



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

FOURTH SECTION

CASE OF TOKIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA

(Applications nos. 12455/04, 14140/05, 12906/06 and 26028/06)

JUDGMENT

STRASBOURG

8 July 2008

FINAL

08/10/2008

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

In the case of Tokić and Others v. Bosnia and Herzegovina,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 17 June 2008,

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

PROCEDURE

1. The case originated in four applications (nos. 12455/04, 14140/05, 12906/06 and 26028/06) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four citizens of Bosnia and Herzegovina, Mr Mehmed Tokić, Mr Jusuf Alibašić, Mr Danijel Marinić and Mr Adis Hadžić (“the applicants”), on 24 March 2004, 7 April 2005, 9 March 2006 and 25 April 2006 respectively.

2. The applicants, who had been granted legal aid, were represented by Mr N. Omerović, a lawyer practising in Lukavac. The Government of Bosnia and Herzegovina (“the Government”) were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicants complained of the unlawfulness of their detention in Zenica Prison Forensic Psychiatric Annex under Article 5 § 1 (e) of the Convention. They further invoked Article 5 § 4 of the Convention, but did not develop this aspect of their case.

4. On 1 June 2007 the President of the Fourth Section of the Court decided to give notice of the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the applications at the same time as their admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The facts concerning Mr Tokić

5. The applicant was born in 1934 and lives in Lukavac.

6. On 16 August 1999 the local police searched the applicant and found a hand grenade on him. The police acted on a tip-off because the applicant had a history of violent outbursts, including the killing of his first wife.

7. On 24 January 2000 he was charged with possessing a prohibited weapon.

8. On 14 November 2001 the Gračanica Municipal Court found the applicant not guilty by reason of insanity (paranoid schizophrenia) and imposed a hospital order on him under Article 63 of the Criminal Code of the Federation of Bosnia and Herzegovina 1998 ("old Criminal Code"). The decision entered into force on 28 January 2002.

9. On 28 June 2002 he was placed in Zenica Prison Forensic Psychiatric Annex.

10. On 4 July 2003 the Gračanica Municipal Court reviewed the necessity of the applicant's continued confinement pursuant to Article 480 § 1 of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina 1998 ("old Code of Criminal Procedure"). It decided on the basis of reports prepared by Zenica Prison Forensic Psychiatric Annex that the applicant's condition did not allow for his discharge.

11. On 11 November 2003 the applicant lodged a complaint with the Human Rights Chamber concerning the lawfulness of his detention.

12. On 3 March 2004 the Gračanica Municipal Court relinquished jurisdiction in favour of the Social Work Centre in Gračanica pursuant to Article 420 of the Criminal Code of the Federation of Bosnia and Herzegovina 2003 ("new Criminal Code").

13. On 23 November 2004 the Social Work Centre in Gračanica established that the applicant's mental disorder no longer warranted his confinement and ordered his conditional discharge. He was released from Zenica Prison Forensic Psychiatric Annex on 8 December 2004.

14. In the light of the applicant's release, on 26 June 2007 the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court"), the legal successor of the Human Rights Chamber, held that it was no longer justified to continue the examination of the applicant's case.

B. The facts concerning Mr Alibašić

15. The applicant was born in 1971 and lives in a care home in Fojnica.

16. On 31 March 1999 he threatened Z.B. with a knife on the premises of the Social Work Centre in Goražde.

17. On 16 April 1999 he was charged with threatening behaviour.

18. On 17 June 1999 the Goražde Municipal Court found the applicant not guilty by reason of insanity (schizophrenia) and imposed a hospital order on him under Article 63 of the old Criminal Code. The decision entered into force immediately.

19. On 21 June 1999 the applicant was placed in Zenica Prison Forensic Psychiatric Annex.

20. On 26 November 2001 the Goražde Municipal Court established that the applicant's mental disorder no longer warranted his confinement and ordered his conditional discharge. He was released on 9 January 2002.

21. On 17 January 2002 the Goražde Municipal Court recalled the applicant to Zenica Prison Forensic Psychiatric Annex, after he had been found to be abnormally aggressive by Sarajevo Psychiatric Hospital.

22. On 21 January 2003 the applicant complained of the unfairness and outcome of the criminal proceedings (which had ended on 17 June 1999) to the Human Rights Chamber.

23. On 20 January 2004 the Goražde Municipal Court relinquished jurisdiction in favour of the Social Work Centre in Goražde pursuant to Article 420 of the new Criminal Code.

