Corte costituzionale

# JUDGMENT NO. 219 OF 2008

*FRANCO BILE, PRESIDENT*
*UGO DE SIERVO, AUTHOR OF THE JUDGMENT*

# JUDGMENT No. 219 YEAR 2008

**In this case the Court considered a reference from the Court of Cassation concerning the arrangements governing pre-trial detention, which did not contemplate any right to compensation where the period spent in pre-trial detention was longer than the sentence imposed, and proceedings were discontinued due to the application of the statute of limitations. The Court found that the institute of compensation for imprisonment was informed by solidarity principles, and accordingly was to be considered on an ex post basis (i.e. where the custody turned out to be unfair by virtue of the acquittal of the accused); however, the contested provision required an acquittal on the merits. The Court held that whilst pre-trial detention called on the accused to make a sacrifice that was balanced out by the public interest at large, "where however the duration of the pre-trial custody is longer than the sentence subsequently imposed, ...in order to pursue the aforementioned goals, the legal order requires of the guilty party a sacrifice directly impinging upon his freedom which, as much as it may be justified in the light of the above goals, surpasses the extent of his personal responsibility". Therefore, in view of the foundation in solidarity, the situation of a person acquitted on the merits was only superficially different from that of a person convicted, but to a shorter term, which meant that in both cases there was a violation of constitutional rights giving rise to an entitlement to compensation. The Court therefore declared the provisions unconstitutional insofar as challenged.**

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 314 of the Code of Criminal Procedure, commenced pursuant to the referral orders of 19 July 2006 of the Court of

Cassation, Joint Criminal Law Sections, in relation to the appeal filed by P. A., and of 30 March 2007 of the Trieste Court of Appeal pursuant to the application filed by B. A. V., registered as No. 558 in the Register of Orders 2006 and No. 753 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 49, first special series 2006 and No. 45, first special series 2007.

*Having heard* the Judge Rapporteur Ugo De Siervo in chambers on 2 April 2008.

*The facts of the case*

1. – By order of 19 July 2006, the Joint Criminal Law Sections of the Court of Cassation raised the question of the constitutionality of Article 314 of the Code of Criminal Procedure with reference to Articles 2, 3, 13 (the last being mentioned only in the reasons supporting the referral order), 24, 76 and 77 of the Constitution, "insofar as it does not contemplate any right to compensation for pre-trial detention that is longer than the sentence imposed".

The court was seized of an appeal filed against a ruling by which the Reggio Calabria Court of Appeal partially accepted the request filed by the applicant pursuant to Article 314 of the Code of Criminal Procedure for payment of damages as compensation for unfair imprisonment from 23 January 1986 to 22 June 1989. The local court had in fact ordered the Ministry for the Economy to pay compensation only in relation to the restriction of freedom suffered between 26 January 1988 and 22 June 1989.

The Court of Cassation summarises the facts underlying the contested decision as follows.

On 23 January 1986 the accused was remanded in custody on charges of mafia conspiracy, possession of firearms and, subsequently, attempted murder.

On 22 January 1988 the maximum time limits for pre-trial detention expired in relation to the offences concerning mafia membership and the firearms; the accused however continued to be held in custody as he had been sentenced to fourteen years' imprisonment for the offences of attempted murder and possession of firearms. In its judgment of 23 June 1989, the Court of Assizes of Appeal acquitted the accused of the offence of attempted murder due to insufficient evidence, whilst the trial continued in relation to the other offences. On 17 June 1999 the accused was acquitted on the charge

of mafia membership and sentenced to ten months' imprisonment for the firearms offences. Finally, on 7 May 2001, the local court ruled that proceedings be discontinued due to expiry of the time limits for prosecution of the offence of possession of firearms.

The Court of Appeal, ruling on an application for compensation for unfair imprisonment, held that compensation should be paid only for the period, falling between 26 January 1988 and 22 June 1989, relating to pre-trial detention for the offence of attempted murder, whilst the application was to be rejected for the period falling between 23 January 1986 and 22 January 1988, both on the grounds that the pre-trial detention was justified by the number of charges, and also because the discontinuation of proceedings due to expiry of the time limits for prosecution of the firearms offences precluded the right to compensation. This is because this right is available under Article 314 Code of Criminal Procedure only where the accused is acquitted on the merits.

P.A. appealed against this order to the Court of Cassation.

The Joint Sections, to which the appeal was referred by the fourth section (by order No. 1920 of 14 November 2005), first state that the case involves an examination of the request for compensation for unfair imprisonment only in relation to the period of detention between 23 January 1986 and 22 January 1988, when the maximum time limits expired for custody measures relating to the offences of mafia membership and illegal possession of firearms, offences for which the maximum limits for pre-trial custody are the same.

In view of the above, the Court of Cassation asserts that the *thema decidendum* in the case before it consists in establishing whether or not there is “a right to compensation in cases in which the accused, who has been remanded in custody on more than one charge with an equal maximum duration, is acquitted of one of the offences on one of the grounds specified in Article 314(1) of the Code of Criminal Procedure, whilst he is acquitted of another offence because the time limits for prosecution have expired”.

