Winning CCBE Amicus Curiae Brief

CONTEST AWARD 2023 – 2024

Author: Jana Brezovicova

The Contest Award Ceremony was held on **17 May 2024**
during the **CCBE Plenary Session** in Lausanne, Switzerland

by the **President of the CCBE**, Pierre-Dominique Schupp

and the **Jury of the CCBE Amicus Curiae Contest**
Stefan von Raumer, Chair of the Human Rights Committee, Jacques Bouyssou, Member of the CCBE Human Rights Committee, Alexis Anagnostakis, Member of the CCBE Human Rights Committee, Patrick Henry, Member of the CCBE Human Rights Committee, Joseph O'Sullivan, Member of the CCBE Human Rights Committee

Constitutional Court of the Slovak Republic
Hlavná 110
042 65 Košice
Slovak Republic

case no. **Rvp/2416/2023**

In Brussels, on 2 February 2024

AMICUS CURIAE BRIEF

Regarding the criminal proceedings against JUDr. Jozef Mak

Disclaimer: This is a fictitious amicus brief prepared in the context of the CCBE Amicus Curiae Contest. The case, facts and information presented in this brief are also fictitious.

The Council of Bars and Law Societies of Europe (CCBE) is an international non-profit association, which represents the bars and law societies of 46 countries from the European Union, the European Economic Area, and wider Europe. CCBE is recognised as the voice of the European legal profession representing more than one million European lawyers. Since its creation in 1960, CCBE has been advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based.

Through this *Amicus Curiae* Brief (Brief), CCBE wishes to provide its views in relation to the proceedings before the Constitutional Court of the Slovak Republic (CCSR) in the case no. Rvp/2416/2023, regarding the criminal proceedings against JUDr. Jozef Mak, as far as the review of the claim has direct impact over strong and independent legal profession in Slovakia.

I. FACTS OF THE CASE

1.1 JUDr. Jozef Mak is an independent attorney registered in the Slovak Bar Association (SBA) since 2003 and an assistant professor at Comenius University, Faculty of Law, Department of Criminal Law, thus he is a recognized defence lawyer and expert on Slovak criminal law. He is also the member of the Board of the SBA and the CEO (and only executive) of his own law firm JM Attorneys, which includes around 20 employees and provides legal services in other fields of law (e.g. civil law, family law, etc.).

1.2 Dr. Mak has been a defence lawyer of Mr. Adam Šangala, a head of the criminal organization (mafia) commonly referred to as *"Šangalovci"*. This group was responsible for many crimes, such as thefts, illegal weapon possession, drug offences, rapes or murders. As Mr. Šangala was accused of many serious crimes (including murders, rapes, illegal weapon possession and drug distribution), Dr. Mak provided him with legal services related to his defence as his defence lawyer. Šangalovci organized groups consisted of approximately 50 members, who had been performing various tasks, mostly illegal and with high monetary compensations.

1.3 On 15 February 2023, National Criminal Agency (NAKA) has arrested Dr. Mak at his office, while searching the whole JM Attorneys law firm and seizing Dr. Mak´s computer. All other employees of JM Attorneys were highly traumatized by this event and

repeatedly highlighted the unlawfulness of the NAKA procedure in the law firm. Dr. Mak was accused of the crime of establishing the criminal organization and its operation, since he was allegedly cooperating with Šangalovci as a member of their organization and used his legal practise as a cover. At the same time, many other members of Šangalovci were also arrested. After his interrogation, Dr. Mak was taken into detention on remand on the ground that he can disturb ongoing investigation through his influence on witnesses.

1.4 Dr. Mak has been kept in detention on remand since then, despite various notions on his release. Dr. Mak was not allowed to have any contact with his family or employees since his arrest. During the criminal proceeding, there is no clear and direct evidence proving his involvement in the activities of the criminal organization, except for a witness statements of Mr. Ondráš Machuľa, one of the members of Šangalovci accused of illegal weapon possession. Mr. Machuľa decided to cooperate with NAKA (and subsequently the prosecutor) and he provided many witness statements in exchange for the suspension of his own criminal proceedings. Throughout the criminal proceedings with other members of Šangalovci, many of them pleaded guilty and were sentenced. All these proceedings (including Dr. Mak) were decided by the same panel of judges.

II. ARGUMENTS OF THE CLAIMANT

2.1 During the criminal proceedings, Dr. Mak used all legal means and remedies in order to be released from detention on remand. As all of these notions on his release were dismissed, he brought the claim before the CCSR. He argues with the unlawfulness of his detention as well as several violations of his human rights.

2.2 Dr. Mak stated that there have not been presented any strong evidence of his involvement in Šangalovci criminal organization, except for one witness statement from the cooperating witness (whose own criminal proceedings has been suspended in exchange for his witness statements). The argument about his legal practise as a cover for his criminal activities is contrary to the elementary logic, as he has a law firm consisting of 20 employees and he is a recognized expert on Slovak criminal law. All of the mentioned is firstly not possible to fund from illegal activities without actual and real legal practise, and secondly the academic activities would not be necessary to cover the illegal activities.

Thus the arguments and evidence against him are not in compliance with the standards required for the commencement of criminal proceedings or with the elementary logic and the conditions for the detention on remand have not been met.

2.3 Moreover, Dr. Mak was taken into detention on remand on the ground that he can disturb ongoing investigation through his influence on witnesses. He claims that this ground for detention is unfounded, as the crimes were committed many years ago and all potential witnesses have been already interrogated. Even if he wanted to influence the previous witnesses, he has had many opportunities to do it before his arrest. Therefore, his detention is arbitrary and causes violation of his right to liberty and security of person. Other human rights of Dr. Mak have been violated due to the conditions of his detention – as he is not allowed to have any contact with his family or employees, his right to respect for family life as well as his freedom to conduct a business have been violated.

