

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

SECOND SECTION

CASE OF BAKSZA v. HUNGARY

(Application no. 59196/08)

JUDGMENT

STRASBOURG

23 April 2013

FINAL

23/07/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Baksza v. Hungary,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 2 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 59196/08) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr István Baksza ("the applicant"), on 2 December 2008.

2. The applicant was represented by Mr A. Kádár, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant complained under Article 5 § 3 of the Convention that the excessive length of his pre-trial detention had not been justified. Furthermore, relying on Article 5 § 4 of the Convention, he complained that the principle of "equality of arms" had not been respected when he had been challenging his detention, since he could not get acquainted in detail with the material of the investigation which had underlain the risks held against him.

4. On 13 October 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Gödöllő.

6. The applicant, married and father of a minor, was arrested on 18 January 2006, because the police found several suspicious spare car parts, car documents and various tools in his vehicle. On the same day he was interrogated on suspicion of attempted aggravated larceny, allegedly committed in respect of a van.

7. On 20 January 2006 the prosecution proposed the applicant's pre-trial detention. Relying essentially on the above material evidence, it was of the view that there was reasonable suspicion that the applicant and his accomplice, together with other unknown helpers, were active in the car theft business.

8. On the same day, the Dunakeszi District Court ordered the applicant's pre-trial detention, referring to, but not substantiating, the risks of absconding, collusion and repetition of crime. An accomplice was detained as well.

9. The applicant appealed, challenging the suspicion against him and pointing out that his settled background – he had never been convicted before, had legal income, and supported several family members – rendered unlikely the risks of absconding and repetition of crime. The Pest County Regional Court dismissed the appeal on 27 January 2006, without addressing in detail the applicant's arguments.

10. On 13 February 2006 the applicant's detention was prolonged. The decision referred to eight counts of larceny. In his appeal, the applicant pointed out that the material evidence relating to one of the thefts was in no way capable of connecting him to the vehicle in question, whereas in respect of the remaining seven counts, he had not formally been implicated as a suspect.

11. On 28 February 2006 the Regional Court dismissed the appeal. Without addressing in detail the defence's arguments, the court pointed out that it could not assess the evidence at that stage of the proceedings.

12. On 24 April 2006 the applicant requested his release. He argued that the living conditions of those supported by him had deteriorated. His request was to no avail.

13. Subsequently, the applicant's detention was repeatedly prolonged at the statutory intervals. The reasoning in the decisions was largely identical to that in the previous ones, and the discrepancy in the counts of theft with which the applicant was charged persisted. His requests for release were to no avail.

14. On 10 July 2006 the prosecution again proposed the prolongation of the applicant's detention. This time, reasonable suspicion was invoked in respect of four counts of car theft. The reasons for the applicant's proposed detention remained the same.

15. On 14 July 2006 the District Court held a hearing and sustained the prosecution's motion, while including in the decision the suspicion of another car theft. The applicant's appeal and subsequent requests for release were to no avail.

16. On 29 August 2006 an expert was appointed to examine whether or not the material evidence found in the applicant's car was capable of connecting him to any car theft.

17. Further prolongations took place on 19 October and 16 November 2006, with essentially unchanged reasoning. The applicant's ensuing requests for release or a less stringent measure were unsuccessful.

18. On 21 December 2006 the applicant was charged with further counts of car theft.

19. On 15 January 2007 the Pest County Regional Court prolonged the applicant's detention. The underlying reasons were the same as before. In his appeal, the applicant complained that the expert opinion had never been communicated to him.

20. After further prolongations, on 16 May 2007 a bill of indictment was preferred. The applicant was charged with altogether 17 counts of car theft or attempted car theft and one count of forgery of documents. The applicant's detention was maintained, with reference to the risk of absconding and repetition of crime.

21. The first hearing took place on 21 November 2007. The applicant's detention was upheld because, in the trial court's view, the potential severe sanction gave rise to a risk of absconding. No reason was given as to the risk of repetition of crime.