In cases involving cumulative trials with more than one charge, the case law of the Court of Cassation tends towards the view that, since the right to fair compensation subsists only insofar as the interested party has been acquitted on the merits, for the purposes of the recognition of this right it is necessary that this prerequisite be satisfied

with regard to all the charges. This follows from the fact that the period of pre-trial detention is unitary and indivisible for all the charges, which means that, if their maximum limit is the same, the absence of an acquittal on the merits even for only one of the offences results in the whole period of pre-trial detention being associated with that charge, irrespective of the length of the sentence which would have been imposed in the event of a conviction.

Therefore, in the event of custodial measures based on more than one charge, a non-merits acquittal even in relation only to one of them precludes the availability of any right to compensation.

However, the Supreme Court reached a different conclusion in two judgments of the Fourth Section, which were characterised by the fact of having awarded compensation to the co-accused in the same trial as the accused currently seeking compensation, who, along with the latter, had been acquitted of the mafia offence and, after being convicted of the firearms offences, had been acquitted due to expiry of the time limits for prosecution of the offence.

In the first judgment (No. 40094 of 6 July 2005) the Court found that "the period of pre-trial detention relating to the firearms offences could in no case exceed the limit of ten months, which corresponded to the length of the custodial sentence imposed by the trial court: accordingly, since the public prosecutor had not appealed against this decision, the offence which the court subsequently found could no longer be prosecuted corresponded with a period of pre-trial detention no longer than ten months, and the excess duration of prison custody was to be associated with the charge for which the accused had been acquitted on the merits".

In the second judgment (No. 36898 of 8 July 2005) the court found that "where it is clear from the specific circumstances of the case that the duration of the custodial measures is not the same for all offences charged, in the sense that a distinction may be drawn with a high degree of precision between the period in custody for an offence charged in relation to which the accused was acquitted due to expiry of the time limits for prosecution and the period in custody – which went beyond and, in the case before the court, well beyond, this threshold – suffered only for the offence charged in relation

to which the accused was acquitted on the merits, there are no grounds to deny fair compensation for this second period of restriction of freedom".

This judgment is based on the argument that the grounds for custody which no longer subsist pursuant to the acquittal due to the expiry of the time limits for prosecution "cannot be associated with a period corresponding to the maximum duration provided for under the law of procedure, but rather exclusively the period of pre-trial detention equal to the length of the sentence which would have been imposed in the event of a conviction".

The joint sections did not accept this argument since it would result in consequences which go beyond the substantive extent of Article 314 of the Code of Criminal Procedure.

Article 314(1) stipulates that an acquittal on the merits is a prerequisite for the availability of the right to fair compensation. Sub-section 4 goes on to provide that the right to compensation is precluded in relation to periods of pre-trial detention which are taken into account when calculating the length of sentences, according to the rule of transferability contained in Article 657 of the Code of Criminal Procedure, i.e. for periods during which the restrictions resulting from the incarceration were suffered also by virtue of a different charge.

A combined reading of these provisions points to "the intention of Parliament globally to preclude any right to compensation for unfair imprisonment in all cases involving non-merits acquittals and, even more so, in cases involving convictions, entirely irrespective of the effective length of the sentence applicable or actually applied, even where that sentence is significantly lower than the actual period of pre-trial detention".

Nevertheless, the Joint Sections question the constitutionality of Article 314 of the Code of Criminal Procedure precisely "insofar as it denies the right to compensation for pre-trial detention which is longer than the length of the sentence imposed, thereby precluding – in cases involving more than one ground for custody with the same maximum time limits – the payment of compensation in relation to the charge for which the accused was acquitted on the merits, even if the actual period of pre-trial detention

is longer than the length sentence imposed (or which would have been imposed) for the other charge had the time limits for prosecution of the offence not expired".

The unequivocally literal meaning of the contested provision precludes the possibility of interpreting the same in a manner compatible with the Constitution. This conclusion is supported by the legislative policy choice underlying Article 314(1) of the Code of Criminal Procedure, which requires an acquittal on the merits for all charges.

In the opinion of the Court of Cassation, this provision in the first place breaches Articles 76 and 77 of the Constitution insofar as it does not faithfully comply with the directions contained in Article 2(1)(100) of law No. 81 of 16 February 1987 (Legislative authorisation to the Government of the Republic to enact the new Code of Criminal Procedure). In fact, in view of the breadth of the principle stipulated in the legislative authorisation, which does not contain any restriction pertaining to the grounds for detention or the reasons for the unfair treatment, the secondary legislator is argued to have indiscriminately refused compensation in cases in which the sentence actually imposed for one of the offences is shorter than the duration of the period in custody "even though such detention appears, with regard to part thereof, '*ex post*' to be objectively unfair".

Furthermore, the secondary legislator is argued to have disregarded the direction contained in Article 2(1) of law No. 81 which obliges it to respect the provisions "of international treaties ratified by Italy concerning the rights of the person and to a fair criminal trial". Indeed, by denying compensation for the detriment caused by the restriction of personal freedom for a period longer than the sentence imposed, the legislation fails to comply with Article 5(5) of the European Convention and Article 9(5) of the International Covenant on Civil and Political Rights which provide for the right to compensation, with no maximum limits, in the event of unfair imprisonment.

The secondary legislator is also argued to have failed to comply with Article 5(3) of the Convention, which recognises the right of every person arrested or detained to be tried within a reasonable time. In fact, the contested provision does not recognise a right to compensation even where the individual is remanded in custody for a period of time longer than the sentence subsequently imposed because he is placed on trial a long time after the date of the offence.

Article 314 of the Code of Criminal Procedure is also argued to violate Articles 2, 13 and 24(4) of the Constitution.

