sup> Ruling of the Constitutional Court of the Czech Republic (1st Senate) of 12 September 1996, Case No. I. ÚS 62/96, Collection of findings and resolutions of the Constitutional Court, 74/1996.

merely formal justifications using stereotypical formulations.<sup>30</sup> However, it is not possible to require that, when proving the existence of a ground for detention on remand, it must be shown that the foreseen consequence (the accused will continue criminal activity) will certainly occur.<sup>31</sup>

According to the Czech Constitutional Court, there are no objective and immutable criteria for the interpretation of specific facts, but they must be derived from the nature of the specific and individualised criminal case, including the person of the accused, his personal circumstances, the scope of the necessary evidence, etc.<sup>32</sup> If the reason for detention on remand is based on the defendant's conduct, the Czech Constitutional Court considers that this may be not only current conduct, but also past (especially recent) conduct.<sup>33</sup> In the present case, the court based the reason for preventive detention on the fact that the accused was unemployed, his previous criminal activity had enabled him to earn a living and the previous sentences had not achieved correction, which the Constitutional Court considered to be constitutionally consistent. In another case, however, the Constitutional Court emphasised that it was not sufficient as a relevant reason for preventive detention on remand *per se* that the accused had significant debts.<sup>34</sup> Nor is it sufficient as a ground for preventive detention on remand that the accused has been prosecuted in the past for the same criminal activity (but without a final conviction).<sup>35</sup>

From the selected decisions (resolutions) of the Supreme Court of the Slovak Republic (hereinafter referred to as "**the Supreme Court**") in the framework of the second instance (complaint) proceedings, we note that they included an examination of the fulfilment of formal and material conditions in criminal cases in which only (or even) grounds for so-called preventive detention on remand were given. In particular, these decisions concerned the review of the decisions of the Specialised Criminal Court (hereinafter referred to as the "**SCC**") to remand (or not to remand) the accused in detention, or to extend (or not to extend) the period of remand in detention in the pre-trial proceedings.

### 2.3.1 Investigation of Reasonable Suspicion of a Criminal Offence

In terms of the substantive conditions of detention on remand, they included circumstances relating to the merits of the prosecution in relation to the evidentiary situation and the facts set out in the charging order, focusing on whether the acts which were the subject of the prosecution had been committed, had the elements of a criminal offence and there were grounds for suspecting that they had been committed by the accused.

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<sup>30</sup> Ruling of the Constitutional Court of the Slovak Republic of 24 September 2014, Case No. I. ÚS 250/2014, 23/2014 Coll.

<sup>31</sup> Resolution of the Constitutional Court of the Czech Republic of 21 June 2001, Case No. III ÚS 185/01, Collection of findings and resolutions of the Constitutional Court, 23/2001.

<sup>32</sup> Ruling of the Constitutional Court of the Czech Republic (III. senate) of 26 September 1996, Case No. III. ÚS 18/96, Collection of findings and resolutions of the Constitutional Court, 88/1996. Also the ruling of the Constitutional Court of the Czech Republic of 7 April 2005, Case No. I. ÚS 585/02, Collection of findings and resolutions of the Constitutional Court, 77/2005.

<sup>33</sup> Resolution of the Constitutional Court of the Czech Republic of 18 November 2004, Case No. III ÚS 605/04, Collection of findings and resolutions of the Constitutional Court, 55/2004.

<sup>34</sup> Ruling of the Constitutional Court of the Czech Republic of 16 September 2014, Case No. II ÚS 2086/14, Collection of findings and resolutions of the Constitutional Court, 170/2014.

<sup>35</sup> Ruling of the Constitutional Court of the Czech Republic of 25 October 2017, Case No. III ÚS 1876/17, Collection of findings and resolutions of the Constitutional Court, 17/2017.

