



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

GRAND CHAMBER

**CASE OF BLOKHIN v. RUSSIA**

*(Application no. 47152/06)*

JUDGMENT

STRASBOURG

23 March 2016

*This judgment is final but it may be subject to editorial revision.*



**In the case of Blokhin v. Russia,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,  
Dean Spielmann,  
András Sajó,  
Işıl Karakaş,  
Josep Casadevall,  
Luis López Guerra,  
Mark Villiger,  
Boštjan M. Zupančič,  
Ján Šikuta,  
George Nicolaou,  
Ledi Bianku,  
Helen Keller,  
Aleš Pejchal,  
Valeriu Griţco,  
Dmitry Dedov,  
Robert Spano,  
Iulia Antoanella Motoc, *judges*,

and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 12 February 2015 and 7 January 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case originated in an application (no. 47152/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Ivan Borisovich Blokhin (“the applicant”), on 1 November 2006.

2. The applicant was represented by Mr I.V. Novikov, a lawyer practising in Novosibirsk. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his detention in a temporary detention centre for juvenile offenders had been unlawful, that the conditions of his detention there had been inhuman, and that the proceedings against him had been unfair.

4. On 29 September 2010 the application was communicated to the Government.

5. On 14 November 2013 a Chamber of the First Section, composed of Isabelle Berro-Lefèvre, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Erik Møse, Ksenija Turković and Dmitry Dedov, judges, and also of Søren Nielsen, Section Registrar, delivered a judgment in which it unanimously declared the application partly admissible and found that there had been a violation of Article 3, Article 5 § 1 and Article 6 §§ 1 and 3 (c) and (d) of the Convention.

6. On 13 February 2014 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73 of the Rules of Court. The panel of the Grand Chamber granted the request on 24 March 2014.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

8. The applicant and the Government each filed written observations. On 9 October 2014, after consulting the parties, the President of the Grand Chamber decided not to hold a hearing but invited the parties to submit further written observations, which they did. In addition, third-party comments were received from the Mental Disability Advocacy Center (“MDAC”) and the League of Human Rights of the Czech Republic (“LIGA”), which had been given leave by the President of the Grand Chamber to take part in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1992 and lives in Novosibirsk.

#### **A. The applicant’s background and medical condition**

10. At some point before September 2004, the applicant’s parents were deprived of their parental responsibility and the applicant was placed in a local orphanage until his grandfather was assigned as his guardian in October 2004 and the applicant was placed with him. On 28 February 2005 the grandfather’s guardianship was revoked but he was reinstated as guardian at the beginning of 2006.

11. From 2002 to 2005, the applicant allegedly committed offences prohibited by the Criminal Code of the Russian Federation, including disorderly acts, aggravated robbery and extortion, alone or in a group of minors. Since he was under the age of criminal responsibility, no criminal

proceedings were instituted against him but he was the subject of five pre-investigation inquiries and placed under the supervision of the Juveniles Inspectorate within the Department of the Interior of the Sovetskiy District of Novosibirsk (hereafter “the Juveniles Inspectorate”). Moreover, following the fourth inquiry, he was placed in a temporary detention centre for juvenile offenders on 21 September 2004 for thirty days.

12. According to the applicant’s medical records, he suffered from an attention deficit hyperactivity disorder (a mental and neurobehavioural disorder characterised by either substantial attention difficulties, or hyperactivity and impulsiveness, or a combination of the two; hereafter “ADHD”) and a neurogenic bladder causing enuresis (a disorder involving urinary incontinence).

13. On 27 December 2004 and 19 January 2005 he was examined by a neurologist and a psychiatrist. He was prescribed medication, regular supervision by a neurologist and a psychiatrist and regular psychological counselling.

#### **B. The pre-investigation inquiry regarding the applicant**

14. On 3 January 2005 the applicant, who at that time was twelve years old, was at the home of his nine-year old neighbour S. when his mother, Ms S., called the police, who came and took the applicant to the police station of the Sovetskiy District of Novosibirsk. He was not informed of the reasons for his arrest.

15. According to the applicant, he was put in a cell that had no windows and the lights in the cell were turned off. After he had spent about an hour in the dark, he was questioned by a police officer. The police officer told him that S. had accused him of extortion. He urged the applicant to confess, saying that if he did so he would be immediately released, whereas if he refused he would be placed in custody. The applicant signed a confession statement. The police officer then immediately telephoned the applicant’s grandfather to tell him that the applicant was at the police station and could be taken home. When his grandfather arrived at the police station, the applicant retracted his confession and protested his innocence.

16. The Government disputed the applicant’s account of the events at the police station. They submitted that the applicant had been asked to give an “explanation” rather than being formally questioned, that he had been interviewed by a police officer who had pedagogical training, and that he had been apprised of his right to remain silent. He had not been subjected to any pressure or intimidation. His grandfather had been present during the interview.

17. On the same day the applicant’s grandfather signed a written statement describing the applicant’s character and way of life. He stated that two days earlier he had seen the applicant in possession of some money.

When asked where the money had come from, the applicant had said that he had got it from his father.

18. S. and his mother were also heard by the police about the incident and they claimed that on two occasions, on 27 December 2004 and 3 January 2005, the applicant had extorted 1,000 roubles (RUB) from S., threatening him with violence if he did not hand over the money.

19. On 12 January 2005 the Juveniles Inspectorate refused to institute criminal proceedings against the applicant. Relying on the applicant's confession and the statements of S. and S.'s mother, it found it to be established that on 27 December 2004 and 3 January 2005 the applicant had extorted money from S. His actions therefore contained elements of the criminal offence of extortion, punishable under Article 163 of the Criminal Code. However, given that the applicant was below the statutory age of criminal responsibility he could not be prosecuted for his actions.

20. On 3 February 2005 the applicant's grandfather complained to the Prosecutor's Office of the Sovetskiy District of Novosibirsk that the applicant, a minor suffering from a psychological disorder, had been intimidated and then questioned in the absence of his guardian and that his confession had been obtained under duress. The grandfather requested that the confession statement be declared inadmissible as evidence and that the pre-investigation inquiry be closed on account of lack of evidence of an offence, rather than the applicant's age.

21. On 8 June 2005 the Prosecutor's Office of the Sovetskiy District of Novosibirsk quashed the decision of 12 January 2005, finding that the pre-investigation inquiry had been incomplete. It ordered a further pre-investigation inquiry.

22. On 6 July 2005 the Juveniles Inspectorate again refused to institute criminal proceedings against the applicant, for the same reasons as before.

23. During the following months the applicant's grandfather lodged several complaints with prosecutors' offices of various levels, asking for a fresh examination of the case against the applicant. He complained that the applicant's confession had been obtained as a result of intimidation by the police; in particular, he had been placed in a dark cell for an hour and he had then been questioned by a police officer in the absence of a guardian, psychologist or teacher. The police officer had coerced the applicant into signing the confession statement without the benefit of legal advice. He had then issued a decision refusing to institute criminal proceedings on the ground that the applicant had not reached the statutory age of criminal responsibility, while stating at the same time that the applicant's involvement in extortion had been established.

24. By letters of 4 August, 9 November and 16 December 2005 the Prosecutor's Office of the Sovetskiy District of Novosibirsk and the Prosecutor's Office of the Novosibirsk Region replied that no criminal proceedings had been instituted against the applicant on grounds of his age.

He therefore did not have the status of a suspect or a defendant. On 3 January 2005 he had been asked to give an “explanation” rather than questioned by the police. In those circumstances the participation of a lawyer, psychologist or teacher had not been mandatory. There was no evidence that the applicant had been held in a dark cell before the interview and he had had to wait no more than ten minutes for an officer from the Juveniles Inspectorate to arrive and interview him. That the applicant had committed extortion had been established on the basis of the statements of S. and S.’s mother and the applicant’s admission of guilt during the interview of 3 January 2005.

### **C. The detention order**

25. On 10 February 2005 the Head of the Sovetskiy District Police Department of Novosibirsk asked the Sovetskiy District Court of Novosibirsk to order the applicant’s placement in a temporary detention centre for juvenile offenders.

26. On 21 February 2005 the Sovetskiy District Court held a hearing at which the applicant and his grandfather attended and submitted medical certificates confirming that the applicant suffered from a psychological disorder and enuresis.

27. On the same day the court delivered its judgment in which it ordered the applicant’s placement in the temporary detention centre for juvenile offenders for thirty days. It held as follows:

“The Head of the Sovetskiy District Police Department of Novosibirsk has applied to the court with a request to place [the applicant], who has been registered with the [Juveniles] Inspectorate as a delinquent minor since 4 January 2002, in the temporary detention centre for juvenile offenders for thirty days.

On 14 May 2003 [the applicant] committed an offence proscribed by Article 161 of the Criminal Code of the Russian Federation. A criminal case was not opened because he had not reached the age of criminal responsibility.

On 24 July 2003 [the applicant] again committed an offence proscribed by Article 213 of the Criminal Code of the Russian Federation. A criminal case was not opened because he had not reached the age of criminal responsibility.

On 27 August 2004 [the applicant] again committed a criminal offence under Article 161 of the Criminal Code of the Russian Federation. A criminal case was not opened because he had not reached the age of criminal responsibility. [The applicant] was placed in the temporary detention centre for juvenile offenders for thirty days.

The minor lives in unfavourable family conditions in which his grandfather is responsible for his upbringing in so far as possible; [the applicant’s] parents are alcoholics and have a negative influence on their son. Before [the grandfather] was given guardianship status, [the applicant] had lived in an orphanage and studied in school no. 61. At the material time he studied in school no. 163, often played truant from school, and stopped attending school entirely from December onwards. Given

that the requisite control over him is absent, the minor spends the major part of his day on the streets, committing socially dangerous offences.

On 27 December 2004 [the applicant] committed another offence proscribed by Article 163 of the Criminal Code of the Russian Federation; a criminal case was not opened because he had not reached the age of criminal responsibility.

Taking the above-mentioned circumstances into account, [the Head of the Police Department] considers it necessary to place [the applicant] in the temporary detention centre for juvenile offenders for a period of thirty days to prevent his further unlawful actions.

The representative of the Juveniles Inspectorate supported the request made by the Head of the Police Department and explained that [the applicant's] guardian had requested in writing that his guardianship rights be lifted and the [Inspectorate] had accepted that request.

[The applicant] refused to provide any explanations.

The [applicant's] representative [the grandfather] objected to [the applicant's] placement in the temporary detention centre, having noted that [the applicant] had not committed a criminal offence on 27 December 2004 as he had been with [the grandfather] at a doctor's surgery for an examination at that time.

The lawyer, Ms [R.], asked the court to dismiss the request of the Head of the Police Department.

The prosecutor asked the court to accept the request and to place [the applicant] in the temporary detention centre for juvenile offenders, taking into account that the documents presented by [the applicant's] guardian did not confirm that [the applicant] had been at a doctor's surgery on 27 December 2004 at 1 p.m. or that he had been unable to commit the criminal offence, particularly taking into account the [applicant's] personality and the fact that he had already committed a number of offences.

Having heard the parties to the proceedings and having examined the materials submitted by them, the court considers that the request must be allowed for the following reasons: [the applicant] is registered in the database of [the Juvenile Department of the police]; he was previously placed in the [temporary detention centre for juvenile offenders] for behaviour correction but did not draw the proper conclusions and committed further delinquent acts; the preventive measures put in place by the [Juveniles] Inspectorate and by the guardian have not produced results, which shows that [the applicant] has not learnt his lesson. [The applicant] must be placed in the [temporary detention centre for juvenile offenders] for thirty days for behaviour correction.

The case-file materials examined by the court confirm that [the applicant] committed a socially dangerous offence: a complaint by Ms [S.] shows that on 27 December 2004, at approximately 1 p.m., [the applicant] extorted 1,000 roubles from her son [S.] in a yard; he accompanied those actions with threats of violence. On 3 January 2005 [the applicant] again came to their house and again extorted 1,000 roubles from her son, having again threatened the son with violence. Explanations by [S.] indicate that on 27 December 2004, at approximately 1 p.m., [the applicant] told [S.] to give him 1,000 roubles in a yard; he accompanied those actions with threats of violence and [S.] gave him the money. On 3 January 2005 [the applicant] again came to their house and requested 1,000 roubles from [S.], having



again threatened him with violence. [S.] complained to his mother, who called the police.

The court takes into account that those circumstances are corroborated by the statement made by [the applicant], who did not deny that he had received money from [S.] on 27 December 2004 as the latter had been afraid of the applicant. [The applicant] also did not deny that he had come to [S.'s] house on 3 January 2005. A criminal case in respect of the events on 27 December 2004 and 3 January 2005 was not opened as the applicant had not reached the age of criminal responsibility.

Having taken these circumstances into account, the court finds unsubstantiated and far-fetched the explanations by the applicant's guardian that [the applicant] did not commit the offences on 27 December 2004 and 3 January 2005.

Having regard to the above-mentioned facts and ruling under section 22(2)(4) of the Minors Act, the court grants the request of the Head of the Police Department and decides to place the applicant in the temporary detention centre for juvenile offenders for thirty days."

#### **D. Detention in the temporary detention centre for juvenile offenders**

28. On 21 February 2005 the applicant was placed in the Novosibirsk temporary detention centre for juvenile offenders, where he remained until 23 March 2005.

##### *1. The applicant's description of the conditions of detention in the centre*

29. According to the applicant, he had shared his bedroom in the centre with seven other inmates. The lights were kept on all night.

30. During the day inmates were forbidden to lie on their beds or to enter the bedroom. They had to spend the whole day in a large empty room which had no furniture or sports equipment. On a few occasions they were given a chess set and other board games. They were allowed to go out into the yard only twice during the applicant's thirty-day stay in the centre.

31. Inmates had classes twice a week for about three hours. They had mathematics and Russian grammar classes only. They were not taught any other courses from the officially approved secondary school curriculum. About twenty children of different ages and school levels were taught together in one class.

32. The supervisors applied collective punishment to the inmates. If one of them committed a breach of the centre's strict regime, all inmates were forced to stand in line against the wall without moving, talking or being allowed to sit down. Given that many inmates were psychologically unstable and unruly, because of their socially disadvantaged background, such punishment was applied every day and often lasted for hours.

33. Inmates were not allowed to leave the room where they were assembled. They had to ask for the supervisor's permission to go to the toilet and were accompanied there in groups of three. They therefore had to

wait until such a group was formed before being able to go to the toilet. Given that the applicant suffered from enuresis, the fact that he could not go to the toilet as often as he needed caused him bladder pain and psychological suffering. If his requests for permission to go to the toilet became too frequent, the supervisors punished him by making him do particularly arduous cleaning work.

34. Although the applicant's grandfather had informed the staff of the centre about the applicant's enuresis and his attention deficit hyperactivity disorder, the applicant did not receive any treatment.

## *2. The Government's description of the conditions of detention*

35. According to the Government, each bedroom in the temporary detention centre for juvenile offenders measured seventeen square metres and was equipped with four beds. Access to the bathrooms and toilets situated on each floor was not limited.

36. The centre had a dining room where meals were served five times a day. There was also a games room and a sports room. Audio and video equipment, educational games and fictional works were available.

37. The supervisors carried out "preventive work" with each inmate of the centre and could apply incentive measures or punitive measures in the form of oral reprimands. Corporal punishment was not used; nor were juvenile inmates ever required to do hard or dirty work.

38. The centre's medical unit had all the necessary equipment and medicine. It could be seen from the staff list of the centre submitted by the Government that the medical unit was staffed by a paediatrician, two nurses and a psychologist. According to the Government, each child was examined by the paediatrician on his admission and every day thereafter. Treatment was prescribed when necessary. It could be seen from the temporary detention centre's "accounting and statistical record" concerning the applicant that he had not informed the doctor about his enuresis.

39. The applicant's personal file, containing, in particular, the information about his medical condition on admission, the preventive work carried out and the punishment applied to him, had been destroyed on 17 January 2008 after the expiry of the statutory time-limit on storage, in accordance with Order no. 215 of the Ministry of the Interior of 2 April 2004 (see paragraph 73 below). However, the Government stated that the applicant's "accounting and statistical record", referred to above, had been retained since its storage period was unlimited in accordance with Order no. 215 (see paragraph 74 below).

40. According to the Government, the applicant's other medical records and logbooks at the temporary detention centre had been destroyed as soon as they had become unnecessary, without any records being compiled in this respect. This had been possible because there had been no regulations on storing such documents until Order no. 340 of the Ministry of the Interior

had entered into force on 12 May 2006 (which provided that medical records were to be stored for three years).

41. However, the Government submitted a written statement by a supervisor at the detention centre dated 23 December 2010. She confirmed the Government's description of the conditions of detention in the centre. She also stated that one of the supervisors was always present in the room where the inmates were gathered, which ensured continuity of the educational process. Teachers from the neighbouring school regularly came to the centre so that the inmates could follow the secondary-school curriculum. After their release from the centre, they received an education progress record. She stated that she did not remember the applicant but asserted that she had not received any requests or complaints from him or from any other inmate.

42. The Government also submitted a copy of an agreement of 1 September 2004 between the detention centre and secondary school no. 15 according to which the school undertook to organise secondary-school courses in the centre in accordance with a curriculum developed by the centre. A copy of an undated two-week curriculum was produced by the Government. It included four classes per day on Tuesdays, Thursdays and Fridays.

#### **E. The applicant's medical condition after release from the temporary detention centre for juvenile offenders**

43. On 23 March 2005 the applicant was released from the detention centre. On the following day he was taken to hospital, where he received treatment for neurosis and attention deficit hyperactivity disorder. He remained at the hospital until at least 21 April 2005.

44. On 31 August 2005 the applicant was placed in an orphanage and, according to an extract from the applicant's medical record drawn up at the orphanage, he was on the run between 14 September and 11 October 2005 and again between 13 and 23 October 2005.

45. On 1 November 2005 he was transferred to a children's psychiatric hospital, where he remained until 27 December 2005. At some point after this, he was returned to his grandfather who had been reinstated as his guardian.

46. On 4 October 2005 the applicant's grandfather complained to the Prosecutor General's Office that the applicant, who suffered from a mental disorder, had not received any medical treatment in the temporary detention centre for juvenile offenders, which had caused a deterioration in his condition; nor had he been provided with any educational courses. He reiterated his complaints to the prosecution authorities in a letter dated 30 November 2005. While the Prosecutor's Office of the Sovetskiy District of Novosibirsk sent a reply to the applicant's grandfather on

9 November 2005 and the Prosecutor's Office of the Novosibirsk Region sent a reply on 16 December 2005, both of these dealt exclusively with the procedural issues related to the applicant's case (see paragraph 24 above) and did not contain any answer to the grandfather's complaints in so far as they related to the applicant's health and the conditions of detention.