In the light of these constitutional provisions, which indicate the primary and essential value of the principles of solidarity and personal freedom, the concept of judicial error – with regard to which Article 24 of the Constitution provides for compensation – must include "all cases of pre-trial detention which, by virtue of the fact that they appear '*ex post*' to be objectively unfair, reveal the mistaken nature of the custodial measures adopted which infringed the right to personal freedom". The preclusion of the right to compensation in cases in which the loss of personal freedom exceeds the length of the sentence imposed – all the more so where this difference between pre-trial detention and length of sentence is a result of the unreasonably long duration of the trial – violates the values protected by the Constitution.

Finally, the lower court argues that Article 3 of the Constitution, containing the requirement of reasonableness, has been violated insofar as the restrictions to the right to compensation, which has been recognised within the case law of the Constitutional Court as being grounded in solidarity, are inadequate compared to the goal of ensuring fair compensation for objectively unjust restrictions on personal freedom.

2. – The Trieste Court of Appeal also raised, in the referral order of 30 March 2007, with reference to Articles 2, 3, 24 and 77 of the Constitution, the question of the constitutionality of Article 314 of the Code of Criminal Procedure insofar as it does not provide for a right to compensation for unfair imprisonment in respect of periods of pre-trial detention which exceed the length of the sentence imposed.

The referring court states that the accused was remanded in custody from 8 January 1999 to 8 September 2000 for the offences of the possession in a public place of non-military firearms, reset, the illegal possession of a non-military firearm, as well as premeditated attempted murder. The trial court, after having de-classified the last offence to intentional multi-aggravated bodily harm, sentenced the accused to one year and eight months' imprisonment and a fine of 3,000,000 lire. In judgment No. 503 of 17 June 2004, which partially amended the above decision and further de-classified the offence of intentional bodily harm to negligent bodily harm (Article 590 of the Criminal Code), the Court of Appeal discontinued proceedings in relation to this offence on the

grounds that no complaint had been made and reduced the sentence for the other offences to one year, two months and twenty days' imprisonment and a fine of 1,600.00 Euro, also suspending the sentence.

Having concluded that it could not accept the application for compensation in respect of the whole period of pre-trial custody, since it referred to all the offences charged (and not only to that of attempted murder), the referring court found on the facts that the pre-trial detention had lasted for one year and eight months, i.e. for a period of time longer than the sentence imposed on appeal pursuant to the ruling that proceedings could not be continued on the grounds that no complaint had been made in relation to the offence contained in Article 590 of the Criminal Code.

"According to the settled case law of the Court of Cassation" however, Article 314 of the Code of Criminal Procedure cannot be used as a basis for the finding that the detention was unfair and hence for the recognition of a right to compensation.

In view of the above, the lower court notes that the Joint Criminal Sections of the Court of Cassation has raised the question of the constitutionality of the provision in question, with reference to Articles 76 and 77 of the Constitution, as well as in relation to Articles 2, 3 and 24(4) of the Constitution. This question is also of relevance for the case under examination before it in which the interested party was held in pre-trial detention for a longer period than the duration of the sentence imposed.

The referring court considers that the above question of constitutionality is relevant also in the proceedings before it and is not manifestly groundless "for the reasons and under the terms set out in the referral order of the Joint Sections of the Court of Cassation cited above, which is referred to in its entirety".

*Conclusions on points of law*

1. – The Joint Criminal Sections of the Court of Cassation question the constitutionality of Article 314 of the Code of Criminal Procedure, "insofar as it does not contemplate any right to compensation for pre-trial detention that is longer than the sentence imposed", with reference to Articles 2, 3, 13 (the last being mentioned only in the reasons supporting the referral order), 24, 76 and 77 of the Constitution.

In a similar referral order, the Trieste Court of Appeal questions this provision, on the same grounds, with reference to Articles 2, 3, 24 and 77 of the Constitution.

2. – The cases must be joined since the object of the questions of constitutionality raised is identical.

3. – The referral order of the Trieste Court of Appeal fails to address the issue of the non manifest groundlessness of the question, limiting itself to a reference to the previous referral order of the Joint Sections, and to mentioning some of the principles on which the latter court based its constitutional complaint.

This is not accompanied by any independent argument concerning the reasons why the examination of these principles could result in any doubts over the relevant provision's constitutionality: in accordance with the settled case law of this court, any question raised in this manner must be ruled manifestly inadmissible (see, *ex plurimis*, orders No. 81 and No. 14 of 2008).

4. – The case before the Joint Sections concerns a claim for compensation for unfair imprisonment by an individual who had been remanded in custody on several charges relating to offences in respect of which the law provides for an equal maximum limit to custodial measures.

The referring court states that the accused was definitively acquitted, under the terms of Article 530 of the Code of Criminal Procedure, of the most serious offence charged, and sentenced at first instance to ten months' imprisonment, having been found guilty of the other offence: subsequently, following an appeal filed by the accused alone, the Court of Appeal ruled that proceedings be discontinued in relation to the latter offence due to expiry of the time limits for prosecution of the offence.

The applicant claims that the public prosecutor's failure to appeal against the sentence imposed by the trial court means that it is certain that, even had the appeal proceedings concluded with a judgment on the merits of the charge, the sentence could not have been longer than ten months' imprisonment. It follows that the period of pre-trial custody relating to the offence for which the accused was not acquitted on the merits may be associated with a period of detention equal to ten months, whilst the residual and longer period in custody was related exclusively to the charge for which by contrast

the accused was acquitted on the merits: this detention must therefore be compensated, pursuant to Article 314(1) of the Code of Criminal Procedure.