2.4 Another right of Dr. Mak that has been violated is his right to an impartial court of law (and more broadly right to a fair trial). If there is a complex and huge criminal proceedings with many members of a criminal organization and some of them pleaded guilty and were sentenced by one panel of judges, it does not appear as impartial if the same panel of judges shall hear the case of other members who pleaded not guilty (including Dr. Mak). Regarding the right to a fair trial, the infringement of the right to defence may also occurred. The execution of legal profession shall not itself establish the commitment of the same crimes as the person being defended by the accused lawyer, in accordance with the principle of non-assimilation of the lawyer with his case.

2.5 The last pleading of Dr. Mak, even though not directly connected to the human right issues, is the potential breach of legal profession regulations and principles. The search of the law firm and seizure of legal documents (whether in written or electronic form) is subjected to strict regulations. Most of the documents present at the law firm are strictly confidential and even though the investigators aim to obtain the documents related to their case, it shall not impair the obligation of confidentiality of the lawyer to his other clients. In this case, the seizure of Dr. Mak´s computer (containing also other clients´ documents) breached the relevant rules.

III. LEGAL ISSUES OF THE CASE

In line with the argumentation of the Claimant in this proceedings, the CCBE identified the potential legal issues of the present case as follows:

a) the detention on remand of Dr. Mak as the violation of his right to liberty;
b) the detention on remand of Dr. Mak as the violation of his right to respect for family life;
c) the detention on remand of Dr. Mak as the violation of his freedom to conduct a business;
d) the violation of the right to a fair trial of Dr. Mak by the decision of the same panel of judges that have been deciding the criminal cases of other members of Šangalovci;
e) the violation of the principle of independence of a lawyer;
f) the violation of legal profession rules and regulations by unlawful search of law firm of Dr. Mak and the seizure of his computer.

III. a) The unlawfulness of the detention of Dr. Mak violated his right to liberty.

3.1 The right to liberty and security is guaranteed to Dr. Mak on the national level on the basis of Article 17 of the Constitution of the Slovak Republic (Constitution), on European level on the basis of Article 5 of the European Convention on Human Rights (ECHR Convention), and on international level on the basis of Articles 9 to 11 of the International Covenant on Civil and Political Rights (ICCPR).

3.2 Article 17 (1) of the Constitution stipulates, that "*Personal liberty of every individual shall be guaranteed."*, Article 17 (2) of the Constitution stipulates that *"No one shall be prosecuted or deprived of liberty except for reasons and by means laid down by a law. […]"* and Article 17 (5) of the Constitution stipulates that *"Pre-trial detention can be imposed only on the grounds and for the period provided by a law and determined by the court."* From the interpretation of the relevant paragraphs of Article 17 of the Constitution, the right to liberty may be restricted by lawful means (and additionally in case of pre-trial detention, on the decision determined by the court).

3.3 The CCSR itself confirmed the interpretation of Art. 17 (2) of the Constitution in a sense that the deprivation of a person´s liberty may be only on the grounds and by means established by the law. In other words, every liberty deprivation has to be lawful and in

accordance with the procedure prescribed by the law. In addition, every measure leading to the liberty deprivation has to be consistent with the purpose of Art. 17, i.e. the protection of individuals against arbitrariness. The following paragraphs of Art. 17 then contain the concrete allowed measures of liberty deprivation or limitation,[1] such as in case of pre-trial detention enshrined in Art. 17 (5) of the Constitution.

3.4 Resulting from the interpretation of Art. 17 (5) of the Constitution as well as from the case-law of CCSR, the Constitution itself does not establish neither the grounds for detention nor the time period of detention, but it references to statutory regulation. The relevant regulation contained mostly in the Criminal Code is therefore the integral part of the constitutional framework of guaranteed right to liberty. Not respecting the conditions of detention under Criminal Code means also not respecting the Constitution and thus the violation of right to liberty.[2]

3.5 The detention is in Slovak national law regulated in provisions of Articles 71 to 84 of the Criminal Code. As to the case of Dr. Mak, the applicable material conditions for detention contain the factual circumstances of taking the accused into detention, i.e. the facts found suggest that the criminal offence was committed, there are reasonable suspicions the crime was committed by the accused, and on the basis of the actions of the accused and other facts there are justified concerns that the accused will influence the witnesses, experts, other accused or otherwise avoid the investigation of the facts important for the criminal proceedings.[3] The CCSR case law has also established that the existence of the reasonable suspicion of the commitment of crime by the accused is condition *sine qua non* of the justified taking and keeping the accused in detention. Moreover, the decision on detention of the relevant court shall contain logical and persuasive reasoning of the justification of the suspicions of the accused.[4]

3.6 Not only the CCSR has established certain requirements for a detention to be considered lawful, also the European Court on Human Rights (ECHR) established the following:

[1] Decision of the Constitutional Court of the Slovak Republic of 24 April 2014, case no. III. ÚS 264/2014, para.41.
[2] Decision of the Constitutional Court of the Slovak Republic of 18 October 2001, case no. II. ÚS 55/1998, art. I.
[3] In the Slovak Criminal Code, there are 3 main types of detention (the accused may attempt to flee, the accused may influence witnesses or the accused may continue with the criminal activities). For the purposes of this Brief, the focus is only on the detention on the basis of influence of witnesses.
[4] Decision of the Constitutional Court of the Slovak Republic of 25 May 2023, case no. I. ÚS 184/2023, para. 15.