We note that what is relevant to the **existence of reasonable suspicion is not the** number of incriminating pieces of evidence, but their nature and significance, as well as the circumstances of the whole case, including the nature of the criminal activity itself and the position of the particular accused in it.<sup>36</sup> We add that, according to the decision-making of the Constitutional Court of the Slovak Republic (hereinafter referred to as "**the Constitutional Court**") – in line with the case law of the ECtHR, as we have examined it in the preceding text – the reasonableness of suspicion presupposes the existence of factors or information which would enable an objective observer (the "**objective observer test**") to make a judgment that a particular person could have committed a criminal offence, and such reasonableness always depends on the totality of the circumstances of the case.<sup>37</sup>

The examination of these conditions is practically carried out in the pre-trial proceedings by the court (the judge for the preparatory proceedings) and the prosecutor as follows:

- i) the court when deciding on detention on remand, and failure to fulfil them results in its decision not to take the accused into detention or to release him from detention (even though the grounds for detention on remand may be fulfilled);
- ii) prosecutor within the framework of supervision over the observance of legality (Section 230 of the Code of Criminal Procedure) and their non-fulfilment is a reason for the cancellation of the order on bringing charges on the basis of Section 230(2)(e) of the Code of Criminal Procedure;<sup>38</sup> in case of their fulfilment, the prosecutor further examines the specific grounds for filing a motion for taking the accused into detention on remand, which is decided by the court.

The courts have the primary responsibility for deciding whether an accused person will be prosecuted in detention on remand or at liberty. Given that the personal liberty of the accused is a principle enjoying constitutional and international guarantees, and that the detention on remand of a person in **detention on remand is an exception** to it, the court's consideration of the existence of legal grounds and the time of detention on remand in a particular case must always correspond to this relationship between principle and exception. The Constitution thus clearly ensures that detention on remand, as a measure depriving a person of liberty, is carried out in a manner which provides the accused with basic procedural safeguards against its abuse by arbitrary actions and decisions of the courts.<sup>39</sup> In deciding on detention on remand, the court's attention is focused exclusively on the establishment of suspicion – more or less well-founded – resulting from a comprehensive assessment of the current evidentiary situation and the state of the case.

The decision on detention itself is always directed to the level of probability, not absolute certainty, as to the consequences which might arise in the event of release, and it is from that perspective that the reasonable apprehension of the defendant's particular conduct must then be assessed.

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<sup>36</sup> Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.

<sup>37</sup> Resolution of the Constitutional Court of 28 June 2016, Case No. III. ÚS 447/2016. See also ECtHR, Fox, Campbell and Hartley v. the United Kingdom, app. nos. 12244/86, 12245/86, 12383/86, 30 August 1990.

<sup>38</sup> Or for cancellation within the framework of the secondary proceedings under Section 194(1)(a) or (b) of the Code of Criminal Procedure by the so-called supervising prosecutor or Section 363(1) of the Code of Criminal Procedure by the Prosecutor General of the Slovak Republic.

<sup>39</sup> Resolution of the Supreme Court of the Slovak Republic of 18 May 2023, Case No. 5 Tost 9/2023.

The material conditions for the continued detention on remand must be continuously strengthened by the grounds for suspecting the accused of having committed a crime (the so-called ***doctrine of strengthened grounds for detention on remand***), especially in the case of a court deciding to extend the period of detention on remand, e.g. by questioning witnesses, or by the prosecutor filing an indictment, or by the existence of an conviction which is not final.

A weakening of reasonable suspicion may occur, for example, if the opinion of the second instance (appellate) court substantially undermines the credibility of the evidence proving guilt, or indicates future acquittal of the defendants as a "result" of the proceedings after reversal and remand of the case to the trial court.<sup>40</sup>

The situation is different when the second instance court annuls the judgment of the court of first instance also in the entire acquittal part, finding in principle that the established factual situation and legal reasoning are incorrect, *inter alia*, with regard to the (initially expressed) conclusion that the act legally qualified as the crime of formation and support of a criminal group under Section 296 of the Criminal Code has not been proven. In such a case, the criminal prosecution may be found to be justified (as a material ground for detention).<sup>41</sup>

A decision on detention on remand is not a decision on the guilt or innocence of the accused. When deciding on detention on remand, the court does not focus on issues related to the assessment of guilt or the final evaluation of evidence – in accordance with the principle of free evaluation of evidence under Article 2(12) of the Code of Criminal Procedure, but instead limits itself to examining whether the material and formal conditions for detention on remand are met, or whether the existence of a reasonable suspicion of the commission of an offence is not only sufficient, but also directly determining and limiting when deciding on detention.<sup>42</sup>