The proceedings before the lower court therefore involve a special case in which there is an overlap between grounds for pre-trial detention in prison: nevertheless, the ruling requested from this court concerns, in more general terms, the constitutionality of the provisions governing compensation for unfair imprisonment, insofar as they apply only to cases in which the accused is acquitted on the merits, and not also where the accused, who was not acquitted on the merits, has been held in pre-trial detention.

It is thereby clear that the outer boundary of constitutional review traces out an area which concerns the issue of the compensation due: the right to compensation is granted to whoever has been definitively acquitted on the merits, even where at the outset the prerequisites for the custodial measure were satisfied.

On the other hand, the cases in which the pre-trial detention was ordered or extended, even though certain prerequisites for the applicability of the measures were not satisfied, raise a different question which falls beyond the purview of these proceedings.

The referring court considers that the acceptance of the application on which it must decide is unequivocally precluded by the prohibition, which applies in accordance with a literal reading of Article 314(1) of the Code of Criminal Procedure, on awarding compensation where the accused is not acquitted on the merits. In fact, this prohibition is stated to stand in the way of the interpretation – which has however been tested by individual sections of the Court of Cassation in certain previous decisions – which only attributes a period equal to the length of the sentence imposed to the charge on which the accused was convicted, considering on the other hand compensation to be due in regard of the remaining period, in that it was no longer justified by the charge of which the accused was acquitted on the merits. According to the Joint Sections, it is only by starting from the presumption that pre-trial detention in excess of the sentence imposed (currently precluded pursuant to Article 314 of the Code of Criminal Procedure) gives rise to a right to compensation that the period in custody in respect of which no compensation is due may be contained with the maximum limit of the relevant sentence and, *vice versa*, compensation may be due in respect of the excess period.

If this were not the case, the entire period of time, corresponding to the maximum limit for pre-trial detention, would be justified in the light of the charge of which the accused was not acquitted on the merits, precluding compensation for the period in excess of the sentence actually imposed by the trial court, thereby preventing this latter period from being taken into account in respect of the charge of which the accused was acquitted.

The fact that the special circumstances of a particular case, involving the overlap between several grounds for custody, are used as a basis for a request for a ruling that Article 314 of the Code of Criminal Procedure is unconstitutional in the broad terms set out above does not mean that the question is irrelevant. It is not indeed a matter for this court to review analytically the logical steps which the lower court takes in order to arrive at the conclusion summarised above: by contrast, it is sufficient to point out that they have been sufficiently justified (judgments No. 39 of 2008 and No. 50 of 2007). On the strength of this justification, the referring court concludes, by way of a not entirely implausible evaluation, that the application at issue in the main proceedings may be accepted only following the introduction into Article 314 of the Code of Criminal Procedure of new grounds for compensation for unfair imprisonment in cases in which the pre-trial detention exceeds the sentence imposed, and that this be mandated by the Constitution in the light of the principles invoked.

Within the above limits, it is clear that the literal wording of Article 314 of the Code of Criminal Procedure prevents this provision from being interpreted in a manner compatible with the Constitution: this literal meaning represents the borderline beyond which attempts at interpretation must give way to constitutional review.

Even though the referring court did not explore the possibility of a compatible interpretation, the admissibility of this constitutional review is not in fact undermined by the existence of court judgments which, whilst adapting the provision to the requirements of the Constitution, however did so through eccentric interpretations which manifestly disregarded the literal reading of the law.

The reasons which made it possible to define the object of the present referral proceedings in these terms are the same which, correspondingly, stand in the way of an expansion of the confines of constitutional review beyond the limit set out in the referral

order: today this Court is called upon to rule exclusively on whether the rule that periods of pre-trial detention not give rise to a right to compensation where the interested party has not been acquitted on the merits is compatible with the Constitution.

The lower court finds that the case at issue in the main proceedings raises this issue in that, in spite of the fact that there was no definitive conviction due to expiry of the time limits for prosecution of the offence, there was however a procedural bar on a review of the sentence imposed by the trial court since no appeal was filed by the public prosecutor. Similarly, this assessment – provided that it is not implausible – is a matter for the referring court alone and has no bearing on the prerequisites for the admissibility of these proceedings.

5. – In the first place, the lower court doubts that Article 314 of the Code of Criminal Procedure is compatible with Articles 76 and 77 of the Constitution since, by limiting the right to compensation only to cases in which the accused is acquitted on the merits, it violates Article 2(1)(100) of law No. 81 of 16 February 1987 (Legislative authorisation to the Government of the Republic to enact the new Code of Criminal Procedure), which provides that regulations governing "compensation for unfair imprisonment and judicial error" shall be issued as delegated legislation.

In support of this argument, the referring court notes that, when ruling on Article 314 of the Code of Criminal Procedure, this Court held that the parent statute "stipulated the requirement for compensation for unfair imprisonment, without placing any limit on the charge in respect of which the accused is held in custody or the 'grounds' for the injustice" (judgments No. 231 and No. 413 of 2004).