- the lawfulness of the detention and compliance with the procedure prescribed by law refers essentially to national law, however, the national law must itself be in conformity with the ECHR, including mainly the principles of legal certainty and protection of individuals against arbitrariness;[5]
- the reasonableness of a suspicion assumes the existence of facts or information, which would satisfy an objective observer that the accused may have committed the crime;[6]
- arguments of the court on detention shall not be of a general and abstract manner, the arguments shall refer to the specific facts and personal situation of the accused, which justifies his detention;[7]
- specifically, in cases of detention, the court shall decide with due care and speedily, while the condition of the reasonable speed of the decision is considered in a stricter manner than in the cases of standard court trial.[8]

3.7 In addition, to review the lawfulness of the detention and the decision on detention, ECHR has developed certain requirements under its case-law:

- the effective judicial control of the lawfulness of detention shall be provided;[9]
- the decision shall be a substantial measure, which ensures procedural justice to person;[10]
- the deprivation of individual´s liberty shall fulfil the basic requirements of a fair trial under Art. 6 (1) of ECHR Convention, while the principle of fairness bounds the courts to provide sufficient reasoning for their decisions on detention;[11]
- the decision shall constitute an adequate judicial response.[12]

[5] Judgment of the European Court on the Human Rights of 6 December 2011, Case of *Žúbor v. Slovakia*, application no. 7711/06, para. 48.
[6] Judgment of the European Court on the Human Rights of 21 December 2010, Case of *Michalko v. Slovakia*, application no. 35377/05, para. 112.
[7] Judgment of the European Court on the Human Rights of 12 December 1991, Case of *Clooth v. Belgium*, case no. 49/1990/240/311, para. 44.
[8] Judgment of the European Court on the Human Rights of 26 September 1989, Case of *Bezicheri v. Italy*, case no. 8/1988/152/206, para. 24.
[9] Judgment of the European Court on the Human Rights of 10 October 2000, Case of *Graužinis v. Lithuania*, application no. 37975/97, para. 34.
[10] Judgment of the European Court on the Human Rights of 20 June 2002, Case of *Al-Nashif v. Bulgaria*, application no. 50963/99, para 97.
[11] Judgment of the European Court on the Human Rights of 13 February 2001, Case of *Garcia Alva v. Germany*, application no. 23541/94, para 39.
[12] Judgment of the European Court on the Human Rights of 10 October 2000, Case of *Grauslys v. Lithuania*, application no. 36743/97, para 54.

3.8 In the decisions of the court in the case of Dr. Mak, he was allegedly a person engaged in the criminal organization Šangalovci. His actions for the organization were to administer the illegal activities of the organization so that these activities might have seemed legal (e.g. establishing companies, etc.), and to influence and guide the organization members accused in ongoing criminal proceedings as their defence lawyer in a manner that the high-ranked members of Šangalovci would not have been endangered by those criminal proceedings. He allegedly used his legal practise as a cover for the mentioned activities.

3.9 During the criminal proceeding, there is no clear and direct evidence proving his involvement in the activities of the criminal organization, except for a witness statements of Mr. Ondráš Machuľa, one of the members of Šangalovci accused of illegal weapon possession (and ex-client of Dr. Mak). Mr. Machuľa decided to cooperate with National Criminal Agency (NAKA) and subsequently the prosecutor and he provided many witness statements in exchange for the suspension of his own criminal proceedings and his release from detention. Mr. Machuľa claims that Dr. Mak advised him not to plead guilty in his own criminal proceeding and not to provide any witness statements in the criminal proceedings against Mr. Šangala – the head of organization. Dr. Mak then allegedly forced other witnesses not to provide statements against Mr. Šangala. Dr. Mak was therefore taken into detention on remand on the ground that he can disturb ongoing investigation through his influence on witnesses.

3.10 The detention of Dr. Mak has not met the required conditions to be considered as lawful, mainly because the suspicion of the crime committed by Dr. Mak is not reasonable enough, the reasoning of the court in its decisions was only general and abstract, the court has not decided speedily enough, and the basic requirements of a fair trial under Art. 6 of ECHR Convention have not been met.

3.11 Firstly, the unlawfulness of detention is caused by lack of reasonable suspicion that the crime of establishing the criminal organization and its operation was in fact committed by Dr. Mak. The circumstances of the case (additionally in the light of lack of evidence) do not satisfy an objective observer that Dr. Mak may have committed the crime, thus the threshold for a reasonable suspicion has not been met. The assistance with establishment of the companies or the performance of the function of defence lawyer cannot be considered as a cooperation on illegal activities of the organized group. As SBA pointed

out, the client-lawyer communication (and subsequently the legal advice on the question of not pleading guilty) is not capable of being considered as a crime. Under Art. 28(1) of the Criminal Code, some of the actions unable to be considered as a crime include the performance of rights arising from valid legal norms, professional or other obligations. The provision of legal services to the client (while defence lawyer shall exercise all his rights to protect his client before the criminal liability) shall be considered as compliant with this provision. The case of opposite interpretation would lead to an arbitrary elimination of performance of legal profession from this provision.[13]

3.12 The lack of reasonable suspicion can be derived also from the argument that Dr. Mak used his legal practise as a cover for his illegal activities – this argument is absurd and contrary to elementary logic. It is very hard to imagine, that legal practise of an independent attorney duly registered in SBA with the law firm with 20 employees can be considered only as a coved for illegal activities. Additionally, Dr. Mak has not performed any other business activities, which can be easily proven from his search in the publicly available Business Register. Moreover, his academic career would not be necessary in case he wanted to use his legal profession only as a cover.