#### **F. The applicant's appeals against the detention order**

47. Meanwhile, on 2 March 2005, the applicant's grandfather appealed against the detention order of 21 February 2005. He submitted, firstly, that the detention was unlawful because the Minors Act did not permit detention for "behaviour correction". Secondly, he complained that he had not been informed of the decision of 12 January 2005 refusing to institute criminal proceedings against the applicant and had therefore been deprived of an opportunity to appeal against it. He further submitted that the court's finding that the applicant had committed an offence had been based on the statements of S. and his mother and the applicant's confession statement. However, the applicant had made his confession statement in the absence of his guardian. Nor had a teacher been present. No teacher had been present during the questioning of S. either. Their statements were therefore inadmissible as evidence. Moreover, S. and his mother had not attended the court hearing and had not been heard by the court. Nor had the court verified the applicant's alibi. Lastly, the applicant's grandfather complained that the court had not taken into account the applicant's frail health and had not verified whether his medical condition was compatible with detention.

48. On 21 March 2005 the Novosibirsk Regional Court quashed the detention order of 21 February 2005 on appeal. It found that behaviour correction was not among the grounds listed in section 22(2)(4) of the Minors Act for placing a minor in a temporary detention centre for juvenile offenders. Detention for behaviour correction therefore had no basis in domestic law. Moreover, the District Court had not stated reasons why it considered it necessary to detain the applicant. The mere fact that the applicant had committed an offence for which he was not liable to prosecution because of his age could not justify his detention. Such detention would be permissible only if one of the additional conditions listed in section 22(2)(4) of the Minors Act (see paragraph 66 below) was met. The Regional Court remitted the case to the District Court for fresh examination.

49. On 11 April 2005 the Sovetskiy District Court discontinued the proceedings because the Head of the Sovetskiy District Police Department of Novosibirsk had withdrawn his request for the placement of the applicant in the temporary detention centre for juvenile offenders. The applicant and his grandfather were not informed of the date of the hearing.

50. On 22 March 2006 the applicant's grandfather lodged an application for supervisory review of the decision of 11 April 2005. He complained that as a result of the discontinuation of the proceedings the applicant had been deprived of an opportunity to prove his innocence in respect of the offence for which he had already unlawfully served a term of detention in the temporary detention centre for juvenile offenders.

51. On 3 April 2006 the President of the Novosibirsk Regional Court quashed the decision of 11 April 2005. He found, firstly, that, in accordance with section 31.2(3) of the Minors Act, a judge examining a request for the placement of a minor in a temporary detention centre for juvenile offenders had the power either to grant or to reject the request. He had no power to discontinue the proceedings. Secondly, the applicant and his guardian had not been informed of the date of the hearing and had therefore been deprived of an opportunity to make submissions on the issue of the discontinuation of the proceedings.

52. On 17 April 2006 the Prosecutor of the Novosibirsk Region lodged an application for supervisory review of the Regional Court's decision of 21 March 2005.

53. On 12 May 2006 the Presidium of the Novosibirsk Regional Court quashed the decision of 21 March 2005, finding that it had been adopted by an unlawful composition of judges. It remitted the case for a fresh examination on appeal.

54. On 29 May 2006 the President of the Novosibirsk Regional Court held a fresh appeal hearing and upheld the decision of 21 February 2005 ordering the applicant's placement in the temporary detention centre for juvenile offenders. He found that the applicant had committed a delinquent act punishable under Article 163 of the Criminal Code but that no criminal proceedings had been instituted against him because he had not reached the statutory age of criminal responsibility. He belonged to a "problem family"; his parents had been deprived of parental responsibility and he was cared for by his grandfather. He played truant from school and spent most of the time on the streets or in a computer club. In those circumstances, it had been necessary, in accordance with section 22(2)(4) of the Minors Act, to place him in the temporary detention centre for juvenile offenders for thirty days to prevent him from committing further delinquent acts. The fact that the District Court had referred to "behaviour correction" as a ground for detention had not made the detention order of 21 February 2005 unlawful. The applicant's detention had been justified by other grounds. Nor could the detention order of 21 February 2005 be quashed on account of the applicant's frail health, given that it had already been enforced in March 2005.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Constitution of the Russian Federation

55. An arrested or detained person or a person accused of a criminal offence is entitled to legal assistance from the time of his or her arrest, placement in custody, or when charges are brought (Article 48 § 2).

### B. The Criminal Code

56. The Criminal Code fixes the age of criminal responsibility at sixteen years. For certain offences, including extortion, the age of criminal responsibility is fixed at fourteen years (Article 20).

57. Under Article 43 § 2 of the Code, the purposes of criminal punishment are restoration of social justice, reformation of the offender and the prevention of further crimes.

58. Article 87 § 1 of the Criminal Code regulates the criminal liability of minors, defining them as persons between 14 and 18 years of age, and states that mandatory measures of an educational nature or punishment may be applied to minors who have committed a criminal offence. Article 87 § 2 provides that where a court relieves a minor of the punishment, the minor may still be placed in a special closed educational facility run by a body of the Ministry of Education.

### C. The Code of Criminal Procedure

59. A suspect or an accused is entitled to legal assistance from the time of arrest (Articles 46 § 4 (3), 47 § 4 (8) and 49 § 3).

60. The presence of a defence lawyer is mandatory if the suspect or the accused is a minor. If neither the minor nor his guardian has retained a defence lawyer, one must be appointed by the police officer, the investigator, the prosecutor or the judge in charge of the case (Article 51 §§ 1 and 3).

61. A defence lawyer must be present during each questioning of the minor suspect. The presence of a psychologist or a teacher is also mandatory if the suspect is under the age of sixteen. The police officer, investigator or prosecutor in charge of the questioning must ensure that a psychologist or a teacher is present during each questioning (Article 425 §§ 2 to 4).

62. The guardian of a juvenile suspect is entitled to participate in all investigative actions starting from the first questioning (Article 426 §§ 1 and 2 (3)).

63. Witnesses are to be examined directly by the trial court (Article 278). Statements given by the victim or a witness during the

pre-trial investigation can be read out with the consent of the parties in two cases: (i) if there is a substantial discrepancy between those statements and the testimony before the court; or (ii) if the victim or witness has failed to appear in court (Article 281).

#### **D. The Minors Act**

64. The Federal Law on the Basic Measures for Preventing Child Neglect and Delinquency of Minors, no. 120-FZ of 24 June 1999 (“the Minors Act”) defines a minor as a person under the age of eighteen years (section 1).

65. A minor with special educational needs who has committed a delinquent act before reaching the statutory age of criminal responsibility may be placed in a “closed educational institution” for up to three years (section 15(4-7)). The main aims of closed educational institutions are as follows:

- i) the accommodation, upbringing and education of minors between eight and eighteen years old requiring a special educational approach;
- ii) the psychological, medical and pedagogical rehabilitation of minors, as well as individual preventive work;
- iii) the protection of the rights and legitimate interests of minors, and the provision of medical care and of secondary and professional education;
- iv) the provision of social, psychological and pedagogical assistance to minors with health, behavioural or educational difficulties;
- v) the organisation of sports, science or other clubs or sections and encouragement of participation by minors in such clubs or sections;
- vi) the implementation of programmes and policies aimed at developing law-abiding behaviour in minors (section 15(2)).

66. A minor may only be placed in a temporary detention centre for juvenile offenders for the shortest possible time necessary for appropriate accommodation to be found, and for a maximum of thirty days (section 22(6)), in the following cases:

(a) a minor whose placement in a closed educational institution has been ordered by a court may be placed in a temporary detention centre for juvenile offenders for the time necessary to prepare his transfer to the closed educational institution (section 22(1)(3) and 22(2)(1) and section 31(1));

(b) a minor in respect of whom a request for placement in a closed educational institution is pending before a court may be placed in a temporary detention centre for juvenile offenders for a period of up to thirty days if it is necessary in order to protect his life or health or to prevent him from committing a further delinquent act, or if he has no fixed residence, has absconded or has failed to appear at court hearings or medical examinations more than twice without a valid reason (sections 22(2)(2) and 26(6));

(c) a minor who has escaped from a closed educational institution may be placed in a temporary detention centre for juvenile offenders for the time necessary for appropriate accommodation to be found for him (section 22(2)(3));

(d) a minor who has committed a delinquent act before reaching the statutory age of criminal responsibility may be placed in a temporary detention centre for juvenile offenders if it is necessary in order to protect his life or health or to prevent him from committing a further delinquent act, or if his identity is unknown, he has no fixed place of residence, resides in a region other than the one where the delinquent act was committed, or if he cannot be immediately placed in the charge of his parents or guardians owing to the remoteness of their place of residence (section 22(2)(4-6)).

67. The main aims of temporary detention centres for juvenile offenders are as follows:

- the temporary detention of juvenile offenders with the aim of protecting their life and health and preventing them from committing further delinquent acts;
- individual preventive work with minors with the aim of discovering whether they are involved in the commission of delinquent acts, establishing the circumstances, reasons and conditions conducive to such acts, and informing the competent law-enforcement authorities;
- the transfer of minors to closed educational institutions and other measures aimed at finding accommodation for minors temporarily placed in the centre's care (section 22(1)).

68. Placement in a temporary detention centre for juvenile offenders is to be ordered by a judge (section 22(3)(2)) at the request of the local department of the interior, which must submit the following materials in support of the request: evidence confirming that the minor has committed a delinquent act; materials indicating the aims of, and reasons for, the placement of the minor in the temporary detention centre for juvenile offenders; and materials confirming that such placement is necessary to protect the life or health of the minor or to prevent him from committing a further delinquent act (section 31.1). The minor and his parents or guardian are entitled to study these materials. The materials are then examined by a single judge at a hearing with the participation of the minor concerned, his parents or guardian, defence lawyer, a prosecutor, and representatives of the local department of the interior and of the temporary detention centre for juvenile offenders. The judge issues a reasoned decision either granting or rejecting the request for the placement of the minor in the temporary detention centre for juvenile offenders (section 31.2). The minor or his parents, guardian, or defence lawyer may, within ten days, appeal against the decision to a higher court (section 31.3).



### **E. The Instruction on temporary detention centres for juvenile offenders**

69. The Instruction on the organisation of the activities of temporary detention centres for juvenile offenders, adopted by Order no. 215 of the Ministry of the Interior on 2 April 2004 (in force at the material time), provided that temporary detention centres for juvenile offenders were to be managed by the local departments of the interior (§ 4).

70. On admission to a temporary detention centre for juvenile offenders, the minor and his belongings had to be searched. Prohibited belongings had to be confiscated, while money, valuables and other belongings had to be deposited with the centre's accountant (§§ 14 and 15).

71. Temporary detention centres had to be enclosed and the enclosures equipped with an alarm system and an entry checkpoint (§ 19). The disciplinary regime was maintained by a duty squad (§ 22).

72. The director of the temporary detention centre for juvenile offenders was responsible for security arrangements, which had to ensure the twenty-four-hour surveillance of inmates, including during their sleep, and had to exclude any possibility of unauthorised leaving of the premises by inmates (§ 39).

73. A personal file had to be opened in respect of each minor and contain the following information: the documents which served as the basis for the minor's admission to the centre, the search report, the record of preventive work carried out and of rewards and punishment applied, the medical certificates documenting the minor's condition on admission, and any others (§ 18). Personal files had to be stored for two years and be destroyed after the expiry of that time-limit (Appendix no. 5).

74. The temporary detention centre's "accounting and statistical records" for each minor had to be kept indefinitely in the centre (Appendix no. 4, Endnote no. 2).

75. If appropriate, individual preventive work might be carried out with the minors, taking into account their age, conduct, the gravity of the delinquent acts committed and other circumstances (§ 24). In order to make the preventive work more efficient, incentives and punishment might be applied to minors (§ 25).

76. With the aim of preventing delinquency, the staff of temporary detention centres for juvenile offenders might take the following measures in the context of preventive work:

- (a) establish the living and educational conditions of the minor's family, the minor's personal qualities and interests, his or her reasons for running away from home or for abandoning school, and the facts of the minor's participation in the commission of any delinquent acts and the circumstances in which they were committed, including

information on any accomplices and how any stolen property was disposed of;

- (b) pass to the law-enforcement authorities any information about those involved in delinquent acts, or any other information that may contribute to the investigation of such delinquent acts;
- (c) take individual educational measures, with particular emphasis on developing positive qualities and interests, to combat any defects of character and to motivate the minors in studying and working (§ 26).

### III. RELEVANT INTERNATIONAL MATERIALS

#### A. Council of Europe

77. The relevant parts of Recommendation No. R (87) 20 on social reactions to juvenile delinquency, adopted by the Committee of Ministers on 17 September 1987, state as follows:

“...Considering that young people are developing beings and in consequence all measures taken in their respect should have an educational character;

Considering that social reactions to juvenile delinquency should take account of the personality and specific needs of minors and that the latter need specialised interventions and, where appropriate, specialised treatment based in particular on the principles embodied in the United Nations Declaration of the Rights of the Child;

...

Convinced that minors must be afforded the same procedural guarantees as adults;

...

Recommends the governments of member states to review, if necessary, their legislation and practice with a view:

...

#### III. *Proceedings against minors*

4. to ensuring that minors are tried more rapidly, avoiding undue delay, so as to ensure effective educational action;

...

8. to reinforcing the legal position of minors throughout the proceedings, including the police investigation, by recognising, *inter alia*:

- the presumption of innocence;

- the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state;

- the right to the presence of parents or of another legal representative who should be informed from the beginning of the proceedings;

- the right of minors to call, interrogate and confront witnesses;

...

- the right to appeal;
- the right to apply for a review of the measures ordered; ...”

78. The Recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003, in so far as relevant, reads as follows:

“15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. ...”

79. Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008, provides, *inter alia*, as follows:

“Part I – Basic principles, scope and definitions

...

2. The sanctions or measures that may be imposed on juveniles, as well as the manner of their implementation, shall be specified by law and based on the principles of social integration and education and of the prevention of re-offending.

...

5. The imposition and implementation of sanctions or measures shall be based on the best interests of the juvenile offenders, limited by the gravity of the offences committed (principle of proportionality) and take account of their age, physical and mental well-being, development, capacities and personal circumstances (principle of individualisation) as ascertained when necessary by psychological, psychiatric or social inquiry reports.

...

7. Sanctions or measures shall not humiliate or degrade the juveniles subject to them.

8. Sanctions or measures shall not be implemented in a manner that aggravates their afflictive character or poses an undue risk of physical or mental harm.

...

10. Deprivation of liberty of a juvenile shall be a measure of last resort and imposed and implemented for the shortest period possible. Special efforts must be undertaken to avoid pre-trial detention.

...

13. Any justice system dealing with juveniles shall ensure their effective participation in the proceedings concerning the imposition as well as the implementation of sanctions or measures. Juveniles shall not have fewer legal rights and safeguards than those provided to adult offenders by the general rules of criminal procedure.

14. Any justice system dealing with juveniles shall take due account of the rights and responsibilities of the parents and legal guardians and shall as far as possible involve them in the proceedings and the execution of sanctions or measures, except if this is not in the best interests of the juvenile. ...

...

21. For the purpose of these rules:

...

21.5. “deprivation of liberty” means any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will;

...

Part III – Deprivation of liberty

...

49.1. Deprivation of liberty shall be implemented only for the purpose for which it is imposed and in a manner that does not aggravate the suffering inherent to it.

...

50.1. Juveniles deprived of their liberty shall be guaranteed a variety of meaningful activities and interventions according to an individual overall plan that aims at progression through less restrictive regimes and preparation for release and reintegration into society. These activities and interventions shall foster their physical and mental health, self-respect and sense of responsibility and develop attitudes and skills that will prevent them from re-offending.

...

56. Juveniles deprived of liberty shall be sent to institutions with the least restrictive level of security to hold them safely.

57. Juveniles who are suffering from mental illness and who are to be deprived of their liberty shall be held in mental health institutions.

...

62.2. At admission, the following details shall be recorded immediately concerning each juvenile:

...

g. subject to the requirements of medical confidentiality, any information about the juvenile’s risk of self-harm or a health condition that is relevant to the physical and mental well-being of the juvenile or to that of others.

...

62.5. As soon as possible after admission, the juvenile shall be medically examined, a medical record shall be opened and treatment of any illness or injury shall be initiated.

...

65.2. Juveniles shall have ready access to sanitary facilities that are hygienic and respect privacy.

...

69.2. The health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community.

...

73. Particular attention shall be paid to the needs of:

...

*d.* juveniles with physical and mental health problems;

...

77. Regime activities shall aim at education, personal and social development, vocational training, rehabilitation and preparation for release. ...

...

78.3. Where it is not possible for juveniles to attend local schools or training centres outside the institution, education and training shall take place within the institution, but under the auspices of external educational and vocational training agencies.

...

78.5. Juveniles in detention shall be integrated into the educational and vocational training system of the country so that after their release they may continue their education and vocational training without difficulty.

...

81. All juveniles deprived of their liberty shall be allowed to exercise regularly for at least two hours every day, of which at least one hour shall be in the open air, if the weather permits.

...

94.1. Disciplinary procedures shall be mechanisms of last resort. Restorative conflict resolution and educational interaction with the aim of norm validation shall be given priority over formal disciplinary hearings and punishments.

...

95.1. Disciplinary punishments shall be selected, as far as possible, for their educational impact. They shall not be heavier than justified by the seriousness of the offence.

95.2. Collective punishment, corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman and degrading punishment shall be prohibited.

...

#### Part IV – Legal advice and assistance

120.1. Juveniles and their parents or legal guardians are entitled to legal advice and assistance in all matters related to the imposition and implementation of sanctions or measures.

120.2. The competent authorities shall provide juveniles with reasonable facilities for gaining effective and confidential access to such advice and assistance, including unrestricted and unsupervised visits by legal advisors.

120.3. The state shall provide free legal aid to juveniles, their parents or legal guardians when the interests of justice so require. ...”

80. The Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted by the Committee of Ministers on 17 November 2010, state, in so far as relevant, the following:

“II. Definitions

For the purposes of these guidelines on child friendly justice (hereafter “the guidelines”):

...

c. ‘Child-friendly justice’ refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

III. Fundamental principles

...

E. Rule of law

1. The rule of law principle should apply fully to children as it does to adults.

2. Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child’s best interests. This applies to all judicial and non-judicial and administrative proceedings.

...