Nevertheless, the lower court fails to consider the fact that these judgments were issued by the Court in cases concerning the extension through interpretation of the applicational scope of Article 314 of the Code of Criminal Procedure to cases (respectively, provisional arrest and the provisional application of custodial measures pursuant to an application by a foreign state which is found to lack jurisdiction; the termination of proceedings due to the death of the accused in cases where the fellow defendants are acquitted on the merits on the grounds that the conduct averred did not occur) which, according to the lower courts, were not covered by that provision. It must be added that these cases appeared to fall within the ambit of the rationale underlying

the legislation governing unfair imprisonment, as well as being covered by the cases expressly mentioned in Article 314; therefore, precisely by virtue of the comparison with the cases expressly mentioned, the fact that the formal charge, or the "grounds" for the detention, was not expressly mentioned as one of the theoretical cases set out in the contested provision, is immaterial.

In these cases, it was precisely the irrelevance of the formal aspect, in the presence of identical justifications, which permitted – and indeed rendered necessary – the recourse to a constitutionally informed interpretation in the light of the provision contained in the parent statute.

On the other hand, it would be an entirely different matter to find that the "unfair nature" of the imprisonment should, pursuant to a requirement imposed by the parent statute, be assessed merely at the discretion of the interpreting body, there being no requirement incumbent upon the secondary legislator to achieve that "natural relationship of complementarity which ties the secondary legislation with the parent statute", the absence of which would result in a "distortion of the entirely different arrangements which the Constitution put in place" to govern the interaction between primary and secondary legislation (judgments No. 308 of 2002 and No. 4 of 1992).

Against this background, there are no grounds to conclude that the parent statute intended itself to introduce a general provision requiring compensation for "unfair" imprisonment that should be left to the discretion of the interpreting body, rather than passed through the "structural" filter (judgment No. 198 of 1988) of delegated legislation. By contrast, since at the time when the parent statute was enacted, the question regarding the limits within which detention should be considered to be unfair, and hence the right to compensation should be recognised pursuant to Article 24 of the Constitution, was still under debate, the Court finds that, due to the broad terms of the language used, the parent statute intended to leave the identification and specification of such situations to the secondary legislator, albeit within the limits of the principles and directional criteria set out in the authorisation.

On the other hand, the Court accepts the lower court's point regarding the need, which has been reiterated by this Court on various occasions (judgments No. 251 and No. 109 of 1999; No. 310 of 1996; No. 373 of 1992 and No. 344 of 1991), that for the

purposes of constitutional review the provisions of the Code of Criminal Procedure be adapted to interposed legislation, consisting of the "international treaties ratified by Italy concerning the rights of the person and to a fair criminal trial" (Article 2(1) of law No. 81 of 1987); indeed, interposed legislation may be used as a source for principles and directional criteria suitable for informing, from time to time, the limited discretion of the secondary legislator that nevertheless subsists, albeit in limited form (judgments No. 224 of 1990; No. 156 of 1987; No. 56 of 1971 and order No. 228 of 2005).

With regard to the provisions governing compensation for unfair imprisonment, the referring court refers, in particular, to Article 5(5) of the Convention to Safeguard Human Rights and Fundamental Freedoms, ratified by law No. 848 of 4 August 1955, and Article 9(5) of the International Covenant on Civil and Political Rights, adopted in New York on 19 December 1966, and implemented by law No. 881 of 25 October 1977.

However, these provisions do not provide a sufficient basis for the conclusions reached by the Joint Sections.

According to Article 9(5) of the Covenant, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". It is clear from a literal reading of this provision, as well as the additional rule contained in Article 3 of law No. 881 of 1977 – according to which arrest or detention is unfair where it is "arbitrarily" ordered (Article 9(1)), lacks "motivation" or violates the "procedures" provided for by law – that this international treaty law source only covers cases, falling under Article 314(2) of the Code of Criminal Procedure, in which the legal requirements for the application or continuation of custodial measures were lacking *ab initio*, regardless of the subsequent outcome of the merits proceedings.

For the same reason, the reference to Article 5(5) ECHR, which provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation", is inconclusive. The right to compensation arises whenever a person is deprived of his personal freedom outwith the cases specified under national law or provided for under Article 5(1), or where the procedures and time limits governed by sub-sections 2, 3 and 4 are not respected.

In particular, Article 5(1)(c) permits the detention, in accordance with national law, of persons who have been arrested or detained for the purposes of bringing them before the competent judicial authority; as clarified by this Court in judgments No. 348 and No. 349 of 2007, it is necessary to take into account the interpretation of this provision by the European Court of Human Rights.

The European Court has on various occasions held that Article 5 requires that any restriction of freedom comply with the goal of protecting persons from arbitrariness (judgment in Case No. 26629/95 *Witold Litwa v. Poland* and Case No. 24952/94 *N.C. v. Italy*), that is of preventing, in accordance with core *habeas corpus* rights, personal freedom from being infringed in the absence of a measure adopted by an independent court, or outwith the cases provided for by law. Therefore, where detention is ordered in order to implement a court ruling, it is as a matter of principle lawful (judgment of the Grand Chamber in *Benham v. United Kingdom* in Case 7/1995/513/597).