3.13 The second reason for unlawfulness of detention is that the reasoning of the court in its decisions was only general and abstract, as the arguments did not contain neither the specific facts of the case (and again lack of evidence) nor the personal situation of the accused. Only a general statement that Dr. Mak has influenced the witnesses before and thus he may influence the witnesses also now, cannot be in any way considered as a proper justification of his detention. This argument is once again contrary to elementary logic, as the alleged crime was committed many years ago and all relevant witnesses already provided their statements before. The CCSR itself proclaimed, that the mere fact of influencing witnesses is contained within the crime, cannot be sufficient reasoning for detention for this ground. Such reasoning would lead to the situation, that in these cases the reason for detention is always present. This interpretation was therefore assessed as unacceptable and unsustainable.[14]

[13] Slovak Bar Association. *Amicus Curiae Brief* of 1 December 2020.
[14] Decision of the Constitutional Court of the Slovak Republic of 13 May 2021, case no. III. ÚS 33/2021, art. II.

3.14 Thirdly, the detention of Dr. Mak is unlawful as the court has not decided on his detention speedily enough. Based on the CCSR and ECHR case law,[15] the detention has to have a strictly limited time period, thus its revision in short time periods shall be guaranteed. The relevant time periods to be accepted depend on the concrete circumstances and facts of the case. Generally, the time periods to be considered as legitimate are counted not in months, but in weeks. Despite launching several motions for the release from his detention, Dr. Mak has been nonetheless detained for over 13 months. This time period shall not be in any was considered as speedy decision of the courts.

3.15 The fourth ground for the unlawfulness of Dr. Mak´s detention is that the basic requirements of a fair trial under Art. 6 of ECHR Convention have not been met, more specifically regarding to the use of cooperating witness Mr. Machuľa. The possibility to use cooperating witness in a criminal proceeding, in exchange for the suspension of his own criminal proceeding (or release from detention), is a controversial topic in the Slovak criminal law. The ECHR stated that *"The Court reiterates that the use of statements given by witnesses in return for immunity or other advantages may cast doubt on the fairness of the proceedings against the accused and can raise difficult issues to the extent that, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge."*[16]

3.16 On one hand, the use of key witnesses is an important tool when investigating difficult cases of organized crime, but on other hand, their statements shall be carefully examined and the trustworthiness of the witness has to be undisputed. As cited above, the exchange of witness statements for advantages causes doubt on the fairness of the proceedings. In case of Dr. Mak, there was no evidence to support the charges against him except for witness statement of Mr. Machuľa. Moreover, the investigative bodies have not sufficiently proved that this witness is credible enough. All arguments of Dr. Mak on the lack of trustworthiness of the witness were dismissed without any proper reasoning.

[15] CCSR Decisions no. III. ÚS 255/03, III. ÚS 345/06, II. ÚS 301/2020, II. ÚS 490/2020, I. ÚS 160/2019; and ECHR cases *Bezichieri v. Italy*, *Sanchez–Reisse v. Switzerland*, *Tomasi v. France*, *Abdoella v. the Netherlands*.
[16] Judgment of the European Court on the Human Rights of 12 November 2019, Case of *Adamčo v. Slovakia*, application no. 45084/14, para 59.

3.17 Based on the decision on detention and the facts of the case of Dr. Mak, the detention shall be considered as unlawful and non-compliant with national law and therefore a *prima facie* violation of the right to liberty.

III. b) The conditions of the detention of Dr. Mak violated his right to family life.

3.18 The right to respect for private and family life is guaranteed to Dr. Mak on national level by Art. 19 (2) of the Constitution, on European level by Art. 8 of the ECHR Convention and on international level by Art. 17 of ICCPR.

3.19 Under Art. 19 (2) of the Constitution: *"Everyone shall have the right to be free from unjustified interference in his or her private and family life."* Art. 8 (2) of the ECHR Convention contains some exceptions to this right. ECHR stated that detention *per se* entails inherent limitations on private and family life. Even though restrictions on the family visits constitute the interference with the right to family life, they are not themselves a breach of this right. However, any such restriction must be applied in accordance with the law, must pursue one or more legitimate aims listed in Art. 8 (2) of the EHCR Convention and must be justified as being necessary in a democratic society.[17]

3.20 Under Art. 19 (8) of the Act no. 221/2006 Coll. on the Execution of Detention (Detention Act), the accused detained on the ground of potential influence of witnesses is entitled to have a visit only after a previous consent on the investigative body or court. Such consent may be denied in cases of a visit by a relative, only if the visiting person is being prosecuted in the same criminal proceedings or if the person has provable influenced witnesses in the criminal proceeding of the accused. Such restriction is in fact stricter than restrictions in cases of convicted persons, regulated by Act no. 475/2005 Coll. on the Exercise of Imprisonment Sentence (Imprisonment Act).

3.21 The ECHR stated that the restrictions of the visiting rights of persons detained on remand (who are presumed as innocent) shall not be generally applied to a greater extent than the

[17] Judgment of the European Court on the Human Rights of 17 July 2007, Case of *Kučera v. Slovakia*, application no. 48666/99, para 127.

restrictions of visiting rights of convicted persons.[18] The mentioned is also enshrined in Art. 10 (2) a) of ICCPR: *"Accused persons shall, save in exceptional circumstances, […] be subject to separate treatment appropriate to their status as unconvicted persons."* The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) expressed its concerns in several reports on the situation in the Slovak Republic on the issue of visiting entitlements of remand prisoners.