IV. Child-friendly justice before, during and after judicial proceedings

...

19. Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.

...

21. Given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children in particular should have the right to:

...

b. receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport;

...

### B. Child-friendly justice before judicial proceedings

...

26. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.

### C. Children and the police

27. Police should respect the personal rights and dignity of all children and have regard to their vulnerability, i.e. take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties.

28. Whenever a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody. Children should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust.

29. Save in exceptional circumstances, the parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station.

30. A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts. ..."

## **B. United Nations**

81. The United Nations Convention on the Rights of the Child ("the CRC") sets out the fundamental principle of the best interests of the child in Article 3, which reads as follows:

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

82. In so far as relevant to the present case, the CRC further states:

**Article 23**

“1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.

2. States Parties recognize the right of the disabled child to special care ...”

**Article 37**

“States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. ...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. ...

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

**Article 40**

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

...

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;



(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; ...”

83. General Comment No. 9 (2006) of the Committee on the Rights of the Child, dated 27 February 2007 (CRC/C/GC/9), contains, *inter alia*, the following recommendations:

“73. In the light of article 2 States parties have the obligation to ensure that children with disabilities who are in conflict with the law (as described in article 40, paragraph 1) will be protected not only by the provisions of the Convention which specifically relate to juvenile justice (arts. 40, 37 and 39) but by all other relevant provisions and guarantees contained in the Convention, for example in the area of health care and education. In addition, States parties should take where necessary specific measures to ensure that children with disabilities *de facto* are protected by and do benefit from the rights mentioned above.

74. With reference to the rights enshrined in article 23 and given the high level of vulnerability of children with disabilities, the Committee recommends – in addition to the general recommendation made in paragraph 73 above – that the following elements of the treatment of children with disabilities (allegedly) in conflict with the law be taken into account:

a) A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard;

b) Governments should develop and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein;

c) Children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by way of pre-trial detention nor by way of a punishment. Deprivation of liberty should only be applied if necessary with a view to providing the child with adequate treatment for addressing his or her problems which have resulted in the commission of a crime and the child should be placed in an institution that has the specially trained staff and other facilities to provide this specific treatment. In making such decisions the competent authority should make sure that the human rights and legal safeguards are fully respected.”

84. General Comment No. 10 (2007) of the Committee on the Rights of the Child, dated 25 April 2007 (CRC/C/GC/10), includes the following recommendations:

“33. ... In this regard, State parties should inform the Committee in their reports in specific detail how children below the [minimum age of criminal responsibility] set in

their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above [minimum age of criminal responsibility].

...

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of the States parties to determine how this assistance is provided but it should be free of charge. ...

...

52. ... decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.

...

56. In line with article 14 (3) (g) of ICCPR, CRC requires that a child be not compelled to give testimony or to confess or acknowledge guilt. ...

57. ... The term “compelled” should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: “You can go home as soon as you have given us the true story”, or lighter sanctions or release are promised.

58. The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child. ...”

85. General Comment No. 35 of the Human Rights Committee, dated 16 December 2014 (CCPR/C/GC/35), comprises the following remarks concerning Article 9 (Liberty and security of person) of the International Covenant on Civil and Political Rights:

“28. For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives. ...

...

62. Article 24, paragraph 1, of the Covenant entitles every child “to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”. That article entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by article 9 for everyone. A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. In addition to the other requirements applicable to each category of deprivation of liberty, the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation. ... The child has a right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate. ...”

86. The relevant parts of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”), adopted by the General Assembly on 29 November 1985 (A/RES/40/33), state the following:

“5. Aims of juvenile justice

5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

...

7. Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

...

10. Initial contact

10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

...

10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case.

...

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

...

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

...

Commentary

...

Rule 17.1 (b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

...

19. Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

Commentary

...

Rule 19 aims at restricting institutionalization in two regards: in quantity ("last resort") and in time ("minimum necessary period"). Rule 19 reflects one of the basic guiding principles of resolution 4 of the Sixth United Nations Congress: a juvenile offender should not be incarcerated unless there is no other appropriate response. ... In fact, priority should be given to 'open' over 'closed' institutions. Furthermore, any facility should be of a correctional or educational rather than of a prison type.

...

26. Objectives of institutional treatment

...

26.2 Juveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and physical - that they may require because of their age, sex and personality and in the interest of their wholesome development. ..."

87. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("the Havana Rules"), adopted by General Assembly resolution 45/113 of 14 December 1990, include the following provisions:

**"I. Fundamental perspectives**

...

2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

...

## **II. Scope and application of the rules**

11. For the purposes of the Rules, the following definitions should apply:

...

(b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

...

## **IV. The management of juvenile facilities**

...

### **B. Admission, registration, movement and transfer**

21. In every place where juveniles are detained, a complete and secure record of the following information should be kept concerning each juvenile received:

...

(e) Details of known physical and mental health problems, including drug and alcohol abuse.

...

### **C. Classification and placement**

27. As soon as possible after the moment of admission, each juvenile should be interviewed, and a psychological and social report identifying any factors relevant to the specific type and level of care and programme required by the juvenile should be prepared. This report, together with the report prepared by a medical officer who has examined the juvenile upon admission, should be forwarded to the director for purposes of determining the most appropriate placement for the juvenile within the facility and the specific type and level of care and programme required and to be pursued. ...

28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

...

### **D. Physical environment and accommodation**

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.

32. The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for

association with peers and participation in sports, physical exercise and leisure-time activities. ...

...

34. Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.

...

#### **E. Education, vocational training and work**

38. Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. ...

...

#### **H. Medical care**

49. Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. ...

50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.

51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.

52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.

53. A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.

...

#### **L. Disciplinary procedures**

66. Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care,

namely, instilling a sense of justice, self-respect and respect for the basic rights of every person.

67. All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited. ...”

88. The United Nations Guidelines for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”), adopted by General Assembly resolution 45/112 of 14 December 1990, include the following provision:

“46. The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance. Criteria authorizing formal intervention of this type should be strictly defined and limited to the following situations: (a) where the child or young person has suffered harm that has been inflicted by the parents or guardians; (b) where the child or young person has been sexually, physically or emotionally abused by the parents or guardians; (c) where the child or young person has been neglected, abandoned or exploited by the parents or guardians; (d) where the child or young person is threatened by physical or moral danger due to the behaviour of the parents or guardians; and (e) where a serious physical or psychological danger to the child or young person has manifested itself in his or her own behaviour and neither the parents, the guardians, the juvenile himself or herself nor non-residential community services can meet the danger by means other than institutionalization.”

89. In its concluding observations on the combined fourth and fifth periodic reports of the Russian Federation of 25 February 2014 (CRC/C/RUS/CO/4-5), the Committee on the Rights of the Child “urged the State party to establish a juvenile justice system in full compliance with the Convention, in particular articles 37, 39 and 40, and with other relevant standards”. It further recommended that the Russian Federation “prevent the unlawful detention of children and ensure that legal safeguards are guaranteed for children detained”. Articles 37 and 40 of the CRC relates to children in conflict with the law (see paragraph 82 above) while Article 39 concerns the rights of children who are victims of crimes.

## THE LAW

### I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

90. In their submissions before the Grand Chamber, the Government invited the Court to refine the Chamber’s reasoning in respect of the

applicant's complaint under Article 5 § 4 of the Convention relating to the hearing of 11 April 2005. For his part, the applicant maintained his complaints under Article 6 of the Convention that he had had insufficient time to study the case file and that the court-appointed counsel had been ineffective.

91. The Court observes that, according to its case-law, the "case" referred to the Grand Chamber is the application as it has been declared admissible (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, 13 November 2007, and *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII). It notes that in its judgment of 14 November 2013 the Chamber declared inadmissible the applicant's complaints under Article 6 that he had had insufficient time to study the case file and that the court-appointed counsel had been ineffective, as well as his complaint under Article 5 § 4 relating to the hearing held on 11 April 2005. Accordingly, these complaints are not within the scope of the case before the Grand Chamber.

## II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

92. The Government, in their written submissions of 20 May 2014, contended for the first time that the applicant had neither exhausted domestic remedies nor complied with the six-month time-limit as required by Article 35 § 1 of the Convention in respect of his complaints under Article 3 of the Convention, and his complaints under Article 6 relating to the pre-investigation inquiry.

### A. Exhaustion of domestic remedies

93. As concerned the applicant's complaint under Article 3 of the Convention relating to the alleged lack of medical care in the temporary detention centre, the Government submitted that, after his release, the applicant could have instituted civil proceedings which was a domestic remedy capable of affording him adequate redress in the form of monetary compensation for any damage caused to him.

94. Regarding the applicant's complaints under Article 6 relating to the pre-investigation inquiry, the Government contended that the applicant had failed to lodge a complaint with the domestic courts under Article 125 of the Code of Criminal Procedure of the Russian Federation according to which anyone whose legitimate rights and interests had been affected by a decision not to institute criminal proceedings could appeal against that decision to a court.

95. The applicant did not expressly respond to the Government's objections but submitted that the Chamber had made a correct assessment of his complaints.



96. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 79, ECHR 2014 (extracts); *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II; and *K. and T. v. Finland*, cited above, § 145). The Chamber ruled on the admissibility and merits of the application in its judgment of 14 November 2013. The Court observes that the Government did not raise any of these two objections in their observations on the admissibility and merits of the case before the Chamber, or at any other point during the Chamber proceedings.

97. The Government have not claimed that there were any exceptional circumstances that could have dispensed them from the obligation to raise these objections in a timely manner. The Court therefore holds that the Government are estopped from raising their preliminary objections of non-exhaustion of domestic remedies at the present stage of the proceedings (see *Svinarenko and Slyadnev*, cited above, § 82, and *Sejdovic*, cited above, § 42).

98. The Government's preliminary objections must therefore be rejected.

#### **B. Six-month time-limit**

99. The Government contended that the applicant had failed to lodge with the Court his complaint under Article 3 relating to the lack of medical care in the temporary detention centre within the six-month time-limit provided for in Article 35 § 1 of the Convention. They submitted that the applicant's grandfather had only raised this complaint, in a summary fashion, in a letter of 30 November 2005 to the prosecution authorities who had replied on 16 December 2005, more than six months before the application was lodged on 1 November 2006.

100. According to the Government, the applicant had also failed to comply with the six-month time-limit with regard to his complaint under Article 6 relating to the pre-investigation inquiry, since the revised ruling refusing to initiate criminal proceedings against the applicant had been made on 6 July 2005 and the applicant's grandfather's last complaint about this matter to the prosecution authorities had been replied to on 16 December 2005.

101. The applicant did not address the Government's objections but maintained that the Chamber's judgment was correct.

102. The Government did not raise their objections as to non-compliance with the six-month rule in the proceedings before the Chamber and the Chamber did not examine the issue. However, the Court has already held that the six-month rule is a public policy rule and that consequently it

has jurisdiction to apply it of its own motion (see *Sabri Güneş v. Turkey*, no. 27396/06, § 29, 29 June 2012; *Svinarenko and Slyadnev*, cited above, § 85; *Blečić v. Croatia* ([GC], no. 59532/00, § 68, ECHR 2006-III; and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I). Furthermore, the Court has decided that, notwithstanding the requirements of Rule 55 of the Rules of Court, Governments are not estopped from raising the issue of the six-month rule before the Grand Chamber (see *Sabri Güneş*, cited above, § 30).

103. Consequently, the Grand Chamber has jurisdiction to examine the issue of compliance with the six-month rule in relation to the applicant's complaints under Article 3 of the Convention as well as under Article 6 concerning the pre-investigation inquiry.

*1. Compliance with the six-month time-limit in respect of the applicant's complaints under Article 3 of the Convention*

**(a) The parties' submissions**

104. The Government submitted that it appeared from paragraph 40 of the Chamber judgment that the applicant's grandfather had lodged only one complaint with the prosecution authorities, dated 4 October 2005, concerning the quality of medical care in the temporary detention centre. This was more than one year prior to the applicant lodging the application with the Court on 1 November 2006. However, the Government argued that the complaint of 4 October 2005 had not contained any grievances about the lack of medical care and, moreover, a reply had been prepared on 9 November 2005 by the Prosecutor's Office of the Sovetskiy District of Novosibirsk. Furthermore, they stated that a similar complaint, in which the grievances had been set out in a summary fashion and sent by the applicant's grandfather to the prosecution authorities on 30 November 2005, had been replied to on 16 December 2005 by the Prosecutor's Office of the Novosibirsk Region. However, the Government stressed that this was still outside the six-month time-limit.

105. The applicant did not reply to this objection in his submissions to the Grand Chamber.

**(b) The Court's assessment**

106. The Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Moreover, Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before

his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009, and *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001).

107. Turning to the present case, the Court has to ascertain whether the applicant had an effective remedy available to him and, if so, whether he made use of it and then seized the Court within the required time-limit. In doing so, the Court will not consider whether the applicant should have made use of civil proceedings since it has found above (see paragraphs 96-98 above) that the Government are estopped from raising an objection of non-exhaustion at this stage of the proceedings.

108. The Court notes at the outset that, on 28 February 2005, the applicant's grandfather lost his status as the applicant's guardian and that he was only reinstated at some point at the beginning of 2006. Thus, during the entire period when the grandfather was not the guardian, the applicant appears to have been under the guardianship of the State, and the grandfather had no legal rights to represent the applicant or defend his interests. Since the applicant was released from the temporary detention centre for juvenile offenders on 23 March 2005, he had at that time only the State to protect his interests. Consequently, the authorities were under no legal obligation during that period of time to reply to the grandfather's complaints concerning the applicant since he was not his guardian.

109. However, the Court observes that the grandfather continued to endeavour to protect the applicant's interests. Hence, it appears from the grandfather's letter of 30 November 2005 to a deputy prosecutor general that he had been informed that his complaint of 4 October 2005 to the Prosecutor General had been sent to various prosecutors' offices. Moreover, in his letter of 30 November 2005, the grandfather did indeed repeat the complaints about the applicant's treatment in the temporary detention centre and his poor health which he had already set out in his previous letter of 4 October 2005 (see paragraph 46 above). The Court notes that the prosecutor's reply of 9 November 2005 and the regional prosecutor's reply of 16 December 2005 nevertheless contained no information in response to the grandfather's complaints about the applicant's medical condition or the authorities' failure to treat him while in the temporary detention centre for juvenile offenders.

110. Furthermore, the Court has regard to the fact that once reinstated as the applicant's guardian the grandfather pursued the matter of the legality of

the applicant's detention and, within the framework of those proceedings, raised the issue of the applicant's frail health and the lack of medical treatment. In particular, in the complaint against the decision of 21 February 2005, which was examined by the President of the Novosibirsk Regional Court on 29 May 2006, the grandfather cited the applicant's diagnosis and the impossibility for him to be detained in the absence of medical advice. The President of the Regional Court responded in its judgment that the fact that the applicant suffered from various illnesses could not serve as a ground for quashing the decision of 21 February 2005, given that it had already been enforced in March 2005.

111. Against this background the Court finds that, in the absence of any answer from the prosecutors' offices to the grandfather's complaints in October and November 2005, the grandfather, once reinstated as the applicant's guardian, used other possible avenues to argue the applicant's case pertaining to his poor health and the lack of medical treatment in the temporary detention centre. Since the only concrete answer he received to that complaint was through the judgment of 29 May 2006 when, in essence, he was told that there was no point in complaining any further as the applicant's detention had already ended, the Court considers that, in the specific circumstances of the present case, the six-month period should be calculated from that date, as further complaints to the authorities would have had no prospects of success. Noting that the application was lodged with the Court on 1 November 2006, it follows that the applicant's complaints under Article 3 fall within the six-month time-limit.

112. The Government's objection must therefore be dismissed.

*2. Compliance with the six-month time-limit in respect of the applicant's complaints under Article 6 concerning the pre-investigation inquiry*

**(a) The parties' submissions**

113. The Government submitted that the applicant had failed to comply with the six-month time-limit in so far as his complaint under Article 6 related to the pre-investigation inquiry since the revised ruling refusing to initiate criminal proceedings against the applicant had been made on 6 July 2005 and the applicant's grandfather's last complaint on this matter to the prosecution authorities had been replied to on 16 December 2005.

114. In this regard the Government stressed that the present case involved two separate sets of proceedings, not one as found by the Chamber in its judgment. The first of these – the pre-investigation inquiry, conducted in accordance with Chapters 19 and 20 of the Code of Criminal Procedure – was to verify information about an alleged crime and decide whether there was sufficient evidence that a crime had been committed and whether to institute criminal proceedings. The second set – the proceedings deciding on

the placement of the applicant in the temporary detention centre, conducted in accordance with Chapter 3.1 of the Minors Act – did not require a pre-investigation inquiry to be conducted and were not limited in scope to information obtained during the inquiry. Thus, the outcome of the first set of proceedings did not, in itself, constitute a decisive ground for initiating the second set of proceedings, as exemplified in the applicant's case where only the last two inquiries, out of five, had been followed by the second set of proceedings for his placement in the temporary detention centre, and then because it had become obvious that other preventive measures had been unsuccessful. Hence, the Government found no grounds for treating the two sets of proceedings as a single process, as the Chamber had done in its judgment, and argued that the applicant's complaints under Article 6 should be examined separately in respect of each set of proceedings in question.

115. The applicant did not explicitly address the Government's objection or whether the two sets of proceedings should be considered separately or together. However, he maintained that the Chamber's judgment was correct and should be followed.

**(b) The Court's assessment**

116. The Court will first consider the Government's claim that the pre-investigation inquiry and the proceedings leading to the applicant's placement in the temporary detention centre should be considered separately since the result on this point will determine whether or not the Court needs to consider the Government's objection relating to the six-month rule.

117. While the Court acknowledges that the pre-investigation inquiry and the placement proceedings were, formally, two unrelated procedures, governed by separate legal rules, it notes that in the present case there was a close link, both in law and in fact, between them. In particular, the domestic courts gave as the main reason for the applicant's placement in the temporary detention centre that he had committed a delinquent act punishable by the Criminal Code. The District Court referred at length to the witness statements made by S. and his mother in its judgment and relied on those and the pre-investigation inquiry's findings when making its ruling (see paragraph 27 above). Moreover, both the District Court and the Regional Court found that the placement of the applicant in the temporary detention centre was necessary to prevent him from committing further delinquent acts, which shows that the placement was a direct consequence of the outcome of the pre-investigation inquiry.