Whilst it may be true that the European Court invites the national courts also to verify that the deprivation of freedom is necessary in the circumstances (judgment in Case No. 26629/95 *N.C. v. Italy*), reserving this task to itself in the second instance, such scrutiny is however limited to the search for any elements of arbitrariness (judgment in Case No. 42644/02 *Picaro v. Italy*) which pervert the particular case and demonstrate that it involves an undue restriction of freedom: according to its literal wording and the settled interpretation of the Strasbourg Court, there is no way that Article 5 can be stretched to apply to cases, such as the present referral proceedings, in which a person has been remanded in pre-trial custody under the terms of national law and has received a sentence that is shorter than the period in custody attributable to the relevant charge. In such cases in fact, there is no question as to the lawfulness of the pre-trial detention, nor is there any need to provide redress for arbitrary action by the public authorities: by contrast, it is assumed that the detention has a basis in law, and it is entirely different types of complaint which are referred to the Court.

Furthermore, the Joint Sections state, again within the ambit of the complaint that the interposed law referred to in the parent act has been violated, that Article 5(3) ECJR contains the requirement that any person remanded in pre-trial custody be tried “within a reasonable time” or, if this is not possible, be released. There is therefore a “close

connection" between the question of the lawful duration of pre-trial detention and that of the reasonable time-scale for the conclusion of the trial, which means that Article 314 of the Code of Criminal Procedure is unconstitutional in the terms indicated above.

The Court notes on this point that the right to compensation provided for under Article 5 ECHR for those who, in the circumstances mentioned above, are not tried within a reasonable time, is recognised on account of the excessive length of pre-trial detention dictated by the time-scale for criminal proceedings. However, this right is not in any way related to the different question, raised in this case, concerning the relationship between this period in custody and the sentence imposed by the court: there could in theory be an imbalance between the two even in cases involving a rapid, or at least tolerably long, conclusion of the criminal trial.

The prolongation of proceedings for a long period of time without doubt makes it less improbable that the accused will be sentenced to a period of imprisonment that is shorter than the time passed in pre-trial custody, subsequently maintained for the duration of the trial, which albeit remained within the maximum limits imposed by law. However, this fact clearly amounts to a practical problem which does not necessarily result from the legislative content of the contested provision and which therefore, within these limits, falls beyond the ambit of constitutional review (judgment No. 375 of 2006).

For these reasons, the complaint founded on Articles 76 and 77 of the Constitution is groundless.

6. – It is now necessary to examine the complaint that Article 314 of the Code of Criminal Procedure is unconstitutional, raised by the Joint Sections with reference to Articles 2, 3, 13 (the last being mentioned only in the reasons supporting the referral order) and 24(4) of the Constitution.

This court has already had the opportunity to rule on the provisions governing redress for judicial error in judgment No. 1 of 1969, which dates back to a period long before the enactment of the provision under examination today, and which in fact concerned Article 571 of the Code of Criminal Procedure as then in force.

On that occasion, having been requested by the lower court to extend the applicational scope of this legislation pursuant to Article 24, last sub-section, of the

Constitution, the Court exercised restraint in view of the finding that the failure to enact comprehensive legislation, intended to regulate the substantive and procedural aspects of the compensation, could not be offset by a judgment of the Constitutional Court, since "any declaration of unconstitutionality based solely on the partial nature of the legislation would risk leading to a regression of the legislative situation, reopening a gap which could not be filled through interpretation".

It is easy to verify that this disabling condition no longer applies, precisely following the introduction into the body of the new Code of Criminal Procedure of Article 314. By enacting this provision, Parliament expressed its desire to extend compensation beyond cases involving mistakes contained in the court ruling which ordered a custodial measure to include cases involving an "objective violation of personal freedom, or which is otherwise unjust in the light of an *ex post* assessment" (judgments No. 413, No. 231 and No. 230 of 2004, and No. 446 of 1997). In doing so it created a legal right *in abstracto* which lends itself, as far as the procedures for its application are concerned, to extension to any further cases which may be required under the Constitution.

Therefore, judgment No. 1 of 1969 appears to have been superseded due to this aspect of the evolution of the legal system, as this Court already pointed out in judgment No. 310 of 1996, which recognised that "it is precisely Article 314 of the Code of Criminal Procedure which constitutes the concrete implementation of the principle contained in Article 24" of the Constitution.

On the other hand, the judgment remains entirely valid with regard to the assertion, which constituted its foundation, that "the last sub-section of Article 24 of the Constitution sets out a principle of the highest ethical and social value, which must be regarded – from a legal point of view – as a coherent development of the more general principle requiring protection of the inviolable rights of man (Article 2), adopted in the Constitution as one of those underpinning the entire republican order, and which in turn manifests itself in the constitutional guarantees conferred upon the various individual freedom rights and above all – and with greater emphasis – upon those therefrom which consist in the immediate and direct expression of the human personality".

In the current proceedings, this principle deserves to be assessed not only in relation to Article 24, last sub-section, of the Constitution, but also in the light of the

constitutional principles evoked by the referring court, namely Articles 2, 3, and 13 of the Constitution.

"The ultimate goal of social organisation" is in fact "the development of every human person" (judgment No. 167 of 1999), the value of which is placed at the centre of the constitutional order: it is a matter for Parliament to prepare the most effective systems for protection in order that this value not be compromised.

The inviolability of a right, in this case the right to personal freedom, is not in fact an empty proclamation contained in the Constitutional Charter, but by contrast expresses a "pre-eminent force of constitutional principles" capable of contrasting "an arrangement of the system which would result in the infringement of the said rights" (judgment No. 232 of 1998). In other words, it is necessary that both Parliament as well as the interpreting courts seek, each within the ambit of their respective competences, to recognise the most effective means of protection available in order to prevent and, if this is not possible, to provide redress for the violation of this inviolable right. Indeed, the Constitutional Charter "imposes the requirement to prevent the creation of situations devoid of protection which could prejudice the implementation" of the "hard core" of inviolable rights (judgments No. 252 of 2001, No. 509 of 2000, No. 309 of 1999 and No. 267 of 1998).