3.22 Additionally, the European Prison Rules 2020 provide, that unless there is a specific reason to the contrary, untried prisoners should receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners. There should be also a possibility of additional visits and other forms of communication. Generally, in person visits are a significant form of contact which should be prioritised wherever possible. All forms of communication are mainly important for families with children because of the particular impact of imprisonment on children, family relationships and the parent-child bond.[19]

3.23 Dr. Mak has been denied any visits by his relatives during the whole period of his detention (more than 13 months) – he has not seen his wife or his 2 small children. The visits were denied because of the fact, that his wife was his assistant in the law firm and therefore she has knowledge of the cases of Dr. Mak and may influence all the relevant witnesses herself. However, this reasoning is not in compliance with relevant legal norms. Art. 19 (8) of Detention Act requires visiting person to provably influence witnesses in the ongoing criminal proceedings of the accused in order to have the access denies. There is no evidence that the wife of Dr. Mak has influenced any of the actual witnesses. The reasoning for denial of visits itself contains only a hypothetical possibility that she may influence witnesses based on her specific role. As there are no proofs of influence of witnesses by the wife of Dr. Mak, the denial of her visits is contrary to the provisions of Detention Act.

3.24 Thus the breach of the provisions of Detention Act justifies the violation of right to family life of Dr. Mak as the restrictions of his right are not in accordance with the law.

[18] Judgment of the European Court on the Human Rights of 13 December 2011, Case of *Laduna v. Slovakia*, application no. 31827/02, para 64.
[19] Council of Europe. *Guidance document on the European Prison Rules*. 2023.

Additionally, the conditions of his detention have not met European standards on treatment of remand prisoners.

III. c) The conditions of the detention of Dr. Mak violated his freedom to conduct business.

3.25 The right to conduct business activities is granted to Dr. Mak through Art. 35 (1) of the Constitution: *"Everyone shall have the right to choose his or her profession and appropriate training freely, as well as the right to conduct entrepreneurial or other gainful activity."* as well as through Art. 16 of the Charter of Fundamental Rights of the European Union (EU Charter): *"The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."*

3.26 Although the issue of clash between the unlawful detention and the freedom to conduct business has not been yet resolved by any judicial body, we would nonetheless like to provide some general thoughts and opinions on the matter, as we consider the case of Dr. Mak of particular gravity in this regard. Based on the above analysis of unlawfulness of the detention and the facts of the case, there is a reasonable ground to believe that by his detention, the right to conduct business activities in accordance with law, was impaired.

3.27 The performance of the legal profession in the Slovak Republic requires compliance not only with general regulations imposed by commercial law, but also compliance with the specific regulations imposed by Act no. 586/2003 Coll. on Attorneys-at-Law (Attorney Act) and other norms imposed by SBA. In order to operate a private limited liability company in Slovakia, which provides legal services, the shareholders and executives may only be the attorneys duly registered in the SBA. Dr. Mak´s law firm JM Attorneys was a private limited liability company with the only shareholder and executive – Dr. Mak himself. After his unexpected arrest, the company became *de facto* non-functional, as there was no other person capable of acting in the name of JM Attorneys. The possibility of appointing a new executive was hindered by the fact that it had to be decided by Dr. Mak as a sole shareholder. By depriving Dr. Mak of any visits in detention, he was unable to give anyone a power of attorney to enable such decision.

3.28 Another important point on the sudden non-functionality of JM Attorneys is that due to the absence of the only executive, no submissions of the clients of JM Attorneys could

have been signed by JM Attorneys and send to the courts in cases of on-going proceedings. Many of important deadline in clients´ proceedings were missed due to this situation, which caused damages not only to JM Attorneys, but mainly to the clients. Notwithstanding the absence of Dr. Mak as person capable acting in the name of JM Attorneys, his absence as a CEO is also important due to the fact that he was solely responsible for all strategic, financial, personal or other business-related decisions. By depriving Dr. Mak of any visits in detention, he was also unable to give any instructions on all these matters.

3.29 The last important point, which relates not only to a right to conduct business, is that the reputation of JM Attorneys was severely damaged. Many newspapers informed about the arrest of Dr. Mak in his law firm JM Attorneys and his presumption of innocence was not always preserved (as many articles named him as a "perpetrator", which leads to the impression among general public that he has already committed a crime). Even if the detention of Dr. Mak is found unlawful and unjustified, the reputation damage of JM Attorneys will be nevertheless present.

3.30 Therefore, this particular situation of Dr. Mak and JM Attorneys, taking into account all facts of the case (under the condition that the arrest and detention was unlawful), is of such gravity, that it might lead to a violation of right to conduct business of Dr. Mak, even though there is no jurisprudence on the matter yet.

III. d) The decisions in Dr. Mak´s case by the same panel of judges as in other criminal cases of the same organized group violated his right to a fair trial.

3.31 Right to a fair trial is a broad concept which contains many of subsequent rights. We partially raised the issue of violation of right to a fair trial in part III.a) of this Brief in regard to unlawfulness of detention of Dr. Mak (as his detention was based on the witness statement of cooperating witness provided in exchange of several advantages, the fairness of the trial was violated). In point 3.14 of this Brief, we have also raised the issue of not deciding the detention of Dr. Mak speedily enough, which might lead to a violation of right to a fair trial as well. In this part of the Brief, we will consider only the right to an impartial court, violation of which automatically means violation of a right to a fair trial.

3.32 The right to an impartial court as integral part of a right to fair trial is provided for in Art. 46 (1) of the Constitution *("Everyone may claim his or her right by procedures laid down by a law at an independent and impartial court or, in cases provided by a law, at other public authority of the Slovak Republic."*), in Art. 6 (1) of the ECHR Convention *("[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*) and in Art. 14 (1) of ICCPR *("[...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"*).