22. The applicant's subsequent requests for release or a less stringent measure were to no avail.

23. Apart from the one of 10 July 2006, none of the prosecution's motions to have the applicant's detention prolonged had made any specific reference to the actual evidence which underlay the alleged risks held against him. The applicant's lawyer repeatedly complained about having no access to these pieces of evidence – in particular, on 17 July and 20 November 2006 – however, this omission was not redressed; and the courts did not refute the defence's allegations of having no access.

24. Of the altogether twenty-four decisions on the applicant's detention, only one contained separate arguments in respect of each of the two co-detainees.

25. The authorities prolonging the applicant's pre-trial detention considered the possibility of applying less stringent measures on

8 May 14 July and 16 November 2006, but eventually they did not avail themselves thereof.

26. The applicant was finally released on 2 June 2008. A prohibition on leaving his domicile was imposed on him.

27. On 24 May 2011 the applicant was convicted at first instance. The case is currently in the appeal stage.

II. RELEVANT DOMESTIC LAW

28. Act no. XIX of 1998 on the Code of Criminal Procedure provides as follows:

Section 131

"(1) Pre-trial detention ordered prior to filing the indictment may continue up to the decision of the court of first instance during the preparations for the trial, but may never be longer than one month. The pre-trial detention may be extended by the investigating judge by three months at the most on each occasion, but the overall period may still not exceed one year after the order of pre-trial detention. Thereafter, pre-trial detention may be extended by the county court acting as a single judge by two months at the most on each occasion, in compliance with the procedural rules pertaining to investigating judges."

Section 132

"(1) If the period of the pre-trial detention ordered or maintained after filing the indictment

a) exceeds six months and the court of first instance has not delivered a conclusive decision, the justification of such pre-trial detention shall be reviewed by the court of first instance,

b) exceeds one year, the justification of such pre-trial detention shall be reviewed by the court of second instance.

(2) After the lapse of the time period specified in subsection (1) b), the justification of the pre-trial detention ordered or maintained after filing the indictment shall be reviewed by the court of second instance, or, if the procedure is held before the court of third instance, by the court of third instance, at least once in every six months."

Section 211

"(3) At the session the party [that is, the prosecution] having submitted the motion [on ordering or prolonging pre-trial detention] shall present the evidence substantiating the motion in writing or orally. Those present shall be granted the opportunity to examine – within the limits set forth in section 186 – the evidence of the party having submitted the motion. If the notified party does not attend the session but had submitted his observations in writing, this document shall be presented by the investigating judge."

Section 186

"(1) Any person having the right to be present at an investigatory action may forthwith inspect the minutes taken.

(2) The suspect, the counsel for the defence and the victim may inspect the expert opinion during the investigation as well, but they may only inspect other documents if this does not injure the interests of the investigation.

(3) The suspect and the counsel for the defence shall be entitled to receive a copy of the documents they may inspect.

(4) The copy of the documents produced, obtained, filed or attached in the course of the investigation and containing the testimony or personal data of the victim or the witness shall not indicate the personal data of either the victim or the witness. No copy may be issued of the draft decisions of the prosecutor or the investigating authority. No copy may be issued of the documents created in the course of communications between the prosecutor and the investigating authority pursuant to sections 165 and 165/A, except for the documents that contain the legal standpoint of the prosecutor and the investigating authority in relation to the case – including particularly the document containing the prosecutor's instruction concerning the conduct of the investigation, provided that the specific investigation was conducted – provided that this does not interfere with the interests of the investigation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

29. The applicant complained that the length of his pre-trial detention had been excessive, in breach of Article 5 § 3, which reads as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

30. The Government contested that argument.

A. Admissibility

31. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

32. The applicant maintained that the decisions prolonging his detention had not been individualised or taken into account his personal circumstances, had not substantiated the risk of his absconding, collusion and re-offending or involved an assessment of the possibility of applying less stringent measures.