24. Relying on section 22 of the Mental Health Act of the Federation of Bosnia and Herzegovina 2001 ("Mental Health Act"), on 18 February 2004 the Social Work Centre in Goražde reviewed the necessity of the applicant's continued confinement. It decided on the basis of reports prepared by Zenica Prison Forensic Psychiatric Annex that the applicant's condition did not allow for his discharge. The applicant appealed to the Cantonal Ministry for Social Affairs in Goražde pursuant to the instructions of the social work centre.

25. On 10 May 2004 the Cantonal Ministry for Social Affairs in Goražde declined jurisdiction and, since it was unable to determine the competent body to which to transfer the file, dismissed the appeal. The applicant lodged a further appeal with the Goražde Cantonal Court.

26. On 9 July 2004 the Goražde Cantonal Court dismissed the appeal because the applicant had not appealed to the competent second-instance body. The Goražde Cantonal Court was silent regarding which body was competent at second instance.

27. On 22 November 2004 the applicant complained of the unlawfulness of his detention to special chambers which had been created within the Constitutional Court on 1 January 2004 with a mandate to decide on cases

received by the former Human Rights Chamber (namely, the Human Rights Commission within the Constitutional Court).

28. On 13 June 2006 the Social Work Centre in Goražde established that the applicant's mental disorder no longer warranted his confinement and ordered his unconditional discharge. It relied on section 25(2) of the Mental Health Act. The applicant was released from Zenica Prison Forensic Psychiatric Annex on 16 June 2006.

29. On 26 June 2007 the Constitutional Court, the legal successor of the Human Rights Chamber, dismissed the applicant's complaint of 21 January 2003 as out of time and that of 22 November 2004 as incompatible *ratione temporis*: the Constitutional Court had jurisdiction to deal only with those unresolved cases of the former Human Rights Chamber which had been introduced by 31 December 2003.

C. The case of Mr Marinić

30. The applicant was born in 1966. He is still in Zenica Prison Forensic Psychiatric Annex.

31. On 12 July 1999 the applicant killed his parents under the delusion that they were trying to kill him. On the same day, having surrendered himself to the police, the applicant was remanded in custody.

32. On 21 September 1999 he was charged with two counts of murder.

33. On 9 November 1999 the Mostar Cantonal Court found the applicant not guilty by reason of insanity (schizophrenia) and imposed a hospital order on him under Article 63 of the old Criminal Code. The decision entered into force on 22 November 1999.

34. On 28 November 2000 the applicant was transferred from the remand section of Mostar Prison to Zenica Prison Forensic Psychiatric Annex.

35. On 20 December 2002 and 22 October 2003 the Mostar Cantonal Court reviewed the necessity of the applicant's continued confinement pursuant to Article 480 § 1 of the old Code of Criminal Procedure (notwithstanding the fact that the Code was in force only until 31 July 2003). It decided on the basis of reports prepared by Zenica Prison Forensic Psychiatric Annex that the applicant's condition did not allow for his discharge.

36. On or around 23 March 2004 the Mostar Cantonal Court relinquished jurisdiction in favour of the Social Work Centre in Mostar pursuant to Article 420 of the new Criminal Code.

37. On 7 November 2005 the applicant complained to the Constitutional Court of the unlawfulness of his detention. His application and a number of other similar applications were subsequently joined.

38. On 21 December 2006 the Constitutional Court found that the applicant (like others in a similar situation) had found himself in a legal

vacuum following the 2003 reform of the criminal legislation. Furthermore, it held that Zenica Prison Forensic Psychiatric Annex was not an appropriate institution for the detention of mental health patients. As a result, the Constitutional Court found breaches of Article 5 §§ 1 and 4 of the European Convention on Human Rights and ordered the competent authorities to undertake such legislative and other measures as might be necessary within three months of delivery of the decision. The decision was delivered on 7 February 2007. It would appear that the applicant and the other complainants did not seek any compensation.

D. The case of Mr Hadžić

39. The applicant was born in 1982 and lives in Sarajevo.

40. On 19 January 2003 he entered a tram and stabbed I.D. for no apparent reason. I.D. survived the attack.

41. On 21 January 2003 the applicant killed E.G. under the delusion that he was persecuting his mother. He was remanded in custody the same evening.

42. On 17 March 2003 the applicant was charged with murder.

43. On 20 March 2003 he was transferred from the remand section of Sarajevo Prison to Zenica Prison Forensic Psychiatric Annex

44. On 9 April 2003 the Sarajevo Cantonal Court found the applicant not guilty by reason of insanity (hebephrenic schizophrenia) and imposed a hospital order on him under Article 63 of the old Criminal Code. The decision entered into force on 24 April 2003.