3.33 Impartiality of a judge is important element of a procedural fairness, which has been elaborated by the CCSR case law as well as the ECHR case law. The core of the right to an impartial court is that the decision is to be a result of a proceedings of an impartial court, i.e. the court has to hear and decide each case in a manner that is impartial and neutral against the parties of the proceedings, not to act in favour of any of the parties and to objectively access all facts necessary to decide a case. Impartial court offers equal possibilities to apply all legally admissible rights to all parties.[20]

3.34 Impartiality is to be assessed on the basis of two points of view – subjective (i.e. to examine the personal convictions of the trial judge in a given case) and objective (i.e. to examine, if there are sufficient guarantees to exclude any legitimate doubts on the impartiality of a judge in a given case).

3.35 In case of subjective point of view, the assessment contains the state of mind of a judge, i.e. what the judge was thinking of a relevant situation in a given case *pro foro interno*. The subjective point of view of a judge is demonstrated by his personal appearance against the case or parties. The subjective assessment is based on the presumption, that the judge is considered as impartial, unless proven otherwise (i.e. until there is proof to the contrary).[21] In accordance with Art. 31 (1) and Art. 32 (1) of the Criminal Procedure Code, the judge himself may raise the objection of impartiality and may be excluded from the criminal proceedings in cases he has a particular relationship to the proceedings itself,

[20] Decision of the Constitutional Court of the Slovak Republic of 13 April 2005, case no. III. ÚS 24/05, art. I.
[21] Judgment of the European Court on the Human Rights of 1 October 1982, Case of *Piersack v. Belgium*, application no. 8692/79, para 30.

to the persons affected by these proceedings (e.g. defence lawyer, legal representative, etc.), or to other bodies active in these proceedings (e.g. investigator, prosecutor, etc.).

3.36 As mentioned above, for the purposes of subjective assessment of impartiality, the judge is considered impartial until there is proof to the contrary – which means that the presumption of subjective impartiality may be invalidated only in an objective manner. Therefore, the subjective point of impartiality of a given judge has to be necessarily assessed by another judge or panel of judges. The refusal of a judge to submit the impartiality objection of the party to the proceedings for an objective assessment, is considered as a violation of a fair trial. The subjective point of impartiality shall be always subsumed under the stricter criterion of objective impartiality assessment. The CCSR correctly pointed out that the purpose of the criminal proceeding is not only the justified punishment of a perpetrator, but also the maintenance of a fair trial (heard and decided by impartial judge), necessary for the mere existence of a democratic country.[22]

3.37 It is not sufficient to be satisfied only with subjective assessment of impartiality, also the objective assessment is required in each particular case. Objective assessment test (established in the ECHR case law) shall resolve the question whether (irrespective of a personal behaviour of a judge) certain verifiable facts or circumstances may dispute his impartiality. This test refers to the dictum *"justice must not only be done; it must also be seen to be done"*. [23] Every judge may be excluded from hearing and deciding a case, if there are reasonable concerns about his impartiality. The objective test of impartiality leads to the increase of trust of the parties to the courts, necessary in democratic countries. This test is moreover the important guarantee of impartiality of judges.[24]

3.38 To comply with objective impartiality test, the judge shall be perceived by the parties as impartial and cumulatively any external doubts on his impartiality shall be eliminated. The important element in the matters of assessing impartiality of a judge is whether the doubt of a party on his impartiality is justified, based on the objective, particular and sufficiently serious circumstances. Thus it shall be decided in each particular case,

[22] Decision of the Constitutional Court of the Slovak Republic of 31 August 2017, case no. I.ÚS 249/2017, art. 35.
[23] Judgment of the European Court on the Human Rights of 17 January 1970, Case of *Delcourt v. Belgium*, application no. 2689/65, para 31.
[24] Judgment of the European Court on the Human Rights of 23 April 2015, Case of *Morice v. France*, application no. 29369/10, para 88.

whether the manner and level of the circumstances leads to the reveal of lack of impartiality of the court.[25] However, the objective test cannot be understood in a way that every doubt on impartiality of a judge shall exclude him as not impartial. The existence of objectively justified grounds for his exclusion is assessed in each particular case.

3.39 Furthermore, not only the general principles and tests of impartiality shall apply on cases of alleged impartiality of a judge´s participation in previous decisions on the same subject-matter, but also other specific issues established by ECHR case law. When deciding an impartiality of a judge or a bench, the ascertainable facts that may raise doubts to the impartiality should exist, while even appearances may be of some importance. The standpoint for these doubts is the objectively justified fear of lack of impartiality, not only the mere existence of such fear. Likewise, the mere fact that a judge has already ruled on a similar matter or that he has already tried a co-accused in separate criminal proceedings is not itself sufficient to objectively justify the impartiality. It should be also taken into account, whether the judge who participate in both proceedings is a lay judge, juror or a professional judge, as the professional judge can be considered as more prepared.[26] However, the issue of impartiality arises where the earlier judgment already contains a detailed assessment of the role of the accused who is being judged subsequently. As the ECHR pointed out: *"Given the circumstances of the specific case, such elements may be seen as prejudging the question of the guilt of the person on trial in the subsequent proceedings and may thus lead to objectively justified doubts that the domestic court has a preconceived view regarding the merits of the case of the person judged subsequently at the outset of his or her trial."*[27]

3.40 Given the circumstances of the case of Dr. Mak, his case is being heard and decided by the same panel of judges that have already decided several other cases of the organized group Šangalovci, as well as the case of Mr. Machuľa who pleaded guilty and is a key witness in the case of Dr. Mak. Especially in the case of Mr. Machuľa, the decision

[25] Judgment of the European Court on the Human Rights of 20 May 1996, Case of *Pullar v. United Kingdom*, case no. 20/1995/526/612, para 38.
[26] Judgment of the European Court on the Human Rights of 16 February 2021, Case of *Meng v. Germany*, application no. 1128/17, para 51.
[27] Judgment of the European Court on the Human Rights of 25 November 2021, Case of *Mucha v. Slovakia*, application no. 63703/19, para 49.

contained a detailed specification of Dr. Mak´s tasks within the organized group and the description of his alleged conduct based only on the statements given by Mr. Machuľa.