118. Consequently, the Court finds that the two sets of proceedings should be considered together as a single set of proceedings for the purposes of the present case and will proceed with its examination of the applicant's complaints under Article 6 on this basis. The Government's objection as to compliance with the six-month time-limit in relation to the pre-investigation inquiry must therefore be rejected since the final domestic decision,

regarding the proceedings as a whole, was taken on 29 May 2006 when the President of the Novosibirsk Regional Court upheld the initial judgment ordering the applicant's placement in the temporary detention centre for juvenile delinquents. Since the application was lodged with the Court on 1 November 2006, it was introduced within the six-month time-limit.

119. The Government's objection must therefore be dismissed.

### III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

120. The applicant complained that he had not received adequate medical care while in the temporary detention centre for juvenile offenders and that the conditions of his detention there had been inhuman, contrary to Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

#### A. The Chamber judgment

121. The Chamber found that the lack of adequate medical treatment for the applicant in the temporary detention centre for juvenile offenders amounted to inhuman and degrading treatment contrary to Article 3. It noted in particular that, despite its request for a copy of the applicant's medical records from the temporary detention centre, the Government had failed to produce one, claiming that the records had been destroyed in accordance with domestic regulations which had not been submitted to the Court or published or made accessible to the public. Moreover, the Chamber observed that the normal time-limit for storage of medical records was ten years in the Russian Federation. Thus, since the applicant's grandfather had repeatedly informed the authorities of the applicant's health problems, the Chamber found no reason to doubt that the staff at the temporary detention centre had been made aware of his state of health. There was no evidence that the applicant had been examined during his detention by a neurologist or psychiatrist or that he had received any of his prescribed medication. The Chamber found this lack of medical attention, resulting in the applicant being hospitalised a day after his release, unacceptable.

122. In view of its finding of a violation due to the lack of medical treatment, the Chamber did not consider it necessary to examine the remainder of the applicant's complaints under Article 3.

## **B. The parties' submissions**

### *1. The applicant*

123. The applicant stressed that at the time of being placed in the temporary detention centre for juvenile offenders he was suffering from neurosis, ADHD, psychopathic conduct and enuresis. While he acknowledged that these conditions did not require immediate medical aid at the time of being detained, he emphasised that the pressure exerted on him throughout the detention at the police station and the questioning there, together with the thirty days at the temporary detention centre, had resulted in a sharp aggravation of all of his conditions and an immediate need for medical treatment. This had been proved by the medical certificates submitted by him during the proceedings before the Chamber, which confirmed that he had been forcibly hospitalised in a psychiatric hospital immediately upon release from the temporary detention centre. He argued that there were no other possible causes for the aggravation of his conditions.

124. In his view, the Russian authorities had failed to take timely measures to avoid the aggravation of his illnesses. In particular, he alleged that, when requesting to place him in the temporary detention centre, the Head of the Sovetskiy District Police Department was required to submit to the District Court a decision by the relevant healthcare facility on the presence or absence of contra-indications of a medical nature, including a psychiatric examination, placing him in the temporary detention centre. However, no such decision had been submitted either to the court or the temporary detention centre.

125. The applicant further maintained his submissions before the Chamber, claiming that both he and his grandfather had informed the teachers and employees of the temporary detention centre about his illnesses and asked for unrestricted access to the bathroom. However, this had been ignored and he had suffered badly, both psychologically and physically, owing to his enuresis.

126. Having regard to all of the circumstances of his case, the applicant maintained that the conditions in the temporary detention centre for juvenile offenders, at the time of his stay there, had been incompatible with the requirements of Article 3 of the Convention.

### *2. The Government*

127. The Government maintained that the applicant's complaints under Article 3 did not disclose any violation of that provision.

128. They reiterated that the applicant's personal file from the temporary detention centre for juvenile offenders, which might have included a medical record describing the applicant's health on admission, had been

destroyed in accordance with the instructions in force at the time (see paragraph 73 above). Moreover, other medical records and logbooks from the temporary detention centre for the period of the applicant's stay had been destroyed as soon as they had become "unnecessary", as no time-limits for keeping such documents existed at the material time. Order No. 340 of 12 May 2006, referred to in paragraph 34 of the Chamber judgment, had entered into force only after those documents had been destroyed.

129. However, the Government noted that the applicant's "accounting and statistical record" from his stay at the temporary detention centre in September 2004 and in February 2005 had been retained since its storage period was unlimited in accordance with Order No. 215 of 2 April 2004 (see paragraph 74 above). According to the Government, the Court had mistakenly called these records "medical records" in paragraphs 32 and 90 of the Chamber judgment and had therefore reached a wrong conclusion in paragraph 90.

130. They further stated that since they had only been given notice of the present case on 1 October 2010, more than five and half years after the events in question and following the destruction of most of the relevant records, they had to rely on the report by the head of the temporary detention centre, dated 28 December 2010, and the explanation of a supervisor at the same centre, dated 23 December 2010 (see paragraph 41 above). From these documents it appeared that all children kept at the temporary detention centre, including the applicant, had been examined daily by the medical staff. This was further supported by the "daily routine" approved on 17 January 2013 and submitted to the Court. Moreover, children could ask for medical assistance at any time; there were properly equipped medical rooms; access to toilets was not restricted; and special night-time arrangements were made for children suffering from enuresis. No complaints had been made by the applicant concerning any of these matters during his stay at the temporary detention centre. In this respect, the Government pointed out that minors kept in the temporary detention centre could receive unrestricted visits and telephone calls from their relatives, provided that they did not interfere with the activities foreseen in the daily schedule. The applicant's grandfather had never claimed to have been prevented from visiting the applicant and did not appear to have made any written or oral complaints during such visits.

131. Lastly, the Government submitted that, according to the staff schedule of the temporary detention centre in force from 18 June 2003 to 3 October 2005, a psychiatrist, a paediatrician, a doctor's assistant and a nurse were present at the centre. An information note further stated that the quality of medical care and the living conditions at the temporary detention centre had not been subject to any departmental or other inspection during 2004 or 2005. In view of all of the above, and since the applicant had not submitted any documents to substantiate his claims, the Government argued



that there was no indication that the temporary detention centre was not suitable to accommodate, for a maximum period of 30 days, a child suffering from enuresis and a behavioural disorder.

132. With regard to the applicant's health, the Government pointed out that his enuresis was mentioned neither in any medical documents submitted by the applicant (issued after 2003) nor in the applicant's "accounting and statistical record" from the temporary detention centre. Moreover, the degree of manifestation of this illness was not mentioned in any of the available documents. Turning to the applicant's behavioural disorder, the Government noted that, according to the extract from the medical history no. 3624 (submitted by the applicant to the Court in October 2007), the applicant had suffered from a social behavioural disorder at the material time which seemed to be a result of external factors rather than of his other diseases. In their view, the applicant had failed to submit any medical certificate to substantiate the allegation that this disorder prevented his placement in the temporary detention centre. He had also failed to produce a report by a medical expert confirming that his stay at the temporary detention centre had caused his health to deteriorate.

133. Consequently, the Government considered that the applicant's complaints did not disclose a violation of Article 3.

### *3. Third-party observations*

134. The Mental Disability Advocacy Center (MDAC) stressed that children with mental disabilities faced a "double disadvantage" – both as children and as individuals with mental disabilities. These children were particularly vulnerable to violations of their rights and had additional needs which had to be protected through stringent and effective safeguards. The MDAC referred to the United Nations Convention on the Rights of Persons with Disabilities ("the CRPD") and in particular its main object to ensure equality and non-discrimination in all domains (Article 5(2)). It further referred to the CRC, underlining that the best interests of the child should always be a primary consideration and that State Parties undertook to ensure the child such protection and care as was necessary for his or her well-being (Article 3 – see paragraph 81 above). Moreover, Article 23 of the CRC specifically related to children with disabilities and the MDAC observed that the Committee on the Rights of the Child, in its General Comment No. 9 (2006), set out further guidance as to the treatment of children with disabilities in conflict with the law. Thus, the Committee stated that "children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by way of pre-trial detention nor by way of a punishment" (see paragraph 83 above). The MDAC stressed that the Court had held that States had an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the

authorities had or ought to have had knowledge (they referred to *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).

### C. The Court's assessment

#### 1. General principles

135. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment (see, among other authorities, *Stanev v. Bulgaria* [GC], no. 36760/06, § 201, ECHR 2012). However, to come within the scope of the interdiction contained in Article 3 the treatment inflicted on or endured by the victim must reach a minimum level of severity. The assessment of this minimum level of severity is a relative one, depending on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *M.S. v. the United Kingdom*, no. 24527/08, § 38, 3 May 2012, and *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII).

136. Article 3 further imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical care (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; and *Khudobin v. Russia*, no. 59696/00, § 93, ECHR 2006-XII). Thus, the Court has held on many occasions that lack of appropriate medical care may amount to treatment contrary to Article 3 (see, for example, *M.S. v. the United Kingdom*, cited above, §§ 44 to 46; *Wenerski v. Poland*, no. 44369/02, §§ 56 to 65, 20 January 2009; and *Popov v. Russia*, no. 26853/04, §§ 210 to 213 and 231 to 237, 13 July 2006).

137. In this connection, the “adequacy” of medical assistance remains the most difficult element to determine. The Court reiterates that the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention (see *Khudobin v. Russia*, cited above, § 83), that diagnosis and care are prompt and accurate (see *Melnik v. Ukraine*, no. 72286/01, §§ 104-06, 28 March 2006, and *Hummatov*, cited above, § 115), and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a

symptomatic basis (see *Popov*, cited above, § 211; *Hummatov*, cited above, §§ 109 and 114; and *Amirov v. Russia*, no. 51857/13, § 93, 27 November 2014). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Holomiov v. Moldova*, no. 30649/05, § 117, 7 November 2006, and *Hummatov*, cited above, § 116). Furthermore, medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. Nevertheless, this does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities (see *Cara-Damiani v. Italy*, no. 2447/05, § 66, 7 February 2012).

138. On the whole, the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be “compatible with the human dignity” of a detainee, but should also take into account “the practical demands of imprisonment” (see *Aleksanyan v. Russia*, no. 46468/06, § 140, 22 December 2008). When dealing with children, the Court considers that, in line with established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community (see, for example, paragraphs 79, 81 and 87 above – the 2008 European Rules for juvenile offenders subject to sanctions or measures, Rules 57, 62.2, 62.5, 69.2, and 73(d); the CRC, Article 3, paragraph 3; and the Havana Rules, Rules 49-53). The authorities should always be guided by the child’s best interests and the child should be guaranteed proper care and protection. Moreover, if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child’s state of health to determine whether or not he or she can be placed in a juvenile detention centre.

139. The Court further stresses that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt”. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to

the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII, with further references; *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV; *Amirov*, cited above, § 80; and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 121, 10 January 2012).

140. In this connection it should be noted that the Court has held that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation). According to the Court's case-law under Articles 2 and 3 of the Convention, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries, damage and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Amirov*, cited above, § 92). In the absence of such an explanation the Court can draw inferences which may be unfavourable for the respondent Government (see, for instance, *Orhan v. Turkey*, no. 25656/94, § 274, 18 June 2002, and *Buntov v. Russia*, no. 27026/10, § 161, 5 June 2012).

## 2. Application to the present case

141. The Court notes from the outset that both the applicant's young age and his state of health are circumstances of relevance in assessing whether the minimum level of severity has been attained (see paragraph 135 above) and it will have particular regard to the principles set out in paragraph 138 above.

142. In the present case, the Court notes that the Government have submitted numerous documents in support of their submissions before the Grand Chamber to show that the conditions at the temporary detention centre were good and that medical treatment was provided. However, the great majority of these documents date from 2008 to 2014, several years after the applicant's stay at the temporary detention centre and, consequently, do not shed light on the conditions in the centre during his placement there. Moreover, as concerns the report by the head of the temporary detention centre, dated 28 December 2010, and the explanation of a supervisor at the centre, dated 23 December 2010, the Court finds it unlikely that they would remember whether or not one child, staying at the temporary detention centre for thirty days almost six years earlier, had complained about the conditions or access to the toilets. It has also on

previous occasions found that reports or certificates like those submitted by the Russian Government were of little evidentiary value as they lacked references to original documentation held by the relevant prison or detention centre (see *Ananyev and Others*, cited above, § 124, with further references).

143. Thus, while the Court does not question the submission that some of the documents from the temporary detention centre relating to the applicant may have been destroyed in accordance with the relevant rules in force at that time, this does not absolve the Government from the obligation to support their factual submissions with appropriate evidence (*ibid.*, § 125).

144. The parties have submitted a number of relevant documents which allow the Court to examine the applicant's complaints in depth. In particular, it finds it established through the medical certificates submitted by the applicant that he was examined by a neurologist and a psychiatrist on 27 December 2004 and 19 January 2005, that is, only slightly over a month before being placed in the temporary detention centre. At that time, medication was prescribed for him as well as regular supervision by a neurologist and a psychiatrist and regular psychological counselling for his ADHD. It has further been established through medical records that the applicant was hospitalised the day after his release from the temporary detention centre and treated for neurosis and ADHD. He remained in hospital at least until 12 April 2005, thus for approximately three weeks.

145. Moreover, the Court notes that the applicant's grandfather submitted medical certificates at the detention hearing on 21 February 2005 to show that the applicant suffered from ADHD, thereby ensuring that the authorities were aware of his condition. In this connection the Court observes that an officer from the Juveniles Inspectorate was present at the hearing on 21 February 2005 and that, in accordance with section 31.2 of the Minors Act, a representative of the temporary detention centre was also required to be present. Since the applicant's grandfather drew attention to the applicant's medical condition during the hearing, the relevant authorities responsible for the applicant's placement at the temporary detention centre were made aware of his condition.

146. Thus, even if the applicant's personal file from the temporary detention centre has been destroyed, the Court considers that there is sufficient evidence to show that the authorities were aware of the applicant's medical condition upon his admission to the temporary detention centre and that he was in need of treatment. Moreover, the fact that he was hospitalised the day after his release, and kept in the psychiatric hospital for almost three weeks, provides an indication that he was not given the necessary treatment for his condition at the temporary detention centre. The applicant has thereby provided the Court with a *prima facie* case of lack of adequate medical treatment. Having regard to the considerations set out above (see paragraphs 142-43 above) concerning the documents submitted

by the Government and the lack of any other convincing evidence, the Court finds that the Government have failed to show that the applicant received the medical care required by his condition during his stay at the temporary detention where he was kept for thirty days without the right to leave and entirely under the control and responsibility of the staff at the centre. In these circumstances, the authorities were under an obligation to safeguard the applicant's dignity and well-being, and are responsible under the Convention for the treatment he experienced (see *M.S. v. the United Kingdom*, cited above, § 44).

147. As concerns the applicant's enuresis, the Court notes that it is not mentioned in the medical certificates of 27 December 2004 and 19 January 2005 and that it was not the reason for his hospitalisation following his detention. Thus, in the Court's view, the applicant has not submitted sufficient prima facie evidence to show whether and, if so, to what extent he suffered from enuresis on admission to the temporary detention centre and whether the personnel at the centre were, or should have been, aware of it. Since most of the medical certificates and files from the temporary detention centre concerning the applicant have been destroyed, it appears difficult to obtain any clarification on this point. On the other hand, the Court has already found it established that the applicant suffered from ADHD.

148. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of the applicant's rights under Article 3 on account of the lack of necessary medical treatment at the temporary detention centre for juvenile offenders, having regard to his young age and particularly vulnerable situation, suffering as he was from ADHD.

149. There has accordingly been a violation of Article 3 of the Convention.

150. In view of this finding of a violation of Article 3, and like the Chamber in its judgment, the Court does not find it necessary to examine the remainder of the applicant's complaints under this provision.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

151. The applicant complained that his detention in the temporary detention centre for juvenile offenders had violated Article 5 § 1 of the Convention, which reads as follows:

“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:

- (a) the lawful detention of a person after conviction by a competent court;

(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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

### **A. The Chamber judgment**

152. In its judgment, the Chamber found that the applicant’s placement in the temporary detention centre amounted to a deprivation of liberty since the centre was closed and guarded, inmates were routinely searched on admission, all personal belongings were confiscated, and a disciplinary regime was applied to the inmates.

153. The Chamber further considered that the detention had not been intended for educational supervision within the meaning of Article 5 § 1 (d) since, under domestic law, temporary detention centres were designed for the temporary detention of minors while more appropriate accommodation was being sought, such as a return to the family or placement in an educational institution. Moreover, domestic law did not provide for any educational activities in the centres. Thus, the Chamber concluded that the temporary detention centres were not designed to provide educational supervision, and that the applicant’s detention in the centre had not been “for the purpose of” educational supervision, since he had been placed there for “behaviour correction” and the prevention of further delinquent acts.

154. The Chamber then found that the applicant’s detention could not be “reasonably considered necessary to prevent his committing an offence”, within the meaning of Article 5 § 1 (c), since neither the domestic authorities nor the Government had mentioned any concrete and specific delinquent acts which the applicant had to be prevented from committing. Moreover, Article 5 § 1 (c) required that detention to prevent a person from committing an offence was “effected for the purpose of bringing him before the competent legal authority”, which was not the case for the applicant, who had been placed in the temporary detention centre by order of a court at the end of the proceedings against him.

155. The Chamber further considered that since the applicant had not been convicted of an offence because he had not reached the statutory age of criminal responsibility, his detention could not be regarded as “lawful detention after conviction by a competent court” within the meaning of Article 5 § 1 (a). Furthermore, it found that the applicant’s deprivation of liberty did not fall under Article 5 § 1 (b) of the Convention and that subparagraphs (e) and (f) were clearly not relevant in the present case. Consequently, the Chamber concluded that the applicant’s detention in the temporary detention centre had not had any legitimate purpose under Article 5 § 1 and had accordingly been arbitrary.

## **B. The parties’ submissions**

### *1. The applicant*

156. The applicant agreed with the reasoning in the Chamber judgment in relation to Article 5 § 1. He had been placed in the temporary detention centre for thirty days for the “correction of conduct”, which did not involve educational supervision within the meaning of Article 5 § 1 (d). In his view, the temporary detention centre was in no sense an institution intended for educational supervision and, according to section 22 of the Minors Act, its tasks did not include carrying out educational work with the minor. In fact, according to domestic legislation, temporary detention centres were not included in the system of educational institutions. The applicant stressed, further, that special closed institutions existed that did have the specific task of bringing up and educating children and young persons of deviant behaviour.