We note that the court, in the course of proceedings and decision-making on detention on remand, does not conduct evidence and evaluation of evidence to the extent that it is conducted, for example, by the public prosecutor when deciding on the complaint of the accused against the order on bringing charges, after the investigation (summary investigation) when deciding on the further procedural procedure, or after the filing of the indictment by the court at the main hearing on the merits but examines the case in accordance with the dictum of Article 71 of the Code of Criminal Procedure.<sup>43</sup> By carrying out such an examination of reasonable suspicion, the content of the guarantees under Article 5 of the Convention is also fulfilled.

### 2.3.2 Examining the Grounds for Preventive Detention on Remand

It follows from the wording of Section 71(1) of the Code of Criminal Procedure that when deciding on detention on remand, it is not required to be absolutely certain that the accused will act in one of the ways set out in that provision. A reasonable risk, i.e. a real threat that the accused will act in the manner envisaged by the specific reason for detention (here, the so-called preventive detention on remand) if he or she is not taken into detention on remand is sufficient. Thus, the Criminal Procedure Code does not

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<sup>40</sup> See the resolution of the Constitutional Court of the Slovak Republic of 3 February 2016, Case No. I. ÚS 35/2016, or the ruling of the Constitutional Court of the Slovak Republic of 18 February 2015, Case No. III. ÚS 29/2015.

<sup>41</sup> Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-sh/17/2023.

<sup>42</sup> Resolution of the Constitutional Court of the Slovak Republic of 4 February 2016, Case No II. ÚS 115/2016, Resolution of 10 August 2016, Case No II ÚS 626/2016, Ruling of 30 October 2019, Case No I. ÚS 417/2018.

<sup>43</sup> Cf. the Resolution of the Supreme Court of the Slovak Republic of 3 August 2021, Case No. 1 Tost 23/2021.

require absolute certainty of the fulfilment of the reason for so-called preventive detention on remand.<sup>44</sup>

On the problem of whether detention can ensure the preventive effect of criminal law, some authors have raised questions (Stevenson and Mayson, 2022, p. 712): *"If we incarcerate people who have a 20% chance of otherwise committing an assault during the period of detention, for instance, we can expect to prevent one assault for every five detentions. Is such detention justified? How much liberty should we sacrifice to prevent one crime?"* The purpose of **preventive detention on remand** is to prevent the continuation of criminal activity, which means not only the repetition of the same offence, but also the commission of an offence of the same nature. The fear of the commission of the offence then refers to the same offence which the accused has attempted, and the fear of the commission of the offence refers to the offence which the accused has prepared or threatened to commit.

We conclude from the foregoing that this detentional ground is based on the premise that the purpose of the prosecution is also to prevent crime. On what facts can the risk of committing an offence be based in order for preventive detention on remand to apply?

The stable case law of the Constitutional Court (reflecting the established jurisprudence of the general courts) consists (consisted) in the opinion that the facts justifying custodial prosecution may also consist in the **nature, extent and seriousness of the criminal activity**.<sup>45</sup>

Alternatively, it was also necessary to examine and evaluate those circumstances, which, with regard to the person of the accused, his overall life circumstances (in particular social and family circumstances), the environment in which he works or moves, create or increase the risk of further commission of a particular criminal activity.<sup>46</sup> This category of inquiry also includes the 'question' whether the alleged conduct of the accused may have been the principal means of securing their income, or whether it is necessary to consider the accused's previous way of life.<sup>47</sup>

According to settled case-law, the fear of a continuation of proceedings of the same or similar nature is given, in particular, by **reference to the financial volumes which may have been obtained by the offence, the official income of the accused, which was disputed and unprovable, and the fear that the accused may act with a view to obtaining further financial proceeds**. In the particular criminal case, the criminal activity appeared to be extensive, sophisticated, well-established, well-organised and, in terms of its social impact, significantly dangerous. Its high profitability suggests that the criminal activity for the defendants could also be a long-term source of funds, which is usually the main motivation for criminal offences. The standard of living achieved is subsequently difficult to compensate for once such a source of income has disappeared.<sup>48</sup>

Similarly, the reason for preventive detention on remand was fulfilled in the case of prosecution of the accused for a total of 83 acts qualified as a particularly serious crime of legalisation of the proceeds of crime under Article 233(1)(a), (b), (4)(a) of the Slovak Criminal Code, which were to be committed between 2016 and 2019, which, given

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<sup>44</sup> Resolution of the Constitutional Court of the Slovak Republic of 10 August 2016, Case No. II. ÚS 627/2016.