3.41 In the application of impartiality test on the case of Dr. Mak, neither the subjective test nor the objective test were passed. The subjective appearance of the judges (and obvious bias against Dr. Mak), may be implicitly derived from the reasoning of the decisions on his detention. As already argued above, the decisions on detention are very general in nature, arbitrary, without sufficient reasoning and contrary to relevant laws, mentioning only the facts from witness statement of Mr. Machuľa. Thus the subjective test of impartiality cannot be considered as passed. As to the objective test, the detailed description of alleged conduct of Dr. Mak is already contained in the decision of Mr. Machuľa, revoking his witness statements. Such fact leads to a reasonable doubt on the impartiality of judges, who were writing the relevant decision and agreed with the conclusions thereof. Additionally, the bias and impartiality derived from the subjective test may also lead to the existence of objectively justified grounds for judges´ impartiality.

3.42 Based on the above explanation of relevant tests on impartiality and their application on the case of Dr. Mak, we conclude that the judges of Dr. Mak have not passed the impartiality test. Thus the right of Dr. Mak to an impartial court (and more broadly his right to a fair trial), were violated.

III. e) The principle of independence of a lawyer was violated.

3.43 The independence of a legal profession, as well as the principle of non-identification of a lawyer with his case, are some of the principles recognized worldwide. Even though several non-binding legal instruments were adopted on international or European level, many of the principles contained thereof are the essential parts of national law regulations on a profession of lawyers.

3.44 Regarding the international instruments, the UN Basic Principles on the Role of Lawyers[28] stipulated in Art. 16 (a) and (c) that *"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance,*

[28] United Nations. *Basic Principles on the Role of Lawyers*. Adopted on 7 September 1990 on the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba.

harassment or improper interference; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Moreover, Art. 18 of the Basic Principles on the Role of Lawyers stipulates that: *"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."* Additionally, IBA Standards for the Independence of the Legal Profession[29] contained similar principles in Art. 7: *"The lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be."* and in Art 8: "*No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause."*

3.45 As to the European instrument, the Recommendation of the Council of Europe's Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer[30] contains in Principle I, Art. 1 the following: *"All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights."*

3.46 Despite the relevant norms (whether binding or not), the principle of independence of lawyers is being breached, in extreme cases by means of physical violence. As the African Commission correctly noted that "*Where lawyers are intimidated, this has a chilling effect on their ability to defend their clients. This in turn violated the right to defence of the victim. An independent lawyer allows an impartial judge to reach a reasoned and fair decision in view of the law and facts. The physical assault of a lawyer in the premises of the court is an impossible attack on the independence of the judiciary and the rule of law in the State."*[31]

[29] International Bar Association. *Standards for the Independence of the Legal Profession*. Adopted 1990.
[30] Council of Europe. *Recommendation no. R(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer*. Adopted on 25 October 2000.
[31] African Commission on Human and People´s Rights. *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*. Case no. 339/2007. para 135.

3.47 Based on the above, the violation of principle of independence of lawyers has many negative impacts on the clients and victims as their right to defence (and more broadly right to a fair trial) may be severely impaired. The worrying trend of increase in tendencies of the investigators in the Slovak Republic to punish independent attorneys not for their own criminal offences, but for the performance of their legal profession, has been noted by the SBA. The task of an independent attorney is to represent the rights and legally protected interests of his clients and it is impossible to assimilate his work to the activities of his clients. The right to defence and the right to legal assistance are the rights guaranteed by the Constitution and they form a necessary part of a proper functioning of a democratic country. Attorney is in many cases the only person standing on the side of a client against the whole mechanism of public bodies (police, prosecution, courts, etc.) and safeguards the rights of the client. Any assimilation of a lawyer with the actions of his client (who is being prosecuted), is therefore a gross misunderstanding of a role of performance of the legal profession in a democratic country.[32]

3.48 In case of Dr. Mak, there is no clear evidence supporting his charges, except for a witness statement which may have been obtained contrary to the principles of a fair trial. Dr. Mak has been clearly accused and detained purely on the basis of performance of his legal profession and for the same conduct and crimes as his client. There are also reasonable grounds to believe that the charges brought against Dr. Mak were intentionally overqualified, so that stricter rules on his detention may apply. He has been unlawfully detained for a time period exceeding all the applicable European standards, with unjustified restrictions. The case of Dr. Mak is thus a clear violation of principle of independence of lawyers and can lead to unwanted consequences, when the attorneys would be scared of providing adequate legal services to the clients accused of grave criminal offences.

III. f) The legal profession rules and regulations were violated by unlawful search of law firm of Dr. Mak and the seizure of his computer.

3.49 Even though not directly related to human right issues, we consider as necessary to provide the argumentation on the violations of legal profession rules and regulations

[32] SBA Press Release: *Amicus Curiae of SBA in case of constitutional complaint of the attorney M.R.* of 1 December 2020.

related to the investigations in the law firms. In broader context, unlawful search and seizure in a law firm leads to the breach of generally recognized principle of confidentiality between lawyer and client. The obligation of the state to recognize and respect the confidentiality of lawyer-client professional relationship is *inter alia* contained in Art. 22 of the Basic Principles on the Role of Lawyers, and in Principle I, Art. 6 of the Recommendation of the CoE on the Freedom of Exercise of the Profession of Lawyer (which allows exceptions compatible with rule of law). The specific protection of confidentiality against seizure or inspection is contained in Art. 17 (a) of the IBA Standards for the Independence of the Legal Profession: *"Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications."*.