157. Moreover, section 22(4)(2) of the Minors Act contained a list of situations in which a minor could be placed in a temporary detention centre (see paragraph 66 above) and the applicant’s situation did not fall under any of these. He underlined that his identity had been known as had his place of residence and that his guilt in respect of the allegation of extortion had never been established by a court verdict. Furthermore, the applicant noted that, under section 22(6) of the Minors Act, a minor should only be kept in a temporary detention centre for the minimum time necessary for putting his or her affairs in order, and no more than thirty days. This implied that the purpose of the temporary detention centre was not educational supervision, but solely the detention of minors until such time as they could be handed over to their guardian or placed in a special educational institution. In any event, the Government had not submitted any relevant documents confirming that the applicant had received any individual precautionary instructions or had any school lessons while detained in the centre.



158. Lastly, the applicant submitted that his placement in the temporary detention centre did not serve any of the purposes listed in Article 5 § 1 (a), (b), or (c) either.

159. He concluded that his detention had been unlawful as it fell outside the scope of Article 5 § 1 of the Convention.

## 2. *The Government*

160. The Government maintained that the applicant's detention in the temporary detention centre had been in accordance with Article 5 § 1 (d) of the Convention since his placement had been ordered precisely for the purposes of "educational supervision". They noted that the national courts had authorised the applicant's placement in the temporary detention centre to prevent him from committing further offences – by correcting his behaviour through individual preventive work – in accordance with section 22(2)(4) of the Minors Act. They observed that other preventive measures taken earlier had not resulted in the improvement of the applicant's behaviour and that his family had been unable to ensure his proper supervision. In relation to this, the Government stressed the applicant's troubled background with alcoholic parents, placements in orphanages, anti-social and aggressive behaviour and commission of offences which had led to his being placed under the preventive supervision of the Juveniles Inspectorate between 2002 and 2005. They noted that the case file concerning the preventive supervision of the applicant had been destroyed in 2011.

161. Moreover, the Government submitted that individual preventive work, foreseen by the Minors Act, included an element of "educational supervision" and its implementation at the temporary detention centre had been expressly required in the applicant's situation. While the applicant's personal file from the centre had been destroyed in accordance with the domestic rules, the Government relied on other documents which indirectly confirmed that individual preventive work had been carried out with the applicant during his stay, such as an undated personality profile (*характеристика*) of the applicant issued by the temporary detention centre at the request of his representative (submitted to the Court by the applicant's grandfather in 2007). They further relied on a number of documents to demonstrate that temporary detention centres in general were designed to provide "educational supervision" and secondary school education, such as the staff schedule approved on 18 June 2003, the contracts of 1 September 2004 and 1 September 2005 between the temporary detention centre and school no. 15 of Novosibirsk on the provision of education to minors placed at the centre, and the licence issued to that school for the period from 4 September 2002 until 19 June 2007 to work with the educational and consultation centre of the temporary detention centre.

162. The Government also claimed that the regime in closed educational institutions, as foreseen by section 15(4) of the Minors Act, was similar to the regime in temporary detention centres, as specified in section 22(2)(4) of the Minors Act. Although the emphasis was placed differently in the wording of the two provisions, the essence, methods and aims of the work conducted with the minors were the same in both places. The difference was merely in the duration of the stay. The main objects of the closed educational institutions, as specified in section 15 of the Minors Act, were fully applicable to temporary detention centres.

### *3. Third party observations*

163. The MDAC pointed out that pursuant to Article 37(b) of the CRC the arrest, detention or imprisonment of a child must be in conformity with the law and used only as a measure of last resort and for the shortest possible time (see paragraph 82 above). It further observed that the Committee on the Rights of the Child, in its General Comment No. 9 (2006), stated that “children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by way of pre-trial detention nor by way of a punishment. Deprivation of liberty should only be applied if necessary with a view to providing the child with adequate treatment ... and the child should be placed in an institution that has specially trained staff” (see paragraph 83 above). Moreover, Rule 28 of the Havana Rules (see paragraph 87 above) provided that the detention of juveniles should only take place under conditions that took full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensured their protection from harmful influences and risk situations.

### **C. The Court’s assessment**

164. The Court notes at the outset that the Government have not maintained their claim that the applicant’s placement in the temporary detention centre fell outside the scope of Article 5 of the Convention on the ground that the placement did not constitute a deprivation of liberty. In any event, the Court confirms the Chamber’s finding that the applicant’s placement for thirty days in the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5 § 1, noting in particular that the centre was closed and guarded, with twenty-four-hour surveillance of inmates to ensure that they did not leave the premises without authorisation, and with a disciplinary regime enforced by a duty squad (see paragraphs 71-72 above).

165. Moreover, the applicant has submitted that his placement in the temporary detention centre fell outside the scope of all sub-paragraphs of

Article 5 § 1 while the Government, in their submissions to the Grand Chamber, have claimed that the placement was in accordance with Article 5 § 1 (d), without arguing that it could also fall under one of the other sub-paragraphs of the said provision. In view of this, and agreeing with the Chamber's findings that the applicant's detention did not come within the scope of Article 5 § 1 (a), (b), (c), (e) and (f) of the Convention (see the Chamber judgment §§ 117-27), the Court will focus its examination on whether or not the applicant's placement in the temporary detention centre was in accordance with Article 5 § 1 (d).

166. The Court reiterates that the list of exceptions to the right to liberty set out in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see, among many others, *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports of Judgments and Decisions* 1997-IV). Moreover, in the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned (see *P. and S. v. Poland*, no. 57375/08, § 147, 30 October 2012; *D.G. v. Ireland*, no. 39474/98, § 80, ECHR 2002-III; and *Koniarska v. the United Kingdom*, (dec.), no. 33670/96, 12 October 2000).

167. Further, detention for educational supervision pursuant to Article 5 § 1 (d) must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements. However, the placement in such a facility does not necessarily have to be an immediate one. Sub-paragraph (d) does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the interim custody measure must be speedily followed by actual application of a regime of educational supervision in a setting (open or closed) designed – and with sufficient resources – for the purpose (see *Bouamar v. Belgium*, 29 February 1988, §§ 50 and 52, Series A no. 129, and *D.G. v. Ireland*, cited above, § 78).

168. In the present case, it appears from the relevant provisions in the Minors Act that a placement in such a centre should be of a temporary character – as the name itself indicates – and for the shortest possible time, thirty days at the most. Thus, for instance, a minor may be placed there while his identity and place of residence are established or for the time necessary to prepare his transfer to, or return following an escape from, a closed educational institution (section 22(2)(4-6) of the Minors Act). However, none of these grounds is relevant in the present case since the applicant's placement was for the purpose of "correcting his behaviour". In

any event, the various reasons provided for in the Minors Act for placing a minor in a temporary detention centre indicate that its purpose is interim accommodation only until a permanent solution is found and not for “educational supervision”.

169. In the Court’s view, and contrary to the Government’s claims, the applicant’s placement in the temporary detention centre cannot be compared to a placement in a closed educational institution, which is a separate and long-term measure intended to try to help minors with serious problems (compare *A. and Others v. Bulgaria*, no. 51776/08, §§ 66-74, 29 November 2011). As noted above, placement in a temporary detention centre is a short-term, temporary solution and the Court fails to see how any meaningful educational supervision, to change a minor’s behaviour and offer him or her appropriate treatment and rehabilitation, can be provided during a maximum period of thirty days.

170. As concerns the Government’s submission that the applicant did receive schooling in the temporary detention centre, the Court finds that the documents relied on by the Government show that an agreement existed with a local school to provide education to the juveniles at the temporary detention centre during the time that the applicant was there. In this connection, the Court considers that schooling in line with the normal school curriculum should be standard practice for all minors deprived of their liberty and placed under the State’s responsibility, even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education. This is also supported by international instruments dealing with the deprivation of liberty of minors (see, for instance, the 2008 European Rules for juvenile offenders subject to sanctions and measures, Rules 77, 78.3 and 78.5; the Council of Europe Guidelines on child friendly justice, Guidelines 21 and 28; the Beijing Rules, Rule 26.2; and the Havana Rules, Rule 38. All of these sources are cited above in paragraphs 79, 80, 86 and 87 respectively). Consequently, while the Court accepts that some schooling was provided in the centre, it considers that this does not substantiate the Government’s argument that the applicant’s placement was “for the purpose” of educational supervision. On the contrary, the centre was characterised by its disciplinary regime rather than by the schooling provided.

171. The Court further considers it to be of importance that none of the domestic courts examining the applicant’s detention order stated that the placement was for educational purposes. Instead, they referred to “behaviour correction” and the need to prevent him from committing further delinquent acts, neither of which is a valid ground covered by Article 5 § 1 (d) of the Convention. In fact, the Court observes that the purpose of “behaviour correction” coincides with the aims of criminal punishment found in Article 43 § 2 of the Criminal Code and in

Article 87 § 2 of the Code for minors between 14 and 18 years of age (see paragraphs 57-58 above).

172. In view of the foregoing, the Court finds that the applicant's placement in the temporary detention centre did not fall under Article 5 § 1 (d) of the Convention. Since it has already established that the detention did not fall within the ambit of any of the other sub-paragraphs of this provision, it follows that there has been a violation of Article 5 § 1.

## V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

173. The applicant further complained that the proceedings relating to his placement in the temporary detention centre had been unfair. In particular, he alleged that he had been questioned by the police without his guardian, a defence lawyer or a teacher present and that he had not had the opportunity to cross-examine witnesses against him during the proceedings. He relied on Article 6 §§ 1 and 3 of the Convention, which in their relevant parts, read as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ....

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ....”

### A. Applicability of Article 6 to the present case

#### 1. *The parties' submissions*

174. First, in their submissions before the Grand Chamber, the Government considered that the court hearing of 21 February 2005 ordering the applicant's detention in the temporary detention centre should be examined for compliance with the requirements of Article 5 § 4 of the Convention, instead of Article 6, since it concerned the imposition of a measure for the purposes foreseen by Article 5 § 1 (d). In this connection they noted that the Chamber had already examined another court hearing, namely that of 11 April 2005 relating to the applicant's appeal against his placement in the temporary detention centre, for compliance with Article 5 § 4. Moreover, the Court had previously relied on this provision in relation

to similar measures (*Ichin and others v. Ukraine* (nos. 28189/04 and 28192/04, §§ 41 and 43, 21 December 2010, and *A. and Others v. Bulgaria*, cited above, §§ 81 and 107).

175. In any event, the Government maintained their stance that Article 6 of the Convention was not applicable to the proceedings in the present case.

176. They contended that, as far as the pre-investigation inquiry was concerned, it had only involved one informal act with the participation of the applicant – the questioning – which should not be confused with a formal interview. They further reiterated that the pre-investigation inquiry concerned only the establishment of the facts and could not lead to the imposition of any punishment and thus did not involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. The inquiry could only lead to a decision whether or not to institute criminal proceedings. Since the applicant was under the age of criminal responsibility the institution of criminal proceedings was excluded. Thus, as in the situation of a mentally ill defendant, the possibility of conviction was completely excluded. Referring to *Kerr v. the United Kingdom* ([dec.], no. 63356/00, 23 September 2003) and *Antoine v. the United Kingdom* ([dec.], no. 62960/00, 13 May 2003), the Government observed that, for exactly these reasons, the Court had found that Article 6 was not applicable to criminal proceedings in respect of mentally ill defendants.

177. Regarding the proceedings leading to the applicant's placement in the temporary detention centre, the Government argued that Article 6, under its criminal head, was not applicable. They referred to sections 22(2)(4) and 31.1(2) of the Minors Act and to the domestic court rulings of 21 February 2005 and 29 May 2006. In their view, these sources confirmed that the purpose of the applicant's placement in the temporary detention centre had been to prevent him from committing further offences, by correcting his behaviour, and not to punish him for the latest offence he had committed. Thus, the domestic courts had examined not only the circumstances of the latest offence, but the entire record of the applicant's anti-social and delinquent behaviour, as well as his living conditions and family situation, and had concluded that he lacked the necessary supervision and that the preventive measures previously put in place had been inadequate. Consequently, the domestic court could not, and had not, established the applicant's guilt in respect of a crime but had merely assessed the sufficiency of the evidence confirming his commission of an act prohibited by the Criminal Code. This could not amount to a "determination of a criminal charge" within the meaning of Article 6 § 1. Furthermore, the court hearing of 21 February 2005 had been conducted in accordance with the procedure foreseen by the Minors Act, not by the Code of Criminal Procedure, and the Constitutional Court of the Russian Federation had expressly stated that this procedure under the Minors Act constituted a type of civil proceedings (finding of 14 May 2013, no. 690-O).

178. The applicant contested the applicability of Article 5 § 4 and maintained that the Chamber's approach had been the correct one and that the proceedings fell within the scope of Article 6 and should be considered in terms of compliance with that provision. He contended that his placement in the temporary detention centre had not been aimed at educational supervision but to punish him for the crime he had allegedly committed. In his view, the authorities had used the placement as a measure of criminal prosecution since they were prevented from instituting criminal proceedings against him on account of his age.

## 2. *The Court's assessment*

179. The Court notes that, in its judgment, the Chamber came to the conclusion that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 of the Convention (see paragraph 149 of the Chamber judgment). It held as follows:

“139. The Court reiterates that the concept of a “criminal charge” within the meaning of Article 6 § 1 is an autonomous one. The Court's established case-law sets out three criteria, commonly known as the “Engel criteria” (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), to be considered in determining whether or not there was a “criminal charge” within the meaning of Article 6 § 1 of the Convention. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, in particular, *Jussila v. Finland* [GC], no. 73053/01, § 30-31, ECHR 2006-XIII, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X).

140. Turning to the present case, the Court observes that, after establishing that the applicant's actions contained elements of the criminal offence of extortion, the domestic authorities refused to institute criminal proceedings against him because he was under the statutory age of criminal responsibility (see paragraph 13 above). Subsequently, in separate proceedings, a court ordered the applicant's placement in a temporary detention centre for juvenile offenders for thirty days on the ground that he had committed a delinquent act – extortion – and it was necessary to “correct his behaviour” and prevent him from committing further delinquent acts (see paragraph 21 above).

141. The Court takes note of the Government's argument that the proceedings against the applicant were not classified as criminal under domestic law. It has already recognised that States, in the performance of their task as guardians of the public interest, are entitled to create or maintain a distinction between different categories of offences for the purposes of their domestic law and to draw a dividing line between what belongs to the criminal sphere and what does not. By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the needs of the proper administration of justice, as well as the interests of the individual, as in the present case for example, by exempting minors under a certain age from criminal liability for their actions according to the level of

development of their mental and intellectual capacities. Nevertheless, the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of Article 6. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see *Öztürk v. Germany*, 21 February 1984, § 49, Series A no. 73; *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 68, Series A no. 80; *Ezeh and Connors*, cited above, § 83; and *Matyjek v. Poland* (dec.), no. 38184/03, § 45, 30 May 2006). In view of the above, the fact that the proceedings against the applicant were not classified as criminal under Russian law has only a formal and relative value; the “very nature of the offence is a factor of greater import” (see *Ezeh and Connors*, cited above, § 91).

142. It was not disputed before the Court that the delinquent act imputed to the applicant corresponded to an offence in the ordinary criminal law. Indeed, the decision not to institute criminal proceedings stated that “[the applicant’s] actions ... contained elements of the criminal offence of extortion, punishable by Article 163 of the Criminal Code” (see paragraph 13 above). At the same time, the Court does not lose sight of the fact that the criminal charges against the applicant were not pursued on the ground that he had not reached the statutory age of criminal responsibility. It is, however, not necessary to decide whether, despite the indisputably criminal nature of the imputed offence, the fact that criminal prosecution of the applicant was legally impossible because of his age removed the proceedings against him from the ambit of the criminal limb of Article 6. The Court will instead concentrate on the third criterion: the nature and degree of severity of the penalty that the applicant risked incurring.

143. The Court observes that under Russian law a minor who has committed a delinquent act before reaching the statutory age of criminal responsibility may be placed in a closed educational institution for up to three years, or in a temporary detention centre for juvenile offenders for up to thirty days (see paragraphs 57 and 58 above). In the present case, within a month of the refusal to institute criminal proceedings against the applicant, the local department of the interior asked a court to place him in a temporary detention centre for juvenile offenders on the ground that he had committed a delinquent act for which he could not be held criminally liable because of his age. Referring to his unruly way of life and previous delinquent acts, the local department of the interior claimed that it was necessary to detain the applicant in order to “correct” his behaviour and prevent him from committing further delinquent acts (see paragraph 19 above). The District Court ordered the applicant’s placement in a temporary detention centre for juvenile offenders for thirty days for “behaviour correction”, on the grounds that he had not “drawn proper conclusions” from his previous placements in that centre and had committed a further delinquent act (see paragraph 21 above). The Regional Court upheld that decision on appeal, referring to the fact that the applicant had committed a delinquent act punishable by the Criminal Code and to his family situation and poor school performance. It found that his placement in the centre was necessary to prevent him from committing further delinquent acts (see paragraph 48 above).

144. The Court is not oblivious to the fact that the decision to place the applicant in the temporary detention centre for juvenile offenders was taken in separate proceedings which were formally unrelated to the criminal pre-investigation inquiry regarding the applicant. However, taking into account that the domestic courts referred to the fact that the applicant had committed a delinquent act as the main reason for his placement in the temporary detention centre for juvenile offenders, and that in their decisions they extensively relied on the documents obtained and the



findings made during the criminal pre-investigation inquiry, the Court considers that there was a close link, both in law and fact, between the criminal pre-investigation inquiry and the placement proceedings. Indeed, the wording of the applicable legal provisions and of the judicial decisions, both cited in paragraph 143 above, clearly shows that the applicant's placement in the temporary detention centre for juvenile offenders was a direct consequence of the local department of the interior's finding that his actions had contained elements of the criminal offence of extortion.

145. The Court has already found that the placement in a temporary detention centre for juvenile offenders amounted to a deprivation of the applicant's liberty (see paragraph 107 above). There is therefore a presumption that the proceedings against the applicant were "criminal" within the meaning of Article 6, a presumption which was rebuttable only in entirely exceptional circumstances and only if the deprivation of liberty could not be considered "appreciably detrimental" given its nature, duration or manner of execution (see *Ezeh and Connors*, cited above, § 126).

146. As already found above, the applicant's placement in the temporary detention centre for juvenile offenders did not pursue the purpose of educational supervision (see paragraphs 109 to 116 above). The stated purpose of the applicant's placement in the detention centre for juvenile offenders was to correct his behaviour and to deter him from committing further delinquent acts rather than to punish him. However, the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV, and *Ezeh and Connors*, cited above, § 123).