<sup>45</sup> Resolutions of the Constitutional Court of the Slovak Republic of 2 December 2020, Case No. I. ÚS 552/2020, ruling of 27 April 2021, Case No. III. ÚS 227/2020 and the resolution of 9 March 2021, file no. III. ÚS 202/2021.

<sup>46</sup> Ruling of the Constitutional Court of the Slovak Republic of 22 May 2013, Case No II ÚS 597/2012, Resolution of 9 March 2016, Case No I. ÚS 162/2016.

<sup>47</sup> Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-š/17/2023.

<sup>48</sup> Resolution of the SCC of 28 November 2021, Case No. 1 Tp 23/2021, in conjunction with the Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.

the scope, intensity and length of the criminal activity for which the accused is being prosecuted in this criminal proceeding, supports the reasonableness of the suspicion that he could continue his criminal activity if released from detention on remand.<sup>49</sup> The justification for so-called preventive detention on remand was satisfied in a situation where the accused was suspected of having acted for persons suspected of extensive drug offending over a prolonged period of time. This activity was also the source of his income.<sup>50</sup>

In terms of examining the grounds for so-called preventive detention on remand, in the application practice we encounter arguments mainly referring to the legal opinions expressed in the Constitutional Court's ruling Case No. III. ÚS 33/2021, which in principle implies in particular that **both material conditions must be fulfilled cumulatively**.<sup>51</sup> In that ruling, the Constitutional Court expressed the requirement that the reason for preventive detention on remand must be based on some other facts than the nature of the crime for which the accused is being prosecuted.<sup>52</sup> *A contrario*, if the reasoning of the general court deciding on detention on remand is limited to an analysis of the criminal activity of the accused, **such reasoning is sufficient only to establish the existence of reasonable suspicion, not also to establish that there is a ground for preventive detention** (risk of continuation of the criminal activity).

This finding was made in a specific criminal case and thus does not constitute a formal source of law. For this reason, it does not operate *erga omnes*, and thus in favour of all persons under arrest in the Slovak Republic. Taking into account our argument, set out in the previous part of this article, we highlight that every detention on remand decision is **characterised by certain specific features** which must be taken into account in a particular case. At the same time, we add that according to the decision-making activity of the Constitutional Court, the disposition of Article 71(1)(c) of the Code of Criminal Procedure is fulfilled only if the nature of the criminal activity within the scope of the charge is such a fact which, in a real context and currently (at the time of the court's decision on detention on remand), raises a well-founded fear of the accused committing further criminal activity in the event of a negative decision on his detention on remand.<sup>53</sup>

The aforementioned ruling is also responded to by the current decision-making activity of the Supreme Court, which has an impact on the application practice of the bodies applying the law (law enforcement authorities and the court) on the persistence of the need for custodial prosecution in the case of the grounds of the so-called preventive detention on remand. In accordance with settled case-law, the Supreme Court has consistently held that the facts **justifying the need for preventive detention on remand may also consist in the nature of the crime prosecuted and the manner in which it was committed**,<sup>54</sup> i.e. there is no need for the material conditions for such detention on remand to be cumulative. Such an interpretation is consistent with the case

<sup>49</sup> Resolution of the Supreme Court of the Slovak Republic of 3 August 2021, Case No. 1 Tost/23/2021.

<sup>50</sup> Resolution of the Supreme Court of the Slovak Republic of 3 May 2021, Case No. 2 Tost 22/2021.