45. On five occasions (28 November 2003, 9 June 2004, 11 March 2005, 10 April 2006 and 16 November 2006), the Sarajevo Cantonal Court reviewed the necessity of the applicant's continued confinement pursuant to Article 480 § 1 of the old Code of Criminal Procedure (although the Code was no longer in force). It decided on the basis of reports prepared by Zenica Prison Forensic Psychiatric Annex and Sarajevo Psychiatric Hospital that the applicant's condition did not allow for his discharge.

46. On 17 May 2005, 23 May 2006 and 8 February 2007 the Supreme Court of the Federation of Bosnia and Herzegovina upheld the decisions of 11 March 2005, 10 April 2006 and 16 November 2006 respectively.

47. On 21 December 2006 the Constitutional Court examined a number of joined applications (including that of Mr Hadžić) and found breaches of Article 5 §§ 1 and 4 of the European Convention on Human Rights (see paragraphs 37-38 above).

48. On 25 June 2007 the Sarajevo Cantonal Court established that the applicant's mental disorder no longer warranted his confinement and ordered his conditional discharge. It relied on Article 480 § 2 of the old Code of Criminal Procedure (although the Code was no longer in force).

The applicant was released from Zenica Prison Forensic Psychiatric Annex on 10 July 2007.

II. RELEVANT DOMESTIC LAW AND PRACTICE

49. There are two legal regimes applicable to psychiatric detention.

50. First of all, the competent civil court can order compulsory confinement of a mental health patient in a psychiatric hospital if it is satisfied on the evidence of a psychiatrist that this is necessary in order to protect the patient concerned and/or the public from serious harm (see sections 22(1), 29(1) and 31(1) of the Mental Health Act of the Federation of Bosnia and Herzegovina 2001; *Zakon o zaštiti osoba sa duševnim smetnjama*; published in the Official Gazette of the Federation of Bosnia and Herzegovina (“OG FBH”) no. 37/01 of 15 August 2001; amendments published in OG FBH no. 40/02 of 21 August 2002; “Mental Health Act”). The patient concerned must be summoned by the court, where this is possible, and must be examined in person by a psychiatrist (see sections 30(3) and 31(2) of the Mental Health Act). Proceedings must be concluded within seven days and a court decision must be issued within next three days (see sections 45(2) and 53(1) of the Non-Contentious Proceedings Act of the Federation of Bosnia and Herzegovina 1998; *Zakon o vanparničnom postupku*; published in OG FBH no. 2/98 of 20 January 1998; amendments published in OG FBH nos. 39/04 of 24 July 2004 and 73/05 of 28 December 2005). A court decision ordering civil psychiatric detention must always indicate the duration of such detention; that period cannot be longer than one year, but is renewable (see sections 33-35 of the Mental Health Act). The patient concerned, among other authorised persons and bodies, has the right to appeal within eight days (see section 37 of the Mental Health Act). The competent second-instance court must give a decision within three days (*ibid.*). A civil psychiatric detainee has the right to seek judicial review of his or her detention at any time (see section 40 of the Mental Health Act).

51. Secondly, the competent criminal court can impose a hospital order (*obavezno psihijatrijsko liječenje i čuvanje u zdravstvenoj ustanovi*) on an offender who at the time of committing a criminal offence was suffering from a mental disorder affecting his or her mental responsibility, if it is satisfied on the evidence of a psychiatrist that this is necessary in order to prevent the offender from committing another criminal offence. However, there is an important difference in this regard between the old and new criminal legislation (the latter entered into force on 1 August 2003). While a hospital order can still be imposed on those who have been found guilty although suffering from diminished responsibility, it can no longer be imposed against those who have been found not guilty by reason of insanity (see Article 74 § 1 of the Criminal Code of the Federation of Bosnia and Herzegovina 2003; *Krivični zakon Federacije Bosne i Hercegovine*;

published in OG FBH no. 36/03 of 29 July 2003; amendments published in OG FBH nos. 37/03 of 31 July 2003, 21/04 of 17 April 2004, 69/04 of 7 December 2004 and 18/05 of 23 March 2005).

52. Accordingly, as from 1 August 2003 an offender who has been acquitted on the grounds of insanity can be placed in psychiatric detention only by the competent civil court if this is considered necessary for the protection of the offender and/or the public from serious harm (see paragraph 50 above). Any such acquittal is therefore reported to the competent social work centre which must initiate the appropriate procedure (see Article 410 § 1 of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina 2003; *Zakon o krivičnom postupku Federacije Bosne i Hercegovine*; published in OG FBH no. 35/03 of 28 July 2003; amendments published in OG FBH nos. 37/03 of 31 July 2003, 56/03 of 14 November 2003, 78/04 of 31 December 2004, 28/05 of 11 May 2005, 55/06 of 20 September 2006, 27/07 of 18 April 2007 and 53/07 of 8 August 2007).