This Court is well aware that pecuniary compensation, which quantifies in financial terms the sacrifice of an inviolable freedom, is only the shadow of a true remedy, over which instruments capable of avoiding or limiting harm, or of restoring it in specific form, must always be preferred.

However, this argument certainly cannot be used in order to preclude the right to protection through compensation or indemnification when it is *de facto* the only practicable remedy within the legal order: this Court has already held with regard to this issue that actions for compensation are a means for protecting a legal right which has been infringed, and that the nature of such actions varies in line with the right in question (judgment No. 204 of 2004).

Similarly, this Court has also recently underscored the need to guarantee full redress for harm suffered affecting the core values of the person, also with reference to Article 2 of the Constitution (judgment No. 233 of 2003). In addition, and more significantly, the

Court has ruled unconstitutional legislation which denied the right to compensation under arrangements put in place in order to protect the inviolable human rights, where such arrangements amounted to the "manifestation of a solidarity principle" (judgment No. 561 of 1987).

Similarly, it is important not to lose sight of the fact that a restriction of personal freedom may result from the need to pursue goals of equal constitutional importance, provided that such restrictions are enacted through primary legislation and remain under the exclusive jurisdiction of the courts. In such cases, assuming that the balance struck by the law between the conflicting interests is correct, the legality of the acts and of the conduct by which the inviolable freedom is partially sacrificed – whilst precluding the availability of a claim for damages for tort – does not constitute a valid reason for excluding, in accordance with the mandatory duty of solidarity, compensation "due for the simple harmless and objective fact of having suffered a non-avoidable detriment, from which society as a whole draws a benefit" (judgment No. 118 of 1996).

Indeed, under these conditions such redress becomes constitutionally necessary: this Court has repeatedly asserted a similar principle when considering the blameless harm suffered by those who, due to the need to protect the public at large, have undergone compulsory vaccination and, unexpectedly, have suffered damage to their health (judgments No. 118 of 1996, No. 258 of 1994 and No. 307 of 1990).

The institute of compensation for unfair imprisonment provided for under Article 314(1) of the Code of Criminal Procedure shares this goal informed by solidarity (judgment No. 109 of 1999 and No. 446 of 1997), since it regulates cases in which the custodial measure which limits personal freedom was taken and maintained in force lawfully, but turned out only *ex post* to be "unfair" due to the acquittal of the accused. The need to protect society has imposed and legitimated a measure, the detrimental nature of which for the accused may only be assessed following the outcome of the criminal trial, although it remains lawful precisely by virtue of the said requirements and the fact that the conditions imposed by the law were complied with.

In such cases, despite the fact that the prerequisites for the recognition of a right to compensation are not satisfied, Parliament decided to provide redress for the objective infringement of the inviolable right by way of compensation, to be liquidated pursuant

to an equitable assessment by the court, which may thereby provide, on a case by case basis, adequate redress for the undeserved suffering of an individual.

However, Article 314 of the Code of Criminal Procedure expressly provides for this remedy subject to the condition that on conclusion of the trial the accused has been acquitted on the merits.

The constitutionality of this limitation is contested by the Joint Sections, which assume that the inability to recognise a right to compensation "for the part (of pre-trial detention) exceeding the length of the sentence actually imposed" is due precisely to the unequivocal provision which renders the right to compensation for unfair imprisonment subject to the fact that the accused was acquitted on the merits by irrevocable judgment.

Through the contested provision, Parliament therefore intended to regulate the effects of pre-trial detention, following the conclusion of the trial, depending on the outcome of the judgment concerning the criminal responsibility of the accused.

This legislative choice appears to be manifestly unreasonable, and therefore breaches Article 3 of the Constitution.

In fact, under the terms of Article 3, the impact which pre-trial detention has on the inviolable right of the individual to personal freedom during the stage prior to the definitive judgment cannot be assessed exclusively with reference to the outcome of the criminal trial, and be limited only to cases where the accused is acquitted of the charges on the merits. Although the sacrifice of personal freedom occurred during the pre-trial detention stage, the solidarity-based compensatory mechanism cannot fail to be activated also in this case, regardless of the outcome of the trial, and hence also where the accused was not acquitted on the merits. It is on these grounds, which is clearly unreasonable, that Parliament seeks to measure the satisfaction of the prerequisites for compensation with reference to the outcome of the trial, and more specifically to whether there was a merits acquittal, and not simply the sole fact of the harm which occurred during the application of the custodial measure.

In order to appraise this harm, it is certainly not possible to limit the argument to challenging the legality of the procedures applying the pre-trial detention measure: indeed, the guarantees around which the hard inviolable core of the right must be constructed would appear to offer paltry protection had they been satisfied by the mere

compliance with the requirement for primary legislation and the exclusive jurisdiction of the courts contained in Article 13 of the Constitution, without at the same time also requiring a constitutionally grounded goal justifying them in substantive terms on the grounds that they are strictly and necessary related to the pursuit of that goal.

This element is the defining feature of the inviolability of the right with regard to ordinary legislation, compliance with which is overseen by constitutional review by this Court.