<sup>51</sup> For the sake of completeness, we would like to point out that in this ruling the Constitutional Court found a violation of the law not only in the case of the so-called preventive detention on remand, but also in the case of the so-called collusion detention on remand pursuant to Section 71(1)(b) of the Code of Criminal Procedure.

<sup>52</sup> "The Constitutional Court concludes on the grounds for preventive detention on remand of the applicant by recalling its case-law according to which the type, nature, extent or gravity of the criminal activity cannot be a ground for preventive detention on remand for the purpose of Article 71(1)(c) of the Code of Criminal Procedure, unless the disposition of this legal norm is fulfilled." Constitutional Court ruling of 13 May 2021, para. 45.

<sup>53</sup> Ruling of the Constitutional Court of the Slovak Republic of 9 July 2003, IV. ÚS 124/2003.

<sup>54</sup> Ruling of the Constitutional Court of the Slovak Republic of 17 August 2021, IV. ÚS 384/2021.

law of the ECtHR (as we have analysed it),<sup>55</sup> according to which the grounds for preventive detention on remand may also be based on the nature of the criminal activity (as well as on the person of the accused).

In particular, we note that the Supreme Court found that the grounds for the so-called preventive detention on remand, where the accused was to follow the instructions of the accused at a lower level of management and coordination within the criminal group from at least 2020 and, in his absence, to receive cash for the narcotic and psychotropic substances sold, which she subsequently handed over to him, to communicate and coordinate the sale of these substances, to provide personal motor vehicles for the purpose of committing mainly drug offences, and to accompany the accused in the proceedings concerning the trafficking of these substances. **The Supreme Court found that there was a risk of the defendant re-offending in respect of drug offences, which she was to have committed over a long period of time and which could be presumed to have been the source of her livelihood.** The defendant should therefore have been familiar with drug offences, which only facilitates the possibility of her returning to drug offences after her eventual release.<sup>56</sup>

Similarly, in a different criminal case, the Supreme Court found that the grounds for so-called preventive detention on remand were fulfilled with regard to the nature of the criminal activity (in terms of its seriousness) in relation to the acts (9), which are characterised by their **long-term perpetration, for which the accused continue to face a high penalty.**<sup>57</sup> In this criminal case, the reason for the continued detention on remand was strengthened by the fact that the Supreme Court, in the appeal proceedings, also upheld the prosecutor's appeal against the defendants and annulled the relevant operative "acquittal" part of the judgment of the SCC. The Supreme Court noted the risk of further continuation of possible cooperative drug dealing indicative of a more systemic and structured pattern of alleged conduct by the defendants. In practice, this was a fact which intensively "reinforced" the qualitative aspect of the defendants' suspicions that the material conditions for further custodial prosecution of the defendants were present.

### 3. CONCLUSION

The efforts of the highest judicial authorities to progressively raise the level of guarantees of fundamental rights and freedoms through their decision-making is an immanent feature of liberal democracy and the substantive rule of law. Such a development of decision-making can also be identified on the part of the ECtHR in relation to the Convention. In the analysed decisions we have identified an attempt of the Constitutional Court to change the decision-making activity of the Supreme Court and the SCC.

On the other hand, raising the level of fundamental rights guarantees must not jeopardise the general public interest objective of effectively combating organised crime, in particular the detection of crimes committed by criminal groups and the conviction of perpetrators. The specific guarantees of the right to personal liberty cannot be interpreted in such a way as to render the application of preventive detention on remand practically unworkable. Therefore, we are of the opinion (unlike the Third Chamber of the Constitutional Court) that the grounds for preventive detention on remand may also be based on the nature of the offence committed as well as on circumstances relating to

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<sup>55</sup> Also with the European Commission Recommendation 2023/681.

<sup>56</sup> Resolution of the Supreme Court of the Slovak Republic of 15 November 2023, Case No. 5 Tost-š/24/2023.

<sup>57</sup> Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-š/17/2023.

the offender's person (in particular, previous criminal activity). The features of criminal activity which may constitute grounds for preventive detention on remand are, in particular, prolonged, sophisticated, criminal activity as a source of livelihood, or the threat of a heavy sentence. In the case of so-called drug offences, these circumstances apply in particular to persons in the hierarchically higher structures of criminal groups.

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