53. The relevant authorities had until 1 September 2003 to verify the status of all those who had been acquitted on the grounds of insanity pursuant to the old criminal legislation, to terminate the application of any hospital orders which were still pending and to initiate the procedure in which the competent civil court would decide whether to prolong the detention of any such mental health patient (see Article 420 of the Criminal Code 2003 and the instructions of the Ministry of Justice of the Federation of Bosnia and Herzegovina no. 03-02-3132/03 of 22 December 2003).

THE LAW

54. The applicants complained of the unlawfulness of their detention in Zenica Prison Forensic Psychiatric Annex. They relied on Article 5 § 1 (e) of the Convention, the relevant part of which reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention ... of persons of unsound mind ...”

55. The applicants also invoked Article 5 § 4 of the Convention. This Article reads as follows:

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

I. ADMISSIBILITY OF THE COMPLAINTS

56. The Government maintained – and the applicants disagreed – that Mr Marinić and Mr Hadžić could no longer claim to be victims of the alleged violations of the Convention within the meaning of Article 34 of the Convention following the decision of the Constitutional Court of Bosnia and Herzegovina (“Constitutional Court”) of 21 December 2006. In respect of Mr Tokić and Mr Alibašić, the Government submitted that their applications should be dismissed because of their failure to complain to the Constitutional Court.

57. From the outset the Court notes that the domestic decision to which the Government referred had indeed acknowledged the alleged breach of the Convention. The Constitutional Court established the existence, within the national legal order, of a shortcoming affecting Mr Marinić, Mr Hadžić and others in a similar situation. However, the competent authorities failed to eliminate the said shortcoming. The detention of Mr Hadžić in Zenica Prison Forensic Psychiatric Annex thus remained unlawful until his recovery and his subsequent release. Mr Marinić is still unlawfully detained in that Annex.

The objection of the Government concerning the victim status of Mr Marinić and Mr Hadžić must accordingly be dismissed.

58. With regard to Mr Tokić, it is observed that, at the relevant time, he had two domestic remedies at his disposal which had essentially the same objective: an appeal to then Human Rights Chamber and an appeal to the Constitutional Court. The applicant chose the former one and pursued it in a proper manner. The Court considers, for the reasons set out in *Jeličić v. Bosnia and Herzegovina* ((dec.), no. 41183/02, ECHR 2005-...), that his application cannot be dismissed because of that choice. The fact that the applicant’s case was ultimately dismissed since he had been released in the meantime (see paragraph 14 above) has no relevance in this connection.

The objection of the Government concerning the exhaustion of domestic remedies by Mr Tokić must therefore also be dismissed.

59. Lastly, with regard to Mr Alibašić, The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this

burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, amongst other authorities, *T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999).

As to legal systems which provide constitutional protection for fundamental rights, such as the one of Bosnia and Herzegovina, the Court recalls that it is incumbent on the aggrieved individual to test the extent of that protection (see *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, Decisions and Reports 93, p. 15; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (dec.), no. 55120/00, 19 June 2003; and *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006).

The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 69, and *Selmouni v. France* [GC], no. 25803/94, § 77, ECHR 1999-V).

Turning to the present case, the Court notes that the applicant failed to pursue in a proper manner either an appeal to then Human Rights Chamber or an appeal to the Constitutional Court. However, in view of the fact that a judgment of the Constitutional Court in a similar case ordering general measures has not been complied with by the national authorities (see paragraph 57 above) and the particularly vulnerable position of the applicant (a psychiatric detainee), the Court considers that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld with regard to Mr Alibašić. The Court would emphasise that its decision is limited to the circumstances of this case and must not be interpreted as a general statement to the effect that an appeal to the Constitutional Court is never a remedy which must be used in the event of an allegation of unlawful detention.

60. Since the applicants' complaints raise questions of fact and law which are sufficiently serious for their determination to depend on an examination of the merits and since no other grounds for declaring them inadmissible have been established, the Court declares the case admissible. In accordance with the decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

61. The applicants submitted that they were unlawfully detained in Zenica Prison Forensic Psychiatric Annex since the entry into force of the new criminal legislation. They further claimed that Zenica Prison Forensic Psychiatric Annex was not an appropriate institution for the detention of mental health patients.

62. While the Government accepted that the applicants' detention was not in accordance with the relevant domestic law as from the 2003 reform of the criminal legislation and that Zenica Prison Forensic Psychiatric Annex was not an appropriate institution for people detained under Article 5 § 1 (e) of the Convention, they maintained that the applicants could not have been immediately and unconditionally discharged because of the persistence of a mental disorder warranting compulsory confinement (they referred to *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39).