The constitutional goals pursued by the pre-trial measures, which impinge upon personal freedom during the course of the criminal trial, have been endorsed, according to the settled case law of this Court, "exclusively with a view to satisfying requirements of a preventive nature or which are strictly related to the trial" (judgments No. 64 of 1970 and No. 1 of 1980)

Therefore, the "limits which must apply to the duration of pre-trial detention result directly from the ancillary role which the Constitution assigns to preventive custody with regard, on the one hand, to the prosecution of the trial and, on the other hand, to the protection requirements of the public at large. In balancing the interests which deserve protection, this justifies the temporary sacrifice of the personal freedom of those who have not yet been found guilty on a definitive basis" (judgment No. 229 of 2005; see also judgments No. 223 of 2006; No. 292 and No. 232 of 1998; No. 15 of 1982; orders No. 397 of 2000 and No. 269 of 1999).

Where however the duration of the pre-trial custody is longer than the sentence subsequently imposed on a definitive basis, it is immediately obvious that, in order to pursue the aforementioned goals, the legal order requires of the guilty party a sacrifice directly impinging upon his freedom which, as much as it may be justified in the light of the above goals, surpasses the extent of his personal responsibility.

This sacrifice does not thereby cease to be regarded in fully legitimate terms: a supervening fact has no impact on the judgment of the legitimacy of the restriction of personal freedom during the pre-trial stage of the legal proceedings. However, this is not the point under discussion: it is on the other hand necessary to decide whether the pursuit of objective requirements related to the protection of the public at large not only permits the infringement of an inviolable right, subject to the conditions provided for by

law, but also permits Parliament to bar the activation of solidarity-based mechanisms which may compensate for the sacrifice, even though they may have been introduced and regulated as a whole for other similar cases.

The answer to this question must be negative: indeed, it is precisely by virtue of the tendency of pre-trial custody measures to impinge upon the personal freedom of the individual – having been shaped according to the general and objective requirements to which the accused is subject – that compensation for unfair detention must be grounded purely in solidarity, and hence that, as a matter of constitutional law, such compensatory cover be extended to cases involving pre-trial detention for a period longer than the sentence imposed or where the accused is not acquitted on the merits.

Accordingly, having thus identified the frame of reference for the question placed before this Court, it is clear that the position of a person who has been acquitted on the merits of a criminal charge is only apparently different from that of a person who has by contrast been convicted (as regards obviously the sole judgment on the unfairness of the pre-trial detention which exceeded the sentence imposed).

In both cases, the accused suffered a restriction of one of his inviolable rights. In both cases therefore, there is a constitutional requirement to compensate this harm.

By taking into consideration only the former situation, and failing to make provision for the latter, Parliament violated Article 3 of the Constitution.

The Court therefore finds that Article 314 of the Code of Criminal Procedure is unconstitutional insofar as, in cases involving pre-trial detention, it provides that the right to fair compensation is always dependant on an acquittal on the merits from the charges. Naturally, once the right to compensation has been recognised, the quantification of compensation will be a matter for the court, in the manner and according to the criteria in force at the relevant time.

Against this background, the Court considers it important to point out that the practical nature of such evaluations implies that the distinction between an acquitted person and a convicted criminal, which is – subject to the conditions set out above – irrelevant for the purposes of the availability of the claim, shall be of relevance where the court comes to quantify the compensation due.

Since the compensation consists in redress for the moral harm suffered by the accused, it is in fact clear that the degree of suffering to which an innocent person who is remanded in custody is exposed, is in principle greater than that of a guilty person who is incarcerated for a period in excess of the sentence.

It will moreover be a matter for the ordinary courts to assess the particular circumstances of each case brought before them in order to quantify the compensation required under law, in the light of the infringement of the fundamental value of the person.

Naturally, this decision does not prevent Parliament, exercising its own discretionary powers, from subsequently modifying the compensation arrangements, provided that it respect the fundamental requirement to protect the primary value of the personal freedom of the individual.

In fact, this judgment only concerns – as noted above in paragraph 4 – the case at issue in the proceedings before the lower court, in which the sentence definitively imposed on the accused, i.e. which was covered by a procedural bar from appeal in subsequent stages of proceedings, was shorter than the period passed in pre-trial detention.

There is therefore no right to compensation in cases in which the period of pre-trial detention does not correspond to the sentence (whether enforced or enforceable) – where it is different from that imposed – results from subsequent events related to the offence or the sentence. In these cases in fact, a situation is created which is clearly different from that which has led this Court to declare Article 314 of the Code of Criminal Procedure to be unconstitutional.

The additional complaints made by the referring court, regarding Articles 2, 13 and 24 of the Constitution, are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

*declares* that Article 314 of the Code of Criminal Procedure is unconstitutional, insofar as, where an accused is held in pre-trial detention, it provides in all cases that the

right to fair compensation is dependant on an acquittal on the merits from the charges, on the grounds set out in the reasons above;

*rules* that the question of the constitutionality of Article 314 of the Code of Criminal Procedure, raised with reference to Articles 2, 3, 24 and 77 of the Constitution by Trieste Court of Appeal in the referral order mentioned in the headnote, is manifestly groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta* on 11 June 2008.

Signed:

Franco BILE, President

Ugo DE SIERVO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 20 June 2008.

The Director of the Registry

Signed: DI PAOLA