147. The Court notes that the applicant's detention lasted thirty days and was served in a detention centre for juvenile offenders rather than in an educational institution. As established above, the centre was closed and guarded to prevent inmates from leaving without authorisation. Inmates were subject to constant supervision and to a strict disciplinary regime (see paragraph 107 above). The Court therefore considers that the deprivation of liberty, imposed after a finding that the applicant's actions contained elements of the criminal offence of extortion and served in a detention centre for juvenile offenders subject to a quasi-penitentiary regime as described above, contained punitive elements as well as elements of prevention and deterrence. The Court finds it difficult to distinguish between the punishment and deterrent aims of the measure in question, these objectives not being mutually exclusive and being recognised as characteristic features of criminal penalties. Indeed, in the Court's case-law criminal penalties have customarily been recognised as comprising the twin objectives of punishment and deterrence (see *Öztürk*, cited above, § 53; *Bendenoun v. France*, 24 February 1994, § 47, Series A no. 284; *Lauko v. Slovakia*, 2 September 1998, § 58, Reports 1998-VI; and *Ezeh and Connors*, cited above, §§ 102 and 105).

148. In view of the nature, duration and manner of execution of the deprivation of liberty which was liable to be, and which actually was, imposed on the applicant, the Court finds no exceptional circumstances capable of rebutting the presumption that the proceedings against the applicant were "criminal" within the meaning of Article 6.

149. In view of the above, the Court concludes that the nature of the offence, together with the nature and severity of the penalty, were such that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 of the Convention. This Article therefore applies to the proceedings against the applicant."

180. The Court does not see any reason to depart from the Chamber's findings, which are detailed and well-reasoned. Like the Chamber, it stresses the need to look beyond appearances and the language used and to concentrate on the realities of the situation (see the Chamber judgment, paragraph 146, cited above). When doing so in the applicant's case, the Court considers that his placement for thirty days in the temporary detention centre for juvenile offenders had clear elements of both deterrence and punishment (see the Chamber judgment, paragraph 147, cited above).

181. Having regard to the above, the Court does not agree with the Government's contention that the complaints should be considered under Article 5 § 4 of the Convention. In its view, since the proceedings taken against the applicant concerned the determination of a criminal charge, the applicant's complaints should be seen in the context of the more far-reaching procedural guarantees enshrined in Article 6 of the Convention rather than Article 5 § 4. The Court would add that it does not agree with the Government's submission that the applicant's situation should be treated in the same way as that of a mentally ill defendant. In cases of mentally ill defendants the proceedings can lead to their being placed in closed institutions for treatment and to prevent them from committing further criminal acts. There are no punitive or deterrent elements involved, unlike in the applicant's case.

182. Accordingly, the Court concludes that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 of the Convention and that this provision is therefore applicable in the present case.

## **B. Compliance with the requirements of Article 6**

### *1. The Chamber judgment*

183. With regard to the applicant's complaint that he had been questioned by the police in the absence of his guardian, a defence lawyer or a teacher, the Chamber noted that there was no evidence to support the Government's claim that the applicant's grandfather, his guardian, or anyone else had been present during the questioning. Moreover, having regard to his young age, it considered the circumstances surrounding the questioning to have been psychologically coercive. The Chamber further observed that the applicant's confession to the police had been used against him in the ensuing proceedings. Thus, the absence of a lawyer while in police custody had irremediably affected his defence rights and undermined the fairness of the proceedings as a whole. There had therefore been a violation of Article 6 §§ 1 and 3 (c).

184. Next, the Chamber noted that the applicant had had no opportunity to cross-examine S. and his mother although their witness statements were

the only evidence against him and had therefore been decisive. Moreover, no efforts had been made by the authorities to secure the appearance of S. or his mother in court, nor had they made a reasonable effort to compensate for this. It therefore found that the applicant's right to question and challenge witnesses had been restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d).

185. Lastly, the Chamber observed that the above-mentioned restrictions on the applicant's defence rights had been due to the special legal regime applicable to his situation because he had not reached the statutory age of criminal responsibility. The Minors Act, applicable to the proceedings against the applicant, provided for significantly restricted procedural guarantees. In view of the above considerations, the proceedings against the applicant had not been fair and there had been a violation of Article 6 § 1.

## *2. The parties' submissions*

### **(a) The applicant**

186. The applicant fully agreed with the Chamber judgment. He maintained that he had been deprived of his right to a defence both at the time of his initial questioning at the police station and during the court proceedings to place him in the temporary detention centre. He had also been deprived of legal safeguards such as the right to question witnesses and be presumed innocent.

### **(b) The Government**

187. The Government submitted that the applicant had been questioned by a specially trained officer from the Juveniles Inspectorate at the police station in the presence of his grandfather. He had also been informed of his right not to make self-incriminating statements, which was confirmed by his signature on the first page of his confession statement.

188. Moreover, since the Government considered that the court hearing of 21 February 2005 ordering the applicant's detention in the temporary detention centre should be examined for compliance with the requirements of Article 5 § 4 of the Convention, instead of Article 6, they developed their arguments with reference to that provision. They underlined, in particular, that the procedure under Article 5 § 4 did not necessarily have to be attended by the same guarantees as those required under Article 6 for criminal proceedings.

189. Thus, the Government pointed out that the hearing of 21 February 2005 had been held in compliance with section 31.2(2) of the Minors Act and attended by the applicant, his grandfather, a court-appointed lawyer, the officer from the Juveniles Inspectorate who had delivered the ruling of 12 January 2005 on the refusal to initiate criminal proceedings against the applicant, as well as a prosecutor. The applicant's grandfather

had denied that the applicant had committed any offences, referring to his visit to a doctor earlier on the relevant day, and the applicant had refused to give any explanation. The court-appointed lawyer had objected to the applicant's placement in the temporary detention centre. While acknowledging that S. and his mother had not been heard during the hearing, the Government expressed doubts as to whether the applicant had even requested their attendance, since this did not appear from the judgment. Moreover, the court hearing record had been destroyed together with the case file in 2013. Furthermore, in his cassation complaint of 2 March 2005, the applicant's grandfather did not claim to have made such a request to the court. The Government further noted that section 31.2 of the Minors Act neither required nor prohibited the examination of witnesses.

190. In view of the above, the Government considered that the applicant's complaints concerning the fairness of the proceedings did not disclose any violation of the Convention.

**(c) Third party observations**

*(i). MDAC*

191. The MDAC stressed that States had a positive obligation to apply stringent and effective safeguards in order to ensure that rights were "practical and effective" and that this was particularly important in relation to children with disabilities, who were very vulnerable. Article 13 of the CRPD addressed the specific issue of access to justice of persons with disabilities and stated that State Parties must ensure effective access to justice for persons with disabilities, including through the provision of procedural and age-appropriate accommodation, in order to facilitate their effective role as direct or indirect participants in all legal proceedings. Reasonable accommodation meant that appropriate modification and adjustments, which did not impose a disproportionate or undue burden, should be taken in each particular case. Moreover, Article 40 of the CRC dealt with children in conflict with the law and listed the minimum guarantees for children, including the right to legal assistance (see paragraph 82 above). The MDAC reiterated that the best interests of the child had to be of primary importance.

*(ii). League of Human Rights*

192. The League of Human Rights (LIGA) also referred to Article 40 of the CRC. It further referred to the Beijing Rules (see paragraph 86 above), the Vienna Guidelines for Action on Children in the Criminal Justice System (Annex to UN resolution 1997/30, adopted on 21 July 1997) and the Havana Rules (see paragraph 87 above) which all provided for a right to legal counsel and assistance for children in conflict with the law. Moreover, the LIGA pointed out that Council of Europe Recommendation 2008/11 on

the European Rules for juvenile offenders subject to sanctions or measures (see paragraph 79 above) provided that juveniles should not have fewer legal rights and safeguards than those provided to adult offenders by the general rules of criminal procedure. The LIGA also stressed that the right to legal assistance, referred to in various international instruments, applied from the very outset of a procedure, including the police questioning stage, involving children and those under the age of criminal responsibility. Since children below the age of criminal responsibility were often subject to very paternalistic proceedings on the grounds that the proceedings were not penal but protective, the traditional procedural safeguards were often not applied. That approach was based on the theory of welfare juvenile justice systems which had emerged in the United States and Europe in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and had been systematically criticised by a number of scholars for its overall paternalistic approach to children, typically suppressing their procedural rights and treating them as objects of care and discipline.

193. According to the LIGA, the particular vulnerability of children should instead require additional protection of their rights. In particular, legal assistance should be provided to all children on a mandatory basis. Lastly, it noted that Guideline 30 of the Council of Europe Guidelines on child friendly justice (see paragraph 80 above) stated that a child who had been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent was available, another person whom the child trusted.

### 3. *The Court's assessment*

#### (a) **General principles**

194. The Court reiterates that, as the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, it often examines the complaints under both provisions taken together (see, among many other authorities, *Lucà v. Italy*, no. 33354/96, § 37, ECHR 2001-II; *Krombach v. France*, no. 29731/96, § 82, ECHR 2001-II; and *Poitrimol v. France*, 23 November 1993, § 29, Series A no. 277-A). Moreover, where the applicant complains of numerous procedural defects, the Court may examine the various grounds giving rise to the complaint in turn in order to determine whether the proceedings, considered as a whole, were fair (see *Insanov v. Azerbaijan*, no. 16133/08, §§ 159 et seq. 14 March 2013, and *Mirilashvili v. Russia*, no. 6293/04, §§ 164 et seq., 11 December 2008).

195. As regards juvenile defendants, the Court has held that the criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is

dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 70, 2 March 2010; *Panovits v. Cyprus*, no. 4268/04, § 67, 11 December 2008; *V. v. the United Kingdom* [GC], no. 24888/94, § 86, ECHR 1999-IX; and *T. v. the United Kingdom* [GC], no. 24724/94, § 84, 16 December 1999). The right of a juvenile defendant to effective participation in his criminal trial requires that the authorities deal with him with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible the child's feelings of intimidation and inhibition and ensure that he has a broad understanding of the nature of the investigation, of what is at stake for him, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent (see *Martin v. Estonia*, no. 35985/09, § 92, 30 May 2013; *Panovits*, cited above, § 67; and *S.C. v. the United Kingdom*, no. 60958/00, § 29, ECHR 2004-IV).

196. In view of his status as a minor, when a child enters the criminal justice system his procedural rights must be guaranteed and his innocence or guilt established, in accordance with the requirements of due process and the principle of legality, with respect to the specific act which he has allegedly committed. On no account may a child be deprived of important procedural safeguards solely because the proceedings that may result in his deprivation of liberty are deemed under domestic law to be protective of his interests as a child and juvenile delinquent, rather than penal. Furthermore, particular care must be taken to ensure that the legal classification of a child as a juvenile delinquent does not lead to the focus being shifted to his status as such, while neglecting to examine the specific criminal act of which he has been accused and the need to adduce proof of his guilt in conditions of fairness. Processing a child offender through the criminal justice system on the sole basis of his status of being a juvenile delinquent, which lacks legal definition, cannot be considered compatible with due process and the principle of legality (see, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, §§ 45-47, ECHR 2006-IV, relating to the legal classification of recidivism). Discretionary treatment, on the basis of someone being a child, a juvenile, or a juvenile delinquent, is only acceptable where his interests and those of the State are not incompatible. Otherwise – and proportionately – substantive and procedural legal safeguards do apply.

(i) *Right to legal assistance*

197. The Court notes that, although not absolute, the right under Article 6 § 3 (c) of everyone charged with a criminal offence to be effectively

defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrinol*, cited above, § 34).

198. As regards legal assistance at the pre-trial stages of the proceedings, the Court has underlined the importance of the investigative stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. Therefore, the Court has held that the particular vulnerability of the accused at the initial stages of police questioning can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. Indeed, this right presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. It is further important to protect the accused against coercion on the part of the authorities and contribute to the prevention of miscarriage of justice and ensure equality of arms. Accordingly, in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as soon as a suspect is first questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced where incriminating statements made during police questioning without access to a lawyer are used to secure a conviction (see *Panovits*, cited above, §§ 64-66, and *Salduz v. Turkey* [GC], no. 36391/02, §§ 50-55, ECHR 2008).

199. In view of the particular vulnerability of children and taking into account their level of maturity and intellectual and emotional capacities, the Court stresses in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor (see *Salduz*, cited above, § 60; see also the case-law cited in paragraph 195 above).

(ii) *Right to obtain the attendance and examination of witnesses*

200. The Court reiterates that Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Lucà v. Italy*, cited above, §§ 39-40).

201. Moreover, having regard to the Court's case-law, firstly, there must be a good reason for the non-attendance of a witness at the trial and, secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 119, 15 December 2011, as refined in *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 107 and 118, 15 December 2015).

202. Where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery*, cited above, § 147, and as further developed in *Schatschaschwili*, cited above, § 116).

**(b) Application to the present case**

203. The Court notes from the outset that the applicant in the present case was only twelve years old when the police took him to the police station and questioned him. He was thus well below the age of criminal responsibility set by the Criminal Code (fourteen years) for the crime that he was accused of, namely, extortion. In view of this, he was in need of special treatment and protection by the authorities and it is clear from a variety of international sources (see, for instance, Council of Europe Recommendation No. R (87) 20; Council of Europe Recommendation (2003)20; Council of Europe Guidelines on child friendly justice, Guidelines 1, 2, and 28-30; the CRC, Article 40, and General Comment No. 10, point 33; and the Beijing Rules, Rule 7.1., all cited above in paragraphs 77, 78, 80, 82, 84 and 86 respectively) that any measures against him should have been based on his best interests and that from the time of his apprehension by the police he should have been guaranteed at least the same legal rights and safeguards as those provided to adults. Moreover, the fact that the applicant suffered from ADHD, a mental and neurobehavioural disorder (see paragraph 12 above), made him particularly vulnerable and thus he required special protection (see Council of Europe Guidelines on child friendly justice, Guideline 27; the CRC, Article 23, and General Comment No. 9, points 73 and 74, all cited above in paragraphs 80 and 82-83 respectively).

204. Against this background, the Court will look at the applicant's specific complaints under Article 6, that is, whether he was provided with legal assistance and had the opportunity to cross-examine witnesses, in



order to determine whether the proceedings to place him in the temporary detention centre for juvenile offenders were fair.

(i) *Right to legal assistance*

205. The Court observes that it is undisputed that the applicant was taken to the police station without being told why. He also had to wait a certain amount of time before being questioned by a police officer. However, there is no indication that the applicant was in any form or manner informed that he had the right to call his grandfather, a teacher, a lawyer or another person of confidence during this period for them to come and assist him during the questioning. Nor were any steps taken to ensure that legal assistance was provided to him during the questioning. The Government's submission that the applicant's grandfather was present during the questioning remains unsupported by evidence. Moreover, the Court notes that the confession statement signed by the applicant – the probative value of which must be considered to be extremely questionable given his young age and health condition – did not mention the grandfather's presence and was not countersigned by him. The written statement signed by his grandfather on the same day could, as claimed by the applicant, have been signed later, after the applicant had been questioned by the police officer, and thus does not prove his presence during the questioning. In this connection the Court notes that it was marked on the applicant's confession statement that he had been informed of his right not to make self-incriminating statements. However, that document did not mention that the applicant had been informed of his right to have legal counsel or someone else present during the questioning or that any such person had indeed been present.

206. Therefore the Court considers it established that the police did not assist the applicant in obtaining legal representation. Nor was the applicant informed of his right to have a lawyer and his grandfather or a teacher present. This passive approach adopted by the police was clearly not sufficient to fulfil their positive obligation to furnish the applicant, a child, suffering, moreover, from ADHD, with the necessary information enabling him to obtain legal representation (see *Panovits*, cited above, § 72).

207. The fact that the domestic law does not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by the police is not a valid reason for failing to comply with that obligation. The Court has previously found that a systematic restriction on the right of access to legal assistance, on the basis of statutory provisions, is sufficient in itself to constitute a violation of Article 6 (see *Salduz*, cited above, § 56). Moreover, it is contrary to the basic principles set out in international sources according to which a minor should be guaranteed legal, or other appropriate, assistance (see, for example, CRC, Article 40 § 2 (b) (ii), and the comments thereto; the Beijing Rules, Rule 7.1; and Council of Europe

Recommendation No. R (87) 20, point 8, all cited in paragraphs 82, 84, 86 and 77 above).

208. Furthermore, the Court considers that the applicant must have felt intimidated and exposed while being held alone at the police station and questioned in an unfamiliar environment. In fact he retracted the confession immediately when his grandfather came to the police station, and protested his innocence. In this regard, the Court stresses that the confession statement, made in the absence of a lawyer, was not only used against the applicant in the proceedings to place him in the temporary detention centre but actually formed the basis, in combination with the witness statements of S. and his mother, for the domestic courts' finding that his actions contained elements of the criminal offence of extortion, thus providing grounds for his placement in the centre.

209. In view of the above, the Court finds that the absence of legal assistance during the applicant's questioning by the police irretrievably affected his defence rights and undermined the fairness of the proceedings as a whole (see *Panovits*, cited above, §§ 75-76, and *Salduz*, cited above, §§ 58 and 62).

210. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

*(ii) Right to obtain the attendance and examination of witnesses*

211. Turning to the applicant's complaint that he did not have the opportunity to cross-examine S. or his mother during the District Court hearing to decide on his placement in the temporary detention centre for juvenile offenders, the Court first notes that it was a single judge at the Sovetskiy District Court of Novosibirsk, in accordance with section 22(3)(2) of the Minors Act, who ordered the applicant's placement, after having held a hearing. At the hearing, the applicant, his grandfather and court-appointed counsel were present, as were a prosecutor and the officer from the Juveniles Inspectorate who had ruled on 12 January 2005 not to initiate criminal proceedings against the applicant. From the judgment it appears that the applicant and his grandfather had the opportunity to address the court and submit documents. Thus, the Court notes that, on the face of it, it would appear that the proceedings afforded certain procedural safeguards for the applicant.

212. However, the District Court was provided with the results of the pre-investigation inquiry, among other material concerning the applicant. This included the statements made by the alleged victim, S. and his mother as well as the confession statement signed by the applicant. The Court reiterates that the applicant had retracted the confession and had claimed that it had been obtained under duress. Moreover, as found above, the applicant did not benefit from the assistance of a lawyer during the questioning at the police station, which irremediably affected his defence

rights. Furthermore, the grandfather also claimed that the applicant had been at a doctor's surgery earlier on the relevant day. However, the Court observes that neither S. nor his mother was called to the hearing to give evidence and provide the applicant with an opportunity to cross-examine them, despite the fact that their testimonies were of decisive importance to the pre-investigation inquiry's conclusion that the applicant had committed a delinquent act, namely, extortion.