63. In order to comply with Article 5 § 1 of the Convention, the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness (see, amongst many authorities, *Winterwerp*, cited above, pp. 17-18 and 19-20, §§ 39 and 45; *Bizzotto v. Greece*, judgment of 15 November 1996, *Reports* 1996-V, p. 1738, § 31; and *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, pp. 1961-62, § 46).

64. For the purposes of Article 5 § 1 (e), an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, pp. 17-18, § 39; *Johnson v. the United Kingdom*, judgment of 24 October 1997, *Reports* 1997-VII, p. 2409, § 60;

Varbanov v. Bulgaria, no. 31365/96, § 45, ECHR 2000-X; and *David v. Moldova*, no. 41578/05, § 39, 27 November 2007).

65. Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 21, § 44; *Aerts*, cited above, loc. cit.; and *Bizzotto*, cited above, loc. cit.).

66. It has not been disputed in the present case that those in the applicants’ situation (acquitted on the grounds of insanity) can no longer be held in psychiatric detention as from 1 September 2003, unless it has so been decided by the competent civil court for the protection of the offender and/or the public from serious harm (see paragraphs 49-53 and 62 above). No such decision has ever been taken in the present case. Mr Tokić, Mr Alibašić and Mr Hadžić remained in Zenica Prison Forensic Psychiatric Annex until their recovery pursuant to old hospital orders (notwithstanding the fact that they were valid only until 1 September 2003) or administrative decisions (although the social work centres did not have jurisdiction to order psychiatric detention). Mr Marinić is still in Zenica Prison Forensic Psychiatric Annex on the basis of an old hospital order. Furthermore, the domestic Constitutional Court examined similar complaints of a number of psychiatric detainees (including those of Mr Marinić and Mr Hadžić) and considered the impugned situation to be unlawful (see paragraphs 37-38 and 47 above). From 1 September 2003 onwards, the applicants were thus not deprived of their liberty “in accordance with a procedure prescribed by law” within the meaning of Article 5 § 1 of the Convention.

While the Court appreciates that the applicants suffered from a mental disorder which may have warranted their compulsory confinement, this factor is not sufficient in itself to conclude that the applicants’ detention complied with Article 5 § 1 of the Convention, having regard to the pre-eminent importance of the lawfulness requirement within the framework of that Article.

There has therefore been a violation of Article 5 § 1 of the Convention. It lasted more than fifteen months in the case of Mr Tokić, almost three years in the case of Mr Alibašić and almost four years in the case of Mr Hadžić. The violation is still continuing in the case of Mr Marinić.

67. Having found a failure to comply with an essential procedural requirement on this ground, the Court does not consider it necessary to examine whether Zenica Prison Forensic Psychiatric Annex was an appropriate institution for the detention of mental health patients.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

68. The applicants further invoked Article 5 § 4 of the Convention, but did not develop this aspect of their case.

69. The Government pleaded that there was no breach of Article 5 § 4 of the Convention without going into any details.

70. Having regard to its above finding under Article 5 § 1, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 5 § 4 of the Convention (see *Gajcsi v. Hungary*, no. 34503/03, § 24, 3 October 2006, and *David v. Moldova*, cited above, § 43).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Article 41 of the Convention provides:

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

A. Damage

72. The applicants claimed the following amounts in respect of non-pecuniary damage: 45,000 euros (EUR) (Mr Tokić), EUR 48,000 (Mr Alibašić), EUR 60,000 (Mr Marinić) and EUR 50,000 (Mr Hadžić). The Government considered the amounts claimed to be excessive.

73. The Court accepts that the applicants suffered considerable distress as a result of the breach found which justifies an award of non-pecuniary damage. Having regard to the duration of each applicant's unlawful detention, the Court awards Mr Tokić EUR 7,500, Mr Alibašić EUR 15,000, Mr Marinić EUR 25,000 and Mr Hadžić EUR 20,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

74. The Court notes that the applicants were granted legal aid under the Court's legal-aid scheme in the total amount of EUR 3,400. They sought reimbursement of additional costs and expenses in the amount of EUR 15,000, but failed to demonstrate that those expenses had actually been incurred. Accordingly, the Court rejects that claim.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of all four applicants;
4. *Holds* that there is no need to examine separately the applicants' complaint under Article 5 § 4 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros) to Mr Tokić, EUR 15,000 (fifteen thousand euros) to Mr Alibašić, EUR 25,000 (twenty five thousand euros) to Mr Marinić and EUR 20,000 (twenty thousand euros) to Mr Hadžić, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into convertible marks at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President