33. The Government submitted in reply that the applicant's personal circumstances had duly been considered, in an individualised way, and this in an ever-increasing manner as time had passed. Likewise, the possibility of applying less stringent measures had not been overlooked by the courts. The measure had been maintained because the underlying reasons had remained relevant.

34. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, among many authorities, *Szepesi v. Hungary*, no. 7983/06, §§ 23 to 25, 21 December 2010).

35. The Court observes that there is a dispute between the parties as to whether the grounds given by the judicial authorities for the applicant's continued detention were "relevant" and "sufficient", especially in the face of the requisite individualised assessment of the particular circumstances of

the detainee and of the case (see, in the context of Article 5 § 1, *Darvas v. Hungary*, no. 19547/07, §§ 27 to 29, 11 January 2011).

36. The applicant was held in pre-trial detention from 20 January 2006 until 2 June 2008, that is, for over two years and four months. During this period, the courts made repeated references to the risk of his absconding, collusion and repetition of crime. While the Court accepts that these considerations were "relevant" to the applicant's case, it finds that, as time elapsed, they were no longer "sufficient". In particular, no reasons – other than the seriousness of the charges – were advanced at any stage of the proceedings for assuming that the applicant might abscond, which the Court does not find satisfactory in contrast to the fact that the applicant had legal income and supported several family members (see paragraph 9 above).

37. Moreover, it appears that the courts attributed a certain importance to the risk of the applicant's reoffending. However, the Court observes that their reasoning contained no particular elements pointing to this danger.

38. For the Court, the courts' reasoning for prolonging the applicant's detention was rather stereotyped on most occasions and devoid of the requisite elements substantiating the specific risks referred to – which is also reflected by the fact that, one instance apart, no separate arguments were advanced by the courts in respect of the two co-detainees (see paragraph 24 above). It finds this particularly troubling in the face of the fact that the detention lasted over two years and four months, and was terminated only almost a year after the indictment on 16 May 2007 (see paragraph 20 above) (see *Szepesi*, cited above, § 28), during which time the authorities showed no special diligence in accelerating the proceedings.

39. The above considerations enable the Court to find that the grounds for the applicant's detention, if "relevant", were not "sufficient" in respect of the entire period in question.

Drawing attention to its case-law on the matter (see, among many other authorities, the above-cited *Szepesi* judgment), the Court emphasises that, in protracted criminal proceedings involving a deprivation of personal liberty, it is incumbent on the authorities to seek to reduce the duration of pre-trial detention to the possible minimum and to examine the possibilities of applying less stringent alternatives.

There has accordingly been a violation of Article 5 § 3 of the Convention.

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

40. The applicant complained that the principle of "equality of arms" had been infringed when he had been challenging his detention, since he had had no access to the relevant material of the investigation. He relied on Article 5 § 4 of the Convention which provides as follows:

> "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."

41. The Government contested that argument.

A. Admissibility

42. The Government submitted that the applicant should have filed an action in compensation with the civil courts claiming that the judicial authorities denying his right to have access to the documents submitted by the prosecution had caused him damages. Having failed to do so, he had not exhausted domestic remedies. To support this argument, they submitted excerpts of domestic judgments in which damages had been awarded to plaintiffs complaining about delayed imposition of a cumulative sentence, overdue release from detention, unlawful composition of a court chamber and inadequate service of a summons.

43. The applicant submitted that at the material time – that is, prior to Constitutional Court decision no. 166/2011. (XII.20.) which endorsed the principles enounced by the Court in the case of *Nikolova v. Bulgaria* [GC] (no. 31195/96, ECHR 1999-II) – it was ambiguous under the domestic law whether or not a suspect in pre-trial detention had a right to access the documents serving as basis for his detention. Therefore, any tort action based on the alleged breach of this right had little prospect of success. In any event, no tort liability could be established on the judicial authorities' side unless an intentional breach of procedure could be proven. Given the cumbersome nature of bringing such an action, it could not be regarded as an effective remedy in the circumstances.