213. In this connection it is also relevant to note that there is no indication, nor has it been claimed by the Government, that S. and his mother were not available or that it would otherwise have been difficult to summon them to the hearing as witnesses. There was consequently no good reason for the witnesses' non-attendance. Moreover, in view of the fact that the applicant had retracted his confession, the Court considers that it was important for the fairness of the proceedings that S. and his mother be heard. In the Court's view, this safeguard is even more important when the matter concerns a minor under the age of criminal responsibility in proceedings determining such a fundamental right as his right to liberty.

214. Furthermore, although court-appointed counsel was present at the hearing to represent the applicant, it is unclear when she was appointed and to what extent she actually defended the applicant's rights. If it is correct, as indicated by the Government, that no request to hear S. or his mother was made to the District Court by the applicant, then this would indicate a lack of diligence on the part of counsel and, in the Court's view, also on the part of the judge, who should have ensured that the principle of equality of arms was respected during the proceedings. In fact, no efforts were made by the authorities to secure the appearance of S. and his mother in court, even though the Minors Act does provide for the possibility to hear witnesses, as acknowledged by the Government. Having regard to the fact that what was at stake for the applicant in the placement proceedings was his deprivation of liberty for thirty days – not a negligible length of time for a twelve-year-old boy – the Court considers that it was of utmost importance that the District Court guarantee the fairness of the proceedings.

215. Lastly, the Court notes that there were no counterbalancing factors to compensate for the applicant's inability to cross-examine S. and his mother at any stage of the proceedings. As noted by the Chamber in paragraph 173 of its judgment, the applicant was not provided with an opportunity to scrutinise the witnesses' questioning by the investigator, nor was he then or later provided with the opportunity to have his own questions put to them. Furthermore, as the witnesses' statements to the investigator were not recorded on video, neither the applicant nor the judges were able to observe the witnesses' demeanour under questioning and thus form their own impression of their reliability (see, for similar reasoning, *Makeyev v. Russia*, no. 13769/04, § 42, 5 February 2009).

216. Having regard to all of the above, the Court finds that the applicant's defence rights, in particular the right to challenge and question witnesses, were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention and there has accordingly been a violation of these provisions.

*(iii) Conclusion*

217. The Court has found that the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 of the Convention because of the absence of legal assistance during police questioning and the denial of an opportunity to cross-examine the witnesses whose evidence against him had been decisive for the domestic court's decision to place him in the temporary detention centre for juvenile offenders for thirty days.

218. However, the Court considers it important to add, as did the Chamber (see paragraph 176 of its judgment), that the above restrictions were due to the fact that the applicant was under the age of criminal responsibility and therefore fell outside the protection offered by the procedural guarantees provided for by the Code of Criminal Procedure (see paragraphs 59-63 above). Instead, the Minors Act was applicable to the applicant. This Act provided for significantly restricted procedural safeguards (see paragraph 68 above) since it was intended as protective legislation for minors. According to the Court, and as also noted by the League of Human Rights in its submission (see paragraph 192 above), this is where, as illustrated by present case, the legislature's intention to protect children and ensure their care and treatment comes into conflict with reality and the principles set out in paragraph 196 above, since the child is deprived of his liberty without having the procedural rights to defend himself properly against the imposition of such a harsh measure.

219. In the Court's view, minors, whose cognitive and emotional development in any event requires special consideration, and in particular young children under the age of criminal responsibility, deserve support and assistance to protect their rights when coercive measures are applied in their regard albeit in the guise of educational measures. As is clear from the relevant international materials before the Court (see paragraphs 77-89 above), this has been established in many international documents. It has also been highlighted by the third party interveners. Thus, the Court is convinced that adequate procedural safeguards must be in place to protect the best interests and well-being of the child, certainly when his or her liberty is at stake. To find otherwise would be to put children at a clear disadvantage compared with adults in the same situation. In this connection, children with disabilities may require additional safeguards to ensure that they are sufficiently protected. The Court would point out that this does not mean, however, that children should be exposed to a fully-fledged criminal

trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the Convention on the Rights of the Child.

220. Having regard to all of the above-mentioned considerations, the Court concludes that the applicant was not afforded a fair trial in the proceedings leading to his placement in the temporary detention centre for juvenile offenders in violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

221. 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

#### 1. *The parties' submissions*

222. The applicant claimed 7,500 euros (EUR) in respect of non-pecuniary damage, as awarded to him by the Chamber in its judgment, although he submitted that it would not fully cover all costs for the recovery of his physical and mental health.

223. The Government contested that sum and considered that if the Court were to find a violation of the Convention, the Court's judgment in this respect should in itself constitute sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

#### 2. *The Chamber judgment*

224. The Chamber, making an assessment on an equitable basis, awarded the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

#### 3. *The Court's assessment*

225. The Court observes that it has found the same combination of violations as the Chamber in the present case. Moreover, the applicant has requested the same sum as granted to him by the Chamber in its judgment. The Court finds this to be an equitable amount and thus awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

## **B. Costs and expenses**

### *1. The parties' submissions*

226. The applicant also claimed RUB 24,979 (approximately EUR 417) for legal fees (RUB 20,000), translation costs (RUB 4,620) and postal expenses (RUB 359) incurred before the Grand Chamber, in addition to the sum granted by the Chamber in its judgment.

227. The Government contested both the sum awarded by the Chamber and the applicant's additional claims before the Grand Chamber. They considered that the available payment receipts submitted to the Court could not be viewed as valid documentary evidence since they bore stamps of a bar association but were signed by the representative himself. Moreover, no legal assistance contract between the applicant, or his grandfather, and the representative had been submitted to the Court. The random payment receipts from a translation centre were also insufficient to confirm translation expenses. The Government further pointed out that the representative was not mentioned in any of the domestic courts' decisions and that his involvement in the proceedings before the Court had been limited, most of the work having been done by the applicant's grandfather.

### *2. The Chamber judgment*

228. The Chamber awarded the applicant EUR 1,493 for legal fees and translation expenses, plus any tax that may be chargeable to the applicant on that amount.

### *3. The Court's assessment*

229. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court finds no reason to question the sum granted by the Chamber to the applicant for his costs and expenses. It further finds that the invoices and payment receipts submitted by the applicant to the Court prove that he has paid his representative RUB 20,000 for his legal services in the proceedings before the Grand Chamber. It also accepts in full the invoices and payment receipts relating to costs for translations and postal services.

230. In the light of the above, the Court grants the applicant the full amount claimed, that is, EUR 1,493, for the proceedings before the Chamber and EUR 417 for the proceedings before the Grand Chamber, namely, a total amount of EUR 1,910, plus any tax that may be chargeable to the applicant on that amount.

### C. Default interest

231. 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. *Dismisses*, unanimously, the Government's preliminary objections of non-exhaustion of domestic remedies and non-compliance with the six-month time-limit raised in respect of the applicant's complaints under Article 3 of the Convention, and under Article 6 as regards the pre-investigation inquiry;
2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds*, by eleven votes to six, that there has been a violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention;
5. *Holds*, unanimously,
  - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
    - (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 1,910 (one thousand nine hundred and ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 March 2016.

Lawrence Early  
Jurisconsult

Guido Raimondi  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Zupančič;
- (b) partly dissenting opinion of Judges Spielmann, Nicolaou, Bianku, Keller, Spano and Motoc;
- (c) partly dissenting opinion of Judge Motoc.

G.R.A.  
T.L.E.



## CONCURRING OPINION OF JUDGE ZUPANČIČ

I agree with the outcome in this case. However, the purpose of this concurring opinion is to clarify the question of the non-litigability of status crimes. Since the young Blokhin in this case was treated as a “juvenile delinquent”, the issue is whether he should or should not be entitled to the adversarial procedural safeguards. In order to understand this I shall refer to the history of this issue in constitutional terms.

Three key US Supreme Court cases of the mid-twentieth century defined the scope of due process requirements of the juvenile court.

In *Kent v. the United States* (383 U.S. 541 [1966]), the Supreme Court first stated that constitutional due process protections were applicable in juvenile proceedings. In reaching this conclusion, the Supreme Court found as follows (pp. 554-56):

“1. The theory of the District’s Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy, rather than in the *corpus juris*. Its proceedings are designated as civil, rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society, rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae*, rather than prosecuting attorney and judge. But the admonition to function in a “parental” relationship is not an invitation to procedural arbitrariness.

2. Because the State is supposed to proceed in respect of the child as *parens patriae*, and not as adversary, courts have relied on the premise that the proceedings are “civil” in nature, and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. ...

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”

*Kent* was followed by the case *In re Gault* (387 U.S. 1 [1967]), which held that the Due Process Clause of the 14<sup>th</sup> Amendment required that children subject to the jurisdiction of the juvenile court be afforded many, but not all, of the same procedural protections as adults in criminal courts. The Supreme Court held as follows (p. 36):

“A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the

proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him’.”

Lastly, in *In re Winship* (397 U.S. 358 [1970]), the US Supreme Court held that in juvenile delinquency proceedings the prosecution had the burden of proving each element of the offence charged beyond reasonable doubt (p. 364).

In the case of *Robinson v. California* (370 U.S. 660 [1962]), the US Supreme Court held that a Californian statute which had been used to convict a person for *being* a drug addict, not for an *act* of taking narcotics, was unconstitutional, in breach of the 8<sup>th</sup> and 14<sup>th</sup> Amendments. In reaching its conclusion, the Supreme Court made the following observations (pp. 666-67):

“This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See Francis v. Resweber*, 329 U. S. 459.

We cannot but consider the statute before us as of the same category.”

As the United States Supreme Court noted in the case of *Kent v. the United States*, the State takes on a *parens patriae* role with the objective of providing guidance and rehabilitation for the child and protection for society, not to establish criminal responsibility, guilt and punishment. However, in doing so, the child is deprived of important due process rights and may in fact receive the “worst of both worlds”, obtaining neither the protection accorded to adults nor the solicitous care and treatment postulated for children (see *Kent*, cited above, p. 556).

In these cases the child is deprived of his liberty on the basis of his status, namely, the fact of *being* a juvenile delinquent, not on account of the *act* allegedly committed by him, the question of his guilt having been determined at the close of proceedings which are Article 6 compliant.

In my view, these are two completely different approaches. The criminal procedure is triggered by an *act* of the criminal defendant, and the guilt or innocence of the defendant can be tested in accordance with the rules of evidence in a setting which satisfies the requirements of due process and the

principle of legality. In other words, the *act* of any defendant is litigable and triable on the facts. It is defined both *in abstracto* and *in concreto* in terms of time, place and *modus (operandi)*. However, the being of the perpetrator, in this case the fact of *being* a juvenile delinquent, is vague and for that reason cannot be legally predetermined (the principle of legality) or proved (the requirement of a fair trial).

It is also to be noted that ascribing a particular status to an individual in the criminal justice system may simply be a consequence of the commission of a series of acts by that individual, as for example in *Achour v. France* ([GC], no. 67335/01, ECHR 2006-IV), where the Court made an exception regarding the *ad hominem* principle (the applicant *being* a multi-recidivist) in view of the proven *in rem* series of acts for which the defendant had been convicted.

This is the real reason why the very existence of status crimes is not acceptable in criminal law (and was also found to be unconstitutional by the US Supreme Court in *Robinson v. California* (cited above)).

Conversely, in situations in which the State acts as *parens patriae* – and only in so far as this benevolence is demonstrably in the best interests of the aggrieved person (juvenile delinquent, a mentally ill person, and so forth) – it can be said that there is no conflict of interests between the State and the aggrieved person. In consequence, the principle of legality does not come into play and the adversarial nature of the trial is not indispensable.

It is not acceptable for a child to be deprived of his liberty on the basis of his status, rather than on account of the act allegedly committed by him and established in legal proceedings. The inherent vulnerability of children demands that when they enter the criminal justice system they should be appropriately protected and their rights guaranteed. The Court has previously found that special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v. the Netherlands*, 24 October 1979, § 60, Series A no. 33). Likewise, adequate procedural safeguards must be in place for children to protect their rights and best interests.

PARTLY DISSENTING OPINION OF JUDGES SPIELMANN,  
NICOLAOU, BIANKU, KELLER, SPANO AND MOTOC

I.

*Preliminary remarks*

1. The applicant, a minor under the age of criminal responsibility, was placed in a juvenile detention centre for thirty days to prevent him from committing further delinquent acts. The majority accept that his complaint as to the procedural shortcomings during the placement proceedings falls under the criminal limb of Article 6 § 1 of the Convention. Furthermore, the majority find that there has been a violation of that provision together with Article 6 § 3 (c), owing to lack of legal assistance, and Article 6 § 3 (d), as the applicant was not afforded the right to challenge and question crucial witnesses.

2. We respectfully dissent from the majority's finding that Article 6 is applicable to the proceedings leading to the temporary detention of the applicant and thus we cannot subscribe to the view that there has been a violation of that provision. As we explain below, we consider that the applicant's complaint as to the lack of procedural safeguards during the detention proceedings should have been examined under Article 5 § 4 of the Convention and a violation found on that basis. We fully agree, however, with the findings of a violation of Articles 3 and 5 § 1 of the Convention in the present case.

3. We will first proceed by examining and rejecting the majority's reasoning in finding Article 6 applicable to the detention proceedings (parts II-VI) and then move on to examining the applicant's complaint on the basis of Article 5 § 4 of the Convention (part VII).

II.

*The arguments for and against the applicability of Article 6*

4. In finding that Article 6 is applicable to the detention proceedings, the majority adopt the following arguments advanced by the Chamber, applying the *Engel* criteria (*Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22) (see paragraphs 179-82 of the present judgment):-

(i) The fact that the proceedings against the applicant were not classified as criminal under Russian law had only a formal and relative value; the "very nature of the offence [was] a factor of greater import", the Chamber referring here to the Court's judgment in *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, § 91, ECHR 2003-X).

(ii) It was not necessary to decide whether, despite the indisputably criminal nature of the imputed offence, the fact that criminal prosecution of the applicant was legally impossible because of his age removed the proceedings against him from the ambit of the criminal limb of Article 6.

Instead, the Court had to concentrate on the third *Engel* criterion: the nature and degree of severity of the penalty that the applicant risked incurring.

(iii) There was a close link, both in law and fact, between the criminal pre-investigation inquiry and the placement proceedings.

(iv) As the temporary placement in a detention centre amounted to a deprivation of liberty the Court should presume that the proceedings against the applicant were “criminal” within the meaning of Article 6, a presumption which was rebuttable only in entirely exceptional circumstances and only if the deprivation of liberty could not be considered “appreciably detrimental” given its nature, duration and manner of execution, the Court again referring to the judgment in *Ezeh and Connors* (cited above, § 126).

(v) Although the detention order was based on the grounds of behavioural correction and to deter the applicant from committing further delinquent acts rather than to punish him, the Court had to look beyond appearances and the language used and concentrate on the realities of the situation. The detention centre had not been an educational institution, it had been closed and guarded and inmates had been subject to constant supervision and to a strict disciplinary regime. Therefore, the deprivation of liberty, imposed after a finding that the applicant’s actions contained elements of the criminal offence of extortion and served in a detention centre subject to a quasi-penitentiary regime, contained punitive elements as well as elements of prevention and deterrence. Thus, the *Ezeh and Connors* presumption of Article 6 applicability was not rebutted, and the proceedings against the applicant were therefore to be considered “criminal” within the meaning of Article 6 of the Convention.

5. We consider that the majority’s argumentation is flawed for the following three reasons:

*Firstly*, the majority overestimate the legal and material significance of the link between the pre-investigation inquiry and the placement proceedings.

*Secondly*, the majority are, with respect, wrong to consider that the *Ezeh and Connors* presumption of Article 6 applicability has relevance for the examination of the present case.

*Thirdly*, the majority rely heavily on the punitive elements of the temporary thirty-day detention of the applicant in the juvenile detention centre. If this argument is accepted it will, in reality, result in almost all temporary measures involving deprivation of liberty, which fall under Article 5 of the Convention, hitherto being considered “criminal” under Article 6. Henceforth member States will thus have to provide the full plethora of procedural guarantees of a fair trial before a person is temporarily detained within the meaning of Article 5. Not only does this approach make the special provision for review of lawfulness contained in Article 5 § 4 obsolete, it also fails to recognise the fundamentally different nature and purpose of Article 5 detention proceedings on the one hand and full fair trial proceedings in criminal cases on the other.

6. We will now explain each argument in turn in more detail.

### III.

#### *The link between the pre-investigation inquiry and the placement proceedings*

7. We note, as described in paragraphs 14-24 of the judgment, that the pre-investigation inquiry took place in January 2005 on the grounds that the applicant had allegedly perpetrated an act of extortion. On 12 January 2005 the Juveniles Inspectorate refused to institute criminal proceedings as the applicant was below the statutory age of criminal responsibility. In June 2005 the Prosecutor's Office of the Sovetskiy District of Novosibirsk quashed that decision, finding that the pre-investigation inquiry had been incomplete. However, on 6 July 2005 the Juveniles Inspectorate again refused to institute criminal proceedings for the same reasons as before.

8. In the meantime, on 21 February 2005, the Sovetskiy District Court ordered the applicant's placement in a temporary detention centre for juvenile offenders for thirty days. The Head of the Sovetskiy District Police Department had made the request to the court "to prevent [the applicant's] further unlawful actions". The District Court reasoned that the applicant had to be placed in the detention centre for "behaviour correction" (see paragraph 27 of the judgment). The applicant appealed, and the appeal proceedings culminated in the judgment of the President of the Novosibirsk Regional Court on 29 May 2006 confirming the decision of 21 February 2005. As described in paragraph 54 of this Court's judgment, the Regional Court took a different approach from the District Court, considering that it had been "necessary, in accordance with section 22(2)(4) of the Minors Act, to place [the applicant] in the temporary detention centre for juvenile offenders for thirty days to prevent him from committing further delinquent acts". The Regional Court stated explicitly that the "fact that the District Court had referred to "behaviour correction" as a ground for detention had not made the detention order of 21 February 2005 unlawful. The applicant's detention had been justified on other grounds".

9. In the light of the above, we consider that although the District Court referred to the alleged perpetration by the applicant of a delinquent act containing the objective criminal elements of extortion, the Regional Court reclassified the main purpose of the temporary detention as only preventive, described the acts as "delinquent" and firmly placed its legal basis within the provisions of the Minors Act. It is true that the applicant's delinquent conduct as a minor was the basis for the request to place him in a temporary detention centre for juveniles, but that cannot, in and of itself, be a relevant argument for finding Article 6 applicable to the proceedings leading up to that detention. It is very often, although not exclusively, the case that measures taken by member States to deprive persons temporarily of their liberty, as permitted under Article 5 § 1 of the Convention, are based on those persons having acted in a manner that may be socially disruptive or

criminal in nature. Detention is then considered necessary to further certain defined legal interests, which are personal to the detainee in question and/or related to the interests of the wider public.