3.50 The ECHR through its case law stated that the search of a law firm premises shall be subject to strict scrutiny, as the persecution and harassment of members of the legal profession strikes at the very heart of the ECHR Convention system.[33] The search and seizure represent a serious interference, therefore very clear and detailed rules on the subject are necessary. In case of a law firm search and seizure, the ECHR does not accept the extensive search and seizure and the absence of independent or judicial supervision.[34]

3.51 In the Slovak Republic, the confidentiality obligation imposed on the lawyer in regard to the professional relationship is regulated by Art. 23 of Attorney Act. Under certain narrow exceptions, the attorney may be released from this obligation. However, as a general rule, attorney may be released from the confidentiality obligation on the basis of a written confirmation by his client. Moreover, Art. 106a of the Criminal Procedure Code contains specific provisions to be applied while the search of a law firm premises and the seizure of any document thereof. The police officers are obliged to request SBA to cooperate in the matters of a law firm search and seizure of documents (thus the designated representative of SBA shall be present). The order for a search shall be written and shall

[33] Judgment of the European Court on the Human Rights of 19 April 2018, Case of *Hajibeyli and Aliyev v Azerbaijan*, application nos. 6477/08 and 10414/08, para 66.
[34] Judgment of the European Court on the Human Rights of 27 September 2005, Case of *Petri Sallinen and others v Finland*, application no. 50882/99, para 90.

contain specific documents to be searched for and seized. The police officer is entitled to check the content of the relevant documents only when the SBA representative is present. Without a consent of SBA representative, the police officer cannot check or seize any other documents containing the information protected by client confidentiality rules.

3.52 In case of Dr. Mak, the search and seizure of his law firm have not met any of the conditions imposed by the Criminal Procedure Code. During the search of JM Attorneys, there was no SBA representative present in the premises and the police officers denied to call anyone from SBA despite numerous warnings from the JM Attorneys employees as well as by Dr. Mak himself. The written order has not contained a specific document to be searched, so that the police officers searched through all the documents in the law firm. Moreover, they seized the computer of Dr. Mak, where all of his files were saved and not only the files related to the criminal proceedings. In spite of numerous warnings to the unlawfulness of the search, the police officers left the premises with arrested Dr. Mak and his computer. The computer was returned to JM Attorneys after two months, which led to the denial of access to many of the client´s files saved therein.

3.53 Taking into account all of the mentioned, serious breaches of relevant provisions of the Criminal Procedure Code as well as serious breaches of confidentiality principle were caused by unprofessional and unlawful search of JM Attorneys and the seizure of Dr. Mak´s computer. The unjustified seizure lasting for two months caused other serious consequences (not only the breach of confidentiality of clients) – such as the denial of access of clients to the files saved in the computer of their attorney.

IV. CONCLUSIONS

In order to conclude this Brief, we would like to provide the following summary of CCBE findings and opinions:

a) **the unlawfulness of the detention of Dr. Mak violated his right to liberty** – the detention of Dr. Mak has not met the required conditions to be considered as lawful, mainly because the suspicion of the crime committed by Dr. Mak is not reasonable enough, the reasoning of the court in its decisions was only general and abstract, the court has not decided speedily

enough, and the basic requirements of a fair trial under Art. 6 of ECHR Convention have not been met. The detention is non-compliant with national law and therefore a *prima facie* violation of the right to liberty.

b) **the conditions of the detention of Dr. Mak violated his right to family life** – as the restrictions of his right to family life were not in accordance with the law (due to several breached of Detention Act), the right to family life was violated. Additionally, the conditions of detention have not met European standards on treatment of remand prisoners.

c) **the conditions of the detention of Dr. Mak violated his freedom to conduct business** – even though not yet judicially decided, under the condition that the detention is unlawful, the particular situation of Dr. Mak and JM Attorneys is of such gravity, that it might lead to a violation of right to conduct business of Dr. Mak.

d) **the decisions in Dr. Mak´s case by the same panel of judges as in other criminal cases of the same organized group violated his right to a fair trial –** in case of Dr. Mak, neither general nor specific principles of impartiality of judges were fulfilled. The subjective test of impartiality was not passed due to the obvious bias against Dr. Mak. The objective test and specific conditions of impartiality were not passed due to the fact that alleged conduct of Dr. Mak is already contained in details in the decision of Mr. Machuľa written by the same judges. Thus the right of Dr. Mak to an impartial court (and more broadly his right to a fair trial), were violated.

e) **the principle of independence of a lawyer was violated** – based on all facts of the case, Dr. Mak is being punished for the performance of the legal profession, while his case was unlawfully assimilated with the cases of his clients. It is therefore a clear violation of principle of independence of lawyers and can lead to unwanted consequences and negative impacts (e.g. the waiver of lawyers of their clients´ cases, the hindrance of the right to defence and to a fair trial of victims).

f) **the legal profession rules and regulations were violated by unlawful search of law firm of Dr. Mak and the seizure of his computer –** the search and seizure of a law firms is subject to strict conditions, taking into account the confidentiality obligation of lawyers towards their clients. Serious breaches of relevant provisions of the Criminal Procedure

Code as well as serious breaches of confidentiality principle were caused by unprofessional and unlawful search of JM Attorneys and the seizure of Dr. Mak´s computer.

Therefore, and following the reasons stated above, the CCBE proposes to the Constitutional Court of the Slovak Republic to dismiss the criminal proceedings of JUDr. Jozef Mak (as well as his detention on remand) as ungrounded, and to preserve the strong and independent legal profession in Slovakia as guaranteed by the Slovak Bar Association, national, European and international legal norms.

Sincerely,