44. The Court considers that it is not necessary to embark on a closer scrutiny of the parties arguments' about the effectiveness of a civil action in the circumstances, since the Government have not produced any evidence to show that such an action has proved effective in cases sufficiently similar to the present one and would consequently constitute a remedy to be exhausted in the circumstances. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. Moreover, the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

45. The Government submitted that under the domestic law access to the case-file in the investigation phase was not absolute in so far as it was limited to access to those elements of evidence which were relevant to the ordering or maintaining of pre-trial detention. The selection of these pieces

of evidence was in the public prosecutor's discretion. It was important to emphasise in this connection that the judge deciding on detention received exactly the same elements and based his decision on them. In reaction to a proposed amendment to the Code of Criminal Procedure, the Constitutional Court held (in decision no. 166/2011. (XII.20.)), in line with the Court's judgment in the above-mentioned *Nikolova* case, that the existing rules satisfied the requirements of the principle of "equality of arms". Since the applicant had never brought the civil action referred to above (see paragraph 42 above), the Government were unable to take a position as to whether the access actually granted in the instant case had satisfied those requirements.

46. The applicant submitted that in his particular case no sufficient access to the evidence underlying his detention had been secured. Had such an access been granted, this would have been recorded in the case file. However, the Government had not demonstrated that this was the case. Moreover, had he been able to exercise the right of access, it would have been superfluous on his part to complain about this. However, he had repeatedly made such complaints, but in vain (see paragraph 23 above).

47. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to the investigation file in so far as it is essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among many other authorities, *Nikolova*, cited above, § 58). The disclosure of evidence must take place in good time, giving access to the relevant elements of the file prior to the applicant's first appearance before the judicial authorities (see *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151).

48. In the present case, the Court notes the Government's submission according to which – in the absence of a subsequent civil action, in which the disputed issues could be clarified – they were not in a position to form a view on the adequacy of the information provided to the applicant concerning his continued detention. In this connection, the Court would refer to its above finding (see paragraph 44 above) that the non-introduction

of the civil action suggested by the Government must be seen as immaterial in the circumstances.

49. Furthermore, the Court observes that the applicant has consistently asserted, both before the domestic authorities and the Court, that he was granted no access to the relevant elements of the file and that the domestic courts did not refute the allegations about the denial of access (see paragraph 23 above). It also notes (see paragraph 28 above) that such an access is guaranteed by the Code of Criminal Procedure, unless it interferes with the interests of the investigation.

However, there is no element in the case file or the parties' submissions indicating that the applicant could indeed exercise this right (cf. *Lamy v. Belgium*, loc. cit.; *Lietzow v. Germany*, no. 24479/94, § 47, ECHR 2001-I; *Svipsta v. Latvia*, no. 66820/01, § 138, ECHR 2006-III (extracts)).

50. In these circumstances, the Court cannot but conclude that the Government have failed to provide evidence that the requisite access was indeed made available to the applicant, the burden of proof being incumbent on the Government in this connection.

It follows that the principle of "equality of arms" cannot be considered to have been respected in the instant case.

Consequently, there has been a violation of Article 5 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicant claimed 6,494 euros (EUR) in respect of pecuniary damage. This amount corresponds to income lost during his detention. Moreover, he claims EUR 20,000 in respect of non-pecuniary damage.

53. The Government contested these claims.

54. The Court finds no causal link between the violations found and the pecuniary damage claimed. It therefore rejects this claim. On the other hand, it considers that the applicant must have sustained some non-pecuniary damage, and awards him, on an equitable basis, EUR 6,500 under this head.

B. Costs and expenses

55. The applicant also claimed EUR 5,800 for the costs and expenses incurred before the Court. This sum corresponds to 43 hours of legal work billable by his lawyer at an hourly rate of EUR 131, plus EUR 167 of clerical costs.

56. The Government contested this claim.

57. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,500 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President