In the present case the pre-investigation inquiry was terminated by the Juveniles Inspectorate as the applicant was under the age of criminal responsibility. He was not and could not be “criminally charged” for the alleged act under domestic law, nor, in our view, within the autonomous meaning of these terms under Article 6 of the Convention. His placement in the juvenile detention centre was based only on the provisions of the Minors Act to further the public interest in preventing further instances of his possible destructive behaviour. We emphasise here that section 22(2)(4) of the Minors Act, which was the sole legal basis for the detention order, explicitly states that detention for up to thirty days is permitted when a minor has committed “a delinquent act before reaching the statutory age of criminal responsibility”, *inter alia* for the purpose of protecting “his life or health or to prevent him from committing further delinquent acts”. The provision makes no mention of the need to assess whether the delinquent act in question corresponds to the objective elements of a criminal act. Consequently, although we agree with the majority that there was a factual link between the two proceedings as to the underlying events that triggered the pre-investigation inquiry, on the one hand, and the placement proceedings, on the other, and thus it was justified on that basis to reject the Government’s objection as to the admissibility of the Article 6 complaint for the purposes of the six-month rule under Article 35 § 1 of the Convention (see paragraphs 116-19 of the judgment), we firmly disagree that there was a close link between the two proceedings as a matter of domestic law justifying the conclusion that the placement proceedings fall under the criminal limb of Article 6.

#### IV.

##### *The Ezeh and Connors presumption of Article 6 applicability*

10. The majority find that as the applicant was deprived of his liberty the Court has to presume that Article 6 applies to the proceedings leading up to the decision to detain him and that this presumption has not been rebutted on the facts in accordance with the criteria established in the judgment of *Ezeh and Connors v. the United Kingdom* (cited above). We respectfully disagree that the *Ezeh and Connors* presumption applies at all in the present case.

11. In *Ezeh and Connors* the applicants were prisoners who were charged with offences contrary to the Prison Rules, the first applicant for threatening to kill a parole officer, the second with assaulting a prison officer. Both were found guilty by the prison governor and awarded additional days’ custody pursuant to the Criminal Justice Act of 1991: the first applicant an additional forty days and the second an additional seven days, together with fourteen days cellular confinement for the first applicant

and three days for the second. Lastly, the first applicant was temporarily excluded from associated work and his privileges forfeited, the second also fined GBP 8.

12. The applicants complained under Article 6 § 3 (c) of the Convention of the lack of legal representation and, in the alternative, of legal aid for their hearing before the prison governor in the disciplinary proceedings brought against them under the Prison Rules. In determining whether Article 6 was applicable to the proceedings the Court referred, at § 126, to § 82 of *Engel and Others* (cited above), and then stated the following:

“Accordingly, given the deprivations of liberty liable to be and actually imposed on the present applicants, there is a presumption that the charges against them were criminal within the meaning of Article 6, a presumption which could be rebutted entirely exceptionally, and only if those deprivations of liberty could not be considered “appreciably detrimental” given their nature, duration or manner of execution.”

13. In our view, the majority read the above-stated presumption of Article 6 applicability out of context and consider, wrongly in our view, that it applies to the facts of the present case where a temporary detention order for preventive purposes was imposed on a minor under the age of criminal responsibility.

In *Ezeh and Connors* the applicants, who were convicted adult prisoners, had violated the Prison Rules by perpetrating criminal acts of threats and assault and were sentenced under the domestic Criminal Justice Act with the consequence that their deprivation of liberty in the prison was prolonged purely for the purpose of punishment. It is in that context that the presumption of Article 6 applicability is stated by the Court. In no way does it suggest that every measure under domestic law in the form of temporary deprivation of liberty, thus falling in principle under Article 5 of the Convention, is to be presumed to be criminal and thus to engage the full fair trial guarantees of Article 6 of the Convention which can only be rebutted “exceptionally, and only if those deprivations of liberty [cannot] be considered ‘appreciably detrimental’ given their nature, duration or manner of execution” (see *Ezeh and Connors*, cited above, § 126). The consequence of such an interpretation of *Ezeh and Connors* is that a presumption applies to the effect that member States cannot detain persons temporarily within the meaning of Article 5 of the Convention without providing them with all the procedural guarantees of Article 6 §§ 1, 2 and 3, unless that presumption is exceptionally rebutted. With all due respect, this interpretation by the majority of the scope of the rule of presumption is not in line with the Court’s consistent case-law on the interrelationship between Articles 5 and 6. Furthermore, this approach is liable to disrupt the delicate and necessary balance that must be maintained in the separate and independent application of these two fundamental provisions of the Convention.



## V.

*The “punitive elements” of the applicant’s detention*

14. The majority conclude, lastly, as to the applicability of Article 6, that the applicant’s deprivation of liberty, imposed on him after a finding that his actions contained elements of the criminal offence of extortion and served in a detention centre subject to a quasi-penitentiary regime, contained punitive elements as well as elements of prevention and deterrence.

15. Again, we note that the applicant, as a minor under the age of criminal responsibility, had, according to the assessment by the competent national authorities, engaged in socially disruptive and delinquent acts and his situation therefore necessitated, in the estimation of the domestic courts, State intervention in the form of temporary detention to prevent him from committing further such acts. In our view, it is clear that regard being had to the reasoning of the final judgment of the domestic court examining the present case, the Novosibirsk Regional Court, the purpose of this measure was preventive on the basis of a statutory provision explicitly formulated to that effect in the Minors Act.

16. The detention was for a period of thirty days and took place in a juvenile detention centre. It goes without saying that any form of deprivation of liberty within a State institution is a difficult and troubling experience for the individual upon which such a measure is imposed. Thus, no one doubts that detention on remand under Article 5 § 1(c), detention in a mental institution under Article 5 § 1 (e), or indeed the temporary detention of a foreigner, such as an asylum seeker, under Article 5 § 1 (f), usually takes place in institutions or centres that may necessarily impose a “quasi-penitentiary regime” and a system of disciplinary measures. The case-law of this Court is rife with such examples. However, the fact that a deprivation of liberty under Article 5 has these inherent characteristics cannot justify the conclusion that the detention imposed contains “punitive elements”, unless that label applies to all detention measures under Article 5, thus automatically triggering the applicability of Article 6 whenever they are imposed. It is the *legal basis and purpose* of the detention that is crucial in the assessment under the *Engel* criteria and not the physical placement of the individual in a detention centre as in the present case. If a person is liable to be incarcerated in a prison or a penal institution for punitive, retributory purposes following a conviction for a criminal act, that detention falls under Article 5 § 1 (a) of the Convention and cannot be imposed unless the person in question has had a fair trial in conformity with Article 6. That principle does not however apply, in our view, to other detention measures which do not, directly or indirectly, have punitive purposes, as is the case when minors, mentally unstable individuals or foreigners are detained to further other legitimate public interests as well as, in some cases, the personal interests of the detainee, in particular children. In sum, and in the light of the above arguments, we cannot agree with the majority that the detention of the applicant contained “punitive

elements” within the meaning of the third *Engel* criterion for the Article 6 applicability analysis.

## VI.

### *Conclusion on the applicability of Article 6*

17. Having disposed of the arguments advanced by the majority for finding that Article 6 is applicable to the detention proceedings in the applicant’s case, we note in conclusion that it seems that the majority are heavily influenced by the argument that minors facing measures in the form of deprivation of liberty must be afforded sufficiently robust procedural safeguards, thus warranting the finding that Article 6 is applicable (see paragraphs 181 and 219 of the judgment).

18. Although we concur with the premise of this argument, we disagree with the conclusion. It is difficult to see how the majority’s findings of applicability of Article 6 in the present case, and the arguments relied upon to arrive at that conclusion, do not effectively render the special provision for review of lawfulness contained in Article 5 § 4 obsolete within the framework of the Convention. Article 5 § 4, however, is a far more suitable vehicle for providing a minor with sufficient procedural protections to challenge the lawfulness of a measure in the form of temporary detention and, moreover, better conforms to the structure and interrelationship between Articles 5 and 6 of the Convention (see *Ichin and Others v. Ukraine*, no. 28189/04 and 28192/04, § 43, 21 December 2010). Importantly, the application of Article 5 § 4 is also in greater harmony with the nature and purpose of a child-friendly system of juvenile justice as recently developed in relevant international instruments, as we will now explain.

## VII.

### *The application of Article 5 § 4 of the Convention*

19. We observe, at the outset, that we agree with the Court that the detention measure imposed on the applicant did not fall under Article 5 § 1 (d) of the Convention and nor could it find any basis in other subparagraphs of this provision. Thus, there has been a violation of Article 5 § 1 in the applicant’s case. However, we note that, as the Court has previously held (see *Bouamar v. Belgium*, no. 9106/80, § 55, 29 February 1988, Series A no. 129), a finding of a violation of Article 5 § 1 does not dispense it from examining whether there has been a failure by the member State to comply with Article 5 § 4 since the two provisions are distinct.

20. Article 5 § 4 provides: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is unlawful.”

21. In *Bouamar v. Belgium* (cited above), the Court stated that a procedure for the detention of a minor will satisfy Article 5 § 4 “only on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question”; “in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place” (ibid., § 57). In particular, proceedings concerning the detention of a minor must provide him with the effective assistance of a lawyer (ibid., § 60). Furthermore, in *Nikolova v. Bulgaria* ([GC], no 31195/96, § 58, ECHR 1999-II) the Court held that Article 5 § 4 proceedings must be adversarial and always ensure equality of arms between the parties.

22. *Bouamar* thus introduced a flexible test under Article 5 § 4 that requires analysis of the relative necessity of introducing certain procedural guarantees that take appropriate account of the nature of the review of lawfulness in question and the particular circumstances of the proceedings. In this way, the required procedural guarantees under Article 5 § 4 are not of a fixed determinate scope but must be assessed on a case-by-case basis by examining the legal basis for the detention measure that the State intends to impose and the nature of the proceedings, including the status of the person against whom the measure is directed.

23. The applicant alleged that he should have been provided with a lawyer during the detention proceedings and given the opportunity to challenge and question witnesses. We note that the applicant was temporarily detained in a juvenile detention centre under section 22(2)(4) of the Minors Act for the purpose of preventing him from committing further delinquent acts. As we have already pointed out (see paragraph 9 above), this provision requires that the domestic court assess whether the minor has committed a “delinquent act” and whether certain personal or public interests, namely the life or health of the minor or the interest in preventing further delinquent acts, justifies imposing a temporary detention order on him or her. The review of lawfulness under this provision, and the vulnerable status of the minor – in the present case a young boy only twelve years old at the relevant time, with certain health problems – thus clearly necessitate under Article 5 § 4 that the minor have access to legal assistance during the proceedings and have the possibility of challenging the veracity of witness statements that form the basis of the allegation against him.

24. We note that this interpretation of Article 5 § 4, emphasising the child-friendly nature of juvenile justice in detention proceedings, finds support in the relevant international instruments of the Council of Europe comprehensively set out in Chapter III of the present judgment (see paragraphs 77-79) and of the United Nations (see paragraphs 81-89). In particular, we refer here to Part IV on legal advice and assistance to juveniles of Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures (see paragraph 79 of the judgment) and to point 30 of the Guidelines of the Committee of Ministers

of the Council of Europe on child friendly justice, adopted on 17 November 2010, (see paragraph 80 of the judgment), which states that a child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts.

25. Applying the above-mentioned principles in the Court's case-law and taking account of the relevant international materials described above, we agree in substance with the reasoning of the majority in paragraphs 197-99 of the judgment as regards the applicant's right to legal assistance, although we consider that the necessity of providing the applicant with the assistance of a lawyer when he was questioned during the pre-investigative stage of proceedings should have been based on Article 5 § 4 of the Convention, not Article 6 § 3 (c). As the applicant's statement confessing to the act in question during that stage, which he later retracted and alleged had been taken under duress, was adduced as evidence in the placement proceedings, it is clear that in the review of lawfulness under Article 5 § 4 the lack of legal assistance during that stage was highly prejudicial to the applicant in his quest to challenge the legality of the detention measure under section 22(2)(4) of the Minors Act.

26. The same applies in substance as regards the majority's reasoning regarding the *right of the applicant to question and challenge the crucial witnesses*: the alleged victim S. and his mother, who gave statements during the pre-investigation inquiry but were not summoned before the domestic court. This deprived the applicant of the opportunity to cross-examine them, although these witness statements were clearly decisive for the court's assessment of whether the applicant had committed a delinquent act within the meaning of section 22(2)(4) of the Minors Act.

27. We subscribe to the majority's view (see paragraph 214 of the judgment) that whether or not the applicant's legal counsel did in fact request during the hearing the attendance of the witnesses is not decisive for the purposes of the procedural assessment under Article 5 § 4, whilst under the case-law of the Court the lack of such a request by counsel can be determinative under Article 6 § 3 (d) and also problematic for the purposes of non-exhaustion of domestic remedies if no such request is made before the domestic courts. That is the material and very problematic difference between applying the fundamentally adversarial fair trial provision of Article 6, as the majority do, in cases of this nature, and not, as we suggest, Article 5 § 4 which is specially formulated to take account of the inherent features of the particular type of review of lawfulness of detention that is involved in a particular case. Thus, in detention proceedings where a request is made to temporarily detain a minor to protect his life or health and/or to further certain public interests, it is certainly incumbent on the court to act *proprio motu* to secure the introduction of all relevant evidence so as to give the minor and his legal counsel a real and effective opportunity to challenge the probative value of such evidence. Therefore, in our view, the majority's

reasoning on this issue at paragraph 214, requiring that the domestic court in the present case should have acted of its own motion within the context of Article 6 § 3 (d), does not sit well with the existing case-law on this provision. This approach was simply not necessary, in our view, to further the important aim of securing the applicant's procedural rights, as Article 5 § 4 is better designed for that purpose.

28. In the light of the foregoing, we conclude that the applicant's procedural complaint should have been examined under Article 5 § 4 and that on the facts of the present case there has been a violation of that provision owing to the lack of legal assistance at the pre-investigative stage and the failure of the domestic courts to secure the attendance of the alleged victim and his mother at the hearing so as to provide the applicant and his counsel with the opportunity to cross-examine them.

## PARTLY DISSENTING OPINION OF JUDGE MOTOC

With all due respect to the majority, I cannot agree that paragraph 196 of the judgment belongs to the “General principles” developed by the case-law of this Court. The paragraph is obviously a legal transplant from the US Supreme Court’s case-law. As Shakespeare said in the words of Hamlet: “Neither a borrower nor a lender be; for loan oft loses both itself and friend”. I find that our Court is in exactly the situation described by Hamlet.

Paragraph 196 does not reflect the general principles established by our Court and the mere distinctions between *in rem* and *ad personam* formulated in the context of recidivism in *Achour v. France* (§§ 47-49)<sup>1</sup>. And I do see the reasons why these should be included under the heading “General principles”. In fact paragraph 196 borrows, without citations, ideas from the US Supreme Court expressed in several cases, such as *Kent v. the United States*, *In re Gault* and especially *Robinson v. California*. In this sense the paragraph operates a legal transplant or a “cross-fertilisation of the case-law”.

As the creator of the notion of legal transplant, A. Watson has warned us that legal transplants should be operated in a careful way<sup>2</sup>. Even if cross-fertilisation has become a common practice nowadays, at the Court some criteria are still to be used; otherwise, as Vico has stated, “*La mente umana è naturalmente portata a dilettarsi dell’uniforme*” (The human mind naturally tends to delight in the uniform)<sup>3</sup>. It is essential that the cross-

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<sup>1</sup> “47. Consequently, the issue before the Court is indeed whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the statutory rule, read in the light of the accompanying interpretative case-law, satisfied the requirements of accessibility and foreseeability at the material time.

48. The Court notes that the applicant was initially convicted of drug trafficking on 16 October 1984 and that he finished serving his sentence on 12 July 1986. He was subsequently convicted of further drug offences committed in the course of 1995 and up to 7 December of that year. In their respective decisions of 14 April and 25 November 1997, the Lyons Criminal Court and Court of Appeal found the applicant guilty of offences under Article 222-37 of the Criminal Code and sentenced him in accordance with that provision and with Article 132-9 of the same Code, on recidivism.

49. The Court notes that Article 132-9 provides that the maximum sentence and fine that may be imposed are to be doubled in the event of recidivism and that the applicable period is no longer five years, as prescribed by the former legislation, but ten years from the expiry of the previous sentence or of the time allowed for its enforcement. As the new statutory rules came into force on 1 March 1994, they were applicable when the applicant committed fresh offences in 1995, so that he was a recidivist in legal terms as a result of those offences (see paragraph 46 above).”

<sup>2</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

<sup>3</sup> Giambattista Vico, *Principi di scienza nuova: d'intorno alla comune natura delle nazioni*.

fertilisation take into account the differences between legal cultures and rebut any attempt at the axiomatisation of similarity<sup>4</sup>.

Furthermore, including the paragraph under the general principles gives the impression that the majority would like to develop a critique of the doctrine of *parens patriae* in the context of juvenile justice. Whilst the evolution of criminal justice in the US, especially in California in the 1960s, had determined a need for the US Supreme Court to intervene and to ensure against “processing a child offender through the justice system on the sole basis of his status of being a juvenile offender”, there is no counterpart to this in the member States of the Council of Europe nowadays.

Furthermore, the majority view becomes confusing when stating, under the general principles again, that “the status of juvenile delinquent lacks definition.” It is true that the term “juvenile delinquent” is still used by some international, European and domestic instruments but after the adoption of the Convention on the Rights of the Child the term was increasingly replaced with “minor” or “child”. In the present case the remark that the term lacks definition does not make sense since the applicant was twelve years old when he committed the crime. Furthermore, the Court has already cited the international instruments relevant to juvenile justice in part III, “Relevant international materials”. The lack of definition of the notion could be relevant in other contexts, for instance where the delinquent is between eighteen and twenty years old.

Again, the majority should be more careful regarding general principles which have been correctly stated by the Court and when operating “cross-fertilisation”.

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<sup>4</sup> D. Nelken, J. Feest (eds), *Adapting Legal Cultures*, Hart Publishing, Oxford Portland Oregon 2001.